The Suspect as a Source of Testimonial Evidence: A Comparison with the English Approach

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The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches
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by

GORDON VAN KESSEL*

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A substantial body of judicial and academic opinion assumes that the government’s use of the suspect as a source of testimonial evidence through pre-trial interrogation is fundamentally wrong. This view is

1. Mr. Justice Goldberg best summarized this position when he stated, “We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the ‘confession’ will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.” Escobedo v. Illinois, 378 U.S. 478, 488-89 (1964) (footnotes omitted).

Yale Kamisar perhaps most forcefully expressed an academic’s disdain for police interrogation in his “Mansion v. Gatehouse” analogy:

The courtroom is a splendid place where defense attorneys bellow and strut and prosecuting attorneys are hemmed in at many turns. But what happens before an accused reaches the safety and enjoys the comfort of this veritable mansion? Ah, there’s the rub. Typically he must first pass through a much less pretentious edifice, a police station with bare back rooms and locked doors.

In this ‘gatehouse’ of American criminal procedure—through which most defendants journey and beyond which many never get—the enemy of the state is a
often expressed by judges in the context of analysis and application of constitutional principles. The fifth amendment privilege against compulsory self-incrimination prohibits the government from compelling testimonial evidence from a suspect and using it against that suspect in a criminal proceeding. Courts have assumed that attempts to use the suspect as a source of testimonial evidence by means of police interrogation involve elements of compulsion and are therefore improper if not outright unlawful. Likewise, due process requires that before a court may admit a confession into evidence, it must find that the suspect made the confession voluntarily. The United States Supreme Court has expressed doubts as to the voluntariness of statements made during police interrogation. Indeed, as a general rule, no statement made during custodial police interrogation may be admitted into evidence in the absence of demonstrated adherence to "procedural safeguards." While the Court has stopped short of applying the sixth amendment right to counsel to an interrogation which occurs prior to formal accusation, some commentators believe that the pressures and coercive aspects of custodial interrogation render protective devices short of the presence of counsel inadequate.


2. E.g., Miranda v. Arizona, 384 U.S. 436, 461 (1966) ("An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak."); id. at 457-58 ("The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself.").

3. While Miranda rested on the fifth amendment privilege and the Court recognized that "we might not find the defendant's statement to have been involuntary in traditional terms," the Court's reasoning came close to traditional due process analysis: "Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." Id. at 457-58.

4. Id. at 444. This principle is now subject to a recently announced "public safety" exception. See infra notes 251-54 and accompanying text.

5. Indications that the sixth amendment right to counsel applies to custodial interrogation prior to formal accusation in Miranda and Escobedo v. Illinois, 378 U.S. 478, 488-89 (1964), have not been followed by the Supreme Court. See, e.g., Michigan v. Tucker, 417 U.S. 433, 438 (1974).
to ensure truly voluntary confessions during that interrogation process. They argue that all statements by suspects to law enforcement officers that are not either spontaneous outbursts or statements made in the presence of counsel should be regarded as compelled incrimination and, therefore, involuntary.⁶

Even when statements resulting from custodial interrogation pass constitutional muster, cases and legal literature frequently reflect an underlying view that it would be preferable to forego their use. The reasons for this view often parallel fifth amendment rationales. Courts and commentators have asserted that the innocent often confess and that confessions are inherently unreliable.⁷ One encounters, as well, the argument that it is simply unfair to convict a defendant on the basis of a confession even if that confession is reliable. Under this view, the state should be forced to "shoulder the entire load" by proving its case through other evidence of guilt.⁸ This rationale is closely akin to the inquisitorial sys-


⁷. Among the many "fundamental values" and "noble aspirations" reflected by our fifth amendment privilege is "our distrust of self-deprecatory statements." Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (Goldberg, J.); see Sutherland, Crime and Confession, 79 HARV. L. REV. 21, 37-38 (1965); see also Ellis, Vox Populi v. Suprema Lex: A Comment on the Testimonial Privilege of the Fifth Amendment, 55 IOWA L. REV. 829, 844 (1970) (confessions by innocent suspects may be "self-punishment or self-abnegation" rather than disclosure of the truth); Foster, Confessions and Station House Syndrome, 18 DE PAUL L. REV. 683, 684 (1969) ("[S]cientific as well as humanitarian considerations require all confessions be held inadmissible as evidence."); but cf: Marshall, Evidence, Psychology, and the Trial: Some Challenges to Law, 63 COLUM. L. REV. 197, 212-14 (1963) (declarations against interest may be an "act of self-punishment or self-abnegation," but may reveal truth).

⁸. The Supreme Court has expressed the view that "men are not to be exploited for the information necessary to condemn them before the law . . . [T]he State which proposes to convict and punish an individual [must] produce the evidence against him by the independent labor of its officers . . . ." Culombe v. Connecticut, 367 U.S. 568, 581-82 (1961) (footnote omitted).

Professor Wigmore, although unwilling to condemn all police interrogation, noted that such a practice is a morally dangerous course:

The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer—that is, to a confession of guilt. Thus the legitimate use grows into an unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized.
INTERROGATIONS AND TESTIMONIAL EVIDENCE

system argument, according to which interrogation of a suspect, whether by the police or by the judiciary, smacks of the inquisitorial system of ancient English and present continental and communist courts, increasing the possibility of "Star Chamber" abuses, in fundamental opposition to our accusatorial system. Finally, some commentators argue that use of the suspect as a source of testimonial evidence is not necessary because such evidence plays a minor role in the guilt-determining process and other, more reliable forms of evidence are available. In addition, it is argued that the minimal impact of the criminal justice system on the control of crime does not justify the extensive state intrusions into individual liberty and dignity which accompany police interrogation.

From these arguments and assumptions, many judges and commentators conclude that the use against an accused of statements obtained during custodial police interrogation cuts against the very nature of our adversary system and violates constitutional principles. Since this type of evidence plays a relatively minor role in our system of justice, it should be severely restricted or, preferably, eliminated.

Of course, these attitudes and assumptions do not prevail unopposed, if they prevail at all. A significant body of authority recognizes no impediment to the frequent use of police interrogation, nor does it see any conflict between interrogation and our accusatorial system. This

8 J. Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 2251, at 309 (3d ed. 1940); see also J. Stephen, A History of the Criminal Law of England 441-42 (1883) ("[T]he fact that the prisoner cannot be questioned stimulates the search for independent evidence.")

9. Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation. 'The law will not suffer a prisoner to be made the deluded instrument of his own conviction.' Watts v. Indiana, 338 U.S. 49, 54 (1949) (quoting 2 Hawkins, Pleas of the Crown, ch. 46, § 34 (8th ed. 1824)); accord Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964); Rogers v. Richmond, 361 U.S. 534, 541 (1961).

10. Miranda v. Arizona, 384 U.S. 436, 481 (1966) (law enforcement officials exaggerated need for confessional evidence in five cases before the Court); Escobedo v. Illinois, 378 U.S. 478, 488-89 (1964) (use of confessions less reliable and subject to greater abuse than extrinsic evidence); see also Sobel, Majority of Confessions "Useless"; Evidentiary Rules No Block to Prosecution, 3 Trial 15, 16 (1967) (judicial exclusion of confessions does not measurably affect successful criminal prosecution); Project, supra note 6, at 1519 n.6, 1579 n.157.

11. See Ellis, supra note 7, at 862. The writer's views were confirmed by Zeisel's study which concluded that "law enforcement by itself is relatively powerless to control crime." H. Zeisel, The Limits of Law Enforcement 4-5 (1982); see also Schwartz, The Mind of a Liberal Law Professor: Selections from the Writings of Louis B. Schwartz, 131 U. Pa. L. Rev. 847, 848-49 (1983) ("Somehow we manage to conduct a fairly orderly, stable society although arrests are made in a small percentage of offenses committed, and convictions lag very far behind arrests.").
view regards statements of the accused as both reliable and extremely valuable to the effective administration of justice. Most statements of the Supreme Court affirming the importance of police interrogation predate the Warren Court's distrust of confession evidence as expressed in *Miranda*. Recently, however, the Court has begun to place considerable value on such evidence. In 1977, the Court stated, "indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable." In a 1986 case, the Court went further: "Admissions of guilt are more than merely 'desirable,' . . . they are essential to society's compelling interest in finding, convicting and punishing those who violate the law." Nonetheless, the arguments against police interrogation are significant and influential. They have given rise to numerous debates in judicial opinions and legal literature. While not all of these arguments represent prevailing views, they are often advanced by influential scholars, and some have been accepted by the United States Supreme Court as essential to our constitutional principles.

Debates on these questions most often rehash old arguments and positions rather than propose new ideas or solutions, and the arguments often reflect emotion or personal feeling rather than a reliance upon em-


After an exhaustive study of the English criminal justice system, the 1981 Royal Commission on Criminal Procedure concluded that "there can be no adequate substitute for police questioning in the investigation and, ultimately, in the prosecution of crime." THE ROYAL COMMISSION ON CRIMINAL PROCEDURE, REPORT, 1981, CMND. 8092 ¶ 4.1, at 70 (1981) [hereinafter ROYAL COMMISSION REPORT 1981].

Certainly most law enforcement personnel have a high regard for the importance of confessions. One study found that prosecutors value confessions more than do the police. Robinson, *Police and Prosecutor Practices and Attitudes Relating to Interrogation as Revealed by Pre- and Post-Miranda Questionnaires: A Construct of Police Capacity to Comply*, 1968 DUKE L.J. 425, 445 (1968).


15. Moran v. Burbine, 106 S. Ct. 1135, 1144 (1986). The Court did not cite statistical or other authority for these conclusions.
We may therefore find it refreshing to take leave of our own rules and procedures and look to how a criminal justice system not too distant from our own deals with similar issues.

Comparing the English system of justice with our own has a number of advantages. First, English and American systems have the same common core: an accusatorial process in which the parties, rather than the judge, have the primary responsibility for marshaling and presenting the evidence, and in which the fact-finder is an all-lay jury. Second, both England and the United States give the accused a similar, though not identical, right to remain silent. England also has extensive experience with rules governing police interrogation which protect this right that can profitably be compared with our own. Its common-law voluntariness principles and its Judges' Rules which embodied right to silence cautions are comparable in many respects to American Miranda requirements. Furthermore, the English interrogation process has been the subject of extensive study and debate, much of it recent, factual, and objective. As a result of some of these studies, principally the Report of the Royal Commission on Criminal Procedure in 1981, Parliament recently undertook a major overhaul of the Judges' Rules governing police interrogation. The Police and Criminal Evidence Act 1984 modified the traditional voluntariness principle and directed that the Judges' Rules be replaced with a detailed Code of Practice which has been implemented as of January, 1986. The new Act and the Code of Practice provide a unique opportunity to compare our rules to a modernized, comprehensive scheme for the detention, treatment, and questioning of suspects.

A final important reason for analyzing the English approach is that, at least in this century, the English are generally regarded as meticulous in safeguarding the rights of the accused. In particular, it is often as-
sumed that England, along with a few other countries, has either dis-
pensed with or severely limited police interrogation of suspects. A
recent comparison of the English Judges’ Rules with our Miranda
rights concluded that the Judges’ Rules provide superior protection for the in-
dividual in all areas except the right to counsel.

While the crime problem facing the English criminal courts is gener-

English law displays “enduring attitudes conducive to a large-souled concept of fair trial”); see also Kauper, Judicial Examination of the Accused—A Remedy for the Third Degree, 30 Mich. L. Rev. 1224, 1235 (1932) (noting that criminal procedure in England is characterized by “the tradition of scrupulous fairness to the accused”); Steinberg, A Comparative Examination of the Role of the Lawyer in Our Present-Day Society, 15 Case W. Res. 479, 483 (1964).

This view of English criminal procedure is not, however, universally shared among American scholars. Some view aspects of the English system as strongly favoring the prosecution. See M. Graham, Tightening the Reins of Justice in America 228 (1983); Hughes, We Try Harder, N.Y. Rev., Mar. 14, 1985, at 17 (“English concerns for fair criminal procedure, whether in legal analysis or judicial practice, remain trivial. The calm of English courtrooms may resemble that of a desert.”); cf. M. Freedman, Lawyer’s Ethics in an Adversary System 105-12 (1975).

This illusion is apparently still prevalent despite the fact that nearly 20 years ago Illinois Supreme Court Justice Walter Schaefer did his best to dispel it:

Most other countries utilize interrogation as a technique of law enforcement to a far greater extent than does the United States. The experience of a few nations, however, has suggested to some scholars that police questioning is expendable. These scholars usually list England, Scotland, and India as nations which have dispensed with inter-
rogation and suffered no serious social consequences. The observation is true, how-
ever, only of Scotland: and even in Scotland, only post-arrest or station-house questioning has been eliminated.


Countries which have severely restricted police interrogation, such as Italy and India, have placed authority to question suspects in the hands of magistrates. See Scaparone, Police Interrogation in Italy, [1974] Crim. L. Rev. 581; see also Balsara, Criminal Procedure, in The Indian Legal System 231 (J. Minatur ed. 1978); Lushing, Comparative Criminal Justice—Search and Seizure, Interrogation, and Identification of Suspects in India: A Research Note, 10 J. Crim. Just. 239, 244 (1982).


However, English scholars who have conducted extensive research concerning the Eng-
lish interrogation process would dispute this view. See M. McConville & J. Baldwin, Courts, Prosecution, and Convictions 5 (1981) (asserting that the rights of English sus-
pects in police custody are “virtually non-existent” and that police practices are “more favorable to the accused in the United States where the courts have striven in recent years to give meaning to his rights.”).
ally not as severe as our own, evidence shows recent significant increases in the English crime rate. In fact, since 1980, the United States crime rate has leveled off, and begun to decline, while at the same time the British crime rate has continued to rise steadily. Furthermore, the traditional equanimity with which the British have viewed their system of justice has been undermined by declining public confidence in the police and worsening police-community relations. Consequently, English courts now confront many of the same tensions between "law and order" and personal liberty which we have faced for decades.

Learning how the English approach the complex and delicate problems encountered in using the suspect as a source of testimonial evidence may give us new perspectives on the propriety of our own assumptions.

22. In 1958 Lord Devlin wrote that there is comparatively little organized crime in England and "the homicide rate in England, allowing for the difference in population, is about one-tenth of that in the United States." He also noted that the number of persons in prison, again allowing for the difference in population, is eight or nine times greater in the United States. P.DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 134 (1958). Even in the 1980s, a substantial difference appears. For example, the rates (number of offenses per population figure) of robbery and residential burglary in 1981 in England and Wales were about one-half of those in the United States. M. HOUGH & P. MAYHEW, THE BRITISH CRIME SURVEY: FIRST REPORT (Home Office Research Study No. 76, 1983); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES: 1973-82 TRENDS (1983) [hereinafter SPECIAL REPORT, 1973-82 TRENDS].

23. Reported crime in England has increased five-fold since 1945. M. HOUGH & P. MAYHEW, supra note 22, at 1; see also Shawcross, supra note 12, at 225.


In response to the continuing increase in the British crime rate, the government recently issued a "White Paper" containing a number of proposals to strengthen law enforcement efforts and "ensure crime does not pay." Recommendations included increases in prison sentences and elimination of the right to jury trial for certain offenses. The Times (London), Mar. 7, 1986, at 1.

26. See infra notes 687-88.

27. "The general view in the United States is that crime detection and the administration of criminal justice in Great Britain is much more effective than it is here, but [Shawcross] shows that the same problems confront both." Introduction to Shawcross, supra note 12, at 225. See also Reichert, Shoot-Out in Kensington High Street . . . The British Response to a London Bank Robbery, 48 CAL. ST. B.J. 144 (1973). See generally D. SMITH & J. GRAY, THE POLICE IN ACTION (Police and People in London No. 4, 1983).
tions and approaches to these problems. As Justice O'Connor recently pointed out, "The learning of [England and certain other countries] was important to development of the initial Miranda rule. It therefore should be of equal importance in establishing the scope of the Miranda exclusionary rule today." 28

I. General Restrictions on Police Questioning

A. The Right to Remain Silent

In many ways the right to silence principles of English law parallel those of our own. However, in one fundamental respect the English right is more limited than ours, with the result that police may subject the accused to greater pressures. This important difference has not been widely recognized by American authorities.

The following basic English principles regarding police questioning are substantially the same as our own:

1. Police may question any person, whether or not suspected of criminal activity; 29

2. A person questioned by the police is not legally obligated to respond, and the police have no legal power to compel answers. 30 This rule reflects the common-law right to remain silent, recognized in both countries, which guarantees that no one may be required to incriminate himself. 31

3. Absent a proper arrest, police cannot take a person to a police station for the sole purpose of questioning. A citizen may be arrested

30. While there may be a moral or a social duty to assist the police, there is no legal duty; a suspect may refuse to answer questions put to him by persons in authority. Rice v. Connolly, [1966] 2 Q.B. 414; CODE OF PRACTICE, supra note 18, Notes for Guidance 1B.
and taken to the police station only upon reasonable or probable cause to suspect that he is guilty of an offense. 32

Although statements of the right to silence are similar, there is a significant difference in the substance of the right under English and American law which is not readily apparent. If the right to silence is to have any meaning, it must lie in restrictions on the adverse consequences flowing from its assertion. In both countries, this limitation protects suspects from criminal prosecution or civil contempt for failure to answer questions put by the police. But what of the legal consequences, if any, of such silence once the defendant is brought to trial? Here, one must distinguish between a suspect's silence before and his silence after he receives warnings as to his rights. Under both English and American rules, the accused may legally suffer certain adverse consequences from his pre-warning silence. According to recent United States Supreme Court decisions, both pre-arrest and post-arrest silence may be used to impeach a defendant's trial testimony, provided the silence occurred prior to the administration of Miranda warnings. 33 It is not clear, however, whether it could be used as substantive evidence of guilt if the defendant failed to testify. 34 In England such silence also may be admissible, although its evidentiary value is less clear. If, prior to the warning a suspect and police officer are speaking on even terms, and the officer makes an accusation against the suspect which an innocent person would be expected to deny, the suspect's silence may be used as an acknowledgment that the accusation is true. 35 Generally, however, the police and the suspect are not on an equal footing, particularly when the suspect is in custody, and


no adverse inferences may be drawn from the suspect’s silence. One commentator has stated that “although the accused’s silence may be treated as something which has a bearing on the weight of his evidence, it is not something which can support an inference that the story told by him in court is untrue; still less can it amount to the corroboration of the evidence given against him.” Nevertheless, evidence of such silence is admissible and forms “part of the circumstances which the court has to take into account when assessing the evidence.”

Thus, under both English and American law, pre-warning silence is admissible evidence. The principal difference seems to be that, in the United States, pre-warning silence may be used for impeachment if it is inconsistent with the defendant’s trial testimony, while in England, the law usually disallows impeachment, but it does not exclude evidence of the silence and, therefore, does not prevent the jury from considering and using such evidence for whatever purpose it desires. Thus, in both countries, pre-warning silence often has adverse consequences for a defendant at trial.

Silence by a defendant after the administration of warnings is treated differently than pre-warning silence in both England and the United States. Three principal arguments have been marshalled against the admissibility of evidence of silence in this context: (1) if evidence of silence were admitted, the right to silence would be severely diminished by the negative consequences flowing from its assertion; (2) implicit in warning a suspect of his right is a guarantee that no adverse legal consequences will flow from the exercise of the right; and (3) evidence of silence is inadmissible on the general evidentiary ground that its slight probative value is outweighed by the possibility of prejudice.

Relying on the first argument, the United States Supreme Court has prohibited the admission of evidence of a defendant’s post-warning silence as substantive evidence of guilt. Relying on the second and third arguments, the Court has prohibited the use of evidence of such silence for impeachment purposes as well. In light of the implicit assurance of the Miranda warning that exercise of the silence right will not cause

39. “[I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.” Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966) (citations omitted).
harm, fundamental principles of fairness embodied in due process prohibit the use of such silence for impeachment at trial.\(^{40}\) In federal courts such silence is inadmissible on the additional ground that it lacks sufficient probative value.\(^{41}\) The prohibition includes not only evidence of muteness but also "the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted."\(^{42}\) Thus, whether or not the defendant testifies, the jury never learns that the defendant, after he was admonished of his *Miranda* rights, made such statements as "I won't talk about it" or "I'll take the fifth" or "I want a lawyer" or merely said nothing.\(^{43}\)

In England, courts have come to similar conclusions about the evidentiary value of post-warning silence. Once a suspect has been cautioned, courts hold that it is "unsafe to use his silence against him for any purpose whatever."\(^{44}\) Consequently, despite a great deal of debate, English courts hold that the judge should not, by adverse comment or otherwise, invite the jury to draw inferences from an accused's exercise of his right to silence.\(^{45}\) In fact, the judge should instruct the jury that they must not draw an inference of guilt from such silence.\(^{46}\) Unlike American practice, however, English courts restrict only comments about the evidence of silence; they do not exclude the evidence itself. As a consequence, the jury is fully aware that the defendant refused to answer questions when cautioned and interrogated by the police.\(^{47}\)

The 1981 *Report of the Royal Commission on Criminal Procedure*,

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43. Though statements of counsel are not considered evidence, courts generally hold impermissible any prosecutorial reference to defendant's exercise of his *Miranda* rights. However, such references are often considered harmless error. *Cf.* State v. Reid, 585 P.2d 411, 413 (Or. Ct. App. 1978). *But see* Wainwright v. Greenfield, 741 F.2d 329 (11th Cir. 1984), *aff'd*, 106 S. Ct. 634 (1986) (comment was not harmless error).
45. The trial court judge is entitled to comment on the accused's failure to give evidence. As the law now stands, he must not comment adversely on the accused's failure to make a statement. Regina v. Gilbert, 66 Crim. App. 237, 245 (C.A. 1977) (citing CRIMINAL LAW REVISION COMMITTEE, 11TH REPORT ¶ 30 (1972)).
46. *Id.* at 243.
47. For example, in Regina v. Sullivan, 51 Crim. App. 102, 105 (C.A. 1966), the court held that the trial judge erred in telling the jury that, if the defendant were innocent, he would be anxious to answer questions. Nonetheless, Lord Salmon observed that "[i]t seems pretty plain that all members of the jury, if they had any common sense, must have been saying to themselves precisely what the learned judge said to them."
while recognizing that it is unsafe to use such silence against a defendant for any purpose, observed that, regardless of legal rules:

if the jury or the magistrates are aware that a person refused to answer questions under caution or was evasive, that may have some effect upon the way they interpret the evidence before them. Accordingly, although the law may give a person the right to say at all stages of the process “Ask me no questions. I shall answer none,” in relying upon this right, he would be wise to have regard to how people are likely to interpret his conduct.48

The Commission made the further observation that whatever a judge may say to a jury concerning a defendant’s silence, “it does not, indeed it cannot, prevent a jury or bench of magistrates from drawing an adverse inference.”49

It is noteworthy that the Commission seriously considered altering the right to silence by formally allowing an adverse inference to be drawn from the lack of response to questioning after caution. The proposal relied, in part, upon the argument that, in view of the tendency of magistrates and juries to draw adverse inferences from such silence, alteration of the rules would not, in practice, constitute a fundamental change.50 A majority of the Commission concluded, however, that the present law on this subject should not be altered.51 No change was made by the Police and Criminal Evidence Act 1984.52 Michael Zander, a distinguished English scholar, commented that, under the Act, “although the prosecution are not allowed to suggest that this accused’s silence was suspicious, they can inform the jury that the accused was silent. Nothing can prevent a jury from drawing adverse inferences from the fact of silence if

49. ROYAL COMMISSION: INVESTIGATION 1981, supra note 29, ¶ 70, at 81, 83; see R. CROSS, supra note 35, at 551.
51. Id. ¶ 4.53, at 87.
52. However, the CODE OF PRACTICE, supra note 18, Notes for Guidance 10D, makes the following recommendation:

In case anyone who is given a caution is unclear about its significance, the officer concerned should explain . . . that a person need not answer any questions or provide any information which might tend to incriminate him, and that no adverse inferences from this silence may be drawn at any trial that takes place. The person should not, however, be left with a false impression that non-co-operation will have no effect on his immediate treatment as, for example, his refusal to provide his name and address when charged with an offense may render him liable to detention.

This elaboration might leave the erroneous impression that in fact no adverse inferences from silence will be drawn, either by the police or prosecutor during investigation or later at trial. Whether the distinction between what the law allows and what actually occurs can or should be explained to the suspect is certainly questionable.
they choose to do so.\textsuperscript{53}

In summary, because the English rule against drawing adverse inferences from a defendant's post-warning silence does not affect the admissibility of evidence, but only controls what the judge and prosecutor may say to the jury, it is considered wise for English suspects to make statements when cautioned and questioned by police.\textsuperscript{54} In contrast, in the United States, the pressures on suspects in this context are considerably diminished by the knowledge that ordinarily the jury will remain ignorant of a refusal to talk to the police.

B. The Voluntariness Rule

(1) The English Voluntariness Rule

An examination of English rules governing the character of police questioning and elicitation of statements reveals another principle strikingly similar to one of our own. Under English law, before an admission or confession can be used, the court must find that it was made voluntarily.\textsuperscript{55} As under our rules, the prosecution bears the burden of proof,\textsuperscript{56} and the judge must decide the question of voluntariness outside the presence of the jury in a "trial within a trial."\textsuperscript{57}

Before the passage of the Police and Criminal Evidence Act 1984, judges considered two factors in determining whether a statement was voluntary: (1) whether the statement was obtained through threat or inducement; and (2) whether the statement was made as a result of oppression. The most significant formulation of the voluntariness test was set forth by Lord Sumner in Ibrahim v. The King.\textsuperscript{58} According to Lord Sumner, a judge determining voluntariness must ask: has the prosecution proven that the contested statement was voluntary in that it was not


\textsuperscript{54} See, e.g., C. EMMINS, supra note 36, at 331-32; ROYAL COMMISSION REPORT 1981, supra note 12, ¶ 4.39, at 82.

\textsuperscript{55} Ibrahim v. The King, 1914 App. Cas. 599, 609 (P.C.); see also ARCHBOLD, supra note 32, § 15-23.

\textsuperscript{56} The introduction to the Judges' Rules defined voluntariness as an absence of "fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression." JUDGES' RULES, supra note 29, at 237 n.2 (para. (e)).

\textsuperscript{57} Ajodha v. State, 1982 App. Cas. 204 (P.C. 1981); Director of Pub. Prosecutions v. Ping Lin, 1976 App. Cas. 574, 583 (1975). "It is for the Judge to rule having heard the evidence whether or not the prosecution have established to the extent required that the confession or admission was made voluntarily." ARCHBOLD, supra note 32, § 15-28, at 1094 (citations omitted).

\textsuperscript{58} 1914 App. Cas. 599 (P.C.) (H.K.).
obtained by fear of prejudice or hope of advantage excited or held out by a person in authority, or by oppression? Determination that the statement had been obtained involuntarily led automatically to its exclusion regardless of its reliability.

English courts traditionally construed and applied these principles rather strictly. Any threat or inducement uttered or held out by a person in authority rendered a resulting confession involuntary and inadmissible. Courts held that "even the most gentle . . . threat or slight inducements will taint a confession." Despite this strict interpretation, application of the rule in specific factual contexts was not without difficulty. Similar police behavior often resulted in inconsistent decisions, and the authority of older cases was sometimes questionable. For example, while there was nothing improper in saying to a defendant, "tell the truth" or "be a good boy and tell the truth," statements such as "you had better tell the truth" or "I think it would be better if you made a statement and told me exactly what happened" resulted in inadmissible confessions. The decision of the House of Lords in Director of Public Prosecutions v. Ping Lin, for example, raised some doubt as to how strictly the voluntariness principle was to be applied. Ping Lin was taken into custody for smoking and possessing heroin. The next day, he was cautioned and questioned by police officers. He attempted to gain favors by offering to inform police

60. ARCHBOLD, supra note 32, §§ 15-23, 15-28(3); R. CROSS, supra note 35, at 536.
62. The issue for the judge to determine is one of fact and causation . . . . It is not sufficient for the Crown to show that the person in authority had not intended to extract a confession or that there had been no impropriety on his part. . . . The Crown must prove that the statement in question has not been obtained in consequence of something said or done by a person in authority which amounted to an express or implicit threat or promise to the accused.
It is true that many of the so-called inducements have been so vague that no reasonable man would have been influenced by them, but one must remember that not all accused are reasonable men or women: they may be very ignorant and terrified by the predicament in which they find themselves. So it may have been right to err on the safe side.
64. See ARCHBOLD, supra note 32, § 15-37; see also ROYAL COMMISSION: INVESTIGATION 1981, supra note 29, ¶ 75, at 27; Cross, supra note 61, at 34.
of his heroin source if they would let him go, but each time the police stated, "that can't be done." Finally, he admitted selling heroin, but asked for the third time, "If I help police, can you help me?" The interrogator responded, "I can make no deals with you," but added, "If you show the Judge that you have helped police to trace bigger drug people, I am sure he will bear it in mind when he sentences you." Ping Lin then identified his supplier. The House of Lords upheld the admission into evidence of Ping Lin's identification of his source of narcotics as well as his confession that he was a seller. While recognizing that the case was "near the boundary line," the judges concluded that the foregoing principles had not been violated.

The Ping Lin case limited the voluntariness rule by emphasizing the causation factor and requiring that the threat or promise actually lead to the confession. As one commentator noted, "if a police officer holds out a 'gentle threat' or a 'slight inducement' the judge is entitled to hold that that was not the true cause of the confession but that the accused confessed because, for example, he appreciated that the prosecution evidence against him was overwhelming."67

A second factor embodied in Lord Sumner's voluntariness test required that a confession not be obtained by oppression. This requirement focused on the overall effect of interrogation on the mind and will of the suspect and asked whether, in view of all the circumstances, including particular attributes of the accused, his free will was sapped to such extent that he was, in effect, forced to speak. According to this subjective analysis, interrogation techniques that are proper when directed at a hardened criminal can be oppressive when applied to a person of good character who has no previous experience with the inside of a police station.68

In cases decided immediately before the Police and Criminal Evidence Act 1984, courts relied more on the oppression test than on the traditional threat or inducement standard of voluntariness and were increasingly reluctant to find oppression even in rather extreme circumstances. For example, holding a suspect incommunicado for several days while refusing to allow him to see his solicitor generally did not entail oppression.69 But oppression was found when such conduct was com-

67. C. Emmins, supra note 36, at 326.
bined with police trickery and the threat that the suspect would be held "until the truth was out."\textsuperscript{70}

Lord Lane's opinion in \textit{Regina v. Rennie}\textsuperscript{71} clearly demonstrates the movement away from the traditional threat or inducement standard toward the more flexible oppression test emphasizing free will. The appellant was charged with conspiracy to obtain a pecuniary advantage by deception, a scheme which involved members of his family. He first confessed after his arrest during his journey to the police station. Upon arrival, he was cautioned and then made a second confession. At trial he challenged the admissibility of both confessions because the police had led him to believe that, unless he confessed, they would interview and perhaps arrest and prosecute members of his family. The interviewing police officer testified that he thought the appellant "made the confession in the hope that I would terminate my inquiries into members of his family, and perhaps leave the mother out of it, whom I suspected of being involved."\textsuperscript{72} The trial judge denied appellant's motion on the ground that he had confessed because of the strength of the case against him. In dismissing the appeal, Lord Lane observed that the officer's opinion as to the motives of the accused was inadmissible and that it was for the judge alone to draw inferences from the events.

This case clearly shows the ease of finding that a particular inducement was not a true cause of a confession as well as the difficulty facing appellants in persuading a court of appeal to overturn a trial judge's decision admitting a confession. More significantly, Lord Lane went on to propose, albeit in dicta, that even if the appellant had decided to admit guilt because he hoped that if he did so police would not bring in members of his family, it did not follow that the confession should have been excluded. Lord Lane noted that motives behind confessions are often mixed and include hope of some benefit such as earlier release or lighter sentence. Sometimes this hope is self-generated, but more commonly it will owe its origin, at least in part, to the statements or behavior of a person in authority. "If it were the law that the mere presence of such a motive, even if prompted by something said or done by a person in authority, led inexorably to the exclusion of a confession, nearly every confession would be rendered inadmissible."\textsuperscript{73} Referring to Lord Sumner's traditional voluntariness test, Lord Lane noted that it was unnecessary and undesirable to complicate the issue by refined analysis of whether the

\textsuperscript{72}. \textit{Id.} at 210.
\textsuperscript{73}. \textit{Id.} at 212.
conduct was improper or constituted an inducement. Rather, the judge should approach the inquiry much as would a jury, were it for them to decide. "In other words, he should understand the principle and the spirit behind it, and apply his common sense; and . . . he should remind himself that voluntary in ordinary parlance means 'of one's own free will.'"\textsuperscript{74}

\textit{Regina v. Rennie} may be read narrowly as requiring only that the pressure amounting to a threat or promise sufficient to exclude a confession must be explicit rather than that which is implicit in most every case in which an accused is firmly but fairly questioned while in police custody. However, taken at face value, the language of the opinion goes much further and signals a new approach to the voluntariness inquiry. Lord Sumner's test, focusing on inducements and causation, had previously existed side-by-side with the oppression standard, focusing on free will: the tests were applied in the conjunctive, not in the alternative. Lord Lane's opinion appears to downgrade the inducement test and merge what is left of it into a flexible free will standard which forms the basis of the oppression test.\textsuperscript{75} Thus, well before the Police and Criminal Evidence Act 1984, appellate courts had weakened the rather strict and absolute standards that traditionally governed the voluntariness requirement.\textsuperscript{76}

\textsuperscript{74} Id. at 213.

\textsuperscript{75} One commentator concluded that the court in \textit{Rennie} "appears to be hinting at a new approach" but that traditional voluntariness principles "would be considerably weakened by such a change." Jackson, \textit{Voluntariness and the Admissibility of Confessions: A New Approach}, 1983 LIVERPOOL L. REV. 101, 104-05.

\textsuperscript{76} In addition to this judicial weakening of the voluntariness requirement, evidence indicates that English law enforcement practices often come close to violating the voluntariness rules. For example, English police may grant bail to an arrestee that will entitle him to remain free for up to weeks prior to his first court appearance. This power creates the expectation on both sides that, if a suspect confesses, the police will allow his release pending trial. The Justices' Clerks Society recently expressed serious concern that "bargaining between the police and the accused during interrogation can result in police granting bail when no court would be easily persuaded." \textit{Justices' Clerks Society Concerned at Police Use of Bail}, The Times (London), May 10, 1983, at 4 [hereinafter \textit{Police Use of Bail}]. One commentator observed:

Without detailed observational studies, the extent to which this [bargaining] happens is impossible to estimate, but bargaining theory, when combined with the power differential between the [police and the accused] would certainly help to explain the fact that only exceptionally are "third degree" tactics resorted to by the police. . . . [T]here is simply a built-in assumption which is understood by both parties that certain decisions remain flexible and may be influenced by the outcome of the interrogation.

P. MORRIS, \textit{POLICE INTERROGATION: REVIEW OF LITERATURE} 25 (Royal Comm'n on Criminal Procedure Research Study No. 3, 1980). For a review of bluffs and other current police interrogation tactics, see P. SOFTLEY, \textit{AN OBSERVATIONAL STUDY IN FOUR POLICE STATIONS} 78-80 (Royal Comm'n on Criminal Procedure Research Study No. 4, 1980).
The 1981 Royal Commission on Criminal Procedure found the voluntariness rule, and the "oppression" standard in particular, imprecise and ambiguous.\textsuperscript{77} The Commission recommended that the rule be replaced by a Code of Practice having the force of law which would strengthen safeguards for suspects and provide clear and workable guidelines for police. However, the rule of automatic exclusion would not apply to breaches of the Code except when evidence was obtained through torture, violence or threat of violence, or other inhuman or degrading treatment.\textsuperscript{78}

With the passage of the Police and Criminal Evidence Act 1984, Parliament significantly modified the voluntariness rule. It rejected, however, the Commission's recommendation to eliminate the exclusionary rule, reasoning that such action would seriously weaken the safeguards against unreliable confession evidence.\textsuperscript{79} Under the Act, a confession must be excluded unless the prosecution proves beyond a reasonable doubt that it was not obtained:

(a) by oppression of the person who made it; or 
(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof.\textsuperscript{80}

Oppression is defined as including "torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture)." \textsuperscript{81}

So what has changed? Although the rule of automatic exclusion is now mandated by Parliament, and the "person in authority"\textsuperscript{82} require-
ment has been abolished, the Act probably does not provide suspects with more protection. It is more likely that courts will conclude that Parliament intended to limit the effects of automatic exclusion caused by liberal, but confusing, applications of the old voluntariness rule, and that the Act will reduce protections afforded suspects under traditional voluntariness standards.

A number of factors support this conclusion. By and large, the Act was a consequence of the report of the 1981 Royal Commission which recommended outright abolition of the voluntariness rule (with the limited exception noted) because vague and unworkable rules led to the exclusion of reliable confessions. A principal objective of the Act was to clarify interrogation standards and to limit the exclusion of reliable confessions except where the police employ unconscionable measures to extract them. While the oppression principle remains, the Act has narrowed its scope. The Act states that oppression includes such extreme measures as "torture, inhuman or degrading treatment, and the use or threat of violence," but no mention is made of threats of nonphysical harm or other psychological pressures. The old voluntariness rule looked to whether the action of the authorities sapped the free will of the suspect or excited hopes or fears of the suspect such that "his will crumbles and he speaks when otherwise he would have stayed silent." 83 This subjective approach was rejected by the 1981 Royal Commission. Thus, while the Act retains oppression as a standard, the narrow inclusive description of extreme police practices and the lack of a comprehensive definition consistent with prior case law suggest an attempt to restrict the term to clear, objective police misconduct. 84

Finally, the Act does not mention the aspect of the old voluntariness standard which asked whether the confession was obtained "by fear of prejudice or hope of advantage." Instead, the Act provides that a confession must be excluded only if obtained "in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made . . . in consequence thereof." 85 This reliability test was drawn from the recommendations of the 1972 Criminal Law Revision Committee. That Committee

84. On the other hand, one could conclude that Parliament meant to adopt the approach of the 1972 Criminal Law Revision Committee, which recommended retaining the oppression standard but substituted "oppressive treatment of the accused" for "oppression," and that Parliament assumed that this expression would be construed similarly to the definition adopted in Prager. CRIMINAL LAW REVISION COMMITTEE, 11TH REPORT EVIDENCE (GENERAL) § 60, at 41 (1972).
regarded the rules relating to admissibility of confessions as excessively strict and considered two alternative approaches: (1) "to have no restriction on admissibility but allow all confessions to be proved before the jury or magistrates' court" and (2) "to preserve the general rule that a threat, inducement or oppression makes a resulting confession inadmissible but to provide that this should not apply to all threats or inducements but only to those likely to produce an unreliable confession." The majority of the Committee approved a modified form of the second approach: "[T]he right course is for the rule as to inadmissibility of a confession on account of a threat or inducement to be limited to threats or inducements of a kind likely to produce an unreliable confession, but for inadmissibility on account of oppression to remain." Thus, the history of the Police and Criminal Evidence Act 1984 reveals the rejection of that part of the common-law voluntariness rule that would exclude all confessions induced by even slight threats or promises.

Following the apparent intent of the Act, the Code of Practice for the Detention, Treatment and Questioning of Persons by the Police indicates that certain inducements, previously prohibited, might now be accepted. The Code provides:

No police officer may try to obtain answers to questions or to elicit a statement by the use of oppression, or shall indicate, except in answer to a direct question, what action will be taken on the part of the police if the person being interviewed answers questions, makes a statement or refuses to do either. If the person asks the officer directly what action will be taken in the event of his answering questions, making a statement or refusing to do either, then the officer may inform the person what action the police propose to take in that event provided that that action is itself proper and warranted.

While the Code clearly prohibits seeking answers by oppressive treatment or by indication of future action which would be improper or unwarranted, if the suspect directly asks the officer what he proposes to do in response to the suspect's decision whether or not to make a statement, the officer may now tell the suspect of certain consequences that may follow from refusing to do so. For example, since the action of granting bail is perfectly proper and police have significant authority and freedom in bail decisions at early stages in the proceedings, it seems that offering bail in return for a statement may no longer result in an involuntary and inadmissible confession.
Even in the absence of a suspect's direct question about future police action, police may properly encourage a suspect to make a statement in the course of explaining his right of silence. The Code of Practice provides that if, after receiving the caution, a suspect is "unclear about its significance," the interviewing officer must "explain it in his own words"; however, in explaining that no adverse inferences from silence may be drawn at trial, the suspect should not "be left with a false impression that non-cooperation will have no effect on his immediate treatment as, for example, his refusal to provide his name and address when charged with an offense may render him liable to detention." Courts may hold that non-cooperation encompasses silence in the face of accusation and that the suspect should not be left with the "false impression" that such lack of cooperation will not affect the question of his current custody.

The focus of inquiry under the Act is not merely whether the inducement caused the particular confession at issue, but whether, in light of all the circumstances, that inducement was sufficiently strong to render it likely that any confession obtained under such circumstances would be false. Minor threats or inducements are not likely to render a confession inadmissible in a serious case when the suspect's motivation to refrain from self-incrimination is substantial. It will probably be the highly unusual case in which a court will find a confession reliable but order it excluded on the ground that police conduct was likely to produce a false confession. Indeed, under this objective reliability test, it is appropriate to ask whether a court may consider the actual reliability of the particular confession at issue.

Questioning—A Comment, [1982] CRIM. L. REV. 659, 663; see also Police Use of Bail, supra note 76.

90. CODE OF PRACTICE, supra note 18, Notes for Guidance 10C & 10D.

91. M. ZANDER, supra note 53, §§ 53-65, at 89.

92. Mirfield, supra note 89. Parliament appears to have adopted the Committee's view that the issue should turn not on whether a specific confession is likely unreliable, but whether any confession given under the circumstances would likely be so:

[T]he Judge should imagine that he was present at the interrogation and heard the threat or inducement. In the light of all the evidence given he will consider whether . . . any confession which the accused might make as a result of it would be likely to be unreliable. If so, the confession would be inadmissible.

M. ZANDER, supra note 53, § 76, at 113.

93. Michael Zander suggests that even powerful inducements might be acceptable if given in response to a suspect's inquiry:

It would therefore now appear to be proper for instance for the officer to say to the suspect "If you make a statement I will let you go home, or let you off the more serious charges or not pursue charges against your wife, etc." (This represents a major shift in the rules. . . .

M. ZANDER, supra note 53, §§ 53-65, at 90.
Under this test, the reliability of the resulting confession, while not determinative, may be regarded as relevant circumstantial evidence on the question whether it was obtained "in consequence of anything said or done which was likely . . . to render unreliable any confession which might be made . . . in consequence thereof."\textsuperscript{94} The Act's legislative history, however, suggests that the truth or falsity of the confession is not relevant to its admissibility. When the bill proposing the Act was first published, it contained a provision that evidence could be admitted to prove the truth or falsity of the confession if the court thought that such evidence would assist in determining the issue of admissibility.\textsuperscript{95} The government's abandonment of this provision and its absence from the Act may be regarded as an intent to maintain the view of the Judicial Committee of the Privy Council in \textit{Wong Kam-ming v. The Queen},\textsuperscript{96} which held that at a suppression hearing, the prosecution could not cross-examine the accused as to the truth of his statement. The result may be an absolute bar to introduction of any evidence at the suppression hearing going toward truth of the confession in support of its reliability.\textsuperscript{97}

Aside from this uncertainty regarding evidence of truth or falsity, the new focus on reliability also casts doubt on whether English law any longer recognizes a true "voluntariness" principle. The word is not mentioned in the Act, and, although the oppression standard and the causation aspect of the reliability rule preserve aspects of the old voluntariness rule, it is no longer appropriate to ask simply whether a confession was made voluntarily. However, it will most likely take many years and numerous judicial decisions to define the precise boundaries of the new "voluntariness" standard.

\subsection*{(2) The American Voluntariness Rule}

American voluntariness principles reflect a "totality of the circumstances" approach in which results do not turn on the presence or absence of any single criterion.\textsuperscript{98} It is thus extremely difficult to draw generalizations, and it is not an easy task to compare our voluntariness standards with those of England. Most United States Supreme Court cases suppressing confessions as involuntary have involved rather ex-
treme factual situations such as police brutality, unconscionable trickery, or a particularly vulnerable suspect. In such cases, the Supreme Court has required the prosecution to prove that the confession was the product of a rational intellect and a free will.

While the emphasis on freedom of choice in our test corresponds to the English prohibition of oppression, our rationality requirement has no direct English equivalent. This difference is significant in the case of mentally disordered suspects. The confession of an insane person is not regarded as voluntary under our law. However, under English law, an irrational or disordered state of mind will not render a confession involuntary. In such cases, the judge retains discretion to exclude the confession if its probative value is slight and is outweighed by the danger of prejudice, but no English authority requires the exclusion of a confession obtained from a mentally abnormal suspect.

Another traditional difference is that the American standard is not limited to official action. If the accused's free will was overborne, it matters not that the impairment was caused by the accused himself, third persons, or circumstances beyond anyone's control. In this aspect, our rules are broader than the traditional English standard which required conduct by "a person in authority." However, after elimination of this requirement by the 1984 Act, the English approach more closely parallels our own.

As noted earlier, English law is not altogether clear as to whether the reliability of a contested confession may be considered in determining its admissibility. However, the long-standing American rule is that courts do not consider the probable truth or falsity of the confession


105. See supra notes 94-97 and accompanying text.
in assessing voluntariness, but only whether police behavior was such as to overbear the suspect's will to resist and thus bring about a confession not freely self-determined. This question must be answered "with complete disregard to whether or not [the suspect] in fact spoke the truth." 106 The Supreme Court emphasized in Lego v. Twomey 107 that the principal aim of the rule excluding involuntary confessions is to protect suspects from compelled self-incrimination, rather than to prohibit the admission of unreliable evidence. Consequently, the sole issue is whether the confession was coerced. An inquiry into whether it was true or false is irrelevant and forbidden: "[T]he judge . . . is . . . duty-bound to ignore implications of reliability in facts relevant to coercion and to shut from his mind any internal evidence of authenticity that a confession itself may bear." 108

A suspect's will may be overborne by either threats or inducements. In Brain v. United States, 109 the Court stated that to be free and voluntary, a confession "must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." 110 These principles are strikingly similar to the traditional English voluntariness rule in that they prohibit "any" threats or inducements, no matter how slight. 111 However, while English courts have, until recently, applied these principles strictly, 112 our Supreme Court has avoided a strict application of the rules against threats or promises. Instead, the Court has focused on whether pressures or inducements were sufficient to overbear the free will of the accused. In emphasizing free will, rather than the prohibition of all inducements, the Court might be seen as allowing the police to apply psychological pressures that the English courts have found improper. For example, in Fare v. Michael C. 113 police told the suspect that a cooperative attitude would be to his benefit. The Court dismissed the defend-

108. Id. at 484-85 n.12 (citation omitted). The Fourth Circuit has held that the trial judge in certain circumstances may properly consider the fact that defendant's confession contained facts known only to him. Gilreath v. Mitchell, 705 F.2d 109, 110 (4th Cir. 1983) (per curiam).
110. Id. at 542-43. The language was reaffirmed in Malloy v. Hogan, 378 U.S. 1, 7 (1964); see also Haynes v. Washington, 373 U.S. 503, 513 (1963) (statement excluded because police had held defendant incommunicado until he confessed).
112. See supra notes 61-66 and accompanying text.
The defendant's claim that the confession was involuntary, describing the police remarks as "far from threatening or coercive." This would seem to indicate that something more than a gentle threat or slight inducement is required to render a confession involuntary.

Uncertainties persist, in part because, unlike English courts, our Supreme Court has taken a hands-off approach to traditional inducement issues. While the Court recently has been particularly protective of an accused's sixth amendment right to counsel in the interrogation context, it has failed to articulate clear and predictable voluntariness standards and often has avoided supervising lower courts in their review of claims that threats or promises were used to procure confessions. Accordingly, state courts, left to fend for themselves, have come to strikingly different and often conflicting conclusions, many of which are difficult to reconcile with the principles established by the Supreme Court. Even courts in the same jurisdiction may come to conflicting results. For example, California courts have found police suggestions that the suspect would benefit from making a statement to be proper in some cases but improper in others.

Recently, the Supreme Court further confused matters in Miller v. Fenton. In deciding that the voluntariness question is both an issue of fact and of law for the purpose of federal habeas corpus review of state convictions, the Court considered the nature of the voluntariness inquiry. It recognized that the test traditionally looked to whether the confession was the product of a free and rational will and had been "framed as an issue of psychological fact." However, finding the "locus of the right" in the due process clause of the fourteenth amendment, the Court found the voluntariness question to have a uniquely legal dimension:

[T]he admissibility of a confession turns as much on whether the tech-

114. Id. at 727.
115. See infra notes 315-19 & 322-28 and accompanying text.
116. See generally W. La Fave & J. Israel, supra note 99, § 6.2(c)-(d).
117. See cases cited in Kaci, supra note 21, at 91-96; see also cases cited in W. La Fave & J. Israel, supra note 99, § 6.2(c).
118. Generally, statements that the accused would somehow benefit from confessing will render the resulting confession involuntary, see People v. Brommel, 56 Cal. 2d 629, 364 P.2d 845, 15 Cal. Rptr. 909 (1961), unless the nature of the benefit "flows naturally" from a truthful and honest course of conduct. People v. Hill, 66 Cal. 2d 536, 426 P.2d 908, 58 Cal. Rptr. 340 (1967), cert. denied, 390 U.S. 911 (1968). Yet it appears that almost any statement which goes further than advising a suspect that he would "feel better" if he confessed is improper. People v. Jackson, 28 Cal. 3d 264, 618 P.2d 149, 168 Cal. Rptr. 603 (1980), cert. denied, 450 U.S. 1035 (1981); see also People v. Hogan, 31 Cal. 3d 815, 647 P.2d 93, 183 Cal. Rptr. 817 (1982); People v. McClary, 20 Cal. 3d 218, 571 P.2d 620, 142 Cal.Rptr. 163 (1977); In re Roger E.G., 53 Cal. App. 3d 198, 125 Cal. Rptr. 625 (1975).
niques for extracting the statements, as applied to this suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne.120

Thus, the voluntariness inquiry was seen to entail a complex of values.

The Court's language is puzzling. In an attempt to demonstrate that the voluntariness question is at least as much an issue of law as one of fact, the Court implied that though a confession may be an entirely "voluntary" product of a rational intellect and a free will, it must be suppressed as "involuntary" if it was obtained by a process inconsistent with the presumption of innocence and our adversary system of justice. Since the Court did not elaborate upon or apply its explanation of this distinction, it created doubt as to what official conduct, if any, might produce a confession from a suspect's free and rational will, yet require that the confession be suppressed as involuntary.

In many respects, the confusion and inconsistency of the United States cases mirror problems found to exist in English cases by the 1981 Royal Commission on Criminal Procedure and are the inevitable result of rules which depend on such imprecise and ill-defined phrases as "free will" and "totality of circumstances." This lack of clarity and consequent uncertainty is likely to persist both in the United States and in England despite the 1984 Act. Parliament's retention of a form of the oppression test together with its adoption of a new reliability principle will not likely clarify matters, though it probably will result in a narrower rule against inducements. Until quite recently, English courts have been more active than American courts in establishing firm rules against verbal inducements in the form of threats or promises, but under the 1984 Act, following the trend of the most recent cases,121 the English "voluntariness" principles may now offer less protection to suspects than their American counterparts.

C. Enforcement of General Restrictions on Police Questioning

Thus far, we have examined English principles which closely parallel our own. Enforcement of these principles is also similar in that both countries apply an automatic exclusionary rule to involuntary confessions. This prohibition extends to the prosecution's attempt to use such statements to cross-examine the accused or impeach his testimony.122

120. Id. at 453 (emphasis in original).
122. In England, if the inadmissible statement is material to the defense of a co-defendant, the co-defendant may cross-examine the defendant concerning it, but the judge should dis-
However, the process of enforcement differs in important respects. Both countries place on the prosecution the burden of proving that a confession was made voluntarily, but England requires proof beyond a reasonable doubt, while the United States merely requires proof by a preponderance of the evidence.

While English courts require a higher standard of proof, American courts rely more on the exclusionary rule as an enforcement tool, with the result that more severe sanctions flow from a finding that a statement was involuntary or otherwise inadmissible. For example, the exclusionary rule in the United States applies not only to the illegally obtained evidence itself, but also to other incriminating evidence derived from it. This “fruit of the poisonous tree” rule may lead to suppression of physical and other highly reliable forms of evidence, including the very body of a murder victim. While the United States Supreme Court has adopted an “ultimate or inevitable discovery exception,” the “fruit of the poisonous tree” rule is currently applied broadly to fourth, fifth, and sixth amendment violations. Thus, reliable evidence found to be the product of an involuntary confession or a confession obtained in violation of the sixth amendment right to counsel must be suppressed along with the confession unless the prosecution proves that the evidence inevitably would have been discovered by other means.

In contrast, English law does not apply the “fruit of the poisonous tree” doctrine when the “fruit” is reliable evidence. For example, when a coerced confession leads to recovery of stolen property, the confession will be suppressed but the property will be admitted in evidence.

courage the jury from considering it a part of the prosecution’s case against defendant. Regina v. Rowson, [1985] 2 All E.R. 539, 542 (C.A.).

In the United States, use of an involuntary statement to cross-examine a defendant or to impeach his testimony violates due process of law even though ample evidence aside from the confession supports the conviction. Mincey v. Arizona, 437 U.S. 385, 398 (1978). However, voluntary statements obtained in violation of the procedural requirements of Miranda may be used to impeach a defendant. Oregon v. Hass, 420 U.S. 714, 722 (1975); Harris v. New York, 401 U.S. 222, 225 (1971).

125. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).
129. Rex v. Warickshall, 1 Leach 263, 264-65 (1783); see also Gotlieb, Confirmation by Subsequent Facts, 72 LAW Q. REV. 209, 235-36 (1956); ARCHBOLD, supra note 32, §§ 15-71 to -72. See generally ABA, ENGLISH CRIMINAL LAW AND PROCEDURE: THE WAY A BRITON
Thus, the English exclusionary rule as applied to the fruits of excluded confessions is tempered by a reliability principle. The rule of exclusion does not apply
to the admission or rejection of facts, whether the knowledge of them
be obtained in consequence of an extorted confession, or whether it
arises from any other source; for a fact, if it exists at all, must exist
invariably in the same manner, whether the confession from which it is
derived be in other respects true or false.\textsuperscript{130}

The English rejection of the "fruit" doctrine is preserved by the
1984 Act, which provides that the exclusion of a confession "shall not
affect the admissibility in evidence ... of any facts discovered as a result
of the confession."\textsuperscript{131} In emphasizing the importance of reliable evi-
dence, this rule comports with the Act's adoption of a reliability standard
as part of its voluntariness test.

Another difference between the English and American approaches
to the "fruit" or "product" doctrine arises in a more subtle fashion in the
context of multiple confessions. In the United States, if the first of sev-
eral confessions was voluntary, but obtained without the warnings re-
quired by the \textit{Miranda} rules, it must be excluded. However, later
voluntary statements obtained after proper warnings may be admitted.\textsuperscript{132}
If, on the other hand, the first confession was actually coerced, subse-
quent confessions must be suppressed unless a "break in the stream of
events" separates the two statements.\textsuperscript{133} What this means is unclear. Ar-
guably, it requires nothing more than a showing that the connection be-
tween the coercion and later confessions is so attenuated that the later
confessions themselves are not regarded as coerced. On the other hand,
it likely requires something more.\textsuperscript{134} The Ninth Circuit recently applied
the "fruit" doctrine to coerced confessions, holding that subsequent con-
fessions must be suppressed unless they are "sufficiently attenuated from
[the] initial admission of guilt so as to dissipate its taint."\textsuperscript{135} Applying
this test, the court must look to the temporal proximity of the statements
and the unconstitutional activity, the presence of intervening circum-

\textsuperscript{130} Rex v. Warickshall, 1 Leach 263, 264 (1783).
\textsuperscript{131} Police and Criminal Evidence Act 1984, ch. 60, § 76(4).
\textsuperscript{133} Clewis v. Texas, 386 U.S. 707, 710 (1967); \textit{accord} Oregon v. Elstad, 105 S. Ct. 1285,
1292 (1985).
\textsuperscript{135} United States v. Wauneka, 770 F.2d 1434, 1441 (9th Cir. 1985).
stances, and the purpose and flagrancy of the official misconduct.\textsuperscript{136} Implicit in this approach is the requirement that, under certain circumstances, subsequent confessions that were not the products of coercion must be suppressed because they are insufficiently attenuated. The Supreme Court has suggested that this is the proper approach in cases involving constitutional violations.\textsuperscript{137}

Under English law, although the circumstances attending the first confession will often affect later ones, the principal question is whether the later confessions are voluntary. Rather than relying on a "fruit" or "product" doctrine, courts look to whether the original pressures on the accused remained to impel his later confessions.\textsuperscript{138} If the threat or inducement under which the first statement had been made operated on the defendant's mind when he made the second statement, the latter would be involuntary and inadmissible.\textsuperscript{139} However, if the effect of the original threat or inducement had ended at the time of the second statement, it would be voluntary and admissible. Thus, English rules would not require exclusion of a subsequent voluntary confession on the basis of lack of attenuation alone.\textsuperscript{140}

There is another subtle but marked difference. The American "fruit" or "product" rule includes the English inquiry into the continuation of original threats or inducements, but it also emphasizes "the purpose and flagrancy of the official misconduct."\textsuperscript{141} This involves an

\textsuperscript{136} Id.

\textsuperscript{137} Referring to a confession obtained voluntarily but in violation of \textit{Miranda}, the Supreme Court reasoned, "Since there was no actual infringement of the suspect's constitutional rights, the case was not controlled by the doctrine . . . that fruits of a constitutional violation must be suppressed." Oregon v. Elstad, 105 S. Ct. 1285, 1293 (1985) (discussing Michigan v. Tucker, 417 U.S. 433 (1974)). By implication, when a constitutional right is violated, as with a coerced confession, admissibility of derivative evidence is controlled by the fruit doctrine.

\textsuperscript{138} See Regina v. Rosa Rue, 13 Cox Crim. Cas. 209 (1876); The Queen v. Doherty, 13 Cox Crim. Cas. 23 (1874). See generally \textsc{Archbold}, supra note 32, § 15-41.

\textsuperscript{139} Regina v. Williams, 52 Crim. App. 439, 442 (Central Crim. Ct. 1968).


\textsuperscript{141} Brown v. Illinois, 422 U.S. 590, 604 (1975). In \textit{Brown} the poisonous tree was an illegal arrest. In suppressing confessions which were found to be its "product," the Court noted that the original illegality "had a quality of purposefulness" and that "the impropriety of the arrest was obvious." There is no reason to believe that the Court would find that the deterrent rationale of \textit{Brown} applies with less force when the poisonous fruit is a coerced confession. Indeed, the Court applied a form of the fruit doctrine to confessions in \textit{Brown} itself. After holding that the first confession was the product of the illegal arrest, the Court went on to hold that the second confession "was clearly the result and fruit of the first." \textit{Id.} at 605. The giving of the first statement, the suspect's cooperation in the arrest of his partner, and "his anticipation of leniency bolstered the pressures for him to give the second, or at least vitiated any incentive on his part to avoid self-incrimination." \textit{Id.} n.12. The Supreme Court has continued to apply the \textit{Brown} criteria when considering the fruit of a fourth amendment violation.
assessment of the degree of illegality involved in obtaining the first confession, as well as an inquiry into the need to suppress the second in order to deter police from engaging in such conduct. This deterrent or enforcement purpose, while not foreign to the English approach, is regarded there as less important.

Another significant difference in the enforcement of police interrogation rules relates to the prohibition of searches of suspects without adequate cause, and the detention or arrest of persons for the purpose of station house questioning. A violation of search and seizure rules in England will not, as in the United States, lead to the exclusion of statements obtained as a result. The basic English rule is that if such evidence is relevant, it is admissible: "It matters not how you get it; if you steal it even, it would be admissible." 142 While a number of English cases have suggested that evidence improperly obtained may be excluded at the discretion of the judge, 143 Lord Diplock of the House of Lords rejected such reasoning:

It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. If it was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with. What the judge at the trial is concerned with is not how the evidence sought to be adduced by the prosecution has been obtained but with how it is used by the prosecution at the trial. 144

The House of Lords recently reaffirmed this view: "The duty of the court is to decide whether the appellant has committed the offense with which he is charged, and not to discipline the police for exceeding their powers." 145

Thus, English courts, unlike our own, would not suppress a confession on the ground that it was the fruit of an unlawful search or on the ground that it was the product of an improper detention, arrest, or other seizure. While English courts retain discretion to exclude evidence if the police have acted oppressively or unfairly toward the accused, this dis...

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cretion, in fact, is quite narrow and rarely exercised.\textsuperscript{146}

This English reluctance to use exclusionary rules to discipline the police was strongly approved by the 1981 Royal Commission. The Commission specifically rejected exclusion of evidence as a way of enforcing police compliance with rules of conduct.\textsuperscript{147} The 1984 Act follows the Commission’s recommendations in this respect. While the Act sets forth rules governing police authority to stop, detain, arrest, and search, it does not provide for the exclusion of evidence obtained in violation of any principle of the Act or of the ensuing Code of Practice respecting search and seizure powers of the police. Indeed, the Act provides that “failure on the part . . . of a police officer to comply with any provision of [the new Code] . . . shall not of itself render him liable to any criminal or civil proceedings.”\textsuperscript{148} Instead, the Act relies upon police disciplinary proceedings for enforcement.\textsuperscript{149} Thus, while the Act treats a breach of the Code’s rules on detention and search of suspects as a serious matter, suppression of evidence is generally not contemplated as an enforcement method.\textsuperscript{150}

Finally, it should be recognized that English impeachment rules significantly deter suspects with criminal records from challenging the admissibility of confessions. Allegations of police misconduct which often accompany a defendant’s challenge to the voluntariness of a confession may lead to unpleasant consequences. Under English law, a defendant does not open himself up to prior conviction impeachment merely by

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146. The House of Lords recently suggested that, based on assuring fairness to the accused, a court might have discretion to exclude evidence obtained by trick or deception or by other oppressive police behavior. \textit{See id.} at 397. The limited discretion to exclude evidence on grounds of oppression or unfairness to the accused is a part of the Act, but appears to be further narrowed by the requirement that the improper conduct adversely affect the fairness of the proceedings. Police and Criminal Evidence Act 1984, ch. 60, § 78(1). It is difficult to see how, outside the context of confessions, the admission of reliable evidence could detract from the fairness of the trial.

147. \textsc{Royal Commission Report} 1981, \textit{supra} note 12, ¶¶ 4.131-.132, at 116. However, automatic exclusion would apply to breaches of rules prohibiting violence, threats of violence, torture, or inhumane or degrading treatment in order to mark the seriousness of the breach and society’s abhorrence of such breach. \textit{Id.} ¶ 4.132, at 116.


149. \textit{Id.} § 67(8).

150. \textit{See} T.C. Walters & M.A. O’Connell, \textsc{A Guide to the Police and Criminal Evidence Act} 1984, at 70 (1985); M. Zander, \textit{supra} note 53, §§ 66-67, at 93-95. Though breach by the police of a Code of Practice will not lead automatically to the exclusion of evidence, it may, when relevant, be taken into account by a judge when exercising the general discretion to exclude evidence on grounds of unfairness, or by a jury in determining the weight to be given to the evidence. \textit{See} Police and Criminal Evidence Act 1984, ch. 60, § 67(11). Judicial discretion to exclude evidence will be discussed further in the context of enforcement of specific rules governing the manner of police questioning. \textit{See infra} section II.E.
\end{flushright}
testifying in his own defense. However, his prior convictions may be used on cross-examination if he places his own "character" in question or impugns the "character" of a prosecution witness. The latter can occur through allegations of police misconduct which accompany a challenge to the voluntariness of a confession. Glanville Williams gives the example of a false verbal confession strongly corroborated by the testimony of two policemen. The task of defense counsel becomes almost impossible when the defendant has suffered criminal convictions:

If the defendant tries to expose the lie, prosecuting counsel may ask him whether he is calling the officer a liar. If he replies in the affirmative, he will, by a singularly wicked rule, be subject to cross-examination on his criminal record, which otherwise would be kept from the jury.

Consequently, defense counsel in England tend to dissuade defendants who have criminal records from challenging either the admissibility or the accuracy of statements.

II. Specific Rules Governing the Manner of Police Questioning

A. Rules for Cautioning Suspects: The Right to Remain Silent

In formulating more specific rules governing the interrogation process, each country has developed a scheme to ensure that suspects are aware of their rights. At first glance, the English caution requirements and our \textit{Miranda} admonition rules appear similar. Both provide that police explicitly warn a suspect of his right to remain silent prior to questioning. A closer look, however, reveals more differences than similarities between the English and American admonition rules, not only in the warnings themselves but in the nature of both the substantive rights and enforcement mechanisms. While in many ways the English cautions appear broader and more protective of suspects' interests than \textit{Miranda}, in

\begin{footnotesize}
151. The prohibition on questioning an accused concerning his past offenses or his bad character does not apply whenever "the nature or conduct of the defence is such as to involve imputations on the character of the prosecution or the witnesses for the prosecution." Criminal Evidence Act 1898, § 1(f)(ii), \textit{reprinted in ARCHBOLD, supra} note 32, § 4-338; \textit{see Regina v. Britzman, 76 Crim. App. 134 (C.A. 1982); Monday, Reflections on the Criminal Evidence Act 1898, 44 CAMBRIDGE L.J. 62, 74-78 (1985).}

152. \textit{Williams, Authentication of Statements to the Police, [1979] CRIM. L. REV. 6, 13.} However, Williams states that if the defendant is properly instructed, he will reply: "I am only giving my evidence. The jury can decide between us." \textit{Id.} at 26; \textit{see also House of Commons, Dec. 5, 1985, col. 513.}

\end{footnotesize}
important respects they are much narrower and much less protective. But they are also much more complex and, to thoroughly understand the difference in approaches, it is necessary to review the development and current character of both sets of rules.

(1) The English Cautions

The English cautions were originally formulated and approved by the judges of the King's Bench Division of the High Court in 1912.154 With later additions, there were nine "Judges' Rules" in all. It is important to note that these Rules were not considered rules of law but merely guidelines or directives to the police. Though they later were pronounced by the judges of the Queen's Bench Division of the High Court, they had never been established by Parliament as rules of law, nor approved by England's highest court, the House of Lords.155

The Judges' Rules may be briefly summarized as follows: (1) when a police officer decides to charge a person with a crime, he should caution him, explaining that he is not obligated to say anything unless he wishes and that whatever he does say will be taken down in writing and may be used in evidence; (2) persons in custody should not be questioned without the usual caution being first administered; and (3) a prisoner making a voluntary statement must not be cross-examined, and no questions may be put to him about his statement except for the purpose of removing ambiguity in what he has actually said.156

These rules proved ambiguous and controversial. In 1930, the Home Secretary, with the approval of the Judges, issued a police circular explaining the true intent of the rules: that persons in custody should not be questioned or cross-examined on the subject of the crime for which

154. Actually, the origin of the Judges' Rules is probably to be found in a letter dated October 26, 1906. The Lord Chief Justice had written to the Chief Constable of Birmingham in answer to a request for advice. On the same Circuit, one Judge had censured a member of his force for having cautioned a prisoner, while another Judge had censured a Constable for having omitted to do so. Replying to the inquiry, the Lord Chief Justice advised that the approved practice was that whenever a Constable determined to make a charge against a man he should caution him before taking a statement in the following manner: "you are not obligated to say anything unless you wish to, but anything you say will be written down and may be used in evidence against you." But the Lord Chief Justice suggested that the words "against you" be omitted "on the ground that the man might just as well say something in his favor as against him." ROYAL COMMISSION: INVESTIGATION 1981, supra note 29, app. 13, at 163.


they are in custody. 157 This interpretation followed from the long-established principle that, as a general rule, arrest should take place at the end of the investigation and that, upon arrest, the suspect should be promptly charged. 158 For some time thereafter, courts tended to follow the circular by excluding written statements resulting from questioning or cross-examination of persons in custody. Gradually, however, enforcement began to loosen as the courts perceived a public need for some police power to interrogate suspects in custody. After 1950, courts uniformly began to admit statements obtained during custodial questioning. By 1961 Glanville Williams regarded the Home Secretary’s circular of 1930 as a "dead letter." 159 He surmised that "the Rules have been abandoned, by tacit consent, just because they are an unreasonable restriction upon activities of the police in bringing criminals to book." 160

In 1964, the Queen’s Bench Division of the High Court amended the Judges’ Rules to give police greater freedom to question suspects in custody. 161 The Rules existed in this less restrictive form for the next twenty years. 162

157. HOME OFFICE, CIRCULAR NO. 5360 53/23; see ROYAL COMMISSION: INVESTIGATION 1981, supra note 29, app. 13, at 164; Williams, Police Interrogation, supra note 12, at 50.
159. Williams, Police Interrogation, supra note 12, at 50-51 ("[T]he courts acquiesced in [the practice of detention for questioning] by failing to enforce the Judges’ Rules, so much so that they had, by 1960, ceased to exist as a legal constraint on custodial questioning.").
160. Id. at 52; see also V. BEVAN & K. LIDSTONE, supra note 158, § 5.02 ("[T]he courts acquiesced in [the practice of detention for questioning] by failing to enforce the Judges’ Rules, so much so that they had, by 1960, ceased to exist as a legal constraint on custodial questioning.").
161. JUDGES’ RULES, supra note 29, at 237. The reference by the Miranda Court in 1966 to the “recently strengthened” Judges’ Rules, Miranda v. Arizona, 384 U.S. 436, 486-87 (1966), charitably could be described as misleading. While the new Rules did add more precision and detail, their principal effect was to legitimize greater police questioning of suspects in custody:

[The new Rules] have confirmed quite unambiguously the right of the police to interrogate persons already in custody, a practice which hitherto has been discouraged and was officially denied under the old Rules except for the purpose of clearing up ambiguities. It . . . clear that the balance in the past between private right and public interest has sometimes appeared to be “excessively and unnecessarily tilted in favor of the individual,” . . . The new Rules appear partly to redress the balance by conferring additional powers and extended discretion on the police without depriving the individual of all safeguards, and in so doing should fulfill a pressing need.

162. Various Home Office circulars have since been issued in connection with the Administrative Directions and other matters, but the Rules themselves have remained unchanged. ROYAL COMMISSION: INVESTIGATION 1981, supra note 29, ¶¶ 162-165.
The amended Rules provided for three separate cautions, depending on the circumstances. The first caution was required prior to any questioning as soon as police had evidence providing reasonable grounds for suspecting that the person had committed an offense. The second was required, regardless of police efforts to question, whenever the person was charged with or informed that he may be prosecuted for an offense. The third caution was required in the “exceptional” case when police question a person after he has been charged or informed that he may be prosecuted.163

Attached to the Judges’ Rules were appendices which affirmed or

163. The portion of the Rules dealing with cautioning suspects is as follows:
1. When a police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted for it.
2. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.

The caution shall be in the following terms:
“You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence.”

When after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and the place at which any such questioning or statement began and ended and of the persons present.
3.(a) Where a person is charged with or informed that he may be prosecuted for an offence he shall be cautioned in the following terms:
“Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence.”
(b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement.

Before any such questions are put the accused should be cautioned in these terms:
“I wish to put some questions to you about the offence with which you have been charged (or about the offence for which you may be prosecuted). You are not obliged to answer any of these questions, but if you do the questions and answers will be taken down in writing and may be given in evidence.”

Any questions put and answers given relating to the offence must be contemporaneously recorded in full and the record signed by that person or if he refuses by the interrogating officer.
(c) When such a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any questioning or statement began and ended and of the persons present.

pronounced other rights and protections. The introduction to Appendix A listed principles unaffected by the Rules including a statement of the traditional voluntariness requirement and a reference to the qualified right of access to a solicitor. Appendix B contained "Administrative Directions on Interrogation and the taking of Statements" which established general rules for the treatment of persons in custody and requirements concerning record-keeping and the writing of statements.

The 1981 Royal Commission on Criminal Procedure found the Judges' Rules unclear and imprecise and regarded the law governing police interrogation as "jigsaw pieces of two centuries of police and legal history." It recommended that all aspects of the treatment and questioning of suspects be regulated by statute and that a detailed Code of Practice be drafted to replace the Judges' Rules. The Police and Criminal Evidence Act 1984 implemented the substance of the Commission's recommendations and required the Secretary of State to issue Codes of Practice in connection with four substantive areas, one of which concerned the detention, treatment, and questioning of persons by police officers. In December, 1985 Parliament approved the Codes of Practice issued by the Secretary. As of January 1, 1986, they replaced the Judges' Rules as well as the associated appendices. The Codes are said to "provide clear and workable guidelines for the police as well as strengthened safeguards for the individual." They establish a comprehensive scheme for the treatment and questioning of suspects and therefore cover a much broader area than the Judges' Rules. They are also more precise and more detailed. While they were not enacted by statute and thus lack the status of legislation, they were the subject of extensive study and debate by the government, and the order bringing them into effect was

164. Id. at 237 n.2 (paras. (c) and (e)).
165. Appendix B also contained a requirement that persons in custody should be informed "of the rights and facilities available to them." Id. at 240 n.3 (para. 7(b)).
167. Id. ¶ 5.18, at 124.
168. Police and Criminal Evidence Act 1984, ch. 60, § 66. The Act also required the issuance of Codes of Practice in the following areas: the exercise by police officers of statutory powers of stop and search, the searching of premises by police officers and the seizure of property found by police officers on persons or premises, and the identification of persons by police officers.
170. Following each section of the Code are "Notes for Guidance," which are not technically part of the Code but provide "guidance to police officers and others about its application and interpretation." CODE OF PRACTICE, supra note 18, § 1.3. The Code also contains Annexes, which are part of the Code itself, the purpose of which is to collect in one place provisions that recur in the text of the Code and would otherwise require repeating. Id.
approved by resolution of both Houses of Parliament.\textsuperscript{171} It is likely, therefore, that they will have a somewhat higher status than the Judges’ Rules in the eyes of the police and the courts.\textsuperscript{172}

The Code\textsuperscript{173} provisions with respect to cautions elaborate upon and in some respects alter the Judges’ Rules. The language of the caution is simplified but in substance unchanged: “You do not have to say anything unless you wish to do so, but what you say may be given in evidence.”\textsuperscript{174} The first caution is required prior to questioning when police have “grounds to suspect” a person of an offense and the questioning is “for the purpose of obtaining evidence which may be given to a court in a prosecution.”\textsuperscript{175} This may occur before a suspect’s arrest. If a person not under arrest is cautioned at a police station or other premises, he must be told that he is not under arrest and is not obliged to remain with the officer, but that if he chooses to remain, he may obtain legal advice if he wishes.\textsuperscript{176} In any event, unless previously cautioned, a suspect must be cautioned upon arrest except when the suspect’s condition or behavior makes it impractical.\textsuperscript{177}

Whenever a police officer believes there is sufficient evidence to prosecute a detained person, he must, without delay, bring him before a “cus-
The position and responsibilities of custody officer are created by Part IV of the Police and Criminal Evidence Act 1984, ch. 60, §§ 35-36.

179. See id. §§ 35-39; CODE OF PRACTICE, supra note 18, §§ 2-4, 9, 12, 17.

180. CODE OF PRACTICE, supra note 18, § 3.1.

181. During debates on the Code in the House of Commons, it was suggested that the suspect be provided a simplified or shortened leaflet setting out these rights. The Minister of State for the Home Office gave his assurance that this will be the practice. House of Commons, Dec. 5, 1985, col. 519; see also House of Lords, Dec. 9, 1985, col. 36 (assurance of Lord Glenarthur).

182. CODE OF PRACTICE, supra note 18, § 3.2, .4.

183. Id. § 17.2-.3.

184. Id. § 17.5.

185. Id.
suspicion reaches the required level. The second caution is required regardless of questioning when the suspect is charged or informed that he may be prosecuted, and the third caution is required when the police question a suspect after he has been charged or informed that he may be prosecuted. Although this basic structure remains, the Code is much more comprehensive and provides enhanced guarantees with respect to giving of the caution. For example, in some contexts, the caution must be given earlier and more often. The Judges’ Rules did not require that a suspect be cautioned at the time he is taken into custody unless he was questioned regarding an offense for which there were reasonable grounds to suspect him. The Code of Practice requires that the suspect be cautioned “upon arrest” even though he is not subjected to questioning.\footnote{186} Also, the Judges’ Rules did not require written cautions, but the Code requires the custody officer to give those under arrest at the police station written notice of their rights including the caution.\footnote{187} However, in other respects the Code decreases protection for suspects—for example, by providing additional exceptions to restrictions on police interrogation.\footnote{188}

(2) \textit{Comparison with the Miranda Rules}

Before \textit{Miranda v. Arizona},\footnote{189} specific national standards for the questioning of suspects had never existed in the United States. Apart from the vague voluntariness limits imposed by due process and the search and seizure rules of the fourth amendment,\footnote{190} the interrogation of suspects was regarded as a matter for state and local authorities, which, in turn, usually deferred to the policies of individual police departments.\footnote{191} It was not until the United States Supreme Court decided \textit{Miranda} twenty years ago that federal and state law enforcement officials were required by law to advise suspects of their rights prior to questioning.\footnote{192} The \textit{Miranda} decision, applicable to both federal and state prose-
cutions,\textsuperscript{193} set forth, for the first time, specific warnings to be provided suspects prior to custodial questioning. \textit{Miranda} also detailed the circumstances under which questioning may proceed once the suspect has been warned. \textit{Miranda} requirements are limited in scope and effect, however, since they concern only narrow aspects of custodial questioning and rely only on the judicial system and its exclusionary rule for enforcement.

Compared to the English caution requirements, the \textit{Miranda} rules are simple. When an officer has taken a suspect into custody or otherwise deprived him of his freedom of action in any significant way, procedural safeguards must be employed prior to any questioning to protect the suspect’s fifth amendment privilege against compelled self-incrimination. Unless other fully effective means are devised to inform suspects of their right to silence and to assure them a continuous opportunity to exercise it, the suspect must be warned that: (1) he has a right to remain silent and anything he says can and will be used against him in court; and (2) he has the right to consult with an attorney and if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.\textsuperscript{194}

The suspect may waive these rights, provided the waiver is made voluntarily, knowingly, and intelligently. If, however, the suspect indicates in any manner at any time prior to or during questioning that he wishes to remain silent, the interrogation must cease. If he states that he wants an attorney, the interrogation must cease until an attorney is present. Unless there is demonstrated compliance with these procedural safeguards, no evidence obtained as a result of the interrogation can be used as evidence against the accused.\textsuperscript{195}

In many respects, the English and American rules are similar. Both provide for an investigatory period during which police can question persons without warning them of their rights. Both systems identify a point at which the assertion of official authority requires warnings. Finally, there is an attempt to reduce or eliminate all questioning at some later defined event which marks the commencement of the accusatory stage of the proceedings.

\textsuperscript{193} Miranda is designed to protect fifth amendment rights and both the fifth amendment’s and \textit{Miranda}’s protections apply to state as well as federal prosecutions. Michigan v. Tucker, 417 U.S. 433, 441-43 (1974).

\textsuperscript{194} Miranda, 384 U.S. at 479.

\textsuperscript{195} Id. at 479; see id. at 444-45, 469, 470, 473-74. But see infra notes 251-54 and accompanying text.
Nevertheless, in numerous instances both the Judges' Rules and the Code of Practice offer suspects greater protection. Miranda's requirements for admonitions do not come into play absent custody and interrogation. Custody occurs upon formal arrest or restraint on freedom of movement to the degree associated with formal arrest.\textsuperscript{196} Interrogation consists of express questioning or its functional equivalent, that is, any words or action on the part of the police, other than those normally attendant to arrest and custody, that police should know are reasonably likely to elicit an incriminating response.\textsuperscript{197} Under the Judges' Rules and the Code, custody is often not determinative and interrogation is often insignificant. Though the suspect may not be in custody, the Judges' Rules required the first caution prior to any questioning as soon as the police have "evidence which would afford reasonable grounds for suspecting [he] . . . has committed an offence."\textsuperscript{198} Under the new Code, the duty to caution arises at an even earlier point: "reasonable grounds" under the Judges' Rules had been taken to require evidence admissible over objection in a court of law, but the Code's new relaxed standard of "grounds to suspect" may be present though based on inadmissible evidence.\textsuperscript{199} Thus, as a general rule, persons suspected of an offense will have to be cautioned before they are questioned even though they may not be under arrest or otherwise detained.

Under Miranda, warnings are only necessary when the suspect is in


\textsuperscript{197} Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

\textsuperscript{198} Judges' Rules, supra note 29, rule 2, at 238. This standard was not comparable to either our own reasonable suspicion standard or our probable cause requirement, since "evidence" in the Judges' Rules meant information of a nature that would be admissible as evidence in court. Regina v. Osbourne, [1973] Q.B. 678, 682 (C.A. 1972). Thus, the caution could be delayed if the suspicion justifying the arrest was based on information which could not be put before a court. See Regina v. Dodd, 74 Crim. App. 50, 55-56 (C.A. 1981); C. Emmins, supra note 36, at 328-29. Our reasonable suspicion or probable cause standards, on the other hand, may be satisfied by evidence ordinarily inadmissible in court. See Illinois v. Gates, 462 U.S. 213, 235 (1983); Draper v. United States, 358 U.S. 307, 314 (1959).

\textsuperscript{199} Code of Practice, supra note 18, § 10.1; see T. C. Walters & M. A. O'Connell, supra note 150, at 72. The authors suggest that the new standard should be regarded as "subjective" and will have the effect "that an officer may now have to administer the caution, in its new form, at an earlier stage than previously." This may occur well before the time of arrest since the power to arrest can only be exercised when the officer has reasonable grounds for his suspicion. See also M. Zander, supra note 53, §§ 66-67, at 98. Furthermore, the Notes for Guidance provide that persons voluntarily at police stations to assist with an investigation should be treated with no less consideration than those who are in custody and that they "enjoy an absolute right to obtain legal advice or communicate with anyone outside the police station." Code of Practice, supra note 18, Notes for Guidance 1A.
custody. The question of custody does not depend on the strength or content of police suspicions, nor is it affected by the fact that questioning takes place in a "coercive environment," such as a police station. Custody will be found only when the suspect is formally arrested or subjected to restraints comparable to those associated with a formal arrest.

Another important difference should be noted with regard to the suspect who has been arrested but is not questioned. Under the Judges' Rules an arrest without questioning did not require the caution, but under the Code, unless the suspect has previously been cautioned, he must be cautioned "upon arrest" regardless of whether he is subjected to questioning. Miranda requires warnings only if the arrestee is interrogated. Suspects arrested but not questioned need not be warned of their Miranda rights.

The arrest and questioning of suspects by store security personnel or other private persons engaged in law enforcement activities offers another context in which English rules provide greater protection. The fourth amendment exclusionary rule does not apply to evidence discovered from searches by private persons, and neither the Miranda rules nor the sixth amendment right to counsel guarantees circumscribe questioning by private persons such as private detectives or store security officers. The Judges' Rules, on the other hand, provided that persons other than police officers charged with the duty of investigating offenses or charging offenders "shall, so far as may be practicable, comply with these rules." The 1984 Act preserves the spirit of this principle by requiring that such persons "shall . . . have regard to any relevant provision of [the Code]." Thus, private detectives and security officers may be required to caution suspects prior to questioning them. Though the


203. CODE OF PRACTICE, supra note 18, § 10.3.


205. The fifth amendment is not concerned with moral or psychological pressures to confess emanating from sources other than official coercion. Oregon v. Elstad, 105 S. Ct. 1285, 1291 (1985); see In re Deborah C., 30 Cal. 3d 125, 130-31, 635 P.2d 446, 448-49, 177 Cal. Rptr. 852, 854 (1981).

206. JUDGES' RULES, supra note 29, rule 6, at 239.

207. Police and Criminal Evidence Act 1984, ch. 60, § 67(9).
Act merely exhorts private persons to "have regard" for the Code, their compliance may be taken into account in court proceedings with respect to questions of admissibility and weight of evidence.\textsuperscript{208}

The Code requires a second caution when a detained person "is charged with or informed that he may be prosecuted for an offense."\textsuperscript{209} Under the Code, whenever there exists sufficient evidence to charge, police have a duty to bring the suspect before the custody officer who then must determine whether to charge the suspect.\textsuperscript{210} The charge itself triggers the duty to caution irrespective of whether the person is interrogated.\textsuperscript{211}

The English rules contain limited prohibitions against questioning not found in \textit{Miranda}. First, the Code provides that "[a]s soon as a police officer who is making inquiries of any person about an offense believes that a prosecution should be brought against him and that there is sufficient evidence for it to succeed, he shall without delay cease to question him."\textsuperscript{212} Thus, when the police believe that there is enough evidence for a successful prosecution they are not permitted to question the suspect, and if they come to this belief while questioning, they must terminate the interview.

These rules appear to place greater restrictions on police questioning than do their American counterparts. Neither \textit{Miranda} nor any other American legal principle requires that charges be filed as soon as there is enough evidence to prosecute or that questioning cease as soon as police believe they have enough evidence to convict or as soon as the suspect is informed that he may be prosecuted. General due process principles may limit excessive delay in bringing a charge, but violations occur only in

\begin{itemize}
\item \textsuperscript{208} \textit{Id.} § 67(11).
\item \textsuperscript{209} \textit{CODE OF PRACTICE, supra} note 18, § 17.2. If the suspect is charged, he must be given a written notice containing the caution and the particulars of the charge. \textit{Id.} § 17.3.
\item The Judges' Rules imposed the same requirement regardless of whether the suspect was "detained." \textit{JUDGES' RULES, supra} note 29, rule 3(a), at 238.
\item \textsuperscript{210} \textit{CODE OF PRACTICE, supra} note 18, § 17.3; Police and Criminal Evidence Act 1984 § 37(7). The Judges' Rules required that the police officer himself prefer the charge as soon as he had obtained sufficient evidence. \textit{JUDGES' RULES, supra} note 29, at 237 n.2 (para. (d)).
\item \textsuperscript{211} The second caution under the Judges' Rules had been somewhat interrogatory in form, commencing with, "Do you wish to say anything?" Thus, the Rules imposed a duty of inquiry along with a duty to caution. \textit{JUDGES' RULES, supra} note 29, rule 3(a), at 238.
\item \textsuperscript{212} \textit{CODE OF PRACTICE, supra} note 18, § 11.2. The Judges' Rules did not specifically prohibit questioning after obtaining sufficient evidence to convict. However, the Rules were interpreted as requiring that, as soon as a police officer had enough evidence to charge, he must cause the suspect to be charged without delay and thereafter may not question him about the offense. \textit{ROYAL COMMISSION: INVESTIGATION 1981, supra} note 29, § 71, at 26. The Code merely requires the investigating officer to bring the suspect to the custody officer who will make the charging decision.
\end{itemize}
extreme circumstances. The sixth amendment speedy trial right applies only to those who have been charged or otherwise formally accused.213

However, the English rules are not as strict or protective of suspects as first appears. The duty to cease questioning arises not simply with sufficient evidence to charge and prosecute (meaning a prima facie case),214 but only when there is sufficient evidence to secure a conviction.215 Because the interviewing officer, or on occasion the custody officer, makes this judgment,216 the rule prohibits questioning only when other evidence of guilt is so overwhelming that a confession is unnecessary for a conviction. In these cases, the suspect might not be questioned regardless of the rule.

Furthermore, the English rules provide a loophole to the prohibition on questioning persons who have been charged or informed they may be prosecuted. Questioning of such persons is permitted when

necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement or where it is in the interests of justice that the person should have put to him and have an opportunity to comment on information concerning the offense which has come to light since he was charged or informed that he might be prosecuted.217

This exception appears to offer a large enough hole for an interrogator to drive through at will.218


216. Id.

217. CODE OF PRACTICE, supra note 18, § 17.5. Even the broad conditions of this exception do not have to be met when the suspect is questioned regarding offenses other than those with which he is charged or for which he has been informed he may be prosecuted. T.C. WALTERS & M.A. O'CONNELL, supra note 150, at 76. The language of the exception is identical to the Judges' Rules except that the Code added a last provision allowing questioning on new information, thereby expanding circumstances under which a charged person may be questioned with respect to the offense.

218. Interrogation of arrested suspects at the police station is well-accepted practice. P. SOFTLEY, supra note 76, at 85. If the rules are being followed, police either delay charging the suspect or informing him that he may be prosecuted for the offense or employ the stated exceptions to justify interrogation. In one case, for example, a suspect was arrested Wednesday and confessed to ten armed robberies on Thursday. Because police suspected him of other robberies, they did not charge him and continued interrogation through Friday, when he admitted two more robberies, and Saturday, when he admitted another. The court found a breach of the Judges' Rules by not charging the suspect and bringing him before a magistrate on Saturday, but regarded the delay up to that point as reasonable in light of the need to further investigate the unsolved robberies. See, e.g., Regina v. Mackintosh, 76 Crim. App. 177 (C.A. 1982).
Once this exception applies, a third caution is required prior to any questioning. This points up one area in which the protections of the English rules certainly exceed those of Miranda. While Miranda may require that a new caution be given prior to reinterrogation after a substantial period of time has elapsed or after the suspect has first asserted his right to remain silent,219 Miranda sets forth no requirement for multiple cautions in the normal interrogation context.220 Not only does the Code explicitly provide for separate cautioning at each phase of the interrogation process, it requires that, whenever there is a break in questioning, the interviewing officer must ensure that the suspect is aware that he remains under caution. If there is any doubt, the caution must be given again in full when the interview resumes.221 Even under the Judges' Rules, the normal practice of many police officers was to caution suspects on a number of occasions whether or not they intended to question them at that time.222

Yet a number of shortcomings of the English rules appear when contrasted with Miranda rules and sixth amendment right to counsel standards. The English caution and the Miranda warning similarly inform the suspect of his right to silence. The language of the Judges' Rules seems somewhat clearer when it flatly tells the suspect that "you do not have to say anything unless you wish to do so," rather than advising in shorthand legal terms of "the right to remain silent." Nevertheless, the basic meaning conveyed is similar, and in both countries minor deviations from the stated language are not regarded as a breach of the duty to inform as long as the essence of the rights is conveyed.223 However, the implications of the silence warning and the use to which silence can be put in England make the English caution misleading. In holding evidence of silence inadmissible even to impeach, the United States Supreme Court has found that the Miranda warning constitutes an im-

221. CODE OF PRACTICE, supra note 18, § 10.5. The Notes for Guidance admonish that, "[i]n considering whether or not to caution again after a break, the officer should bear in mind that he may have to satisfy a court that the person understood that he was still under a caution when the interview resumed." Id., Notes for Guidance 10A.
222. P. Soffley, supra note 76, at 71.
plicit assurance that a suspect's silence "will carry no penalty."224 Surely no less can be said for the English caution. In fact, the Notes for Guidance in the Code suggest that when a suspect is unclear about the significance of the caution, the officer should explain that it "is given in pursuance of the general principle of English law that a person need not answer any questions or provide any information which might tend to incriminate him, and that no adverse inferences from his silence may be drawn at any trial that takes place."225 Yet, as noted previously, while an English court will instruct the jury that an inference of guilt cannot be drawn from silence, evidence of the silence comes before the trier of fact—the jury knows that when the defendant was questioned, he failed to offer an explanation—and nothing can prevent the jury from drawing adverse inferences.226 Therefore, while English law states that silence cannot be used to convict, in fact, an accused's failure to talk to police often may be used by the jury to his detriment.

In another important respect the caution rules offer less protection than Miranda. An American prosecutor must affirmatively prove a knowledgeable waiver of Miranda rights.227 While Miranda does not require an express waiver,228 relinquishment of rights cannot be inferred

225. CODE OF PRACTICE, supra note 18, Notes for Guidance 10D. See supra note 170 for an explanation of the Notes.
226. See supra notes 44-53 and accompanying text.
228. See id. at 373 (defendant's course of conduct indicated that he had understood rights and waived them). See generally Comment, Waiver of Rights in Police Interrogations: Miranda in the Lower Courts, 36 U. CHI. L. REV. 413, 422-23 (1969).

Adequate waiver of Miranda rights has been found when the police read the Miranda warnings aloud from a printed card and then recorded the suspect's responses as follows:

Do you understand these rights? Yeh.
Do you have any questions about your rights? No.
Having these rights in mind, do you wish to talk to us now? Yeh, I do.

The card was dated and signed by the officer and the suspect. Characterizing the process as a "careful administration of Miranda warnings," and concluding that the suspect was fully capable of understanding them, the court found valid the suspect's waiver of his rights. Oregon v. Elstad, 105 S. Ct. 1285, 1296 & n.4 (1985).

The following is a standard admonition and waiver form used by many police departments in California:

Admonition: You have the right to remain silent, anything you say can be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford a lawyer one will be appointed to represent you before any questioning, if you wish one.

WAIVER: DO YOU UNDERSTAND EACH OF THESE RIGHTS I HAVE EXPLAINED TO YOU?
HAVING THESE RIGHTS IN MIND, DO YOU WISH TO TALK TO US NOW?
from silence. However, *Miranda* makes no provision for explaining to the suspect the meaning and significance of his rights. Factors unknown to the accused, such as police deception or an attorney's efforts to give advice, are irrelevant to the question of waiver:

Once it's determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the state's intention to use his statements to receive a conviction, the analysis is complete and the waiver is valid as a matter of law. 230

If a suspect asserts his right to remain silent, or simply declines to speak, *Miranda* requires that the police honor his assertion by immediately ceasing interrogation until a lawyer is present. 231

The Judges' Rules had failed to require that police take precautions to ensure that suspects understood their rights and failed to require either an express or implied waiver. Thus, in practice, police usually did not inquire whether suspects understood their rights. 232 The Code offers much improvement regarding suspects' knowledge and understanding of their rights. First, if it appears that the suspect does not understand what the caution means, the officer should "explain it in his own words," and if the suspect "is unclear about its significance," the officer should go on to explain the consequences of silence as previously discussed. 233 Special care must be taken when questioning juveniles and mentally ill or mentally handicapped persons. 234 Furthermore, if because of alcohol or drugs, a suspect is "unable to appreciate the significance of questions put to him and his answer," he may not be questioned unless the "urgent interview" exception applies. 235

Although the Code provides greater assurance that suspects understand their rights, it does not change the traditional principle found in the Judges' Rules that allows the police to disregard a suspect's assertion of those rights. Neither the Judges' Rules nor any common-law principle required that if the suspect indicated that he wished to remain silent no more questions could be asked. 236 As long as a suspect was properly

232. P. SOFTLEY, supra note 76, at 73-74.
233. CODE OF PRACTICE, supra note 18, Notes for Guidance 10C, 10D; see supra note 225 and accompanying text.
234. CODE OF PRACTICE, supra note 18, Notes for Guidance 13B.
235. Id. § 12.3; Id. Annex C. The Annex provides for "urgent interviews" of intoxicated, mentally ill, juvenile, or illiterate suspects if a superintendent or other superior officer decides that delay would involve an immediate risk of harm to persons or a risk of serious property damage. Questioning must cease after the police obtain sufficient information to avert the risk.
cautioned, interrogation could continue in the face of protestations and objections, subject only to the prohibition against such pressure as would render the statement involuntary. The Code does not refer to this subject directly, but the Notes for Guidance appear to reaffirm the traditional principles by restating the right of police to question suspects and then noting, "[a] person's declaration that he is unwilling to reply does not alter this entitlement."\textsuperscript{237}

In contrast, \textit{Miranda} principles afford suspects the power to cut off interrogation. Questioning can continue only if the suspect clearly understands "that, at anytime, he [can] bring the proceeding to a halt, or, short of that, call in an attorney to give advice and monitor the conduct of his interrogators."\textsuperscript{238} Indeed, the Supreme Court has accepted the characterization of police interrogation as "a privilege terminable at the will of the suspect."\textsuperscript{239} Moreover, police cannot avoid the rule by ceasing questioning momentarily then shortly thereafter resuming questioning on the same subject since this "would clearly frustrate the purposes of \textit{Miranda} by allowing repeated rounds of questioning to undermine the will of the [suspect]."\textsuperscript{240} While it is possible in some circumstances for the police to interrogate after the lapse of a substantial period of time and upon a different subject matter, the suspect's invocation of the right to silence must otherwise continue to be "scrupulously honored."\textsuperscript{241}

In this respect, the importance of the English caution is severely limited when compared to \textit{Miranda}. The English rules guarantee that suspects are made aware of the right of silence, but by denying suspects the right to cut off questioning, the rules do not give significance to the exercise of the right.

In a related context, the language of the Code appears to be more protective of suspects than is the case. The procedures for taking written statements require that a suspect writing his own statement "shall be allowed to do so without any prompting except that a police officer may indicate to him which matters are material or question any ambiguity in the statement."\textsuperscript{242} When the officer writes the statement, "he must take down the exact words spoken . . . and must not edit or paraphrase it."\textsuperscript{243}
These restrictions are very similar to those of the Judges’ Rules and may suggest that English police are prohibited from questioning or interrogating an accused. Indeed, the *Miranda* Court flatly stated that the Judges’ Rules “require that any statement made be given by the accused without questioning by the police,” and Justice Frankfurter in *Culombe v. Connecticut* asserted that English courts have long tended severely to discourage police from questioning those arrested or about to be arrested. However, these restrictions apply only when a suspect makes a written statement, not during the interrogation process in general. Thus, an English officer who lacks definite proof of guilt may vigorously cross-examine an uncharged suspect unrestricted by these requirements as long as he is not taking a written statement. In fact, written statements are not taken in most cases, and when they are, it is usually after the suspect has orally confessed.

The only restriction imposed by the new law on aggressive questioning in the usual interrogation context is an admonition in the Notes for Guidance that “the purpose of any interview is to obtain from the person concerned his explanation of the facts, and not necessarily to obtain an admission.” This is not part of the actual Code and a violation is not automatically a breach of the police disciplinary code. Most important, the admonition does not alter the general principle of English law that entitles police in the course of crime detection to question any person, whether or not under suspicion or in custody, at least until the person has been charged or informed he may be prosecuted. In fact, the

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In this respect, the English and American practices are similar. Deception techniques are generally allowed in the United States as long as they do not result in an involuntary statement or are not the type that would likely produce a false confession. *Frazier v. Cupp*, 394 U.S. 731, 739 (1969). *See cases cited in Kaci, supra* note 21, at 103-04 & nn.80-81. The English rules in this context certainly cannot be described as “a striking contrast to United States practice.” *See id.* at 103.

247. *See P. SOFTLEY, supra* note 76, at 81.
248. *CODE OF PRACTICE, supra* note 18, *Notes for Guidance* 1B.
Notes expressly state, "A person's declaration that he is unwilling to reply does not alter this entitlement."\(^{250}\) Thus, it is clear that, subject to the minimal restrictions imposed by the Code, English police retain their traditional power to interrogate suspects in and out of custody and may do so aggressively, at least so far as not taking "no" for an answer.

Finally, it is important to consider the emergency or exigent circumstance exceptions to the warning requirements. Until recently, no such limits on \textit{Miranda} were generally recognized,\(^{251}\) but in \textit{New York v. Quarles}, the Supreme Court announced a "public safety" exception.\(^{252}\) In this case, the Court held that \textit{Miranda} warnings need not be given when police question a suspect in response to a threat posed by the presence of a loaded gun. The suspect in \textit{Quarles} was interrogated while in custody concerning the location of a weapon thought to be in a nearby public area. Because the questioning was "reasonably prompted by a concern for the public's safety," the Court found it was justified despite the absence of \textit{Miranda} warnings.\(^{253}\) The Court suggested, however, that the new exception would not be so broad as to sanction the gathering of evidence for the sole purpose of obtaining a conviction even in serious cases.\(^{254}\) Unfortunately, the Court's opinion failed to draw clear boundaries around the exception, and the extent of its effect on the protections afforded by \textit{Miranda} will not be known for some time.

Neither the Judges' Rules nor the Code contains an explicit emergency or public safety exception to the caution requirements. Provisions for emergency questioning certainly abound, but they are exceptions, not to the caution requirements, but to the restrictions on questioning those

\(^{250}\) \textit{CODE OF PRACTICE}, supra note 18, \textit{Notes for Guidance} 1B.

\(^{251}\) However, a number of lower courts had recognized public emergency or public safety exceptions to \textit{Miranda}. See, e.g., \textit{United States v. Castellana}, 500 F.2d 325, 326-27 (5th Cir. 1974); \textit{People v. Dean}, 39 Cal. App. 3d 875, 886, 114 Cal. Rptr. 555, 562 (1974) (en banc).


\(^{253}\) \textit{Id.} at 657. Shortly after midnight, a woman approached police officers seated in their patrol car and told them that she had just been raped. She specifically described the man and said he had just entered a nearby supermarket carrying a gun. The officers entered the supermarket, where one officer spotted a man who matched the description. The officer pursued him but lost sight of him for several seconds. Upon finding him, the officer arrested and frisked him, discovering an empty shoulder holster. He asked where the gun was, and the suspect nodded in the direction of some empty cartons and responded, "the gun is over there." The officer then retrieved a loaded .38 caliber revolver from one of the cartons, formally placed defendant under arrest, and read the \textit{Miranda} rights. \textit{Id.} at 658.

\(^{254}\) The Court was concerned with the possibility that an accomplice, a customer, or an employee might later use the gun or be harmed by it. Noting that the \textit{Miranda} warnings might well have deterred the defendant from revealing the location of the gun, the Court relied upon the fact that the cost to society would have been something more than the mere failure to obtain evidence useful in convicting the defendant. \textit{Id.} at 657.
who have been charged or informed they may be prosecuted,\textsuperscript{255} those who have asked for legal advice,\textsuperscript{256} and juveniles, illiterates, or other persons at a particular disadvantage.\textsuperscript{257} No express public safety or emergency exception applies to the caution required to be given an arrested suspect or one whom there are "grounds to suspect" of an offense.\textsuperscript{258} However, the duty to give the first caution is not as broad as initially appears. Under the Judges' Rules, the first caution was required before the police asked the person suspected of an offense "any questions . . . relating to that offence."\textsuperscript{259} The Code requires this caution to be given to the person suspected of an offense "for the purpose of obtaining evidence which may be given to a court in a prosecution," and explicitly permits police to question a suspect without caution "for other purposes," citing examples.\textsuperscript{260} Though the examples do not mention a public safety purpose, they are not inclusive. The type of questioning in \textit{Quarles}, which was characterized by the Court as "devoted to locating the abandoned weapon," would arguably be permitted under the Code, at least when it occurs prior to formal arrest. The new requirement that a person be cautioned upon arrest (unless first cautioned as a suspect) is excused only when "it is impracticable to do so by reason of [the arrestee's] condition or behaviour at the time."\textsuperscript{261} Certainly, the English rules provide enough latitude for an emergency or public safety exception similar to our own.\textsuperscript{262}

B. Rules for Cautioning Suspects: The Right to Counsel

\textit{(1) The English Right of Access}

The right to counsel as we know it is referred to in England as the right of access to a solicitor.\textsuperscript{263} Compared to the \textit{Miranda} warning, the most glaring omission of the English caution is the absence of any advice on the right to consult with a solicitor. The caution of the Judges' Rules

\textsuperscript{255} \textit{Code of Practice, supra} note 18, § 17.5.
\textsuperscript{256} \textit{Id.} § 6.3.
\textsuperscript{257} \textit{Id.} §§ 13.1-14.9, Annex C.
\textsuperscript{258} \textit{See id.} §§ 10.1, .3.
\textsuperscript{259} \textit{Judges' Rules, supra} note 29, rule 2, at 238.
\textsuperscript{260} \textit{Code of Practice, supra} note 18, § 10.1 (emphasis added).
\textsuperscript{261} \textit{Id.} § 10.3.
\textsuperscript{262} In fact, exceptions to the first caution requirement appear much broader since questioning for other purposes is not limited to public safety reasons. Similarly, if the \textit{Quarles} exception is taken to encompass all questioning except that "designed solely to elicit testimonial evidence from a suspect," 467 U.S. at 654, it may embrace questioning prompted by multiple police purposes, only one of which involves public safety.
\textsuperscript{263} An English suspect would seek advice from a solicitor rather than from "counsel," a barrister.
made no mention of this right, nor is it a part of the caution under the new Code.

From this omission one might be tempted to infer that suspects in England had no right of access to a solicitor during police questioning before appearance in court. However, although limited and ill-defined, a right of access to a solicitor has been established in England for some time. While nothing in the body of the Judges’ Rules referred to a suspect’s right to contact or consult with a solicitor during the interrogation process, and no statutory provisions conferred such a right, a number of other sources indicate recognition of a right of access.

The introduction to the Rules, for example, stated that they did not affect the principle that

every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so.264

In addition, the Administrative Directions in Appendix B provided that “a person in custody should be allowed to speak on the telephone to his solicitor or to his friends,” and that such persons should be informed orally and by posted notices of the rights and facilities available to them. Also, an act of Parliament provided a person in custody the statutory entitlement to notify one person “reasonably named by him” of his arrest and location “without delay or, where some delay is necessary in the interest of the investigation or prevention of crime or the apprehension of offenders, with no more delay than is so necessary.”265

These principles required considerable clarification, but English courts were reluctant to undertake the task. The principles appeared to provide a qualified right of access to a solicitor, but exactly when this right came into play and how it was to be exercised and enforced remained unclear. The prevailing view was that, despite a general right of access, a suspect had no right to the presence of a solicitor during police interrogation.266 Moreover, those rights of solicitor access and communication that did exist were subject to various provisos which turned on the exercise of police discretion. The right to communicate and consult could be limited when it might cause unreasonable delay or hindrance to the process of investigation or to the administration of justice. While

264. Judges’ Rules, supra note 29, at 237 n.2 (para. (c)).
266. Royal Commission: Investigation 1981, supra note 29, ¶ 86, at 32; C. Emmins, supra note 36, at 332; Williams, Police Interrogation, supra note 12, at 56.
police could not, as a matter of routine, prevent persons in custody from obtaining legal advice if they wished to do so, and the fact that a suspect under arrest had not yet made an admission was not regarded as a good reason for refusing to allow the suspect to see a solicitor, access to a solicitor could still be denied for a number of reasons. For example, courts recognized that solicitors could not reasonably be expected to turn up until ordinary business hours and did not require the police to postpone interrogation until then. Also, if other suspects in the case were still at large and the weapons used had not yet been found, police could refuse a suspect's request to consult with a solicitor and could continue interrogation.

Since a suspect in custody had no legal right to the presence of a solicitor during police interrogation or while making a statement, he need not be advised of any such right. The Administrative Directions to the Judges' Rules did suggest that persons in custody should be informed orally and by written notices displayed at convenient and conspicuous places at police stations of the rights available to them. However, since there was no specific requirement of oral advice, most police relied on drawing the suspect's attention to displayed notices of rights. Often, the first time a suspect knew of his rights would be when he saw them printed on the back of the charging document after he was bailed and as he was leaving the police station. Consequently, few suspects ever asked to consult with a solicitor while in police custody. Furthermore, the occasional request by a suspect for a solicitor was no guarantee that a solicitor would be provided. In fact, most requests for access to a solicitor were refused. In any event, there was no requirement that, once a suspect requested a solicitor or otherwise asserted his limited right of access and consultation, police had to cease interrogation until a solicitor was present.

Given the uncertainty and the limits of these English rules, one English barrister and scholar pointed out that the right to consult with a

269. Id. at 839-40.
271. JUDGES' RULES, supra note 29, at 240 n.3 (para. 7(b)).
274. ROYAL COMMISSION REPORT 1981, supra note 12, ¶ 4.84, at 98; M. ZANDER, supra note 53, § 57, at 72 & n.22 (citing articles and studies).
solicitor given by the Judges' Rules "is somewhat illusory." The *Miranda* Court, then, was off the mark when, referring to taking statements from suspects, it stated that "the right of the individual to consult with an attorney during this period is expressly recognized" by the Judges' Rules. In fact, contrary to the Court's implicit assertion, the English limitations on the right of access to legal advice during the critical interrogation period appeared so substantial as to effectively eliminate any such right during this period as is recognized under American law.

The 1981 Royal Commission recognized these weaknesses in the right of access and recommended measures to strengthen the right and make it effective. The 1984 Act adopted the general approach advocated by the Royal Commission. An arrestee now has both a statutory right to have someone informed (a right not to be held incommunicado) and a statutory right of access to a solicitor. With certain exceptions a person "arrested and . . . held in custody in a police station or other premises" is entitled, if he requests, to have a person known to him who is likely to take an interest in his welfare (which includes a solicitor) told of his arrest and his place of detention. He is also entitled, if he requests, "to consult a solicitor privately at any time."

The Act endeavors to make the right of access meaningful by providing for the establishment of duty solicitor schemes which are designed to ensure that legal advice will be promptly available on request to persons in custody. This is regarded as a major achievement by the government in collaboration with the solicitor's organization, the Law Society. At police stations designated for the care of detained persons, all suspects, whether under arrest or voluntarily present, will be able to obtain free legal advice on a twenty-four hour basis regardless of means.

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280. *Id.* § 58. The right of access provisions have been referred to as "arguably the most important protection conferred by the Act." M.D.A. Freeman, *The Police and Criminal Evidence Act 1984*, at 60-105 (1985).
281. Under § 59 of the Act, solicitors participating in magistrates' court schemes may be required to take part in duty solicitor schemes at police stations. The purpose of the schemes is "to ensure that legal advice is available outside normal working hours so that the right to consult a lawyer is not made meaningless for those who are detained at night or during weekends." Comments by the Minister of State to the House of Commons, Dec. 5, 1985, col. 491.
283. See generally *id.*; see also G. Powell & C. Magrath, *supra* note 97, ¶¶ 14.18, 23.04.

However, a number of smaller nondesignated stations will not have duty solicitor
The Code adds precision and provides supplemental guarantees to the rights accorded by the Act. When a suspect is brought to a police station under arrest, or is arrested there, the custody officer must inform him orally of his rights and must also give him a written caution including the right to silence.\textsuperscript{284} He must ask for signed acknowledgement of receipt of the written notice.\textsuperscript{285} If the custody officer authorizes the suspect’s detention, he must inform him of the grounds for detention as soon as practicable and, in any event, before he is questioned about any offense.\textsuperscript{286} The detained person must then be asked to sign the custody record to signify whether or not he wants legal advice at this point.\textsuperscript{287} The right to legal advice includes the opportunity to consult a specific solicitor or one from the duty solicitor scheme if one has been established. If advice cannot be obtained through these means, or if the suspect does not desire the duty solicitor, he may choose a solicitor from a list of those willing to provide legal advice.\textsuperscript{288} The written notice of rights given the suspect by the custody officer should be accompanied by a notice explaining the arrangements for obtaining legal advice.\textsuperscript{289}

In two other important respects, the Code significantly expands upon the protections stated in the Act. First, the Act provides a right of access only to persons “arrested and held in custody in a police station or other premises,”\textsuperscript{290} but the Code provides that “any person may at any time consult and communicate privately . . . with a solicitor.”\textsuperscript{291} Thus, under the Code, all persons have a right of access whether or not they are questioned by police and whether or not they are in custody or under arrest at a police station. However, only the custody officer must give notice of this right, and then only to those under arrest at a police sta-
tion. The right of access is not part of the caution. Neither officers in the field nor officers interviewing suspects at a police station are required to advise of the right of access to a solicitor.

Second, the Act does not prohibit further questioning once a suspect has requested a solicitor. The Code, however, states that, with certain exceptions, "[a] person who asks for legal advice may not be interviewed or continue to be interviewed until he has received it." Furthermore, after consultation with his solicitor, he must be allowed to have the solicitor present whenever he is interviewed if the solicitor is available. The solicitor may be excluded from an interview only if his conduct is such that the investigating officer is unable properly to put questions to the suspect. Exclusion is regarded as a serious matter, and procedural protections are established to ensure that it occurs only in those rare cases when it is clearly justified.

Despite these protections, English law does not force a lawyer on a suspect. Both the Act and the Code provide for the right of access only upon request, and waiver may occur in a number of ways. Since there is no provision for notice of the right of access which exists prior to arrest and incarceration, a suspect may waive the right merely by failing to assert it. The statutory right of access possessed by those under arrest at a police station may be waived by indicating on the custody record that legal advice is not desired at this point. Furthermore, even when a suspect has asked for legal advice, questioning may commence at once in the absence of a solicitor if the suspect agrees "in writing or on tape."

Neither the right of access nor the right not to be questioned after

292. Id. §§ 3.1-.2; see supra note 180 and accompanying text.
293. However, when continued detention is authorized under § 42 of the Act and the suspect has not exercised his right of access, he must be informed of the right once more. Police and Criminal Evidence Act 1984, Ch. 60, § 42(9).
294. CODE OF PRACTICE, supra note 18, § 6.3.
295. Id. § 6.5.
296. Id. § 6.6.
297. See generally id. § 6.6-.10; id., Notes for Guidance 6E. Solicitor misconduct does not occur merely from challenging an improper question or the manner in which it is put, or from seeking to give further legal advice. A solicitor "should not be required to leave an interview unless his interference with its conduct clearly goes beyond this." Id., Notes for Guidance 6D.
299. CODE OF PRACTICE, supra note 18, § 3.4. Under an earlier draft of the Code, refusal to sign on the custody record was deemed a desire for legal advice. Waiver could be accomplished only by signing to that effect. See M. ZANDER, supra note 53, §§ 58-59, at 72. Since the final version states only that the suspect "shall be asked to sign . . . to signify whether or not he wants legal advice at this point," the consequences of a failure to sign remain unclear.
300. CODE OF PRACTICE, supra note 18, § 6.3(d).
requesting legal advice is absolute. The access principle recognized by the Judges' Rules was subject to the limitation that "no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice."\textsuperscript{301} This broad ground of denial was frequently invoked since it applied to persons detained for any offense and could be relied upon by any officer to deny access.\textsuperscript{302} The Royal Commission concluded that these prior rules had been excessively broad and recommended narrowing the power to deny access. The Act and the Code carry out this recommendation. Access to a solicitor for a suspect at a police station who is under arrest but has not yet been charged may be delayed only if he has been detained in connection with a serious arrestable offense, and then only if authorized by an officer of the rank of superintendent or above. The delay must be based on reasonable grounds for believing that exercise of the right will lead to interference with or harm to evidence or other persons, alerting other suspects, or hindering recovery of property.\textsuperscript{303} Furthermore, access cannot be refused merely because the solicitor initially was asked by another person to see the suspect.\textsuperscript{304} These provisions significantly limit police power to delay access. Even when the right of access is delayed, it cannot be denied. Delay is permitted only as long as the grounds justifying it continue to exist, but in no case beyond thirty-six hours from the suspect's arrival at the station.\textsuperscript{305}

In summary, as a general matter, persons under arrest at police stations and requesting legal advice is absolute. The access principle recognized by the Judges' Rules was subject to the limitation that "no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice."\textsuperscript{301} This broad ground of denial was frequently invoked since it applied to persons detained for any offense and could be relied upon by any officer to deny access.\textsuperscript{302} The Royal Commission concluded that these prior rules had been excessively broad and recommended narrowing the power to deny access. The Act and the Code carry out this recommendation. Access to a solicitor for a suspect at a police station who is under arrest but has not yet been charged may be delayed only if he has been detained in connection with a serious arrestable offense, and then only if authorized by an officer of the rank of superintendent or above. The delay must be based on reasonable grounds for believing that exercise of the right will lead to interference with or harm to evidence or other persons, alerting other suspects, or hindering recovery of property.\textsuperscript{303} Furthermore, access cannot be refused merely because the solicitor initially was asked by another person to see the suspect.\textsuperscript{304} These provisions significantly limit police power to delay access. Even when the right of access is delayed, it cannot be denied. Delay is permitted only as long as the grounds justifying it continue to exist, but in no case beyond thirty-six hours from the suspect's arrival at the station.\textsuperscript{305}

\begin{itemize}
\item \textsuperscript{301} Judges' Rules, supra note 29, at 237 n.2 (para. (c)).
\item \textsuperscript{302} V. Bevan & K. Lidstone, supra note 158, § 7.49; M. Zander, supra note 53, §§ 58-59, at 72.
\item \textsuperscript{303} Police and Criminal Evidence Act 1984, Ch. 60, § 58(6)-(9); Code of Practice, supra note 18, § 6.2, Annex B; see Royal Commission Report 1981, supra note 12, ¶¶ 4.90-.91, at 100-01.
\item The Home Office Minister pointed out that "the only reason under the [Act] for delaying access to a legal advisor relates to the risk that he would either intentionally or inadvertently convey information to confederates still at large that would undercut the investigation in progress." Home Office Minister Mr. Douglas Hurd, Standing Committee E, Feb. 28, 1984, col. 1417, cited in V. Bevan & K. Lidstone, supra note 158, § 7.55. The issue concerns the conduct of the solicitor after the interview, and it is no ground for denial that the solicitor might advise the suspect not to answer any questions.
\item Further proposals were made to prevent solicitor misconduct by allowing the police to issue a form of "stop" notice requiring the solicitor to refrain from specified acts for 36 hours. Though the proposal was reluctantly supported by the Law Society, it was opposed by the government and defeated. See V. Bevan & K. Lidstone, supra note 158, § 7.55; M. Zander, supra note 53, §§ 58-59, at 73.
\item \textsuperscript{304} Code of Practice, supra note 18, Annex B(A)(a)(2).
\item \textsuperscript{305} Police and Criminal Evidence Act 1984, Ch. 60, § 58(5), (11); Code of Practice, supra note 18, Annex B(A)(a)(3). In terrorism cases the period is 48 hours from the time of arrest. Id., Annex B(B)(a)(6), (7).
\end{itemize}
tions for serious offenses enjoy a qualified right of access to a solicitor as soon as practicable after request. That right becomes absolute after thirty-six hours. The right of access of persons arrested for other offenses is without qualification. By narrowing and making explicit the previously ill-defined exceptions and by placing outer limits on permitted delay, the Act and the Code have greatly strengthened the English right of access to a solicitor.

Broader and more significant are the exceptions to the right not to be questioned after requesting legal advice, which, it should be recognized, is not a statutory right but found only in the Code. One exception to this right parallels the foregoing cases involving serious arrestable offenses when a delay in exercising the access right is permitted. In these situations, the suspect may be interviewed immediately.\textsuperscript{306} The remaining exceptions are not limited to serious offenses, but apply to all cases in which a suspect asks for legal advice. They authorize immediate questioning despite the fact that the suspect has requested a solicitor and the police cannot postpone calling him. First, a suspect may, after requesting legal advice, waive the right not to be questioned until obtaining such advice by giving his agreement "in writing or on tape" that the interview start at once.\textsuperscript{307} Commentators recognize the grave danger that strong pressures will be brought to bear at this point to persuade the suspect to begin talking at once.\textsuperscript{308} It is significant that no written waiver is required if the conversation is taped, and that nothing in the Act or the Code precludes the police from seeking to persuade a suspect to speak without waiting for his solicitor as long as the tactics do not become oppressive.

Second, questioning of a suspect who has requested legal advice may commence immediately if the solicitor selected by the suspect cannot be contacted or refuses his services and a duty solicitor is unavailable or the suspect declines his services.\textsuperscript{309} Finally, immediate questioning may be authorized by a supervisor or other superior officer if he has reasonable grounds to believe that a delay in questioning will involve an immediate risk of harm to persons, serious damage to property, or unreasonable delay in the process of investigation.\textsuperscript{310} The open-ended nature of this last exception is readily apparent. It has been suggested, for example,

\begin{itemize}
\item \textsuperscript{306} \textit{Code of Practice}, supra note 18, § 6.3(a).
\item \textsuperscript{307} \textit{Id.} § 6.3(d).
\item \textsuperscript{308} \textit{See} V. Bevan & K. Lidstone, supra note 158, § 7.54; M. Zander, supra note 53, §§ 58-59, at 74.
\item \textsuperscript{309} \textit{Code of Practice}, supra note 18, § 6.3(c).
\item \textsuperscript{310} \textit{Id.} § 6.3(b)
\end{itemize}
that if, before the solicitor’s arrival, the end of the permissible period of detention without judicial warrant is near, police may order questioning to begin at once.311

Together, the foregoing exceptions pose a clear danger to the goal of providing legal advice to suspects prior to or during questioning and may reduce the access rule to a narrow exception in this context.312 Nevertheless, the Act and the Code have greatly strengthened general access principles, and suspects are much better protected now than they were under the Judges’ Rules.

(2) The American Right to Counsel

The American right to counsel has two sources. The first is the right to counsel aspect of the *Miranda* warning scheme, which is designed to protect against encroachment on the fifth amendment privilege against compelled self-incrimination.313 Since the *Miranda* rules guard against the coercive aspects of custodial questioning, *Miranda*’s counsel guarantee applies to all police questioning regardless of whether the suspect has been charged with an offense. However, the guarantee is a “procedural safeguard” rather than a right protected by the Constitution.314 The second source of the right to counsel is based on the sixth amendment to the United States Constitution and is enjoyed by those actually subjected to criminal prosecutions.315 This right is not limited to trial proceedings, but attaches earlier at all critical confrontations with authorities “where the results might well settle the accused’s fate and reduce the trial itself to a mere formality.”316 It is clear that the process of police questioning constitutes such a confrontation.317 However, since the sixth amendment counsel right is given only to an “accused” to assist in coping with his adversaries in the criminal prosecution, it comes into play only when the suspect has been formally charged with an offense.318

On the other hand, unlike the *Miranda* counsel right, it is a constitu-

311. V. BEVAN & K. LIDSTONE, supra note 158, § 7.54; but some protection is afforded by CODE OF PRACTICE, supra note 18, Notes for Guidance 6A.
312. The danger is apparent to commentators who have studied the rules. See V. BEVAN & K. LIDSTONE, supra note 158, § 7.54; Gibbons, The Conditions of Detention and Questioning by the Police, [1985] CRIM. L. REV. 558, 563; M. ZANDER, supra note 53, §§ 58-59, at 75.
314. Id. at 444.
315. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”); Gideon v. Wainwright, 372 U.S. 335, 339, 343-44 (1963); see Powell v. Alabama, 287 U.S. 45, 66 (1932).
tional guarantee offering protection throughout the criminal proceedings beyond the context of police interrogation.\textsuperscript{319}

The \textit{Miranda} warning sets out the first counsel right, notifying the suspect that he has the right to consult an attorney and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires.\textsuperscript{320} A suspect's invocation of this right—as, for example, his expression of a desire to speak with a lawyer or have one present during questioning—brings into play a \textit{per se} rule which prevents further questioning unless the accused himself initiates further communication with the police.\textsuperscript{321}

The sixth amendment right to counsel applies upon formal accusation such as arraignment, preliminary hearing, information, or indictment.\textsuperscript{322} Police officers generally are not obligated to warn or notify suspects of this right. However, when an accused first appears in court for arraignment, the judge will inform him of his right to retained or appointed counsel and he must be afforded counsel throughout the proceedings unless the record demonstrates that he knowingly and intelligently waives the right\textsuperscript{323} with an awareness of the dangers and disadvantages of self-representation.\textsuperscript{324} Furthermore, once a suspect is charged with an offense, he is an "accused." Police are then prohibited from "eliciting" any statement from him without a waiver of the right to counsel.\textsuperscript{325} This protection goes beyond affirmative interrogation in the normal context of police questioning and controls the use of secret agents or informants. It prevents police from either intentionally creating or knowingly taking advantage of a situation in which the accused is induced to make incriminating statements without the presence of counsel.\textsuperscript{326}

An accused may generally waive his sixth amendment counsel right,


\textsuperscript{320} See supra note 189 and accompanying text.


\textsuperscript{324} Farretta v. California, 422 U.S. 806, 835 (1975) (citing Von Moltke v. Gillies, 332 U.S. 708, 723-24 (1948)).


but the requirements for such a waiver in the context of police questioning are anything but clear.\textsuperscript{327} However, many courts hold that the standard for waiver of the sixth amendment right to counsel is more demanding than that required for a waiver of \textit{Miranda} rights.\textsuperscript{328}

\textbf{(3) Comparison}

Compared to the right to counsel under American law, the English right of access to a solicitor was a feeble thing prior to the 1984 Act and Code of Practice. Not considered to apply during police questioning and not enforced by effective advice to suspects, the right was rarely asserted. Being subject to broad exceptions, when it was asserted it was usually denied.

The new Act gives the right of access possessed by one in custody at a police station or other premises a statutory foundation, which the Code seeks to effectuate by requiring oral and written notice to suspects, written waiver or assertion, and the availability of legal advice through duty solicitor schemes. These protections go far beyond the \textit{Miranda} and sixth amendment rights which fail to require that notification and waiver take any particular form. Warnings can be oral and usually need not be repeated. Waiver of \textit{Miranda} rights often amounts to a verbal expression of understanding of the rights and a desire to talk. No express waiver is needed. Requirements for waiver of the sixth amendment counsel right in the interrogation context remain unsettled.

Furthermore, the scope of the English access right is somewhat broader than \textit{Miranda} since it applies "at any time,"\textsuperscript{329} irrespective of whether the suspect is in custody or subjected to questioning. However, outside the station house, the right is diluted because of its absence from the caution and the lack of any requirement that police other than the custody officer give notice of the right. A suspect cautioned and interviewed prior to arrival at the police station may be unaware that he has the right of access and thus the power to prevent further questioning.

\textsuperscript{327} See Brewer v. Williams, 430 U.S. 387, 403-04 (1977). The Supreme Court has left undecided the question whether waiver of the fifth amendment right to counsel necessarily serves to waive the "parallel rights" under the sixth amendment. Moran v. Burbine, 106 S. Ct. 1135, 1145 n.2 (1986).


\textsuperscript{329} The Act applies only to those in police detention (\S 8(1)), but the Code contains no such qualification. \textit{CODE OF PRACTICE, supra} note 18, \S 6.1.
until he has received it. In contrast, the *Miranda* warning not only notifies the suspect that he has the right to an attorney, but also states that he has the right to consult with an attorney prior to any questioning.

There is a still more fundamental difference between English and American rules regarding the right to counsel. Under English law, the demand for legal advice requires that it be provided as soon as practicable unless an exception applies. Since *Miranda* rights apply only to police interrogation and the sixth amendment right comes into play only after formal charging, American principles do not give uncharged suspects under arrest and in custody at police stations a general right to consult a lawyer absent police questioning. Police cannot interrogate, but they are under no obligation to provide access to legal assistance before an arrestee is charged or brought to court. Indeed, given the general absence of anything equivalent to duty solicitor schemes and the fact that public defender systems are not established in every jurisdiction, police are often unable to provide legal assistance to suspects. Even if a public defender system is in place or the suspect is fortunate enough to have the funds to hire private counsel, prior to charging or questioning, police are under no constitutional obligation either to notify a lawyer on the suspect’s behalf or to allow a lawyer access to a suspect. Most often, counsel is provided only after the suspect has been charged when he appears in court for arraignment. Earlier requests for a lawyer usually operate only to shut down the interrogation process.

The Supreme Court has recently indicated that police may even inhibit an attorney from contacting an uncharged suspect while continuing to interrogate. In *Moran v. Burbine*, the defendant had been arrested for burglary and his sister contacted a lawyer on his behalf. The lawyer informed the police that she would act as the defendant’s attorney if the police intended to question him, but the police responded that they would not be questioning him that night. Less than one hour later, police began interrogating the defendant on a separate murder case. The defendant waived his *Miranda* rights and confessed to the murder. He was never told of the attorney’s efforts to contact him. Rejecting the defendant’s contention that he should have been informed of the attor-

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330. Some jurisdictions by statute or decisional law give detained persons the right to contact a lawyer or other person. See, e.g., CAL. PENAL CODE § 851.5 (West 1985) (immediately upon being booked and no later than three hours after arrest, arrestee has the right to make three completed telephone calls, one of which can be to an attorney of his choice or a public defender).

ney's attempt, the Supreme Court found the defendant's waiver of *Miranda* rights valid and the confession admissible:

Events occurring outside the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right . . . . No doubt the additional information would have been useful to [the defendant] . . . . But we have never read the Constitution to require that the police supply the suspect with a flow of information to help him calibrate his self interest in deciding whether to speak or stand by his rights.\(^{332}\)

Furthermore, the Court found no violation of the sixth amendment right to counsel since the defendant had not yet been charged. Implicit in the Court's holding is the conclusion that during this period, there is no constitutional protection against police interference with, and even outright denial of, attorney access to the client.\(^{333}\) Nevertheless, it should be recognized that most states generally prevent police interference with an attorney's efforts to provide legal advice.\(^{334}\) Also, the Supreme Court strongly implied that a right of access of some type does arise after the suspect has been formally charged when the sixth amendment right to counsel comes into play. "[O]nce [the right to counsel under the sixth amendment] has attached, it follows that the police may not interfere with the efforts of a defendant's attorney to act as a 'medium' between [the suspect] and the State during the interrogation."\(^{335}\) At present, the nature of this right is unclear.

English law would most likely prevent the police from denying access in a situation like *Moran*. Though the right of access in the 1984 Act depends upon a request by the suspect, the Code provides that access may not be delayed on the ground "that the solicitor was initially asked to attend the police station by someone else," provided that the suspect himself then wishes to see the solicitor.\(^{336}\) This suggests that the police must inform the suspect of the availability of the solicitor and allow access if the suspect so desires.

Despite the questions raised by *Moran*, the police obligation to honor the right to counsel by ceasing interrogation offers suspects greater protection under American law in a number of respects. As noted above, a suspect's assertion of the right to silence requires termination of ques-

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332. *Id.* at 1141-42. The Court noted that the result would not be affected even if the police had intentionally misled the attorney, though the Court characterized such deliberate deception as "highly inappropriate." *Id.* at 1142.

333. *See id.* at 1150, 1163 (Stevens, J., dissenting).

334. *See id.* at 1151 n.10 (Stevens, J., dissenting) (citing cases from such states).

335. *Id.* at 1145 ("The state cannot prevent the accused from obtaining the assistance of counsel." (quoting Maine v. Moulton, 106 S. Ct. 477, 487 (1985)).

tioning under *Miranda*, whereas English police have always been able to meet a suspect's claim to silence by asking further questions and attempting to persuade him to talk. While the Code now seeks to prevent the interrogation of a suspect who has asked for legal advice until he has received it, the new restriction is riddled with exceptions which could overwhelm the rule. Pressure can be brought to bear on a suspect to talk about the offense while waiting for his solicitor. Police may justify immediate questioning by claiming that waiting for the solicitor would "involve an immediate risk" of harm to persons or property or would "cause unreasonable delay to the process of investigation." 337

The *Miranda* requirement that all questioning must cease when a suspect asks for counsel is subject to no similar limitations. The *Quarles* public safety principle involves an exception to the requirement that warnings must be given, not to the rule that questioning must end once a suspect asks for a lawyer. The Supreme Court has been particularly protective of the right to counsel aspect of the *Miranda* rules and has treated the assertion of that right differently from the expression of a desire to remain silent. 338 In light of the greater protection the Court has provided for suspects who have asserted this right, it is unlikely that the Court will extend the *Quarles* public safety exception to this context. Even if it does, the result is not likely to come close to the expansive exceptions to the corresponding English rule.  

*Miranda* also prohibits police from badgering or pressuring a suspect who has asked for a lawyer in the hope he will agree to talk before he has spoken with counsel. In *Edwards v. Arizona*, 339 the Court established what it later described as a "'rigid' prophylactic rule": 340 Once a suspect has invoked his right to counsel, he may not be questioned further unless (1) he himself initiates further discussions with the police and (2) he knowingly and intelligently waives the right he had invoked. 341 The Court has recognized that this is a new per se rule beyond the original *Miranda* principles, 342 yet has applied it strictly. In *Edwards* the sus-

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337. *Id.* § 6.3(b).
338. The Court has suggested that continued interrogation in the face of a suspect's assertion of the right to silence or counsel is more serious and will carry greater sanctions than a mere failure to administer the *Miranda* warning. *Oregon v. Elstad*, 105 S. Ct. 1285, 1295 n.3 (1985). *But see New York v. Quarles*, 467 U.S. 649, 656 n.7 (1984) ("[A]bsent actual coercion by the officer, there is no constitutional imperative requiring the exclusion of the evidence that results from police inquiry of this kind.").
342. *Edwards* was somewhat foreshadowed by earlier cases, but it did establish a new rule...
pect was under arrest at the police station when he waived his rights and agreed to make a statement. At one point during questioning, he said "I want an attorney before making a deal." Police terminated questioning. The next morning detectives visited him in jail, said they would like to talk to him, and again informed him of his Miranda rights. He said he was willing to talk on certain conditions and eventually confessed. The Court held that once the suspect had asked for counsel, he should not have been subjected to further interrogation until counsel was made available to him unless he himself had initiated further communication with the police. Similarly, in Smith v. Illinois during the course of receiving Miranda advice, the suspect was asked if he understood his right to counsel and he responded, "Uh, yeah. I'd like to do that." After some further discussion, he agreed to talk immediately without a lawyer and gave a confession. The Court held that the confession should have been suppressed. The Court regarded "Uh, yeah. I'd like to do that" as a clear expression of a desire for counsel and held that when such an expression is unambiguous, all questioning must immediately cease. Furthermore, an accused's later responses to questioning cannot be used to cast doubt on the clarity or adequacy of his initial request. The Court feared that in the absence of such a "bright line prohibition" the police, through badgering or overreaching, might "wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance."

As noted, under the English Code police may not interview or continue to interview a suspect who has asked for legal advice unless "the person has given his agreement in writing or on tape that the interview may be started at once." This exception suggests that after a suspect asks for legal advice, police may properly inquire whether they may interview him at once before counsel arrives, a course of action prohibited by the "rigid" Edwards rule. Moreover, since the new English "voluntariness" standard allows pressure to be brought to bear as long as it does not constitute oppression or conduct likely to render a confession unreliable, many suspects who request a solicitor may be asked for and acqui-
Both English and American rules restrict the questioning of suspects who have been charged with an offense, but the nature and scope of the restrictions are quite different. The right to counsel guarantee of the sixth amendment forbids elicitation of statements from all charged persons absent a knowing waiver. Although just exactly what may constitute such a waiver remains unclear, the fact that, with a waiver, police may question a charged person contrasts with the English prohibition.

The Code follows the Judges' Rules in prohibiting, with stated exceptions, the questioning of charged persons with respect to the charged offense. Absent an exception, the restriction applies regardless of the person's willingness to talk. However, the English restriction is subject to exceptions which were made even broader by the Code and which have the potential to outweigh the rule itself. Thus, if the charged person requests legal advice, access cannot be delayed, but questioning can proceed before counsel arrives if any of the exceptions apply. Such questioning would be prohibited by the sixth amendment absent a knowing waiver of the right to counsel, and, under Edwards, if the accused had requested counsel, he would have to initiate further discussion with police before his waiver could be accepted.

In still another context the sixth amendment counsel right provides greater protection. The ban against elicitation of statements from a charged person absent a waiver goes beyond typical police interrogation and covers the process of obtaining statements through use of agents or informants. Once a suspect is charged with an offense, police violate his right to counsel if they deliberately elicit from him statements respecting the offense in the absence of counsel. Traditional interrogation is not required. Even when police do not affirmatively create such a situation, they violate the sixth amendment if they exploit an opportunity to confront the accused through an informant without counsel being present. Thus, police cannot record and use at trial statements which the defendant makes to a co-defendant acting as a secret government agent con-

349. See supra notes 87-92 & 302 and accompanying text.
350. See supra notes 322-28 and accompanying text.
351. The restriction includes those who have been informed they may be prosecuted. Code of Practice, supra note 18, § 17.5. The Miranda rules contain no similar limitations as a consequence of such advice.
352. Id.; see supra notes 301-12 and accompanying text.
cerning charges pending against them.\textsuperscript{354} This restriction applies even if the police have reason to believe that the defendant is planning to kill a prosecution witness and the recording is made for the purpose of thwarting such criminal activity.\textsuperscript{355} In these contexts the Court has extended the protections of the sixth amendment beyond the right of access to a lawyer as ordinarily understood.\textsuperscript{356}

The English right of access principles spelled out in the 1984 Act contain nothing comparable to these sixth amendment protections. Furthermore, it is unlikely that the general prohibition on questioning of charged persons applies outside the usual context of official interrogation. The Code requires that a caution precede such questioning and that questions and answers be contemporaneously recorded in full. These provisions indicate that the rules regarding questioning charged persons refer to overt police interviews rather than to a suspect's communication with secret agents or informants. Of course, even if the prohibition is found to apply in this context, the numerous exceptions would still be available.

Evidence gathered by informants or secret agents might still be excluded on grounds of unfairness. The general discretion to exclude evidence on such grounds is founded on a long line of cases and is preserved by the 1984 Act.\textsuperscript{357} It is said that unfairness may consist of "trick or deception" or false "representation."\textsuperscript{358} In practice, however, discretion to exclude evidence on grounds of unfairness is exercised very rarely.\textsuperscript{359} Generally, trickery or deception by itself will not lead to exclusion of evidence or to other sanctions.\textsuperscript{360} For example, the use of informers or eavesdroppers, or even conduct amounting to police entrapment, will not


\textsuperscript{355} Id. at 488-89. In such a case, however, defendant's statements pertaining to other crimes with which he has not been charged would be admissible at the trial of those offenses. Id. at 490 & n.16.

\textsuperscript{356} The right means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. . . . It guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State . . . ." Id. at 484-85.

\textsuperscript{357} See supra notes 143-46 and accompanying text.


\textsuperscript{360} In Regina v. Murphy, [1965] N. Ir. 138 (Courts-Martial App. Ct.), Lord Chief Judge MacDermott commented that prior cases recognizing discretion to exclude evidence obtained by tricks, threats, bribes, or similar devices merely set forth "a variety of classes of oppressive conduct which would justify exclusion. It certainly gives no ground for saying that any evidence obtained by any false representation or trick is to be regarded as oppressive and left out of consideration." Id. at 147 (emphasis in original).
provide grounds for exercising discretion to exclude evidence or otherwise frustrate a prosecution.\textsuperscript{361} The practice of secretly overhearing or recording an accused's jail conversations with fellow inmates or with relatives has also been permitted.\textsuperscript{362} In Regina v. Stewart,\textsuperscript{363} the court allowed evidence of the defendant's statements noted by a police officer dressed as a fellow prisoner. While agreeing that the judge had discretion to refuse to admit the evidence on the ground that it was "obtained by a trap, and the Court does not in general approve of a trap being laid for a man who is in custody," the court nevertheless recognized that the evidence was not only inconsistent with defendant's asserted innocence but also disclosed a plan to concoct alibis to deceive the court. The court stated, "[i]t is difficult to see how in such circumstances a court could have ruled out this evidence and not allow it to be put before the jury."\textsuperscript{364}

Thus, evidence obtained by private persons acting in complicity with the police is not likely to be excluded because the defendant was denied access to a solicitor or because the evidence was obtained by deceptive and unfair techniques. English courts considering the admissibility of such evidence are instead likely to rely on the test of voluntariness. For example, in Deokinanan v. The Queen,\textsuperscript{365} the defendant was convicted of murdering his co-workers during their trip together up river to purchase lumber. Defendant had returned alone and falsely claimed that the other workers and the money had been lost in an accident. He was arrested and taken to prison. The defendant's friend Balchard visited him in jail, and the defendant asked him to help retrieve the money. Balchard agreed, but immediately went to the police, who arranged to place him in the same cell as the defendant in the hope that he would obtain information. Balchard questioned the defendant concerning "how the money got missing" and "how the bodies got chopped," and received incriminating answers which he communicated to the police. At trial, the defendant objected to the evidence of his statements to Balchard.

The Privy Council regarded the question for discussion as "whether the prosecution established at the trial that the appellant's confession was free and voluntary and that he was not induced to confess by any promise or hope of advantage held out to him by a person in authority." The


\textsuperscript{364} \textit{Id.} at 216. The court's opinion does not indicate whether the deception occurred before or after the accused was charged.

court easily concluded that the prosecution had satisfied this burden and further noted that, even if the confession had been induced by a promise or hope of advantage held out by Balchard, the defendant's friend could not be regarded as a person in authority.\textsuperscript{366}

The approach in \textit{Deokinanan} is enlightening. Though the police informant clearly questioned defendant with the intent to elicit incriminating statements from him, the opinion did not mention the Judges' Rules. Furthermore, although the facts indicate that the questioning took place at least a week after defendant had been arrested and most likely after he had been charged, this issue apparently was not regarded as significant by defense counsel, the trial judge, or the Privy Council. Also not raised on appeal or mentioned by the court was the discretion to exclude evidence on grounds of unfairness resulting from trickery or deceptions. The court simply applied the traditional voluntariness test, with both its inducement and its person in authority requirements.\textsuperscript{367}

Similarly, in \textit{Regina v. Longstaff};\textsuperscript{368} police sought the assistance of the defendant's brother, who was also under suspicion, telling him that he had "everything to gain from helping the police." The brother indicated that if he could see the defendant (who was in custody) "it would be to your advantage." He was then placed in the same cell as the defendant and both made incriminating statements that, unknown to either, were overheard by an officer listening outside. The Court of Appeal reasoned that, even assuming there had been a holding out of some hope of advantage, the statements were not obtained by reason of that hope. Since the defendants were unaware that they were being overheard, "[t]hey were accordingly hoping for no advantage from speaking and fearing no prejudice from not speaking." As in \textit{Deokinanan}, the court failed to mention either the Judges' Rules or whether the suspects had been charged.

Although the cases involving secret government agents eliciting confessions do not explicitly reject any resort to the Judges' Rules or the discretionary exclusion of unfairly obtained evidence, the cases suggest

\textsuperscript{366.} Id. at 33.

\textsuperscript{367.} In cases involving secret agents, English courts show no concern for interference with the attorney-client relationship. However, the question has arisen in another context. In Regina v. Heston-Francois, 78 Crim. App. 209 (C.A. 1984), the defendant alleged that police had searched his home and had seen his correspondence with his solicitor including the names of his witnesses. The defense claimed that the prosecution had been guilty of oppressive conduct before trial and requested that the criminal proceedings be stayed. The Court of Appeal, however, refused to impose a duty on the trial court either to hear evidence on such allegations or to stay the proceedings on this ground. \textit{Id.} at 218.

\textsuperscript{368.} The Times (London), June 12, 1984.
rather strongly that English courts will find the voluntariness test controlling in such situations. This approach is even more likely after the 1984 Act, which ties the discretion to exclude on grounds of unfairness to unfairness in the proceedings before the Court. 369

With the Act's abolition of the person in authority requirement and the relaxation of the inducement standard, the result of the voluntariness test will turn on whether the defendant was subjected to sufficient pressure to undermine his free will or to likely render unreliable any confession made as a consequence. 370 In other words, though a witness such as Balchard in Deokinanan would be subject to the rule, it will be easier for the prosecution to prove that his acts did not render a confession "involuntary." This is a far cry from the American right to counsel rule, which demands complete absence of pressure and focuses on interference with the counsel right, prohibiting in all cases the admission in evidence of any statement elicited from a charged person in the absence of a waiver of the right to counsel. Assuming Balchard's meeting took place after the defendant was charged, the defendant's statements would most certainly be inadmissible in this country and the money discovered as a direct result of the statements most likely would also be suppressed.

C. Conditions of Detention, Record-Keeping, and Recording of Interviews

The English Code is not limited to ensuring that suspects are aware of their rights and are allowed access to legal advice. It also establishes detailed rules governing a broad range of subjects connected with the treatment and interrogation of persons in custody. Specifically, the Code prescribes conditions of suspect detention, police record-keeping, and recording of interviews.

If an officer wishes to interview a detained person, he must obtain assent from the independent custody officer, who is responsible for deciding whether to deliver the person for interview. Prior to the interview, the interrogating officer must identify himself and others present by name and rank. Generally, interviews must take place in a room which is adequately heated, lit, and ventilated, and persons questioned must not be required to stand. With few exceptions, in any twenty-four hour period, a detained person under interrogation must be allowed at least eight continuous hours for rest, free from questioning, travel, or other interruptions. If the person interviewed makes a complaint concerning his treatment, the interviewing officer must record the complaint and inform

369. See supra note 146.
370. See supra notes 83-94 and accompanying text.
the custody officer, who is then responsible for dealing with the matter.\textsuperscript{371}

The Code provides special protection for young and disabled persons.\textsuperscript{372} For example, a juvenile or a mentally handicapped person must not be interviewed in the absence of an “appropriate adult,”\textsuperscript{373} unless delay will involve an immediate risk of harm to persons or serious damage to property.\textsuperscript{374}

The Code also contains comprehensive provisions for accurate record-keeping and recording of interviews which go much further than the Judges’ Rules. An accurate record must be made of all interviews with persons suspected of an offense. If the interview takes place in a police station, more detailed records are required. For example, the record must state the place of interview, the time it begins and ends, any breaks in the interview, and the names of those present. It must be timed and signed by the maker. The record of the interview must be made “during the course of the interview” unless doing so would be impracticable or would “interfere with the conduct of the interview,” in which case it must be made as soon as practicable after its completion with the reason for the delay recorded. The suspect must be given the opportunity to read the record and to sign it as corrected or to indicate respects in which he considers it inaccurate.\textsuperscript{375}

Special provisions are made for written statements. When an interview has been contemporaneously recorded and the record signed by the suspect, or when it has been tape recorded, “it is normally unnecessary to ask for a written statement.”\textsuperscript{376} In other cases, when written statements are taken the suspect should always be invited to write down himself what he wants to say. Whether the suspect wishes to write out the statement himself or requests that the officer write it out for him, he must sign a statement that he understands his right to silence. If the officer writes the statement, he must ask the suspect to read it and to make any correc-

\begin{itemize}
\item \textsuperscript{371} Code of Practice, supra note 18, §§ 12.1-.8.
\item \textsuperscript{372} Id. §§ 3.5-.8.
\item \textsuperscript{373} “Appropriate Adult” is specifically defined. Id. Annex E(2). Such adult is not expected to act simply as an observer. “The purposes of his presence are, first, to advise the person being questioned and to observe whether or not the interview is being conducted properly and fairly; and, secondly, to facilitate communication with the person being interviewed.” Id., Notes for Guidance 13C.
\item \textsuperscript{374} Id. §§ 13.1-.3, Annex C.
\item \textsuperscript{375} Id. §§ 11.3-.6, 12.9-.11. The Judges’ Rules had also required some record-keeping for interviews conducted in police stations. See Judges’ Rules, supra note 29, rules 2 & 3(c), at 238.
\item \textsuperscript{376} Code of Practice, supra note 18, Notes for Guidance 12B.
\end{itemize}
tions, alterations, or additions he wishes.\textsuperscript{377}

In some circumstances the Code explicitly prohibits interviewing officers from prompting or making suggestions to suspects, and from editing or altering their statements. When a suspect writes his own statement, he must be allowed to do so "without any prompting except that a police officer may indicate to him which matters are material or question any ambiguity in the statement."\textsuperscript{378} If the officer writes the statement, "he must take down the exact words spoken by the person making it and he must not edit or paraphrase it."\textsuperscript{379} Questioning of charged or informed persons with respect to statements by others is also subject to special restraints.\textsuperscript{380}

Some of the foregoing provisions were taken from the Judges' Rules and Administrative Directions, but most are new and are intended for the first time to provide a detailed, comprehensive regulatory scheme governing the treatment and questioning of detained persons by the police. In particular, the record-keeping requirements and the concern with written statements admirably enhance the reliability of confession evidence and will likely minimize courtroom disputes over admissibility issues.

These English requirements have no counterpart in the United States except for scattered and fragmented rules based on local law or police department regulation. \textit{Miranda} does not require that police make any written record of the questioning process or of suspect statements, nor does \textit{Miranda} place specific limits on the circumstances or the manner of interrogation.\textsuperscript{381} Indeed, the Supreme Court has cautioned that "[n]othing in the Constitution vests in us the authority to mandate a code of behavior for state officials wholly unconnected to any federal right or privilege."\textsuperscript{382}

However, it is important to keep in mind that the English rules are not so rigid that they provide police no room to maneuver, nor do they establish a perfect protection system for the suspect. For example, the

\begin{itemize}
\item \textsuperscript{377} \textit{Id.} Annex D.
\item \textsuperscript{378} \textit{Id.} Annex D(a)3.
\item \textsuperscript{379} \textit{Id.} Annex D(b)5.
\item \textsuperscript{380} If a police officer wishes to bring another's statement to the attention of a suspect who has been charged or informed he may be prosecuted, "he shall hand to [the suspect] a true copy of any such written statement or bring to his attention the content of the interview record, but shall say or do nothing to invite any reply or comment save to caution him." \textit{Id.} § 17.4.
\item \textsuperscript{382} Moran v. Burbine, 106 S. Ct. 1135, 1142 (1986).
\end{itemize}
Code requires contemporaneous recording only when charged persons are questioned.  

In other cases, the Code requires that a record be made during the interview unless the investigating officer believes it would not be practicable or would interfere with the conduct of the interview.  

This preference for a contemporaneous record is new and its effect questionable. Police seem to believe that note-taking inhibits an interview and traditionally have taken brief or no notes, preferring to summarize the salient features afterward. Since the matter is left largely to police discretion, it is not at all certain that present practices will change significantly.

Furthermore, while the Code follows the Judges' Rules in outlining a detailed procedure for taking written statements, neither requires that written statements be taken in all cases. While it has been said that the Judges' Rules "anticipate[d] that all statements will be reduced to writing," written statements were not required by the Rules outside the "exceptional cases" involving questioning charged or informed persons. "Verbals" were generally permitted and studies revealed that verbal statements were much more common than written ones.

By and large, the Code allows these practices to continue. While an "accurate record" must be made of all interviews with suspects, the rules preferring contemporaneous and verbatim recording only apply to those that "take place in the police station or other premises." With respect to the latter category, the Code provides broad discretion to the investigating officer to make a contemporaneous record of the interview or to take a "verbal" confession and later summarize it. These requirements offer more protection than the Judges' Rules, but stop far short of

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383. Code of Practice, supra note 18, § 17.8.
384. Id. § 11.3(b)(ii).
385. “A contemporaneous note of an interview in a criminal case is a rare sight and not likely to become more fashionable as a result of [the Code].” T.C. Walters & M.A. O’Connell, supra note 150, at 71; see also M. Zander, supra note 53, §§ 66-67, at 99; Minfield, The Future of the Law of Confessions, [1984] Crim. L. Rev. 63, 64. See generally Williams, supra note 152, at 6, 9-15.
386. See Kaci, supra note 21, at 102.
387. J. Baldwin & M. McConville, supra note 153, at 34; P. Softley, supra note 76, at 81; J. Vennard, Contested Trials in Magistrates' Courts 9-10 (Royal Comm'n on Criminal Procedure Research Study No. 6, 1980); Vennard, supra note 153, at 21-24.

The prevalence of oral statements was a consequence of the general practice of asking a suspect whether he is prepared to make a written statement only after he had admitted the offense. P. Softley, supra note 76, at 81. A member of the House of Commons with experience as both a barrister and a solicitor recalled that “He verballed me up, guv” was a “classic defence that every lawyer has heard.” House of Commons, Dec. 5, 1985, col. 510.

388. Code of Practice, supra note 18, § 11.3.
389. Id. § 11.3(b)(ii).
disallowing "verbals" or requiring written statements from a suspect in all cases.

However, major changes are now taking place which soon are likely to revolutionize the entire process of memorializing suspect statements in England. Over twenty years of heated debates on the question of whether police interviews of suspects should be tape recorded has come to an end, and a national system of tape recording in police stations likely will be introduced well before the end of this decade. The history of this dramatic change is quite enlightening. For years, public committees considered the tape recording question, but police reaction was strongly negative and the subject was always left for further study. Then, the 1981 Royal Commission conducted a limited experiment on the use of tape recorders, the results of which were cautiously positive and reassuring. Considering this, together with all past studies and debates on the question, the Commission concluded that "[t]he time for further experiments ... is past," and recommended that tape recording of suspect interviews at police stations be introduced on a gradual basis and in a limited manner. Recording would be done openly, but would be limited to the officers' oral summary of the interview together with the suspect's comments on its accuracy. Some criticized the limited nature of the Commission's recommendation as "feeble" and "timorous," yet the Commission's recommendation was widely viewed as an "unqualified endorsement of the principle of tape recording" and as effectively terminating the tape recording debate. In 1982 the Home Secretary scheduled further field trials in which the entire interview would be recorded. With governmental backing, Parliament included in the Police and Criminal Evidence Act 1984 a requirement that the Secretary of State issue a Code of Practice in connection with tape recording of police interviews of suspects at police stations and devise a statutory instrument requiring such interviews to be tape recorded. No date has been set for implementation of the scheme, and field trials are still in progress. How-

391. CRIMINAL LAW REVISION COMMITTEE, 11TH REPORT, EVIDENCE, ¶ 50-2; HYDE COMMITTEE, THE FEASIBILITY OF AN EXPERIMENT IN THE TAPE-RECORDING OF POLICE INTERROGATIONS, CMND. 6630 (1976); see Williams, supra note 152, at 6, 15.
392. J. BARNES & N. WEBSTER, POLICE INTERROGATION: TAPE RECORDING (Royal Comm'n on Criminal Procedure Research Study No. 8, 1980).
393. ROYAL COMMISSION REPORT 1981, supra note 12, ¶ 4.29, at 79.
394. Id. ¶ 4.27, at 78.
395. As a result, the police and other opponents began to accept tape recording as inevitable. Baldwin, supra note 390, at 698, 703.
396. Id. at 698.
397. Police and Criminal Evidence Act 1984, Ch. 60, § 60.

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ever, preliminary results of the trials are promising and it appears likely that a national scheme of tape recording will be introduced in England in the near future. The success of tape recording has been attributed to the stand of the Royal Commission as well as to a positive attitude on the part of the government, but, undoubtedly, a most important factor has been a dramatic about-face in the attitude of law enforcement. Evidence from the field trials as well as interviews with police officers suggests that police have come to take a positive view of tape recording, often believing that they will be the major beneficiaries of the new system.398

The system of tape recording ultimately will be contained in a fifth Code of Practice, and very likely will correspond generally to the guidelines governing the field trials established by the Home Office.399 According to these guidelines, the entire interview with a suspect in a police station must be recorded, including the taking and reading back of statements.400 Recording will be done openly and will include the officer's initial statement that the interview is being tape recorded, a statement of the caution, and other matters such as names of persons present, date, time, and place of the interview.401 Upon completion of the interview, both the officer and the suspect will sign an exhibit label on the tape, and the suspect will be notified of the use to be made of the tape and arrangements for access to it. The officer will then prepare a statement containing a summary of the relevant portions of the interview, though not necessarily in verbatim form.402 It is contemplated that this statement will be the primary evidence used in court and that transcriptions of the tape will only be made in those rare cases in which a dispute arises over the accuracy of the summary.403

An obvious limitation of the tape recording requirements is that they apply only to interviews of suspects at police stations.404 Interviews outside police stations are not covered by the Act and the guidelines pro-

398. "[A]ttitudes are changing and many realized that [tape recording] has even more potential as a tool for the prosecution than for the defence." Roberts, Tape Recording and the Questioning of Suspects—The Field Trials Guidelines, [1984] CRIM. L. REV. 537, 543; see Baldwin, supra note 390, at 699.


400. Id. ¶¶ 2.1, 3.5. Only limited exceptions to tape recording are permitted. Id. ¶ 3.3.

401. Id. ¶¶ 4.3-4.4.

402. M. ZANDER, supra note 53, § 60, at 78; see also PROCEDURAL GUIDANCE, supra note 399, ¶ 5.2.

403. PROCEDURAL GUIDANCE, supra note 399, ¶ 6.1-.5. Transcription of tapes is strongly discouraged on the ground of cost. However, the defense will have the right of access to tape recordings which will be "exhibited in evidence." Id. ¶ 7.1.

404. Police and Criminal Evidence Act 1984, Ch. 60, § 60(1).
vide that "[i]t is not intended that they should lead to any changes of practice as to where suspects are interviewed."405 Experience under the Scottish system of tape recording suggests that police can easily thwart any system forced upon them simply by conducting interviews elsewhere.406 However, while in some cases officers may be tempted to circumvent the rules by avoiding a station house interview, preliminary evidence indicates that police have become convinced of the value of tape recording and are not engaged in any systematic avoidance of it.407 This change is not altogether surprising. In 1979, Glanville Williams, a strong advocate of tape recording, noted advantages to both the prosecution and the defense.408 In particular, Williams pointed out that juries had become "acutely suspicious of verbals," and that disputed verbals often undermined good prosecution cases, resulting in acquittals of guilty defendants.409 Furthermore, police and prosecutors may discover additional collateral benefits. Since evidence of silence of the accused in the face of accusation may be heard by the trier of fact, a tape recording of a suspect's prolonged refusal to answer forceful questioning or dramatic accusations by the police may be powerful evidence in the hands of the prosecution.410

Benefits to the defense are more obvious. Preliminary evidence indicates that tape recorded interviews tend to be shorter and more formal,411 which further reduces the risk of lengthy and overbearing interrogation. The judge can listen to the tape of the entire interview when deciding whether it was conducted oppressively or under circumstances likely to render the confession unreliable. However, since the procedure is unlikely to reveal police use of improper inducements prior to the recorded interview, it may prove more beneficial to the prosecution than to the defense in the ultimate contest over whether the confes-

405. Procedural Guidance, supra note 399, ¶ 3.1.
408. Williams, supra note 152, at 13.
409. Id. at 14. A similar point was made during hearings held by the 1981 Royal Commission. It was noted that generally the only witnesses to what transpires at interviews are the suspect and the police themselves, and circuit judges complained that "the present methods of recording interviews give rise to the acquittal of a substantial number of 'apparently guilty offenders.'" Vennard, supra note 153, at 15.
410. See supra notes 47-53 and accompanying text; see also Roberts, supra note 398, at 543 ("[J]udicial guidelines may well need to take a more robust view than in the past of the inadmissibility of such questions.").
sion was the product of oppressive practices.\textsuperscript{412} Will recording reduce the willingness of suspects to speak? Thus far, the field trials have not demonstrated any significant loss of suspect statements or information-gathering opportunities, even in the few interviews at which solicitors have been present.\textsuperscript{413}

Significant resources may also be saved by tape recording interviews. Courtroom contests over admissibility and reliability of confessions often consume considerable trial time,\textsuperscript{414} and many anticipate a reduction in such contests and an increase in guilty pleas.\textsuperscript{415} This could result in considerable savings in lawyer and court costs.

In the United States, the Constitution does not require the preservation of suspect statements by any means. The duty to preserve evidence imposed by due process is limited to "that [which] might be expected to play a significant role in the suspect's defense."\textsuperscript{416} It must "possess an exculpatory value that was apparent before the evidence was destroyed, and also be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."\textsuperscript{417} The likelihood that the Supreme Court would regard recording interviews as within this rule is highly remote.\textsuperscript{418} This is not to say that tape or other recordings of interviews are not favored or are not made in the United States. The ALI \textit{Model Code of Pre-Arraignment Procedure} requires the making of both written records and sound recordings of interviews.\textsuperscript{419}

\begin{footnotes}
\item[412] See Williams, supra note 152, at 10-11.
\item[413] Roberts, supra note 398, at 543.
\item[414] See, e.g., Williams, supra note 152, at 14.
\item[415] Id.; Roberts, supra note 398, at 543; Vennard, supra note 153, at 24. In Vennard's study of "trials within trials" she found that "disputes over the accuracy or completeness of the police record of what was said were far more frequent than those concerned with involuntariness or other breaches of the Judges' Rules." She regarded as speculative the question whether tape recording would reduce court time lost over disputes concerning accuracy or completeness, but concluded that since most disputed statements were oral rather than written, some form of independent verification would reduce the frequency of disputes and, when they do arise, recourse to an independent record could lessen the time spent in examining officers regarding accuracy of their notes. Id. Anticipation of significant savings in court costs from elimination of lengthy trials concerning the accuracy of police interview evidence also was voiced during the House of Commons debates on the Codes of Practice. House of Commons, Dec. 5, 1985, col. 516.
\item[417] Id.
\item[418] While the Supreme Court has imposed constitutional limits on the government's ability to engage in conduct that would hamper a defendant's ability to gather evidence for trial, the limits concern narrow contexts. See United States v. Valenzuela-Bernal, 458 U.S. 858, 872-73 (1982) (deporting potential defense witnesses); United States v. Lovasco, 431 U.S. 783, 795 (1977) (significantly delaying an indictment).
\item[419] MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 130.4 commentary at 341-44 (1975).
\end{footnotes}
and the Eighth Circuit has suggested that, to the extent possible, all statements of defendants should be videotaped.\footnote{Hendricks v. Swendson, 456 F.2d 503, 506 (8th Cir. 1972).} Indeed, a few jurisdictions require the tape recording of police questioning of suspects under threat of suppression of the evidence of the statements.\footnote{See, e.g., Stephan v. State, 711 P.2d 1156, 1160 (Alaska 1985) (interpreting state constitution); Ragen v. State, 642 S.W.2d 489 (Tex. Crim. App. 1982).} As a general rule, however, whether suspect interviews are recorded is left to the discretion of law enforcement officers, and the existence of a recording affects the weight rather than the admissibility of the statements.

D. Length and Purpose of Detention

Prior to the new Act and the Code, rules limiting the time suspects could be held in custody without charge were imprecise. While persons arrested for offenses not regarded as "serious" had to be brought before a magistrate within twenty-four hours or released on bail, those arrested for "serious" offenses were required to be taken before a magistrates' court "as soon as practicable."\footnote{Magistrates' Courts Act 1980, § 43.} According to Zander, "police tended to interpret the phrase 'as soon as practicable' to mean 'as soon as we have decided whether to charge him,' rather than 'as soon as a court can be found that is sitting.'"\footnote{M. ZANDER, supra note 53, § 41, at 53.} As a result of convenient interpretations of this and other provisions of the detention law, police had virtually unfettered discretion to detain a suspect in custody.\footnote{V. BEVAN & K. LIDSTONE, supra note 158, § 6.04.} Lengthy detention without charge, though relatively uncommon, was not unknown,\footnote{Royal Commission studies found that about 75% of suspects were dealt with within six hours and about 95% within 24 hours. A police study found that in one period 0.4% were held for 72 hours or longer. ROYAL COMMISSION REPORT 1981, supra note 12, ¶ 3.96. A number of reported cases revealed much lengthier detentions without charge. See, e.g., Regina v. Mackintosh, 76 Crim. App. 177 (C.A. 1982) (five day detention); Regina v. Dodd, 72 Crim. App. 50 (C.A. 1981) (detention in excess of 72 hours).} and the only safeguard against excessive detention was the rare intervention of habeas corpus.\footnote{M. ZANDER, supra note 53, § 41, at 53-54.}

To remedy this situation the 1981 Royal Commission recommended that a system of time limits be imposed and that there be a continuous and accountable review of the need to detain a suspect and, in the case of longer periods of detention, some form of outside independent scrutiny.\footnote{ROYAL COMMISSION REPORT 1981 supra note 12, ¶¶ 3.98-.107, at 53-58.} The 1984 Act follows the spirit, though not all the specifics, of the Royal Commission's recommendations.
The Act provides for a custody officer at police stations to determine whether there is sufficient evidence to charge a suspect with an offense, a decision that must be made "as soon as practicable after the person arrested arrives at the police station." When the suspect is charged and kept in detention, he must be brought before a magistrates' court "as soon as practicable and in any event not later than the first sitting after he is charged with the offence." If the custody officer finds insufficient evidence to charge, the suspect must be released "unless the custody officer has reasonable grounds for believing that his detention without being charged is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him." With such reasonable grounds, the suspect may be detained without charge up to twenty-four hours. However, a person under arrest for a "serious arrestable offence" may be detained up to thirty-six hours if a superintendent or other superior officer also has reasonable grounds for believing that the investigation is being conducted diligently and expeditiously and detention is necessary as determined by the custody officer. Upon the same grounds and after a hearing at which the suspect has the right to legal representation, a magistrate can authorize detention for another thirty-six hours. In addition, police can apply to the magistrate for one or more further extensions up to an absolute limit of ninety-six hours. Thus, police may detain a suspect without charge for up to thirty-six hours on their own authority, and, with a magistrate's orders, up to a maximum of ninety-six hours.

But does English law actually allow detention to continue without charge for the primary purpose of questioning to extract a confession? An understanding of developments before the Act becomes helpful at this point. Long and clear tradition established that, absent a proper arrest, police may not detain a suspect at a police station solely for the purpose of questioning him. Yet the law did not provide clear guidance as to whether, given a proper arrest based on reasonable suspicion, a suspect could be detained for the sole purpose of enabling the police to interrogate. Nevertheless, it became accepted police practice to arrest

429. Id. § 46(1)-(2). The time begins upon suspect's arrival at the police station.
430. Id. § 37(2).
431. Id. §§ 37(3), 41(1)-(2).
432. Id. § 42(1).
433. Id. § 43.
434. Id. § 44(1)-(3).
435. See supra note 32 and cases cited therein.
on reasonable suspicion for the purpose of taking the suspect to the police station for questioning.\textsuperscript{437} The 1981 Royal Commission recognized this practice:

[...] the period of detention may be used to dispel or confirm \ldots\ reasonable suspicion by questioning the suspect or seeking further material evidence with his assistance. This has not always been the law or practice but now seems to be well established as one of the primary purposes of detention upon arrest.\textsuperscript{438}

When the Police and Criminal Evidence Bill 1984 was pending before Parliament, the House of Lords clearly affirmed the validity of detention for questioning following a lawful arrest. In \textit{Holgate-Mohammed v. Duke,}\textsuperscript{439} a woman who had been arrested on suspicion of theft was detained for questioning for about six hours and then released without bail. She was never charged and later brought an action for false imprisonment. The trial judge found that the constable had detained the woman "to subject her to the greater stress and pressure involved in arrest and deprivation of liberty in the belief that if she was going to confess she was more likely to do so in a state of arrest."\textsuperscript{440} The trial judge found these motives improper, but the House of Lords unanimously disagreed. Since the arrest was based on reasonable cause and questioning at the station was conducted properly, the court found that the arresting officer, pursuant to his statutory power of arrest, could properly consider the greater likelihood that [the suspect] would respond truthfully to questions about her connection with knowledge of the burglary, if she were questioned under arrest at the police station, than if, without arresting her, questions were put to her by [the officer] at her own home from which she could peremptorily order him to depart at any moment \ldots\textsuperscript{441}

Relying on the Royal Commission Report, Lord Diplock stated that questioning a suspect is "well established as one of the primary purposes of detention on arrest." Though the decision has been severely criticized, it is recognized as far-reaching and one which flatly acknowledges that detention is a potent but proper weapon in extracting confessions.\textsuperscript{442}

The decision in \textit{Holgate-Mohammed}, however, did not condone police conduct previously forbidden, but, as noted by English commenta-

\begin{footnotes}
\item[437] V. BEVAN & K. LIDSTONE, \textit{supra} note 158, \S\ 5.02.
\item[438] ROYAL COMMISSION REPORT 1981 \textit{supra} note 12, \S\ 3.66, at 41.
\item[439] [1984] 1 All E.R. 1054 (H.L.).
\item[440] Id. at 1058-59.
\item[441] Id. at 1059.
\end{footnotes}
tors, merely "set the seal on some eighty years of police practice by formally declaring that arrest for questioning was proper."\(^{443}\) Thus, prior to the 1984 Act, the legality of arrest for the purpose of questioning was clearly established by both common practice and legal principle. During the Committee stage of the Bill in the House of Lords, Lord Elton was correct when he described the provisions dealing with detention for questioning as nothing more than a formal and statutory basis for an established legal principle.\(^{444}\)

Although it is now clearly recognized that the primary purpose of detention without charge as authorized by the Act is to question the suspect,\(^{445}\) the scope of authority to order detentions for this purpose remains unclear. The statutory language is rather open ended: "reasonable grounds for believing that... detention... is necessary... to obtain... evidence [relating to the offense for which he is under arrest] by questioning him." This could be interpreted narrowly. The Home Office Minister testified at the hearings on the bill proposing the Act that the language means "necessary," not just that such questioning would be "desirable, convenient or a good idea."\(^{446}\) Furthermore, if the suspect has refused to answer all questions and the real purpose of prolonging detention is to break him down, a magistrate may refuse to grant an application for further detention.\(^{447}\) However, neither the Act nor the Code requires that detention applications be denied for this purpose, and other than the general prohibitions against oppression and unfair treatment, no rule prevents police-authorized detention for the initial thirty-six hour period for the purpose of convincing suspects to speak. As with other provisions of the new Act, it is simply too soon to gauge the effect of the new detention law.

In the United States as in England, without cause to arrest, police may not detain a suspect at a police station solely for the purpose of subjecting him to interrogation. Recent cases clearly disapprove, on fourth amendment grounds, of arrests for "investigatory" purposes on less than probable cause.\(^{448}\) Unlike in England, this prohibition is enforced by a strict exclusionary rule applicable to confessions obtained by exploiting the unlawful detention. However, the fourth amendment does

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443. V. BEVAN & K. LIDSTONE, supra note 158, § 5.03.
444. See Dockray, supra note 436, at 732.
445. V. BEVAN & K. LIDSTONE, supra note 158, § 5.03; M. ZANDER, supra note 53, § 37, at 50.
not bar questioning during a period of lawful detention following a valid arrest. A confession obtained after a lawful arrest and during a period of reasonable delay prior to appearance before a magistrate is admissible if obtained voluntarily and in compliance with Miranda.

Yet we do not allow, as does England, detention without charge following a lawful arrest for the express purpose of subjecting the person to interrogation. Federal authorities must take an arrested person before a magistrate "without unnecessary delay" at which point he will be arraigned on the charges.\textsuperscript{449} Federal courts interpret this standard rather strictly. In \textit{McNabb v. United States},\textsuperscript{450} the Supreme Court found excessive a two day delay, and in \textit{Mallory v. United States},\textsuperscript{451} a five and one-half hour delay was condemned. Nearly every state has restricted pre-arraignment detention, most using the federal "without unnecessary delay" standard and many imposing definite time limits such as twenty-four, thirty-six, or forty-eight hours.\textsuperscript{452} Generally, delay for such functional purposes as booking, transportation, or awaiting the sitting of a magistrate is regarded as necessary. Delay for the sole purpose of interrogation was clearly disapproved by the Supreme Court in \textit{Mallory}:

The police may not arrest upon mere suspicion but only on "probable cause." The next step in the proceeding is to arraign the arrested person before a judicial officer as quickly as possible so that he may be advised of his rights and so that the issue of probable cause may be promptly determined. The arrested person may, of course, be "booked" by the police. But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt.

The duty enjoined upon arresting officers to arraign "without unnecessary delay" indicates that the command does not call for mechanical or automatic obedience. Circumstances may justify a brief delay between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible of quick verification through third parties. But the delay must not be of a nature to give opportunity for the extraction of a confession . . . .\textsuperscript{453}

While lower federal courts have often stretched the rules, they have usually not countenanced delay solely for the purpose of extracting a

\textsuperscript{449} FED. R. CRIM. P. 5(a).
\textsuperscript{450} 318 U.S. 332, \textit{reh'g denied}, 319 U.S. 784 (1943).
\textsuperscript{451} 354 U.S. 449 (1957).
\textsuperscript{452} \textit{See} Comment, \textit{The Ill-Advised State Court Revival of the McNabb-Mallory Rule}, 72 J. CRIM. L. & CRIMINOLOGY 204, 210 (1981). Some states impose a combination of the federal standard and a specific time limit. \textit{E.g.}, CAL. PENAL CODE § 825 (West 1985) (without unnecessary delay, and, in any event, within two days).
\textsuperscript{453} 354 U.S. 449, 454-55 (1957).
statement. The federal rule restricting delay and prohibiting it for the purpose of police questioning is said to give force to the notion that arrest, even on probable cause, is not properly a vehicle for the investigation of crime. However, many courts regard the period of necessary delay between arrest and arraignment as a perfectly proper time to question the suspect. Nevertheless, our courts generally regard police questioning as incidental to, rather than a primary purpose of, detention pending arraignment on the charges. Express authorization to detain without charge for the purpose of interrogation likely would be regarded as an unacceptable adoption of an inquisitorial technique foreign to our adversary system of justice.

Enforcement of the restrictions on pre-arraignment delay has not been uniform. The Supreme Court in McNabb and Mallory required the exclusion at trial of confessions obtained by federal officers after a period of "unnecessary" delay in taking an arrested person before a committing magistrate, irrespective of whether the confession was voluntary. This McNabb-Mallory rule was not based on the Constitution and did not apply directly to the states. In 1968 Congress limited the rule by providing that a confession shall not be inadmissible in a federal prosecution solely because of delay in bringing an arrested person before a magistrate if the confession was voluntarily given within six hours after the arrest or other detention or if delay beyond the six hour period was reasonable "considering the means of transportation and the distance to be traveled to the nearest available... magistrate." Another provision of the same Act further provides that any confession voluntarily given shall be admissible in federal court and that delay in appearance before a magistrate is only one of several factors, none of which need be conclusive, in determining voluntariness. Most federal courts interpreting this Act have held that this latter provision entirely eliminates the per se McNabb-Mallory rule, while a minority believe the automatic exclusionary rule survives

454. See, e.g., United States v. Sotoj-Lopez, 603 F.2d 789, 790 (9th Cir. 1979); United States v. Mayes, 552 F.2d 729, 734 (6th Cir. 1977); United States v. Odom, 526 F.2d 339, 343 (5th Cir. 1976); United States v. Davis, 459 F.2d 167, 170 (6th Cir. 1972); Williams v. State, 264 Ind. 664, 348 N.E.2d 623 (1976).
459. Id. § 3501(a)-(b).
460. See, e.g., United States v. Mayes, 552 F.2d 729, 734 (6th Cir. 1977); United States v. Shoemaker, 542 F.2d 561, 563 (8th Cir. 1976); United States v. Davis, 532 F.2d 22, 25 (7th
as to unreasonable post-six hour delays.461

At the state level, all but a few jurisdictions have rejected the absolute McNabb-Mallory rule as an enforcement mechanism for their own restrictions on pre-arraignment delay.462 Consequently, most federal and state courts regard unreasonable delay as simply another factor to consider in determining whether a statement was obtained voluntarily.

Comparing our detention rules with those of the English, it appears that, by and large, time limits in the United States are less precise and less subject to periodic review by an independent monitor during the detention process. In England, the 1984 Act eliminated the old flexible standards and imposed a twenty-four hour limit as to most offenses and specific time limits subject to review as to serious arrestable offenses. Continued detention is subject to review by the quasi-independent custody officer and more lengthy detentions (over thirty-six hours) by a magistrate. No similar review procedures exist in most United States jurisdictions, where the propriety of detention is usually considered for the first time in the rare instance of a habeas corpus petition or at a hearing on a motion to suppress a confession obtained after unnecessary delay in bringing the suspect before a magistrate.

Although the English rules are more protective in this respect, when it comes to the propriety and availability of detention at a police station for purposes of interrogation, English rules, at least formally, allow police greater powers. In the past, English police arrested after having investigated and obtained sufficient evidence to charge. Arrests now frequently occur at a very early stage in the investigation when police lack evidence to charge the suspect and seek to substantiate guilt by custodial questioning.463 The 1984 Act officially sanctions the practice of detention without charge for the purpose of interrogating to obtain necessary evidence to charge.

McNabb and Mallory moved the United States in the opposite direction—toward a collapse of the arrest and charging decisions and toward

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461. See United States v. Sotoj-Lopez, 603 F.2d 789, 790 (9th Cir. 1979); see also United States v. Gains, 555 F.2d 618, 623-24 (7th Cir. 1977) (discretion to exclude for excessive delay).


463. V. BEVAN & K. LIDSTONE, supra note 158, § 5.01-.03.
prohibition of questioning intended to determine whether a person lawfully arrested should be charged.\textsuperscript{464} While Congress and most states have either limited or rejected the \textit{McNabb-Mallory} exclusionary rule, its underlying principle—that arrest should occur near the end of the investigation process and that detention without charge should not be used for the primary purpose of interrogation—is still accepted by most courts.

The question remains whether this difference between English and American detention rules exists more in legal theory than in reality. Our rules may not technically allow detention without charge for the primary purpose of extracting a confession, but they often permit it. Only probable cause, not evidence sufficient in degree or kind to sustain a prosecution, is required for a valid arrest, and as long as delay in bringing the suspect before a magistrate is justified on other grounds, nothing prevents the police from using the period of "necessary" delay to interrogate.

E. Enforcement of the Rules

We now come to a most important difference between the English and American rules surrounding police interrogation. While the Supreme Court has characterized \textit{Miranda} requirements as "procedural safeguards" rather than rights protected by the Constitution,\textsuperscript{465} a violation of these protective devices automatically leads to exclusion of statements obtained as a result of the violation\textsuperscript{466} without regard to the extent of the violation or the seriousness of the crime. Judges have no discretion to admit statements taken in violation of \textit{Miranda} when the violation is insubstantial or, in serious cases, when the confession is the only evidence of guilt.\textsuperscript{467} Nor will the good faith of the police in failing to properly advise of \textit{Miranda} rights save a confession.\textsuperscript{468} An even firmer automatic exclusionary rule applies to statements elicited from an ac-

\textsuperscript{464} See 1 W. LaFave & J. Israel, \textit{supra} note 99, § 6.3(b).
\textsuperscript{466} Miranda v. Arizona, 384 U.S. 436, 444, 479 (1966).
\textsuperscript{467} Numerous proposals have sought to temper \textit{Miranda}'s exclusionary rules. In fact, shortly after the decision, Congress sought to modify the harshness of its automatic exclusionary mandate by enacting Title II of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 3501 (1985), providing that voluntary confessions shall be admissible and that \textit{Miranda}-type warnings should not be conclusive on the question of voluntariness. Thus far, courts have abided by the strict rules of \textit{Miranda} rather than the flexible approach of the Act. \textit{See} Oregon v. Elstad, 105 S. Ct. 1285, 1298 (1985) ("The Court today in no way retreats from the bright line rule of \textit{Miranda}.").
\textsuperscript{468} \textit{See} Oregon v. Elstad, 105 S. Ct. 1285, 1298 (1985) ("We do not imply that good faith excuses a failure to administer \textit{Miranda} warnings.").
cused in violation of his sixth amendment right to counsel.469

In contrast, English law applies an automatic exclusionary rule only to statements which are found to be involuntary. During the era of the Judges’ Rules neither a violation of those rules nor a denial of the right of access to a solicitor carried the remedy of automatic exclusion. In part this approach followed from the low status of the Judges’ Rules and reflected the traditional reluctance of British courts to use rules of evidence to discipline the police. The introduction to the Judges’ Rules stated that the Rules were “put forward as a guide to police officers conducting investigations,” and explained that “judges control the conduct of trials and the admission of evidence against persons on trial before them, but do not control or in any way initiate or supervise police activities or conduct.” The introduction further explained that, while a fundamental condition of the admissibility of all statements is that they be voluntary, nonconformity with the Judges’ Rules “may render answers and statements liable to be excluded from evidence.”470

The relationship between the automatic exclusionary rule associated with involuntary statements and the discretionary rule associated with violations of the Judges’ Rules was not at all clear. One view was that the automatic and discretionary rules operated independently, i.e., that involuntary statements were automatically excluded while voluntary statements may be excluded in the court’s discretion if they were obtained in violation of the Judges’ Rules.471 However, by the time the 1984 Act was passed, the prevailing view appeared to reject any judicial discretion to exclude a statement after its voluntariness had been established, although compliance with the Judges’ Rules could be considered in determining whether the statement was in fact voluntary.472 For example, in Regina v. Dodd,473 after suggesting that some Rules might have

470. JUDGES’ RULES, supra note 29, at 237 n.2 (emphasis added).
472. Regina v. Prager, 56 Crim. App. 151, 160 (C.A. 1971) (Nonobservance of Rules “may, and at times does, lead to the exclusion of an alleged confession; but ultimately all turns on the judge’s decision whether, breach or no breach, it has been shown to have been made voluntarily.”); ARCHBOLD, supra note 32, §§ 15-25, -77; Lidstone, Voluntariness, Discretion and the Judges’ Rules, 1982 NEW L.J. 1065; Freveze, England: Pretrial-Procedure, in THE ACCUSED, supra note 61, at 27; see also ROYAL COMMISSION: INVESTIGATION 1981, supra note 29, § 73, at 27. Even assuming judges retain residual discretion to exclude a voluntary confession obtained in violation of the Judges’ Rules, it is clear that in practice they very rarely do so. See supra notes 142-50 and accompanying text.
been violated, the court upheld admission of all the confessions, saying: "In the present case we are not concerned with disciplining the police. We are concerned to make sure that the evidence admitted was not obtained by oppression or by trick and to make sure that the judge was right in concluding that the admissions were made voluntarily."474 Similarly, in Regina v. Mackintosh,475 the court found a violation of the Rules in the detention of an arrested defendant for nearly a week before charging him and bringing him before a magistrate, but found that his confession to a robbery during the period of unlawful detention was properly admitted since "there [was] nothing to suggest that . . . [it] was other than voluntary."476 Thus, before the 1984 Act strong support could be found for the position that both the Judges' Rules and the rules regarding access to a solicitor were not regarded as independent grounds for excluding evidence, but rather, were treated principally as factors relevant to the application of the voluntariness principle. While on occasion courts would assert the authority to exclude evidence which would operate unfairly against the accused, they generally avoided any role in disciplining the police through excluding evidence obtained in violation of the Rules.477

The 1981 Royal Commission considered but rejected an expansion of the disciplinary role of the courts through exclusion of evidence. It recognized that criminal and civil actions could be brought for violation of common-law and statutory rights by the police, and that disciplinary proceedings were available for breaches of police rules of conduct.478 Relying primarily on the latter as a means of enforcement, the Commission recommended that "in general breaches of the [new] Code should not render any subsequent statement inadmissible as evidence."479 However, breaches of the Code would remain relevant to a court's assessment of the reliability of a confession.480

The 1984 Act generally followed the recommendations of the Commission. Confessions obtained in violation of the new "voluntariness" rule are automatically excluded and failure to comply with the Code of Practice may be taken into account by a court when relevant to any ques-

474. Id. at 56.
475. 76 Crim. App. 177 (C.A. 1982).
476. Id. at 181.
479. ROYAL COMMISSION REPORT 1981, supra note 12, ¶ 5.18, at 124.
480. Id.
tion arising in the proceedings. Thus, evidence of a breach of the Code is admissible and may be considered as it bears on the issue of whether a confession has been obtained voluntarily. However, the Act does not explicitly rule out court discretion to exclude a confession for general breaches of the Code. In fact the general discretion to exclude "unfair evidence" is preserved. A court may refuse to admit evidence "if it appears . . . that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it." While the apparent breadth of this authorization suggests that it could be a vehicle for excluding "voluntary" confessions which nevertheless were obtained in breach of the Code, a number of factors suggest that this will not occur. First, the history of the provision shows it was adopted in lieu of a broader authority to reject evidence unlawfully obtained which had been opposed by the government because it would lead to acquittal of the guilty on grounds unrelated to the fairness of the case. Second, the traditional antipathy of the courts toward deterring police misconduct through exclusion of evidence is not likely to be diminished by the Act. Nothing in the Act suggests that it expands the power of the court to exclude evidence to deter police. In fact, rejection of the traditional strict voluntariness test constituted a step in the opposite direction. As the House Secretary stated in the House of Commons debate on the Act, "[t]he purpose of excluding evidence should not be disciplinary [but] should be to avoid . . . an unfair trial." Finally, the language conferring discretion supports a narrow interpretation since it covers only cases in which admission of the evidence would have "an adverse effect on the fairness of the proceedings." Thus, the provision looks to the fairness of the trial itself wholly apart from the fairness or legality of police conduct during the investigation process. Finally, the Act further provides that "nothing [therein] shall prejudice any rule of law requiring a court to exclude evidence." This is a reference to the rule specifically

481. Police and Criminal Evidence Act 1984, Ch. 60, §§ 67(11), 76(2).
482. Id. § 78(1).
484. See supra notes 472-77 and accompanying text. Lord Fraser recently reaffirmed this traditional view in a statement with which the other Lords generally agreed: "The duty of the court is to decide whether the appellant has committed the offense with which he is charged, and not to discipline the police for exceeding their powers." Fox v. Chief Constable, [1985] 3 All E.R. 392, 397 (H.L).
486. Police and Criminal Evidence Act 1984, Ch. 60, § 78.
excluding involuntary confessions and may indicate that the discretionary power to exclude evidence solely on the basis of unfairness does not extend to confession evidence. In short, the language authorizing "unfairness" exclusions is "extremely puzzling" and most scholars are not at all sanguine that it will be used as an independent ground to suppress confessions which have passed the new "voluntariness" test. 487

With these narrow limits on the power to exclude evidence, enforcement of the English rules with respect to the questioning of suspects is left largely to ordinary criminal and civil actions against offending police officers and to police disciplinary procedures. Criminal actions for assault are rare but they do occur. 488 Civil courts may enforce statutory rules such as improper refusal to allow access to a solicitor under the 1984 Act. 489 However, breach of the Code is another matter. Failure to comply with any provision of the Code does not render a police officer liable to any criminal or civil proceedings. 490 The Act reflects the Royal Commission's view that police compliance with the Code should be left to the internal police disciplinary system. In the United States, this approach might be viewed as eliminating any hope that the rules would be of significance. Neither the Supreme Court nor any other federal authority exercises direct control over discipline of state or local police. While violations of a suspect's constitutional rights may lead to suppression of evidence as well as civil liability, whether it will also lead to discipline of the offending officer is generally left to local law enforcement authority.

Arguably at least, England presents a different situation in light of the potential for greater government control over a far less fragmented police system, as well as the long tradition of efforts by the English government to police the police. 491 Numerous studies have been undertaken concerning the disciplinary process, and changes have been implemented

487. M.D.A. FREEMAN, supra note 280, at 60-127; see V. BEVAN & K. LIDSTONE, supra note 158, § 2.41 ("[I]t is inconceivable that a court would exclude a confession [as 'unfair'], if the confession already satisfies the hurdles of [the voluntariness rule.]"); see also Minfield, The Evidence Provisions, [1985] CRIM. L. REV. 569, 572.

488. See generally ROYAL COMMISSION: INVESTIGATION 1981, supra note 29, ¶¶ 120-124, at 42-44; V. BEVAN & K. LIDSTONE, supra note 158, § 2.31 ("Private prosecutions... are very much... a weapon of last resort.").

In 1983 the author witnessed a Birmingham Crown Court case, Regina v. Morton, in which three police officers were convicted of assault for attempting to beat an admission from a suspect in a police station interview room.


to make it more effective. The 1984 Act itself establishes a new Police Complaints Authority with revised complaint procedures and a greater degree of independence. Furthermore, the language of the Act is rather strong: "A police officer shall be liable to disciplinary proceedings for a failure to comply with any provision of [the Code]." While not requiring that disciplinary proceedings must follow from a breach, the Act "at the least seems to suggest that such proceedings could be regarded as a normal consequence for a breach of the Code." However, the effectiveness of the Code will turn largely on the perceptions and reactions of the police and the strength of the disciplinary mechanisms. As yet, it is too soon to tell.

III. Application of Legal Principles: Police Compliance and Judicial Enforcement

Knowing the rules of the game is only the starting point to an understanding of how the game is really played. To gain a realistic picture of how the English and American approaches differ, one must know how each set of rules is applied in practice, as well as the effect of the rules on the prevalence and significance of suspect statements in criminal prosecutions.

Judging the effect of the rules in practice requires an inquiry into both the extent of police compliance and the willingness of courts to enforce the rules. However, this task is not without difficulty. Most views on the subject are based on personal impressions, and conclusions are

493. Id. § 67(8). However, the Notes for Guidance are not part of the Code and, most likely, failure to comply with the Notes will not itself automatically be viewed as a breach of the police disciplinary code. M. ZANDER, supra note 53, §§ 66-67, at 96.
494. M. ZANDER, supra note 53, §§ 66-67, at 95. It could be maintained that disciplinary action is mandatory on the ground that the word "shall" precludes the exercise of discretion on the part of the supervising police officer. See T.C. WALTERS & M.A. O'CONNELL, supra note 150, at 70.
495. The old Judges' Rules did not appear to be held in great respect by the police and were not very strictly observed. However, the linkage to the disciplinary code is new and is at least worth trying as a means of ensuring compliance with the rules. Much is likely to depend on the attitudes of supervising officers, and of the senior officers who decide whether to bring charges. Munro, The Accountability of the Police, [1985] CRIM. L. REV. 581, 585.

The reputation of the police is not what it was even a decade ago. A lot will depend on how responsibly the new law is put into practice by the police . . . . [M]uch must depend on senior officers, on police training, on the inspectorate, the courts and the Police Complaints Authority.

M.D.A. FREEMAN, supra note 280, at viii; see also M. ZANDER, supra note 53, §§ 66-67, at 94 ("[T]he crux of the matter is whether the police treat the rules in the Codes of Practice as rules to which they must adhere.").
open to varying interpretations according to the perspectives and experiences of the writers. Even objective studies may be misleading since results often differ from area to area and even from judge to judge. Furthermore, although English studies are more numerous and more recent than American ones, they were all conducted prior to the 1984 Act, which, with the Code of Practice, altered the rules governing police questioning, most significantly in relation to the right to legal advice. Moreover, studies of the American rules are of limited significance in view of the fragmented and often diverse law enforcement systems in the United States. With these reservations, the application and effect of the rules governing police interrogation in England and America will now be considered.

A. Police Compliance and Judicial Enforcement: English Rules

(1) Police Compliance

English commentators suggest that violations of the 1930 Judges’ Rules prohibiting the questioning of suspects in custody were widespread prior to the 1964 amendment, which provided greater flexibility to police questioning of suspects in custody. Writing in 1961, English scholar Glanville Williams stated that while a strict interpretation of the Rules was followed for a time, police interrogation of persons in custody had since become commonplace and the strict interpretation was, by then, “a dead letter.” Williams attributed police noncompliance to the unrealistic strictness of the virtually absolute prohibition on the questioning of persons in custody.

After the Rules were amended in 1964, eliminating custody as a cri-

496. See authorities cited in Weisberg, supra note 6, at 40 nn.87-88.
497. Williams, Police Interrogation, supra note 12, at 50. On the other hand, writing in 1958, Devlin assumed significant compliance with the rules. P. DEVLIN, supra note 22, at 15.
498. “Perhaps the truth is that the Rules have been abandoned, by tacit consent, just because they are an unreasonable restriction upon activities of the police in bringing criminals to book.” Williams, Police Interrogation, supra note 12, at 52. Another commentator emphasized that the severe restriction on police work was not enforced by an effective sanction:

Where no statement is tendered in evidence, the only possible sanction behind the Rules is disciplinary action by the police themselves and it is thought that the possibility of this may be discounted unless the mere breach of the Rules is accompanied by some more flagrant misconduct. Strict compliance with the Judges’ Rules must be highly inconvenient for the police—and an undoubted handicap to them in their present difficult task—and it is too much to expect them to enforce these very strict standards upon themselves. Even if the true meaning of the Rules is that they prohibit all questioning of prisoners, they are hardly likely to be strictly followed where there is no sanction whatever behind them.

terion and allowing greater freedom to interrogate at the station house, it became easier to comply with the Rules and, at the same time, to interrogate and gain admissions from suspects in custody. Yet the question of police compliance with the latest version of the Judges’ Rules remained controversial. A 1980 study of interrogation practices concluded that, despite a few apparent breaches, “on balance, the police kept close to the spirit if not always to the letter of the Judges’ Rules in the way they treated suspects.”

However, the author of this study based his conclusions on direct reports of interrogation sessions by observers whose presence was known to the interrogating officers. In contrast, two previous Royal Commissions on police powers found that a number of statements tendered in court were not voluntary in the strict sense of the word, and a number of independent studies found that the basic tenets of the Judges’ Rules were disregarded with considerable frequency.

During the Parliamentary debates on the new Code, numerous members of both Houses voiced dissatisfaction with the Judges’ Rules and regarded police compliance as sorely lacking. Reasons for non-compliance are not difficult to understand. English observers recognized that the Judges’ Rules were imprecise and ambiguous. Moreover, they were characterized as “unrealistic” in the sense that they described what police ought to be doing without regard to the realities of the interrogation process:

For example, during the course of questioning, a witness may become a suspect and his status vis-a-vis the police may change. The officer’s thoughts must necessarily be on what questions he is going to ask (or refrain from asking), without revealing that he knows less than he implies; his concern is to obtain information that will be of evidential value in Court. At the same time, under the Judges’ Rules, he must consider what stage he ought to be cautioning the suspect—a situation which he must see as almost extraneous to the real object of interroga-

499. P. Softley, supra note 76, at 94.
500. See studies cited in J. Baldwin & M. McConville, supra note 153, at 36; E.C. Freisen & T.R. Scott, supra note 155, at 63. This lack of compliance is sometimes not only recognized but supported. Lord Shawcross, writing in 1965, stated, “Of course, the police often ignore the rules—and they are quite right to do so.” Shawcross, supra note 12, at 228.
501. See House of Lords, Dec. 9, 1985, col. 11-17; House of Commons, Dec. 5, 1985, col. 504-13. The following are some examples of the views of members of the House of Commons: “The Judges’ Rules have been honored in their breach rather than in their observance, they have been discredited, and the judges themselves have generally recognized that they are almost valueless.” Id., col. 504 (Mr. Carlile). “The Judges’ Rules were outdated. They were also ignored in many instances. If a suspect knew that they existed and asked a police officer for a copy of them, the police officer would regard that as something of a joke.” Id., col. 513 (Mr. Knight).
tion. Identifying this point in time demands a lot of an officer.\footnote{P. Morris, \textit{supra} note 76, at 23.}

As one researcher observed, "it seems absurd to ask a police officer to charge a suspect as soon as he has enough evidence to do so, bringing to an end his freedom to interrogate and having to warn a suspect that he need volunteer no further information."\footnote{Thompson, \textit{Questioning: A Comment}, [1967] \textit{Crim. L. Rev.} 94, cited in P. Morris, \textit{supra} note 76, at 22.} A barrister writing in the \textit{Criminal Law Review} in 1967 commented that police disobey the Rules when they believe it to be in the interest of obtaining a conviction. He quoted a policeman who stated, "any police officer who doesn't know the Judges' Rules is a fool, but he would be even more of a fool if he adhered to them."\footnote{\textit{Id}.}

While evidence indicates that police frequently continued to disregard the Judges' Rules, the extent of violations is unknown. Certainly, by tying the obligation to warn and the limitation on questioning to the degree of suspicion and to formal charging (or informing the suspect that he may be prosecuted), the Rules invited tactical delay by the police and made enforcement difficult.

To the extent that the new Code uses substantially the same criteria, these problems remain. However, in some respects, the Code is more precise. A suspect now must be cautioned upon arrest and the custody officer must give detailed advice orally and in writing to persons under arrest at police stations. It will be more difficult for police to avoid these specific obligations.

Analyzing police compliance with the principles governing access to a solicitor must take into account the previous lack of clarity attending both the nature of access rights and the duty to notify suspects of such rights. The introduction to the Judges' Rules stated that they did not affect the principle that "every person at any stage of an investigation should be able to communicate and consult privately with a solicitor."\footnote{JUDGES' RULES, \textit{supra} note 29, at 237 n.2 (para. (c)). Access to a solicitor could still be denied if it would cause "unreasonable delay or hindrance" to the investigation. \textit{Id}.} The accompanying Administrative Directions required that a person in custody be allowed to speak on the telephone to his solicitor and be informed orally of his rights.\footnote{\textit{Id}. at 240 n.3 (para. 7).} The Administrative Directions also provided that notices describing such rights should be displayed at convenient and conspicuous places at police stations and the attention of persons in custody should be drawn to them.

However, as discussed previously, these requirements were actually
quite limited. Not only were they subject to the proviso that no unreasonable delay to the investigation occur, but they gave no actual right to the presence of a solicitor during police questioning, much less required the police to inform the suspect of such a right. It is not surprising, therefore, that in practice the English took a dim view of the right to legal advice during police questioning. For example, the Lord Chief Justice— the head of the very body of judges that promulgated the Rules, the Queen's Bench Division of the High Court—is reported to have stated in 1971 that any rule requiring a solicitor's presence during police interrogation would be "quite unacceptable." As to whether police even notified suspects of their rights of access, studies disclose that practices were uneven but when such notices were given, they were generally in the form of notices posted at various locations in the police station rather than written or oral advice given to individual suspects.

Another question of compliance with access principles concerns police response to a suspect's request for a solicitor. One Home Office study used in the 1981 Royal Commission Report which was based upon observations of interviews found that police refused one-third of the requests by suspects to see a solicitor. Two studies based upon interviews with prisoners found that their requests to see a solicitor were denied about three-fourths of the time. Furthermore, evidence indicates that even when a suspect was allowed to see a solicitor, it was only after lengthy interrogation or in cases in which the suspect had already made damaging statements. The practice of delaying access had long been recognized as commonplace: "the police in this country . . . need not tell the suspect of his right to have a lawyer present at his interview, and in practice the police often take advantage of the loop-hole provided by the Judges' Rules . . . to prevent a solicitor from communicating with his client until after a statement has been made." Thus, it appears that

509. P. Morris, supra note 76, at 26-28; P. Softley, supra note 76, at 64-65; Baldwin & McConville, supra note 508, at 147.
512. P. Softley, supra note 76, at 69-70; Baldwin & McConville, supra note 508, at 151.
513. SOCIETY OF CONSERVATIVE LAWYERS, THE CONVICTION OF THE GUILTY 11 (1972); see also authorities cited in Baldwin & McConville, supra note 508, at 147-49. A study of 400 Worcester Crown Court cases in 1978 found that while 27 defendants were interrogated in the presence of a solicitor, approximately 34 others unsuccessfully requested the services of a solicitor. Mitchell, Confessions and Police Interrogation of Suspects, [1983] CRIM. L. REV. 596, 599-600.
suspects generally were not specifically informed of their rights of access, and when they nevertheless chose to exercise such rights, the police denied access in a substantial number, if not the large majority, of cases. On those occasions when access was granted, it usually came after the interrogation process had been completed.

The 1984 Act has given the right of access a statutory basis and, together with the new Code, likely will alter past practices considerably. The right now has a firm foundation and is more clearly defined. In addition, the establishment of the position of custody officer and of duty solicitor schemes likely will put flesh on the bones of the access principle. However, it remains to be seen whether the numerous exceptions to the restrictions on questioning those who request a solicitor will significantly alter former practices when it comes to obtaining statements from suspects before they have had the benefit of legal advice.

(2) Judicial Enforcement

A number of reports and studies, made both before and after the 1964 amendment to the Judges’ Rules, concluded that the Rules were not being enforced by judges through exclusion of statements obtained in violation of the Rules. However, the infrequency of exclusion may have been due more to a failure of adequate proof by the defense than to a disregard of judicial duties. A study of contested cases in Crown Courts and magistrates’ courts found that, without exception, defendants relied wholly on their own unsupported assertions of police misconduct and were unable to substantiate their allegations with independent evidence. The researcher concluded it was not surprising that, “having heard the officer[’s] denial of any misconduct, judges pronounced themselves satisfied that the police had acted properly . . . and allowed the statements in evidence.”

Of course, even if a defendant proved that the police had violated the Rules, exclusion was not *required* unless the statement was involuntary. Under the traditional view, exclusion of voluntary statements was left to the discretion of the court; only rarely did the judge exercise discretion in favor of exclusion. Indeed, this result would be required under the recent and possibly prevailing view that “ultimately all turns

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514. In 1960, Glanville Williams noted that “judges at the present time tend to wink at breaches of the Rules, at any rate if the charge is a serious one.” Williams, *Questioning by the Police*, *supra* note 12, at 328; see studies cited in P. *Morris*, *supra* note 76, at 32, 37.


516. *Archbold*, *supra* note 32, § 15-25; C. *Emmins*, *supra* note 36, at 328; see *supra* notes 470-77 and accompanying text.
on the judge's decision as to whether, breach or no breach, [the confession] has been shown to have been made voluntarily." 517

Courts generally have taken the same approach with respect to violations of the principles regarding solicitor access. While at least one court has exercised discretion to exclude evidence of statements made by an accused after police refused to allow him to contact a solicitor, 518 most have not followed this course. 519

The standard approach is demonstrated by the leading case of Regina v. Lemsatef. 520 The appellant's van was stopped and searched at about 12:40 a.m. Police discovered contraband and took the appellant to the customs house to "help with enquiries." He was not told why he was being detained. His interrogation commenced at 3:30 a.m. At 4:20 a.m., the appellant said that he would not answer any further questions until he had seen his solicitor. The officers told him that he could not see his solicitor at that hour in the morning and that, although he was entitled to refuse to answer any questions, the officers were going to continue the interrogation. Appellant was allowed refreshments and a rest, but from time to time questioning was resumed. Later that morning, the appellant's solicitor, who had been contacted by the appellant's wife, went to the customs house, but was refused permission on the ground that allowing him to consult with the appellant at that stage would be prejudicial to the inquiries taking place. Shortly after 3:00 p.m., the interrogation began again. It ended with the appellant making oral admissions. At 6:15 p.m., he completed a written confession. The trial judge admitted both the oral and the written statements on the ground they had been made voluntarily, despite the objection that they were obtained in violation of the right of access principles set forth in the introduction to the Judges' Rules. The Criminal Division of the Court of Appeal made the following points: (1) Neither customs nor police officers have any right to detain a person for the purpose of helping with their investigation; police and customs officials must arrest or detain for the commission of an offense, or not at all, and there is no offense relating to "helping police with enquiries"; (2) a proper arrest or detention requires that the accused be told the offense for which he is being arrested; and (3) the fact that a suspect under detention has not yet made any oral or written admissions is not a good reason for refusing to allow him to consult with his solicitor. However, the Court found that, in this case, a

519. See Baldwin & McConville, supra note 508, at 146-47.
solicitor could not reasonably be expected to turn up until ordinary business hours and that postponing interrogation until that time might have caused unreasonable delay in light of the fact that there were others under suspicion who might flee or destroy evidence. Finding that the trial judge "clearly took into consideration the fact that he had to be sure that the admission had been made voluntarily," the Court concluded that "there is nothing to indicate that he exercised his discretion wrongly." 521

The court in Regina v. Dodd 522 took a similar approach. Defendants were taken into custody and held incommunicado for several days, during which time they denied the charges and demanded to see a solicitor. Access was denied on the ground that it would hinder police investigations since other suspects were still at large and the weapons used had not yet been found. The court determined that the police acted reasonably and held the resulting confessions voluntary. 523 In similar cases, courts have generally upheld the admission of a confession even when a defendant's right of access was denied unjustifiably, unless the violation of the access right was accompanied by improper inducements, trickery, or other unfairness that rendered the confession involuntary. 524

Clearly, the 1984 Act would prohibit the incommunicado treatment as well as the denial of access to legal advice that occurred in these cases. Furthermore, the Code would now prohibit questioning once the suspect requests a solicitor unless one of the noted exceptions applies. Although cases such as Lemsatef and Dodd do not amount to a direction that judges must admit all voluntary statements despite violations of right of access principles, they do indicate that these principles are sufficiently flexible to allow trial judges broad discretion to do so. They suggest that, even when the refusal of a request to see a solicitor amounts to a breach of a suspect's right of access, the ultimate test is one of voluntariness. As long as a statement is voluntary, the trial judge's exercise of discretion to admit it will not be disturbed on appeal.

B. Police Compliance and Judicial Enforcement: American Rules

Analyzing police compliance with American interrogation rules involves difficulties similar to those encountered in studying the English

521. Id. at 246.
523. Id. at 56.
524. See, e.g., Regina v. Gowan, [1982] CRIM. L. REV. 821 (C.A.) (defendant was denied access to a solicitor and was falsely informed that his friend had implicated him in a statement to the police).
approach. Many assumptions regarding police compliance are based on hunches or general feelings rather than on objective, reliable data. Moreover, one encounters additional obstacles: first, most American studies on the subject are less recent than their English counterparts; second, the objectives of American interrogation rules are less certain and the subject of significant controversy.

With respect to compliance with voluntariness requirements, American police in the early part of this century were regarded as lawbreakers. In 1931, the Wickersham Commission, after extensive study of police interrogation techniques, concluded that incommunicado detention and police use of "the third degree—that is, the use of physical brutality, or other forms of cruelty, to obtain involuntary confessions or admissions—is widespread." However, the Wickersham report as well as later decisions of the Supreme Court led to reform efforts which, by 1967, allowed the President's Commission on Law Enforcement to conclude that "today the third degree is almost nonexistent" and that "few Americans regret its virtual abandonment by the police." Certainly, violations of the voluntariness rules do occur still, but police use of third-degree techniques to extract confessions has largely disappeared in the United States.

With respect to Miranda requirements, a meaningful analysis of compliance and enforcement must start with some consensus as to the nature of the rules. In attempting such a definition, we are in one way more fortunate than the English. Miranda rules are shorter, simpler, and clearer. Before police engage in custodial interrogation, they must give the specified warnings. While the meanings of "custody" and "interrogation" are often debatable, they are regarded as embodying an objective standard. If the suspect states that he does not wish to talk, interrogation must cease. If he requests a lawyer, interrogation must cease until a lawyer is present. Although a suspect who has requested counsel nevertheless may initiate a conversation and volunteer a statement without the presence of his lawyer, the consequences of a suspect's assertion of his rights have been spelled out in greater detail than in England, at least before the new Code.

Moving beyond these narrow rules to the goals of Miranda, analysis

525. NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 4 (1931); cf. Chaffee, Pollack & Stern, The Third Degree, in id. at 13, 53 ("In England, by contrast, there has not been one reported case showing evidence of third-degree methods in the past 20 years.") (footnote omitted).

becomes more difficult. The *Miranda* Court, by the introduction of warnings and of defense counsel into the interrogation environment, sought to remove or at least substantially lessen the pressures inherent in custodial interrogation and, arguably, to reduce the frequency of the admission of confessions, which the Court found overvalued. These goals are much broader and less definite than the rules themselves. Warnings may be given and waivers obtained by "mechanical," rather than "meaningful," compliance, and even strict adherence to the rules may not significantly lessen the pressures that produce confessions.\(^{527}\) Thus, analysis of police compliance and judicial enforcement must distinguish between adherence to *Miranda*’s rules and compliance with its "spirit," including the ultimate purpose of diminishing the pressures of custodial interrogation and, possibly, reliance on confessions as a source of proof. The question of compliance with the rules themselves is considered first.

(1) **Police Compliance**

Police compliance with interrogation rules involves: (1) the giving of warnings; (2) proper response to a suspect’s assertion of rights; and (3) the general character of the interrogation as an indication of whether the statement is voluntary. Older studies found that police were gravely remiss in complying with *Miranda*’s warning requirements. The well-known New Haven study on the impact of *Miranda*, undertaken directly after the case was decided, found that, despite the presence of observers in the police station, detectives gave full *Miranda* warnings to only twenty-five of the 118 suspects questioned. Most were informed of their right to remain silent, but less than half were advised that anything they

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\(^{527}\) Others have recognized that the far-reaching goals of *Miranda* contrast with its limited mechanical rules:

Obviously, mere perfunctory recitation of the *Miranda* warnings, however elaborate or technically correct, falls far short of the broad policy objectives emphasized in Chief Justice Warren’s majority opinion. Broadly speaking, he sought to remove what the Court regarded as “inherent pressures of the interrogation atmosphere.” It was assumed that this goal could be attained by making certain that the suspect was fully aware of his right to remain silent and that his option to exercise that right at any time was kept open to him. Thus the Court emphasized not only the applicability of the Self-incrimination Clause to custodial interrogation, but also “the right to have counsel present at the interrogation” as an “indispensable” means of protecting this immunity. Conceding that confessions might “play an important role in some convictions,” Warren perceived a tendency in police circles to overstate the “need” for this form of evidence. Presumably, the *Miranda* requirements were announced with a view toward reducing the incidence of private interrogation and thereby encouraging greater reliance on investigative techniques used to obtain extrinsic evidence.

might say could be used against them, and even fewer were advised of their right to appointed counsel.528 Other studies of the same vintage came to similar conclusions.529 However, these deficiencies in giving the warnings appear to have been due in large part to the failure of police to assimilate the warning requirements promptly. The New Haven study noted:

During the two weeks of June after Miranda less than half of the suspects received a warning which included more than half the elements of the Miranda advice, but by August more than two-thirds of the suspects received such a warning. More important, the number of full Miranda statements increased even more dramatically. No suspects received the full Miranda statement in June, while more than one-third of those questioned in August received the complete warning.530

The study thus found that much of the initial police noncompliance may have been transitional. This view is supported by the later Postscript to the Miranda Project which analyzed FBI interrogations of Yale students, faculty, and staff in late 1967 and found that "[u]nlike the New Haven detectives, the FBI agents advised virtually every suspect of his rights."531 Later studies confirm that Miranda warnings are now given quite regularly.532 A Denver study during the summer of 1969, based on interviews with fifty suspects who had been interrogated, found that all suspects read or were read their Miranda rights.533 Moreover, police often have been found to overcomply with Miranda in a number of respects, such as embellishing the warnings with additional admonitions and even warning suspects when not required.534 By the end of the

528. Project, supra note 6, at 1550.
529. See Medalie, Zeitz & Alexander, supra note 6, at 1362-64; Reiss & Black, Interrogation and the Criminal Process, ANNALS, Nov. 1967, at 55 n.6; Sobel, supra note 10, at 15.
530. Project, supra note 6, at 1550-51 (footnote omitted).
531. Griffiths & Ayers, supra note 6, at 307 (footnote omitted). The researchers made the following observations about the earlier New Haven study:
Miranda was new to the New Haven detectives when the Journal study was begun, and their record of giving the warnings increased dramatically over the period of observation. With the introduction of the waiver form in New Haven, the detectives may well have given the full warning to most of the suspects they interrogated. Id. at 307 n.15 (citation omitted).
533. Leiken, supra note 532, at 10, 14.
534. Studies have found that overcompliance often results from a desire to ensure adherence to the rules, see Robinson, supra note 12, at 452, and often from a misconception as to the nature and extent of the rules. See O. STEPHENS, supra note 16, at 194-95; Schaefer, Patrol-
1960s, *Miranda* advice had become an accepted part of police work, and by the 1980s, it has become part of the American culture.\(^{535}\)

Whether police properly follow constitutional rules when suspects assert their rights presents a more difficult question. The New Haven study found that of forty-three suspects expressing some wish to terminate their interrogations, seventeen were questioned further by detectives. Police compliance, in this context, was found to be strongly related to the seriousness of the crime and the amount of evidence available prior to questioning. The more serious the crime and the less evidence available, the less likely the police were to allow a suspect to terminate the interrogation.\(^{536}\) The *Postscript to the Miranda Project* came to similar conclusions with respect to FBI interrogations.\(^{537}\)

Turning to police compliance with a suspect’s request for counsel, it is clear that the *Miranda* Court contemplated that its ruling would lead to the presence of more lawyers during police interrogation. While the Court noted that once a suspect requests counsel, the police could merely cease interrogation,\(^{538}\) the Court nevertheless assumed that lawyers would more frequently represent suspects in the interrogation process, offering them legal advice in the course of questioning by police.\(^{539}\) However, since police well know that attorneys will almost uniformly

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535. By 1983, a social and political commentator on *Miranda* wrote: *Miranda* had come to the stationhouse. Reading a suspect his constitutional rights was as familiar a procedure to a police officer as strapping on his gun. Settled policy. Particularly among younger officers, who, like the state court judges who had come to the bench with *Gideon, Escobedo,* and *Miranda* already in place, had grown up with them professionally, they were accepted, if not always with enthusiasm, at least with compliance. . . . The word *Miranda* had become a staple of the law enforcement community’s vocabulary, and prosecutors and judges alike referred to the stationhouse ritual of giving *Miranda* warnings as “mirandizing.” The Hill Street blues read them over national television, and in a nationally syndicated comic strip, Peppermint Patty, on her first assignment as a school safety patrol, read them to a kindergartner who had crossed the street improperly. *Miranda* had become part of the popular culture.


537. Griffiths & Ayers, *supra* note 6, at 308.


539. *Id.* at 466, 482. Referring to the *Miranda* decision, Professor Bernard Schwartz recently pointed out that, “[i]n effect, the Warren Court decided that an accused who requests the assistance of counsel should have it at any time after he is taken into custody.” Schwartz, *Chief Justice Warren and 1984,* 35 HASTINGS L.J. 975, 983 (1984); see Medalie, Zeitz & Alexander, *supra* note 6, at 1379-80.
advise a suspect to say nothing, they rarely attempt to obtain an attorney for a suspect who requests one.\textsuperscript{540} It is much easier merely to terminate questioning. When an attorney is contacted, police seldom seek to continue interrogation in the attorney's presence since they realize it will be futile. One study in the District of Columbia found that "in the vast majority (over 95\%) of these cases, the police have not continued the interrogation of the accused after counsel has been contacted."\textsuperscript{541}

Police compliance with interrogation rules might be inferred from studies revealing that defendants make very few motions to suppress statements and that very few such motions are granted. A study sponsored by the National Institute of Justice of robbery and burglary cases in Jacksonville, Florida and San Diego, California between 1978 and 1979 found exclusion problems involving a confession or admission in less than four percent of the cases and a change in outcome in less than one-third of one percent of the cases:

In the 619 arrests covered . . . there were only six suppression motions and only three which were granted. None of these caused a case to be lost, but there were two cases which were rejected at charging because of legality issues. One involved a failure to give \textit{Miranda} warnings and the confession in the other case arguably was the fruit of an illegal street detention.\textsuperscript{542}

But these statistics are ambiguous. While one might conclude that police are complying with the interrogation rules, one might likewise conclude that defense attorneys are not raising valid issues either because of incompetence or because they have found, by experience, that courts tend to believe the police even when the police are lying. Another explanation is that lawyers have become aware that courts are not serious about enforcing the interrogation rules. Further, these studies may also indicate that suspects are inclined to confess when they are already

\textsuperscript{540} Most police officers believe that the presence of an attorney makes interrogation impossible. O. Stephens, \textit{supra} note 16, at 192, 197. This assumption is not unrealistic. Milner observed that "[m]ost suspects waived their rights to an attorney. If an attorney was called into the case, he usually told his client to say nothing. Consequently there occurred either interrogations using pre-\textit{Miranda} techniques or no interrogations at all." Milner, \textit{supra} note 532, at 129 (footnotes omitted). But individual police practices may vary. \textit{See}, e.g., Leiken, \textit{supra} note 532, at 10.

\textsuperscript{541} Medalie, Zeitz & Alexander, \textit{supra} note 6, at 1390 (quoting J. Hennessey & L. Bernard, Comments Addressed To Those Participating in the \textit{Miranda} Project, in Junior Bar Supp. No. 2 to the \textit{Miranda} Kit (Sept. 30, 1966)). The authors noted that other bar organization attempts to play a role in police interrogation encountered the same experience. \textit{Id.} at 1390-91.

hooked on other evidence and, in these cases, defense lawyers seek to plea bargain rather than to contest cumulative evidence.\textsuperscript{543} Thus, while the statistics may suggest that police are complying with the interrogation rules, the strength of this inference is considerably weakened by other possible explanations.

While the evidence on police compliance with the specific directives of \textit{Miranda} is ambiguous, more can be said with respect to the manner of police compliance—whether the way that police give warnings and obtain waivers is consistent with \textit{Miranda}'s goals and ideals. Most studies have found that police comply less with the “spirit” than with the “letter” of \textit{Miranda}. Warnings are often given in a pro forma manner with the underlying assumption that a statement will be made.\textsuperscript{544} Though evidence points to some police “overreaction” to \textit{Miranda} in going beyond its literal warning requirements,\textsuperscript{545} generally police do no more to ensure that suspects are aware of their rights and can exercise

\textsuperscript{543} See infra notes 647-51 and accompanying text.

\textsuperscript{544} As noted in the New Haven project:

Despite increasing adherence to the letter of \textit{Miranda}, however, both groups of detectives complied less readily with its spirit. By and large the detectives regarded giving the suspect this advice an artificial imposition on the natural flow of the interrogation. . . . Often, the detectives advised the suspect with some inconsistent qualifying remark, such as “You don't have to say a word, but you ought to get everything cleared up,” or “You don't have to say anything, of course, but can you explain how . . . .”

Even when the detective advised the suspect of his rights without these undercutting devices, he commonly de-fused the advice by implying that the suspect had better not exercise his rights, or by delivering his statement in a formalized, bureaucratic tone to indicate that his remarks were simply a routine, meaningless legalism. Instinctively, perhaps, the detectives heightened the unreality of the \textit{Miranda} advice by emphasizing the formality of their statement. Often they would bring the flow of conversation to a halt and preface their remarks with, “Now I am going to warn you of your rights.” After they had finished the advice they would solemnly intone, “Now you have been warned of your rights,” then immediately shift to a conversational tone to ask, “Now, would you like to tell me what happened?”

Project, supra note 6, at 1551-52 (footnotes omitted); see also, O. STEPHENS, supra note 16, at 177-79, 199; Medalie, Zeitz & Alexander, supra note 6, at 1394; Robinson, supra note 12, at 493.

In referring to the willingness of law enforcement to cope with \textit{Miranda} and similar interrogation rule changes, the Los Angeles District Attorney stated:

If the Supreme Court wants police officers to sing “Yankee Doodle Dandy” to a suspect before taking a confession, we will do our best to see that every police officer in Los Angeles County learns the words and tune and sings at the appropriate time; but we can't anticipate the requirement.

Younger, Results of a Survey Conducted in the District Attorney's Office of Los Angeles County Regarding the Effect of the \textit{Miranda} Decision upon the Prosecution of Felony Cases, 5 AM. CRIM. L.Q. 32, 34 (1966).

\textsuperscript{545} See supra note 524 and accompanying text.
them than a strict reading of Miranda requires. In fact, police tend to encourage waiver of rights in ways not directly inconsistent with Miranda and waivers are usually obtained promptly and expeditiously.

This is not surprising since it is the duty of police to gather evidence, and, as put by one commentator, "[t]o ask a detective . . . to act both as interrogator and as counsel for the defense is to require a capacity for schizophrenia as a qualification for the job." Turning to Miranda's apparent goals of limiting the pressures of custodial interrogation and reducing reliance on confessions as a source of proof, evidence suggests that these goals by-and-large have not been achieved. Yet, blaming this failure on police noncompliance assumes the existence of definitive rules which are disobeyed. This is not necessarily the case. First, a strong argument can be made that the Miranda warnings themselves are inadequate to impart meaningful and effective knowledge of constitutional rights. Second, the Supreme Court generally has given Miranda a narrow interpretation and has required only literal or mechanical compliance. Recently the Supreme Court rejected the argument that police are responsible for advising the suspect of information known to them which may be generally useful to the suspect in deciding whether to exercise his rights:

> [W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self interest in deciding whether to speak or stand by his rights . . . . Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the state's intention to use his statements to secure a conviction, the analysis is complete and the waiver is

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546. The 1967 Pittsburgh study described the warning process as follows: If a suspect who has been advised of these rights indicates a willingness to talk, this is deemed to be sufficient evidence of an intelligent and understandable waiver of his constitutional rights in most situations. No further attempt is made to determine whether the waiver is intelligent and understanding.

Seeburger & Wettick, supra note 532, at 9; see Robinson, supra note 12, at 480.

547. See Leiken, supra note 532, at 39-40 (discussing anecdotally the results of interrogation room observations); Milner, supra note 532, at 129; Seeburger & Wettick, supra note 532, at 7.

548. Griffiths & Ayers, supra note 6, at 309-10.

549. See infra section IV.B.

550. Medalie, Zeit & Alexander, supra note 6, at 1394-1400; Project, supra note 6, at 1613-16; see Griffiths & Ayers, supra note 6, at 318-19 (confirming the Project's finding of the warnings as "almost wholly ineffective").

551. Referring to the Burger Court's pre-1980 decisions interpreting Miranda, one commentator concluded that the Court "had shown its disdain for the assumptions which underlie Miranda and had limited, misread, or ignored its holding at every apparent opportunity."

valid as a matter of law.\textsuperscript{552}

Thus, \textit{Miranda} has been interpreted to allow police to comply with its directives while, at the same time, subtly encouraging the suspect to waive his rights and make a statement.\textsuperscript{553} While the goals of \textit{Miranda} may have included reducing the pressures inherent in custodial interrogation, the rules themselves certainly do not require the police to \textit{discourage} suspects from making statements nor do they deter prosecutors from relying on such statements when they are obtained.

(2) Judicial Enforcement

Few American studies have concentrated on judicial enforcement of interrogation rules. Those commentators who have observed confession admissibility hearings have generally concluded that courts are not adequately enforcing \textit{Miranda} and other interrogation rules.\textsuperscript{554} When allegations at a hearing are contradictory or ambiguous, judges are likely to decide in favor of officials, particularly when the defendant has a prior criminal record.\textsuperscript{555} The lenient interpretation of the \textit{Miranda} waiver rules and the lack of any record-keeping requirement for interrogation proceedings have led some to conclude that "the \textit{Miranda} hearing is generally, for the suspect, a kind of ritualistic formalism with a vacuous result."\textsuperscript{556} This conclusion is somewhat supported by the foregoing Jacksonville and San Diego study finding extremely few successful motions to suppress statements. However, without more detailed studies, it is not possible to accurately determine whether courts are failing to uphold interrogation rules, or merely applying loose waiver standards in favor of admitting trustworthy evidence in a perfectly proper manner.\textsuperscript{557}


\textsuperscript{553} See Choper, \textit{Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights}, 83 MICH. L. REV. 1, 15 (1984) (suggesting that judicial attempts to prohibit coercion and intimidation “simply produced a shift in police tactics to more subtle techniques”). \textit{But see} People v. Honeycutt, 20 Cal. 3d 150, 570 P.2d 1050, 141 Cal. Rptr. 698 (1977) (in which police “softening-up” tactics were found so inconsistent with \textit{Miranda} warnings as to render waiver involuntary).


\textsuperscript{555} \textit{Id}.

\textsuperscript{556} Leiken, \textit{supra} note 532, at 44. In view of the approach of state trial courts in Colorado, the Denver Study concluded:

[T]he impact of \textit{Miranda} on the ultimate interrogation contest seems to have been effectively neutralized. Indeed, one of the latent functions of \textit{Miranda}, as implemented in Colorado, appears to be to aid the police in overcoming their evidentiary burden with respect to proving the suspect's knowledge and waiver of his constitutional rights.

\textit{Id} at 48 (footnotes omitted).

\textsuperscript{557} Many jurisdictions are regarded as interpreting \textit{Miranda} so as to require "little more
On the other hand, many examples can be given of courts taking *Miranda* seriously and suppressing highly important and trustworthy evidence for violation of *Miranda* rules when "a bit of stretching" would have enabled the court to admit the evidence. For example, in *United States v. Hinkley*, the District of Columbia Circuit Court of Appeals suppressed statements made by John Hinkley after his arrest for the attempted assassination of President Reagan on the ground that, prior to being questioned by the FBI, Hinkley had asked to speak with his father's attorney. The statements consisted of such personal facts as Hinkley's name, date of birth, place of birth, as well as his activities over the past year, but did not touch upon his activities in Washington or his alleged criminal act. The prosecution sought to use the interview in rebuttal to Hinkley's insanity defense, but both the District and Circuit Courts suppressed all evidence of the interview, reasoning that Hinkley had asked to speak with a lawyer. Arguably, much of the interview could have been characterized as "police words or actions normally attendant to arrest and custody" which the Supreme Court has held do not constitute interrogation under *Miranda*. Alternatively, the court could have admitted the "background interview" by finding that it was conducted in order to discover if others were involved in a continuing conspiracy to assassinate political leaders. Yet both the trial and appellate courts took the defendant's rights seriously, a fact recognized even by Professor Yale Kamisar, who has so often bemoaned lack of judicial enforcement of *Miranda* and other interrogation rules.

Furthermore, a number of state courts, relying on independent state grounds, have adopted interrogation rules well beyond the minimum protection established by the United States Supreme Court in *Miranda*.

In summary, the following general conclusions can be drawn with

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558. 672 F.2d 115 (D.C. Cir. 1982).
560. *See Hinkley*, 672 F.2d at 123; *cf. People v. Sirhan*, 7 Cal. 3d 710, 497 P.2d 1121, 102 Cal. Rptr. 385 (1972) (possibility of danger to political leaders created "exigent circumstances" justifying unconstitutional search).
regard to American police compliance and judicial enforcement: (1) Police generally comply with the warning requirement in the sense that they routinely advise suspects of their rights prior to custodial interrogation and, in fact, police may tend to overcomply in advising more often than required or outside the context of custodial interrogation; (2) police less often properly respect a suspect's assertion of rights; (3) if the "spirit" of *Miranda* is taken to mean that police should make an earnest effort to impress upon suspects the extent of their rights and the consequences of a waiver and, thus, to *discourage* suspects from giving statements, police are not fulfilling their obligations; (4) judicial enforcement is difficult to measure, but assuming that courts are properly enforcing the "letter" of the rules, they are often reluctant to impose on police the full force of *Miranda*’s "spirit."

IV. The Effect of Interrogation Rules on Obtaining Suspect Statements and the Significance of Suspect Statements in Criminal Prosecutions

A comparison of the English and American systems would not be complete without an attempt to determine the practical results of rules governing police questioning in terms of the frequency with which police attempt to elicit suspects' statements, the suspects' reactions to these attempts, and the importance that the respective judicial systems place on using the suspect as a source of testimonial evidence. The frequency of statements is in large measure affected by the aggressiveness of the police in seeking them. This, in turn, affects both the reactions of suspects and the availability of statements for use in criminal prosecutions. Thus, analysis of the significance of statements begins with a consideration of the extent to which police seek to obtain statements and how often they succeed. The role played by statements in the criminal prosecution can be understood fully only after gaining perspective on these factors.

A. The English Prosecution

(1) Law Enforcement Reliance on Police Interrogation

In England, police consistently use the interrogation process as an important tool in criminal investigations, particularly in serious cases. A study based on direct observation of interrogations, while noting a difference in practice between various police stations, found that "in nearly nine out of ten cases, suspects were interviewed at the police station and,

in most of the remaining cases, some kind of significant interchange short of a full interview took place between the suspect and the police either before their arrival at the station or subsequently.\footnote{563} A sample of four hundred Worcester Crown Court cases found that only six defendants were not formally interrogated.\footnote{564} Other studies confirm that police question nearly all suspects in serious cases.\footnote{565}

The nature of the offense can make a difference. Police are less likely to interrogate persons suspected of minor offenses.\footnote{566} A study of prosecution cases in contested trials in magistrates' courts (which generally involve less serious offenses) found that twice as many defendants charged with property offenses involving dishonesty had been interrogated than those charged with other minor crimes.\footnote{567} The researcher attributed the difference to the fact that property offenses are more likely to be based upon circumstantial evidence alone and require more proof of intent or dishonest state of mind than other cases. The fruits of greater interrogation efforts were easily seen. Statements were attributed to 50% of defendants charged with offenses of dishonesty compared with 19% of other defendants.\footnote{568} The suggestion that police rely on interrogation to a greater extent in property offense cases is also supported by the Worcester Crown Court study, which revealed a difference in the length of interrogation among types of offenses. Persons accused of burglary tended to be questioned for longer periods than those accused of "criminal damage," and those accused of offenses involving theft generally were questioned for longer periods than those accused of crimes of violence or "criminal damage."\footnote{569}

(2) Suspect Reaction to Interrogation

Clear evidence is available on the reaction of suspects to police questioning. The vast majority of English suspects talk, and most make a confession or admission. A number of different research projects confirm that from two-thirds to three-fourths of suspects questioned make a confession or damaging statement.\footnote{570} Recent studies of committal papers

\footnote{563} P. SOFTLEY, supra note 76, at 76, 85.
\footnote{564} Mitchell, supra note 513, at 598. Nearly 86% of the defendants were questioned by the police for less than two hours. \textit{Id.} at 597.
\footnote{565} J. BALDWIN & M. McCONVILLE, supra note 153, at 13-14; B. IRVING, supra note 246, at 103-04.
\footnote{566} P. SOFTLEY, supra note 76, at 77.
\footnote{567} J. VENNARD, supra note 387, at 10.
\footnote{568} \textit{Id.} at 11.
\footnote{569} Mitchell, supra note 513, at 597-98.
\footnote{570} J. BALDWIN & M. McCONVILLE, supra note 153, at 14-15; A. BOTTOMS & J. McCLEAN, DEFENDANTS IN THE CRIMINAL PROCESS (1976); B. IRVING, supra note 246, at 148-
found a confession or admission in over 75% of Crown Court cases. 571 Researchers consistently noted how uncommon it was for a person to remain silent altogether. One found that only 4% of those interviewed refused to answer all questions of substance; 572 another found even fewer cases in which the accused made no statement. 573 A third study found that only one out of sixty interviewed refused to answer all questions. 574 The Worcester Crown Court study found that of 394 defendants formally interrogated, only two made no statement of any sort. 575

Results were similar with respect to assertions by suspects of their right of access to a solicitor. One study found that only one suspect in ten asked to consult with a solicitor while in police custody. 576 The rate increased to one in nine when they were told of their right to contact a solicitor. 577 Research based on interviews with suspects yielded higher percentages but confirmed that only a minority of those interviewed ever requested a solicitor. 578 This undoubtedly is due in large part to the fact that, prior to the 1984 Act, suspects were not generally made aware of their right of access. 579 Suspects may also have realized that the prevailing police practice of denying requests and continuing interrogation would have made such a request futile. 580

(3) Significance of Suspect Statements

To gauge the significance of using the suspect as a source of testimonial evidence accurately, the role played by statements of the accused in the criminal prosecution must be analyzed. The analysis must include the frequency with which statements are used in the prosecution’s case as well as the importance of statements in relation to other available evidence of guilt.


572. P. SOFTLEY, supra note 76, at 74.


574. B. IRVING, supra note 246, at 149.

575. Mitchell, supra note 513, at 598.

576. P. SOFTLEY, supra note 76, at 68.

577. Id.

578. A 1972 study found that only 57 of 134 suspects requested a solicitor. Zander, supra note 511, at 345. A study published in 1979 found that only one in three suspects requested a solicitor. Baldwin & McConville, supra note 508, at 148-49.

579. See supra note 509 and accompanying text (discussing posted notices); see also P. SOFTLEY, supra note 76, at 68; Baldwin & McConville, supra note 508, at 149; Zander, supra note 570, at 346.

580. See supra notes 510-13 and accompanying text (discussing delay of access to counsel).
Reviewing the English literature on this subject, one is immediately struck by the plethora of general assertions of the great importance, or even absolute necessity, of the use of statements derived from police questioning. Such pronouncements as the following are commonplace:

[T]he accused's statement to the police often plays a great part in the prosecution's case. . . . The least criticism of police methods of interrogation deserves to be most carefully weighed because the evidence which such interrogation produces is often decisive; the high degree of proof which the English law requires—proof beyond reasonable doubt—often could not be achieved by the prosecution without the assistance of the accused's own statement.\(^{581}\)

Today the importance of confessions . . . cannot be overemphasized. . . . In many cases there would be no trial without them, for many times the state has no other evidence implicating the defendant.\(^{582}\)

[If] many suspects did not confess to crimes whilst being interrogated, many offences would not be detected as there is often no other evidence to show their involvement.\(^{583}\)

As noted previously, studies have found the existence of confessions or admissions in two-thirds to three-fourths of the cases and have discovered that only a very few suspects refused to answer all questions.\(^{584}\) One is tempted to conclude from these studies that, in England, testimonial evidence from the defendant procured through police questioning forms a vital part of the prosecution's case in a great majority of serious cases and in a substantial number of less serious ones. However, a number of researchers and scholars have recently questioned this conclusion. They argue that even if confessions are frequently used, they usually are merely cumulative of other evidence which alone is sufficient to establish guilt beyond a reasonable doubt.\(^{585}\)

Judging the importance of defendant statements in relation to other prosecution evidence is, of course, a much more difficult task than determining their frequency. Reliance on testimonial evidence directly from the suspect undoubtedly makes the prosecutor's task simpler; however, the true importance of such evidence can only be fully understood by determining how much more difficult, if at all, the prosecutor's task would be without it. This assessment requires a subjective evaluation of

\(^{581}\). P. Devlin, *supra* note 22, at 58.


\(^{584}\). *See* supra notes 563-75 and accompanying text.

\(^{585}\). *See infra* notes 588-92 and accompanying text.
the relative significance of suspect statements. Attempts at such evaluations often amount to no more than generalized assertions. For example, in a study involving direct observation of police interrogation procedures, the researcher simply concluded, apparently from overall impressions, that "given that so many admissions are obtained without adequate alternative evidence, [reducing the effectiveness of interrogation] would reduce the detection rate unless alternative proof and sufficient additional police manpower to gather it were available."586 When statistical analysis is undertaken, it often takes the form of a comparison of conviction rates between those who confess and those who do not. For example, the Worchester Crown Court study found that 93% of defendants who had made some sort of confession were subsequently convicted, whereas the conviction rate for those who denied their guilt was only 47%.587

Until recently, no English studies had attempted to document empirically the role that confessions play within the prosecution's evidence as a whole. Consequently, it was difficult to measure the accuracy of assertions of their importance against the argument that despite the frequency of confessions and the fact that suspects who have confessed are more likely to be convicted, confessions are generally superfluous. However, it may be that defendants most often confess when the case against them is strong and, therefore, when confessions are presented by the prosecution, it is usually in those cases where other evidence of guilt is overwhelming.

Fortunately, several important empirical studies recently have been conducted in England. A study based upon observations of interrogation at four police stations in 1979 found some cases in which the confession was crucial, but concluded that since the evidence against most suspects was highly incriminating, and since these suspects were more likely to confess, confessions usually merely served to strengthen an already strong case against the defendant.588 A more detailed and comprehensive study of Crown Court cases employed independent assessors to evaluate the significance of defendants' statements in relation to other

586. B. IRVING, supra note 246, at 152.
587. Mitchell, supra note 513, at 600.
588. P. SOFTLEY, supra note 76, at 86. Softley noted that if police questioning were restricted, some offenders would escape conviction, but stated,

these effects would not necessarily be dramatic in terms of rates. In only 8 percent of cases did the officers interviewed say that they would have dropped the case if the suspect had refused to answer questions, while in 56 percent of cases they said that they would have relied on the evidence already available.

Id. at 94.
prosecution evidence. Researchers found that "in almost half of all cases . . . the accused's statement had no real bearing upon the strength of the case as a whole."589 However, they also found that in about 30% of the cases, the confession was of "central importance" and in 20% it was considered "crucial" in the sense that without the statement there would have been no prima facie case against the accused.590 The study concluded that "in a majority of cases, evidence emanating from police interrogation of the defendant added nothing to the prosecutor's case or else merely supplemented an already overwhelming body of evidence."591

Another researcher, in studying contested summary trials, found that the prosecution offered full confessions in only 13% of the cases and other damaging statements in only 16%. Thus, in 71% of the cases tried, the prosecution did not present any statement of the defendant.592

From the foregoing studies one might be tempted to conclude that while confessions or admissions are present in a great majority of cases, at least serious ones, they generally are not of much importance and justice can usually be accomplished without resorting to the accused as a source of testimonial evidence. Indeed, the authors of the Crown Court study using independent assessors generalized from their own and other studies that "confessions are numerically of slight significance to the outcome of criminal trials" and that "interrogation is in fact a relatively unimportant part of the total law enforcement picture."593 However, these studies do not support the proposition that defendant statements are unimportant, but only that they are not crucial in most cases. While the authors of the Crown Court study played down the significance of defendant statements, their own research found that such statements were of some importance in approximately 50%, of central importance in about 30%, and crucial in 20% of the cases studied.594 The researchers also found a difference in the need for such evidence depending upon the type of offense: "Many more burglary and robbery offences would have been weakened by the exclusion of the accused's statements than was the case for any other offence type. . . . For robbery and burglary cases, the prosecution had less additional evidence to supplement the confession of the defendant."595

The study of confessions and admissions in summary trials also

590. Id. at 27-33.
591. Id. at 32.
592. J. VENNARD, supra note 387, at 23.
593. M. McCONVILLE & J. BALDWIN, supra 21, at 139, 154.
595. Id. at 33.
found a significant difference in the importance of confessions depending on the nature of the prosecutor's evidence. In cases based wholly upon circumstantial evidence, 51.5% resulted in conviction when no confession was offered, whereas 85.7% resulted in conviction when a full confession was presented. However, in cases based wholly on direct evidence, 76.6% of defendants were convicted without any confession offered. The researcher observed that "these findings, and the relatively low rate of conviction among cases brought on circumstantial evidence, would seem to indicate that confessions were most crucial in the latter type of case."^596

The foregoing studies indicate that although statements of the accused are not absolutely necessary in most cases, they are of significant and often crucial importance in a substantial number of cases, particularly serious ones and those lacking direct evidence of guilt.

B. The American Prosecution

(1) Law Enforcement Reliance on Police Interrogation

Numerous studies of police interrogations have been conducted in the United States, but most studies have concentrated on the process of interrogation and its results rather than on the decision to interrogate in the first place. Little is known regarding the extent of police efforts to question suspects. However, from remarks in some studies, it is apparent that police interrogation efforts vary widely.

Frequency of interrogation varies not only among different jurisdictions and police departments, but among different offenses. While reports consistently find frequent interrogation in homicide cases, these reports also show that departmental policies differ in their approach toward other types of offenses. The New Haven study found that interrogation was less likely in arrests for narcotics, vice, and minor offenses generally.\(^597\) The Pittsburgh study similarly noted that narcotics, gambling, vice, and certain other offenses were seldom referred to the police branch responsible for interrogation.\(^598\) A District of Columbia study found that the overall police interrogation rate was close to 50% but noted a striking difference among offenses: "[T]he interrogation rate varied considerably with the crime charged from a high of 75% for homicide to a low of 10% for sex offenses, and with rates higher than the 50% average for drug offenses, auto theft, assault, larceny-theft, and housebreaking."\(^599\)

^597. Project, supra note 6, at 1536.
^598. Seeburger & Wettick, supra note 532, at 7.
^599. Medalie, Zeitz & Alexander, supra note 6, at 1365 n.64. The interrogation rate was
Nathan Sobel, in 1966, noted that police and prosecutors in some jurisdictions interrogate in all felony cases, while New York City police interrogate only in "big" cases, which "are astonishingly few despite opinion to the contrary."600

Recent studies of cities with "professional" police departments show that generally the bulk of those arrested for serious offenses are questioned. A recent study sponsored by the National Institute of Justice of aspects of the criminal process in Jacksonville, Florida and San Diego, California found that of those arrested for burglary, police questioned 82% in Jacksonville and 78% in San Diego.601 The questioning rate seemed to be lower in robbery and felony assault cases.602 These later studies were both based upon the interrogation practices of highly "professional" police departments.603

A study of interrogation of suspects arrested for murder, forcible rape, robbery, and burglary from 1964 to 1968 by one western police department in anonymous "Seaside City" (described as an "enclave in the Los Angeles Metropolitan area") found that only 2% of suspects arrested prior to Miranda and 8% of suspects arrested after Miranda were not questioned.604 The study pointed out that police were interrogating fewer suspects after Miranda, but could offer no concrete explanations.605 The District of Columbia study also found that interrogations decreased somewhat after Miranda.606 Thus, evidence suggests that Miranda has had at least some impact on the frequency of police interrogation.

While the foregoing studies provide only limited information on the

also found to be less than 50% for robbery and weapons offenses. Id. at 1417 table E-6; see also id. at 1364-65.

601. F. FEENEY, F. DILL & A. WEIR, supra note 542, at 141, 143.
602. Id. at 142, 146.
603. Id. at 53, 56; Witt, supra note 16, at 324 n.40.
605. Id. at 325, 331. Witt noted the department's policy of securing a signed statement whenever possible but found that this policy was not being followed. Witt pointed out possible reasons:
From conversations with the detectives, it was obvious that since Miranda and the court's preoccupation with procedural matters, they do not want to question suspects in cases where they have enough evidence to convict without interrogation. The human factor is probably involved here, too, in that unenterprising detectives can now rationalize their indolence.

Id. at 326 n.44. This reflects an inconsistency with Sobel's position that confessions are obtained principally in those cases in which police already have enough evidence to convict. N. SOBEL, supra note 600, at 142-43.
606. Medalie, Zeitz & Alexander, supra note 6, at 1364-65.
extent of police efforts to question suspects, they do support the following
general conclusions: (1) police efforts to question vary greatly depending
upon the nature of the offense and the policies of each law enforcement
agency; (2) at least "professional" police departments probably continue
to question the great majority of suspects arrested for serious offenses;
and (3) there has been some decrease in questioning since \textit{Miranda}.

\textbf{(2) Suspect Reaction to Interrogation}

A number of American studies in the aftermath of \textit{Miranda} report
the reaction of suspects to police questioning. The New Haven study
found that 20\% of interrogated suspects refused to talk and that ques-
tioning was "unproductive" in 29\% of the studied cases. In sum, inter-
rogation was found "successful" in 51\% and "unsuccessful" in 49\% of
the cases.\textsuperscript{607} The study further found that the giving of \textit{Miranda}
warnings had not resulted in a decrease in successful interrogations, conclud-
ing that "the impact on law enforcement has been small."\textsuperscript{608} However,
the study did note an increase after \textit{Miranda} in cases in which suspects
refused to talk after being warned.\textsuperscript{609}

The District of Columbia study, based on interviews with suspects
after interrogation, found that of those "post-\textit{Miranda} defendants" who
were given the \textit{Miranda} warning, 40\% gave statements while 60\% gave
no statements.\textsuperscript{610} The Denver study, also based on suspect interviews,
concluded that the rate of confessions or other damaging statements was
well under 50\% and varied significantly according to the race of the
suspect.\textsuperscript{611}

A 1967 Pittsburgh study of homicide, robbery, burglary, auto lar-
ceny, and forcible sex offenses disclosed that of the 173 suspects interro-
gated, 74 (43\%) refused to talk while 99 (57\%) were willing to make a
statement. Of those who talked, 46 (27\% of all interrogated) con-
fessed.\textsuperscript{612} The study also scrutinized police case files for all suspects ar-

\begin{footnotes}
\item[607] Project, \textit{supra} note 6, at 1565 table 11.
\item[608] \textit{Id.} at 1613.
\item[609] \textit{Id.} at 1566 table 12.
\item[610] Medalie, Zeitz & Alexander, \textit{supra} note 6, at 1372-73.
\item[611] Leiken, \textit{supra} note 532, at 13 (confessions taken from 21.4\% of whites, 28.5\% of
blacks, and 46.1\% of Spanish Americans). Leiken also found, as would be expected, that the
young are more likely to make a statement and to confess, and that the more prior felony
convictions a suspect had sustained, the less likely he would be to confess. \textit{Id.} at 19-20. On
the other hand, contrary to what might be assumed, Leiken found that the more educated were
more likely to make a statement. \textit{Id.} In this respect, the study confirms the findings of the
\textit{Postscript to the Miranda Project}, which found that students and staff of Yale University spoke
rather freely to the FBI. Griffiths & Ayers, \textit{supra} note 6, \textit{passim}.
\item[612] Seeburger & Wettick, \textit{supra} note 532, at 13 table 3.
\end{footnotes}
rested and interrogated for similar offenses from 1964 to 1967 and found that the overall confession rate was approximately 50% in the pre-
Miranda cases and approximately 33% for the post-Miranda cases. The confession rate decline after Miranda was 16 to 17% and was even
greater for certain offenses.

The later "Seaside City" study found that suspects arrested for serious offenses refused to talk in 6% of pre-Miranda interrogations and in
9% of post-Miranda interrogations. Suspects gave an incriminating statement in 69% of pre-Miranda and in 67% of post-Miranda interro-
gations. After Miranda, there appeared to be somewhat fewer interrogations, more suspects who refused to talk, and fewer confessions. Yet
the author concluded that Miranda had only "an indirect effect on successful interrogation." In contrast, the Pittsburgh study pointed di-
rectly to Miranda as the cause for the decline in confession rates.

The greater incidence of successful interrogations in "Seaside" than in other jurisdictions might be attributable to many factors, including the higher
quality of the "Seaside City" Police Department and the fact that, since it confronts a less severe crime problem than the other cities studied, it
has more resources to devote to the interrogation process. The difference might also be attributed to the fact that, by the time of the "Seaside
City" study, police were able to adapt their interrogation techniques to comply with Miranda while at the same time more effectively encourage
suspects to talk.

Some information is also available on suspects' reactions to Miranda's right to counsel component. The assumption that, after Miranda
warnings, most suspects would request a lawyer has not been borne out. The District of Columbia study found that of those given Miranda

613. The specific figures are as follows: Case confession rate: pre-Miranda, 54.4%; post-Miranda, 37.5%; decline, 16.9%. Suspect confession rate: pre-Miranda, 48.5%; post-Miranda, 32.3%; decline, 16.2%. These "confession rates" include admissions as well, and, since the study only concerned suspects who were interviewed, figures are not affected by variances in interviewing rates. Id. at 10-12.

614. Id. (homicide 27% decline; robbery 26% decline).

615. Witt, supra note 16, at 325.

616. Id. at 326.

617. Seeburger & Wettick, supra note 532, at 23. The District of Columbia study also noted fewer confessions after Miranda. Medalie, Zeitz & Alexander, supra note 6, at 1414 table E-1.

618. See Witt, supra note 16, at 324 n.40.

619. See supra notes 544-53 and accompanying text.

620. Professor Louis B. Schwartz assumed that, "ordinarily after [Miranda] warnings, a person will request a lawyer and then no interrogation can take place until the lawyer is present." L. SCHWARTZ, LAW ENFORCEMENT HANDBOOK 114 (1980).
warnings only 7% requested counsel. The Pittsburgh study found that of 173 suspects arrested for serious offenses in the 1967 study period, only 27% terminated questioning by requesting counsel.

The National Institute of Justice study did not distinguish between refusals based on silence and those founded on requests for counsel. Of the burglary suspects questioned in Jacksonville, only 5% refused to answer but an additional 17% denied knowledge of or participation in the crime. One-half of those questioned confessed, and an additional 10% provided an admission, rendering a total of 60% of the interrogations successful. Of those interrogated in San Diego, 22% refused to answer and an additional 15% denied the crime, for a total of 37% either refusing or denying. Twenty-nine percent confessed and an additional 13% gave an admission, rendering a total of 42% of the interrogations successful. However, in both cities a significant number of arrestees were not questioned. Of all persons arrested for burglary, confessions were obtained in 41% of the cases in Jacksonville, and in only 23% of the cases in San Diego.

The results of these piecemeal studies vary widely and make it difficult to offer a comprehensive assessment of suspect reaction to police interrogation. However, it is clear that most studies found that a substantial percentage of suspects questioned refused to make a statement and that an even greater portion refused to confess. Furthermore, a number of the studies reveal some increase in these percentages after the Miranda decision. Nevertheless, some studies indicate that police have adapted to Miranda by altering their interrogation techniques to avoid any severe loss of confession evidence from wholesale assertions of Miranda rights. While evidence points to Miranda as the source of some increase in refusals to talk and a decrease in the confession rate, certainly Miranda has not led police or prosecutors to abandon the suspect as a source of testimonial evidence.

(3) Significance of Suspect Statements

In the United States, as in England, the importance of suspect interrogation has been assumed by courts and scholars as well as by the general public. Specifically, proponents of confession evidence argue that

621. Medalie, Zeitz & Alexander, supra note 6, at 1352, 1372 table 8, 1373 table 9.
622. Seeburger & Wettick, supra note 532, at 13 table 3.
623. F. Feeley, F. Dill & A. Weir, supra note 542, at 143.
624. Id.
625. Id. The figures do not work out to 100% since some cases fell into categories described as “other” and “unclear.”
626. Id.
such statements provide cogent proof of culpability, promote judicial efficiency by inducing criminals to plead guilty, and enhance criminal justice by increasing the conviction rate. Statements such as the following can be found in cases and in legal literature: “[M]any offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime.”627 “How else can [crimes] be solved if at all, except by means of the interrogation of suspects or of others who may possess information? Absent confession, the guilt of the offenders in most of the cases could not be established.”628 Public acceptance of these assertions has also been recognized:

The failure of the public to become aroused except momentarily over the Wickersham Commission’s Report on police [use of third degree techniques during interrogation] may be attributed in part to public acquiescence in police methods as supplying a need which our formal procedure does not satisfy . . . . Perhaps the difficulty is not that the public is not enlightened but that it is unwilling to demand cessation of practices believed essential to safeguard the social order.629

Yet, as in England, these assumptions have been seriously challenged not only by scholars, but at times by the Supreme Court.630 It is important, therefore, to look dispassionately at the available evidence on the subject.

The first measure of the importance of suspect statements can be found in the frequency of their use as part of the prosecution’s case. Judge Sobel reviewed 2000 cases presented to the grand jury of King’s County, New York from September 1965 through February 1966 and found that confessions constituted part of the evidence in 14% of the cases, with higher percentages in more serious cases.631 But Sobel noted that this figure was low in comparison with those of other jurisdictions due to the New York practice of interrogating only in “big” cases.632 A Chicago jury study found that confessions were offered in 19% of the cases, but with a higher percentage in more serious prosecutions.633 The New Haven study also found confessions in only 19% of the prosecution’s cases.634

Most other studies have found a greater frequency of confessions.

628. Inbau, supra note 12, at 267-70.
629. Kauper, supra note 19, at 1244 n.89 (emphasis in original); see supra note 525 and accompanying text.
630. See supra notes 10-12 and accompanying text.
631. N. SOBEL, supra note 600, at 141-43.
632. Id.
634. Project, supra note 6, at 1580 table F-3.
In a study of felony complaints issued by the Los Angeles District Attorney's Office, District Attorney Evelle Younger found confessions or admissions in over 40% of the cases.\textsuperscript{635} In 1965, New York District Attorney Frank Hogan reported that of ninety-one pending homicide cases in Manhattan, confessions would be offered at trial in sixty-two (68%).\textsuperscript{636} This is consistent with a Detroit Police Department study of similar vintage finding confessions present in approximately two-thirds of completed prosecutions in 1961 and 1965.\textsuperscript{637} The later "Seaside City" study found interrogations successful in 67% of the cases and noted that a confession or admission formed part of the evidence for the prosecution in 43% of the cases.\textsuperscript{638}

The fact that studies differ concerning the prevalence of confessions is not surprising since results vary significantly according to the nature and seriousness of the offense as well as the methodology, location, and time of the study. While the King's County study found the over-all confession rate to be 14%, the rate varied from 24% for murder to 10% for burglary.\textsuperscript{639} The National Institute of Justice report noted the striking difference between Jacksonville and San Diego in the number of confessions obtained:

There are fully twice as many confessions in Jacksonville in the robbery cases as in San Diego and nearly 60% in the burglary cases.

This greater number of confessions in Jacksonville appears to be due more to the number of defendants in San Diego who refused to answer . . . than to the difference in the number of defendants questioned.\textsuperscript{640}

Even more significant is the fact that results differ between studies based on case files from an early stage in the proceedings and those based on cases presented at trial. Since defendants who have confessed are much more likely to plead guilty or seek other dispositions short of trial, prosecution cases presented at trial are less likely to contain confessions.\textsuperscript{641} The foregoing Chicago and New Haven studies reporting con-

\textsuperscript{635} Younger, \textit{supra} note 542, at 256, 260.


\textsuperscript{637} Unpublished report by Detroit Police Detective Chief Vincent Piersante (July 27, 1966) [hereinafter Piersante Report] (discussing felony prosecutions for 1961), \textit{cited and discussed in} Project, \textit{supra} note 6, at 1640-41 & n.5.

\textsuperscript{638} Witt, \textit{supra} note 16, at 325, 329 table 8.

\textsuperscript{639} N. Sobel, \textit{supra} note 600, at 142.

\textsuperscript{640} F. Feeney, F. Dill & A. Weir, \textit{supra} note 542, at 141.

\textsuperscript{641} The "Seaside City" study found questioning successful in 67% to 69% of the cases although an alleged confession or admission formed part of the prosecutor's evidence in only 43% of the cases. Witt, \textit{supra} note 16, at 225. The fact that the latter figure was derived from the prosecutor's trial evidence, whereas the first was the result of studying police case files, most likely accounts for much of the difference.
fession rates of 19% were based on evidence presented at trial, whereas Hogan’s New York figures and the Detroit Police Department report apparently included pre-trial dispositions.

The prevalence of suspect statements in the prosecution’s case is but one measure of their significance in the criminal prosecution. Their importance in relation to alternative forms of evidence is another, more relevant measure.

Statements of defendants are often regarded as highly reliable evidence and confessions as cogent proof of guilt: “If . . . the ascertainment of truth is perceived as the major and essential objective of [a criminal proceeding], then it is clear that defendant’s silence is at least as inimical to the ascertainment of that objective as lack of discovery . . . .”642 “Ironically, in a criminal case the likelihood is that the story told the police will be more nearly accurate than that told the lawyer.”643

Some studies have confirmed a close connection between confessions and the conviction rate. Most recently, the National Institute of Justice study found:

The conviction rate in robbery and burglary cases involving confessions is 40 to 180 percent greater than in the cases not involving confessions.

. . .

Admissions obviously have a much smaller effect on convictions than do confessions. The conviction rate for robbery cases in which there is an admission is nonetheless considerably above that for the nonconfession cases.644

Such connections between the existence of a confession and the conviction rate have led some observers to conclude that confessions most often lead to convictions and that without confessions conviction of the guilty would be substantially impaired.645

However, even the most cogent proof of guilt may be merely cumulative evidence in cases in which the totality of proof is overwhelming. The importance of obtaining confessions is often justified by the claim that they are a powerful inducement to guilty pleas.646 This argument implies that police do not generally possess other strong proof of guilt.

642. R. SCHLESINGER, COMPARATIVE LAW 451 n.28 (3d ed. 1980).
644. F. FEENEY, F. DILL & A. WEIR, supra note 542, at 141; see also Seeburger & Wetrick, supra note 532, at 20.
645. See W. SCHAEFER, supra note 20, at 8, 32; Traynor, supra note 12, at 660-68.
646. See W. SCHAEFER, supra note 20, at 8; Traynor, supra note 12, at 664.
sufficient to impel a guilty plea. Yet some commentators dispute the apparent effect of confessions on the conviction rate, contending that defendants generally confess only when there is overwhelming evidence of guilt, and that in the great bulk of confession cases the defendant would have been convicted without the confession. As pointed out by La Fave and Israel, statistics showing that confessions are frequently relied upon in criminal prosecutions do not prove that they were required or even important: "The fact a confession was obtained in a particular case and was tendered by the prosecution at trial does not standing alone establish there existed a need in that instance to resort to interrogation."647 In Judge Sobel's study of 2000 indictments in New York, he found only 275 confessions.648 Because 90% of those who confessed pled guilty without contesting admissibility, Sobel concluded:

[A] very substantial percentage of those who give confessions plead guilty because there is other evidence in the case and not because the confession compelled the plea. To put the horse before the cart, where it belongs, this establishes that a substantial percentage of confessions are obtained when they are least needed.649

As a general proposition, Sobel's conclusion rests on shaky foundations because, as noted previously, King's County police and prosecutors, unlike most other law enforcement agencies, interrogated only in "big" cases, and these may be the very ones in which there is sufficient "other evidence" of guilt. More importantly, attempting to ascertain defendants' motives from raw statistics is a questionable enterprise, and Sobel provides no reason for the conclusion that defendants who confess plead guilty because of other evidence against them and not merely because they have confessed. In fact, the opposite appears more reasonable, except in cases of clearly inadmissible confessions, and few of the confessions in Sobel's study fell within this category.650 Finally, the importance of confessions in relation to other evidence in the case is difficult to judge by the decision of the defendant to plead guilty. Numerous other factors, such as the case load and plea bargaining practice of the particular jurisdiction, have a significant influence on the guilty plea decision.651

Sobel's conclusion has nevertheless received considerable support,
most of it based on personal experience or the facts of particular cases; however, as in England, a more reliable analysis of the relative importance of confessions has been achieved through evaluative and comparative case studies. The first studies of this type were conducted by law enforcement agencies. A study by the Detective Chief of the Detroit Police Department, based upon evaluations by investigating officers of the department, compared the importance of confessions in felony prosecutions in Detroit in 1961 with prosecutions completed in 1965. The study found confessions present in 64.7% and “essential” in 23.6% of the 1961 cases and found confessions present in 65.6% and “essential” in 18.8% of the 1965 cases. In 1965, New York District Attorney Frank Hogan reported that confessions would be offered in 68% of the 91 pending homicide cases and that indictments would not have been obtained without confessions in 28% of these pending cases. Los Angeles County District Attorney Evelle Younger conducted two surveys of felony cases in order to determine the impact of *Miranda* and *People v. Dorado*, a California “Escobedo” case preceding *Miranda*. The *Dorado* survey was conducted in 1965 and the *Miranda* survey in 1966. Confessions or admissions accompanied police requests for felony complaints in 40% of the cases in the *Dorado* survey and in half of those in the *Miranda* survey. When felony complaints were issued, confessions or admissions were present in 46% of the cases in the *Dorado* survey and in 57% of the cases in the *Miranda* survey. The prosecutors surveyed concluded that a confession or admission was essential in 40% of the cases in which defendants were convicted after trial; however, when defendants convicted on a plea of guilty were factored in, the figure declined to 10%.

The well-known New Haven study appears to be the first comprehensive “academic,” non-law enforcement effort to rate the relative importance of confessions. Through station house observation, examination of police files, and conversations with detectives, the study found that interrogations were “essential” in only 3% and “important” in 10% of the cases observed. The evaluations were based on information known at the time of the interrogation. As cases developed, how-

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652. See authorities cited supra note 10.


654. See Ellis, supra note 7, at 854.


656. Younger, supra note 544, at 262. Further figures from unpublished portions of the report also point to lesser importance of confessions. See Project, supra note 6, at 1641 & n.12.

657. Project, supra note 6, at 1583.
ever, it became apparent that interrogations were even less necessary than had been supposed. The authors echoed Sobel in concluding that "interrogation usually just cemented a cold case or served to identify accomplices."658

On the other hand, the Pittsburgh study, based on the authors' evaluation of police case files in homicide, robbery, burglary, auto larceny, and forcible sex cases which contained confessions, found such confessions necessary in 24.7% of pre-Miranda cases and in 32.8% of post-Miranda cases.659 If cases without confessions were included, the proportion of cases in which confessions were necessary dropped to 20.2%.660 The study noted that defendants who confessed were convicted 78.7% of the time while defendants who had not confessed were convicted 54.5% of the time.661

The "Seaside City" study published in 1973 is the latest American academic evaluation of the relative importance of confessions. The author evaluated 478 police case files involving persons arrested and incarcerated for murder, forcible rape, robbery, and burglary in anonymous "Seaside City." Interrogation was found "essential or important" in 24%, "not important" in 8%, and "unnecessary" in 68% of the cases. Despite the fact that the vast bulk of the suspects were questioned and that interrogation, when attempted, was successful more than two-thirds of the time, the author concluded that "in most cases interrogation was not needed to solve the immediate crimes for which the suspects were accused."662 However, since interrogation was found to be necessary in approximately one-fourth of the cases and to be important in performing many collateral functions, the author cautioned that "the results do not support the thesis that police interrogation is unnecessary."663

The importance of confession evidence in criminal cases is best measured by taking into account both the prevalence of confessions and their relation to other available evidence of guilt. As with police efforts to interrogate, the frequency of confessions varies according to the nature of the offense and the practices in the particular jurisdiction. Yet confession rates vary even more widely (from 14% to 68%) than interrogation rates since much depends on when the confession rates are evaluated—principally, whether before or after plea bargaining takes place.

658. Id. at 1588.
660. Id. at 15 table 4.
661. Id. at 20.
663. Id. at 332.
Even when confessions are present, they are not necessarily important. Certainly there is a close connection between the presence of confessions and the conviction rate, and it is reasonable to assume that those who confess are more likely to plead and be found guilty. However, suspects facing overwhelming evidence of guilt may well plead guilty for reasons other than having confessed. Thus, the most reliable studies of the importance of confessions evaluate confessions in light of other prosecution evidence. Even the results of these studies diverge widely, but such studies generally conclude that confessions are necessary in less than half the cases in which they are found. Nevertheless, the studies do demonstrate that confessions play an important and often essential role in a substantial minority of criminal cases in the United States.

C. Comparison

Both the English and the American law enforcement systems place significant reliance on police interrogation. This is particularly true in serious cases and in those cases requiring proof of a state of mind not readily inferable from objective facts. Although differences between the systems do emerge, the substantial variety of practices in the various American jurisdictions makes comparison difficult. With respect to the frequency of interrogation, it appears that, in serious cases in England, virtually all suspects are questioned in some fashion. In the United States, interrogation in serious cases varies from over 90% in "Seaside City" to 50% in the District of Columbia and only a few "big cases" in New York according to the Sobel report. The more recent National Institute of Justice study found use of interrogation in about 80% of burglary cases but fewer robbery and assault cases. While generalizations are difficult, it seems fair to say that even though some United States law enforcement systems interrogate as much as the English, many, and probably most, do not. By and large, in serious cases the English authorities tend to rely on interrogation to a greater extent than do police departments in the United States. Some American studies have found a reduction in interrogation since Miranda, but this alone does not appear to account for the significant difference in interrogation rates. Still, in America as in England, recent studies have shown that at least "professional" police departments question the great majority of suspects arrested for serious crimes.664

Although comparison is hampered here as well by significant varia-

664. The lack of sufficient data precludes comparison of interrogation practices with respect to minor offenses.
tions in the American studies, clearer differences emerge between the two countries with respect to the reaction of suspects to police interrogation. The English studies consistently found that from two-thirds to three-fourths of suspects questioned by police made damaging statements, i.e., either confessed or made some admission of guilt. In contrast, successful interrogation rates cited by the American studies varied from one-fourth to two-thirds. Most American studies found that half or fewer of those interrogated made damaging statements. Exceptions were the "Seaside City" study and the National Institute of Justice study of burglary interrogations in Jacksonville, but even these rates did not match the 75% figure recently cited by the British reports of Crown Court cases. Also, while the percentage of suspects refusing to make any statement at all varied a good deal among the American studies, the numbers of such suspects were generally significantly higher than comparable statistics in the English studies.665

Because English police place somewhat greater emphasis on interrogation, and English suspects tend to make damaging statements at a greater rate than their American counterparts, one would suspect that in England, suspect statements assume greater importance in criminal prosecutions. English studies have, in fact, consistently found damaging statements in two-thirds to three-fourths of Crown Court cases, with recent studies of committal papers finding admissions or confessions in over 75% of the cases.666 In contrast, results of American studies vary widely from a low of 14% to a high of 68%, with most studies finding suspect statements in less than half the cases.667

Many more American than English studies have considered the significance of suspect statements in light of other evidence of guilt—a more meaningful measure of their importance in criminal prosecution than mere frequency of occurrence. Figures are generally based on all serious prosecutions studied, not merely those containing confessions. As with frequency figures, results of American studies of the relative importance of suspect statements vary considerably. The proportion of cases in which a statement was evaluated as necessary for conviction varied from a low of 3% in the New Haven study to a high of 28% in Hogan's New York homicide study. Recent scholarly studies have come to somewhat less divergent conclusions, finding statements necessary for conviction in

665. Comparing request for counsel rates would not be productive in view of the very few studies considering the question, but it does appear that in both England and the United States suspects rarely request counsel prior to making a statement.
666. See supra note 571.
667. See supra notes 631-38 and accompanying text.
about 20% of the cases. Though comparison with the English system is difficult because of the existence of only one authoritative study, the objective and meticulous methodology of that study entitles it to significant weight. This study concluded that suspect statements were necessary for conviction in 20% of Crown Court cases. They were of central importance in another 10% and of some importance in an additional 20%. In the remaining cases they were regarded as of no consequence.

While firm conclusions are particularly hazardous in this area due to the likelihood of somewhat different evaluative criteria, it is apparent that most American studies have found statements necessary for conviction in fewer cases than in England. The Detroit, New York, and Pittsburgh studies cite results comparable with the English, but others cite lower figures, particularly Younger (10%) and New Haven (3%). Also, under the broader category of statements either necessary or important, the New Haven study cited 13% and the "Seaside City" study 24%. In significant contrast, the English study reported that statements were necessary or important in about half the cases.

In summary, the criminal justice systems of both countries rely on police questioning of suspects to a significant degree, with police usually questioning the majority of suspects in serious cases. Interrogation rates in America vary substantially, but are generally lower than in England, and evidence points to slightly reduced police reliance on suspect questioning as a source of proof since *Miranda*. Clearer differences appear in suspect reaction to police questioning. While results of American studies vary widely, it can generally be said that a substantially greater percentage of English than American suspects subjected to questioning make damaging statements. American suspects are more likely to refuse to make any statement. Furthermore, American studies conducted after *Miranda* became common knowledge detected some increase in refusals and some decline in confession rates. Differences in the significance of suspect statements in criminal prosecutions are consistent with the higher English confession rates. Confessions are thus more prevalent and more important in English prosecutions.

These generalizations obviously cannot accurately be applied to all the numerous and diverse criminal justice systems in the United States. However, while some may parallel if not exceed the English in their reli-

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668. *See supra* notes 659-63 and accompanying text. The Pittsburgh Study found statements necessary for conviction in 20% of the cases. The “Seaside City” study found them necessary in 16% of the cases and “important” in an additional 8%.

669. *See supra* notes 588-95 and accompanying text.
ance on suspect statements, studies suggest that most do not. Neverthe-
less, American studies should be viewed with caution since most are less
recent than the English, and law enforcement policies and practices may
have changed appreciably.

Finally, a caveat: The significance of suspect statements has been
examined only with respect to its role in the prosecution's case. As one
English author noted, "it would be imprudent to accept without quali-
ification the crude assumption that, even if confession evidence is rarely
crucial to the prosecution's case, police interrogation is itself of little con-
sequence in the criminal process." Police questioning of suspects has a
number of other functions and uses. It often results in discovery of sto-
len property or in apprehension and conviction of other suspects. It may
avoid the possibility that police will release a guilty suspect and eventu-
ally prosecute an innocent one for the crime under investigation. On the
other hand, it may result in a determination that the suspect is innocent
and aid in the apprehension of the guilty. Confessions of criminal ac-
tivity (including uncleared crimes for which the suspect may not be
under investigation) free police resources for investigating other criminal
activity and free courts and prosecutorial resources for other cases. In
addition, use of confession evidence may reinforce public confidence in
the system of criminal justice by affirming that "the right man" has been
convicted. These collateral justifications for police questioning, while
highly significant, are extremely diverse and their relative importance
would be difficult to measure.

V. Summary and Analysis

English and American interrogation rules are quite similar in a
number of fundamental respects. Both countries afford suspects a right
to silence as well as a qualified right to legal assistance and require that
the police notify suspects of these rights. The laws of both countries es-

670. J. BAlDwIN & M. McCOvINvILe, supra note 153, at 7.
671. A number of studies illustrate how questioning before and after arrest may allay sus-
picion and lead to release of suspects without prosecution. See ROYAL COMMISSION REPORT
672. "A confession is sought to be on the safe side, even where there is other sufficient
evidence." Id. ¶ 2.16.
673. Through examining committal papers in Crown Court cases, McConville and Bald-
win sought to discover whether the interrogation of defendants produced material other than
confessions which assisted police investigations. They concluded that "many of the collateral
benefits assumed to be gained from interviewing suspects while in police custody are in impor-
tant respects illusory." M. McCoNvILe & J. BAlDwIN, supra note 21, at 153. However,
their study concerned only interrogations resulting in committals and failed to consider a
number of important collateral objectives.
establish an investigatory period during which police are relatively free to question the suspect and an accusatory period during which questioning is restricted in some manner. Finally, both countries prohibit the use at trial of "involuntary" confessions regardless of their reliability.

These similarities reveal shared values. While we recognize the benefits of suspect statements, we want to guard against pressures that would produce unreliable confessions or would amount to compulsion rendering the process cruel or unfair or incompatible with an adversary system of justice. We neither wish to take advantage of a suspect's ignorance of his rights, nor aim to frustrate his desire to seek legal assistance. Nevertheless, we recognize that suspects who receive legal advice are often less likely to give a full and truthful account of events, and we hesitate to impose rules which would significantly impair the questioning process.

Although the United States and England entertain similar values, the approaches we take toward satisfying those values in many respects diverge considerably. Some disparities can be traced to significant differences in the structure of our respective governments. Lacking a written constitution and judicial power to override legislative acts, England gives its judicial system fewer tools with which to protect individual rights when confronted with the popular will. The intent of the majority, as embodied in an act of Parliament, is the last word in England, while in the United States some of the most intractable national conflicts, particularly in the criminal justice area, are ultimately resolved by the judiciary acting as the ultimate interpreter of the Constitution. Another relevant difference is the fact that England's system of law enforcement is much smaller and more unified than ours, which makes a comprehensive rational approach to problems much easier. In our system, where primary responsibility for law enforcement rests with each of the fifty states, it would be most difficult to devise a national scheme for the treatment of suspects of the type recently adopted in England. Studies and recommendations, even of such respected groups as the American Bar Association, ultimately have only a limited effect on the actual process of criminal justice when compared with a unified scheme enforced by rules of law.

While these differences in governmental structure explain the lack of

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674. Reliance on the European Convention on Human Rights is now possible but is of little value in the bulk of criminal cases since pleas based on the Convention cannot be directed to English courts but only to the World Court in Strasbourg. See Wall St. J., Oct. 21, 1985, at 1, col. 1.

675. See D. Karlen, supra note 161, at 1-12, 103-04.

676. In Moran v. Burbine, 106 S. Ct. 1135 (1986), the Supreme Court accepted police interference with counsel access to the client which was "at odds with" the American Bar Association Standards of Criminal Justice.
a comprehensive national scheme for the treatment of suspects, they do not explain why neither any individual state nor the federal government has established comprehensive rules of its own. By and large, the treatment and questioning of suspects are governed in the United States by a patchwork of constitutional mandates, state and municipal law, and executive and agency regulations. The reluctance of our state and federal governments to impose comprehensive rules on the subject must be explained by more than structural impediments.

The distinct approaches of the English and American systems reflect fundamentally different perceptions regarding the relative importance of the various competing values involved. A reasonable argument can be made that the English place greater emphasis on the protection of individual rights. England's long history of abuses of authority has led to an enduring concern with fairness toward the accused during pre-trial confrontations with the police—a concern which, until recently at least, has not been matched in this country.677 This concern underlies the development of the English caution rules that began at the turn of this century as an inspiration of the judiciary.678 In the United States, similar warnings were not legally required until Miranda was decided in 1966.679 Furthermore, the Judges' Rules and associated directives long ago recognized other protective principles dealing with the treatment of persons in custody, the preservation of statements, and the right of access to a solicitor.680 The Police and Criminal Evidence Act 1984 and the Code of Practice strengthened these principles in many respects. Cautions are now required to be given earlier and more often than under either the old Judges' Rules or Miranda.681 There is now in place a detailed, comprehensive scheme governing the treatment and questioning of persons in custody.682 An independent custody officer is responsible for the conditions and length of detention as well as advice of rights and extent of permissible questioning.683 England's present commitment to memorialize in a reliable manner suspect statements at police stations is also significant. Written statements were formerly rare, but the new Code states a preference for contemporaneous recording of interviews at police stations.684 Additionally, in view of the mandate in the 1984 Act for tape

677. See supra note 19 and accompanying text.
678. See supra note 154 and accompanying text.
679. See supra notes 189-93 and accompanying text.
680. See supra notes 163-65 and accompanying text.
681. See supra notes 173-85 and accompanying text.
682. See supra section II.C.
683. See supra notes 178-82 and accompanying text.
684. See supra notes 375-80 and accompanying text.
recording of interviews and of the preliminary results of the field trials, a national system of tape recording of interviews with suspects at police stations is likely to be in place soon.\textsuperscript{685} Finally, the 1984 Act provides a right not to be held incommunicado and a right of access to a solicitor. This access right has been strengthened and made meaningful by written notice and waiver rules, duty solicitor schemes, restrictions on further interview of one who has requested legal advice, and narrowing the exceptional situations in which access can be delayed. Neither \textit{Miranda} nor associated constitutional or statutory rules offer our citizens the same comprehensive protections.

It would be a mistake, however, to conclude that, when compared with our system, the English rules are more protective of the accused. With respect to the law governing interrogation, the “rights” provided by the Judges’ Rules were largely illusory and prior to the 1984 Act a number of English scholars had concluded that:

\begin{quote}
The situation [with respect to police interrogation] is . . . more favorable to the accused in the United States where the courts have striven in recent years to give meaning to his rights. In the absence of corresponding efforts on the part of English courts . . . , in England more than in the United States, the unverifiable product of police interviews has . . . “a decisively malign impact on the criminal process.”\textsuperscript{686}
\end{quote}

Certainly, the enhanced protections offered by the 1984 Act and Code of Practice reflect the English concern that police act fairly toward an accused, but they are also meant to serve more immediate and pragmatic purposes. Traditionally, the English law enforcement system has enjoyed considerable public confidence. During the past two decades, however, that confidence has declined considerably.\textsuperscript{687} Deteriorating relations between the public and the police are most evident in poor and minority communities.\textsuperscript{688} To a great extent, the new protections are in-

\textsuperscript{685}. \textit{See supra} notes 390-415 and accompanying text.

\textsuperscript{686}. M. \textsc{McConville} & J. \textsc{Baldwin}, \textit{supra} note 21, at 5-6; \textit{see M. \textsc{Graham}, \textit{supra} note 19; Hughes, \textit{supra} note 19; \textit{see also} M. \textsc{Freedman}, \textit{supra} note 19, at 105-12; cf. \textsc{Packer, Two Models of the Criminal Process}, 118 U. Pa. L. Rev. 1 (1964).

\textsuperscript{687}. The decline in public confidence and esteem of the police has been recognized by English commentators. \textit{See M.D.A. \textsc{Freeman}, \textit{supra} note 280, at viii (“The reputation of the police is not what it was even a decade ago.”); Munro, \textit{supra} note 172, at 588 (“There has been a distancing of the police from the public and its representatives in the last 20 years, and there is a price to be paid in deteriorating relations with both.”); The Times (London), Mar. 12, 1986, at 5, col. 1 (“The police are no longer as popular as they once were, and there are signs that the halcyon days may have gone for good.”) (comment of P. \textsc{Evans} on an article in the March 1986 \textit{Police Federation} magazine). A brighter view of the British police was expressed in 1967 by D. \textsc{Karlen}, \textit{supra} note 161, at 98-100.

tended to restore public confidence in law enforcement and lead to better police-community relations. The 1984 Act also gives police greater powers, particularly in the area of search, arrest, and detention, and the new protections are meant to afford some balance between suspects' rights and these new powers. In many respects the new laws either approve existing practices or give the police even greater powers to obtain statements, but the independent custody officer, the tape recording of statements, and the access to a solicitor all serve to open the questioning process to outside scrutiny, enhance confidence in the outcome, and afford an accused greater protections against unfair police practices as a balance to the greater police powers under the Act. Thus, far from crippling police interrogation, the new rules endow the questioning process with renewed respect and legitimacy.

The willingness of the English to accept police interrogation as an integral and important part of their criminal justice system stems from a number of factors. First, the English concern with open and fair treatment of suspects is tempered by the realization that the crime problem is steadily and rapidly worsening and that the police must be allowed the means and the latitude to deal with it effectively. Second, the English traditionally place a high value on the need for an efficient process for discovering the truth and punishing the guilty. This attitude is reflected in the importance given to the reliability principle in dealing with the fruit of an involuntary confession and in the almost wholesale rejection of the exclusionary rule as a means of enforcing the principles governing the arrest, search, and treatment of suspects.

This same pragmatic view also accounts for a fundamental difference between English and American attitudes toward the necessity and legitimacy of police questioning. While agreement is not unanimous, the

689. This purpose was evident from the Parliamentary debates on the Codes and was exemplified by Lord Glenarthur's statement in the House of Lords:

In conclusion, let me say that the Act and the Codes of Practice represent a major step forward in police public relations. . . . [T]he essential point is that we have a real chance of breaking through the innuendo and suspicion which has so often bedeviled the treatment of suspects by the police. The whole area is a fruitful field for the types of fears and allegations which have dogged policing for such a long time especially in sensitive areas—for example areas concerning young people, ethnic minorities and so on—where most damage can be done.

House of Lords, Dec. 9, 1985, col. 38.

690. See M.D.A. FREEMAN, supra note 280, at viii; T.C. WALTERS & M.A. O'CONNELL, supra note 150, at xv.

691. For example, the limited right to silence remains unchanged and the voluntariness rules have been weakened. See supra notes 50-51, 85-97 and accompanying text.

692. See supra notes 22-27 and accompanying text.

693. See supra notes 481-87 and accompanying text.
English generally more readily accept police questioning as an integral and indispensable part of their criminal justice system. After extensive study, the 1981 Royal Commission clearly recognized both the propriety and necessity of suspect interrogation,\(^\text{694}\) and recently both the Houses of Parliament reaffirmed its legitimacy as one of the primary purposes of detention or arrest.\(^\text{695}\) In this country, on the other hand, there is no national consensus on the importance of suspect interrogation.\(^\text{696}\) For example, in their noted treatise on criminal procedure, La Fave and Israel merely cite a few inconclusive studies and conflicting assertions before pointing out that statistics as well as arguments on both sides are inconclusive.\(^\text{697}\) Unlike the English, we have not succeeded in arriving at a consensus through a coordinated national effort involving public debate and commission study.\(^\text{698}\) Even the Supreme Court has demonstrated a schizophrenic attitude toward police interrogation, at times cautioning us not to "overstate[ ] . . . the 'need' for confessions,"\(^\text{699}\) and asserting that "the very fact of custodial questioning exacts a heavy toll on individual liberty,"\(^\text{700}\) but more recently stressing that admissions of guilt are not only desirable, but "essential to society's compelling interest in finding, convicting and punishing those who violate the law."\(^\text{701}\) Yet, the Supreme Court presumes that custodial questioning is "inherently coercive," and therefore illegitimate, unless measures are taken "to insure

\(^{694}\) ROYAL COMMISSION REPORT 1981, supra note 12, ¶ 4.1, at 70. Most likely, the Commission's recognition of the need for interrogation merely reflected the existing position of the courts and the government. Lidstone & Early, supra note 20, at 489, 505.


\(^{696}\) See supra notes 6-16 and accompanying text.

\(^{697}\) 1 W. LA FAVE & J. ISRAEL, supra note 99, § 6.1(2); see also Ellis, supra note 7, at 855; Weisberg, supra note 6, at 46.

\(^{698}\) The significance of the comprehensive, coordinated approach taken by the 1981 Royal Commission on Criminal Procedure toward balancing the rights of the accused and the needs of society cannot be underestimated. See M. GRAHAM, supra note 19, at 232.


\(^{700}\) Miranda, 384 U.S. at 455.


On occasion, the attitudes of individual justices toward interrogation seem ambiguous and indecisive. Compare the language of Justice Frankfurter in Watts v. Indiana, 338 U.S. 49, 54 (1949) ("Ours is the accusatorial as opposed to the inquisitorial system. . . . [S]ociety carries the burden of proving its charge against the accused not out of his own mouth . . . but by evidence independently secured through skillful investigation.") with his statements in Culombe v. Connecticut, 367 U.S. 568, 571 (1961) ("[O]ffenses frequently occur [when] . . . nothing remains—if police investigation is not to be balked before it has fairly begun—but to seek out possibly guilty witnesses and ask them questions . . . . [S]uch questioning is often indispensable to crime detection.").
that the right against compulsory self-incrimination [is] protected.'”702

The consequences of a greater general acceptance of the necessity and propriety of police questioning in England can be seen in a number of contexts. First, England has been more reluctant than the United States to impose absolute rules which could significantly impede the interrogation process. For example, English law does not give a suspect a firm right to cut off questioning by asserting a desire to remain silent; English police do not have to take “no” for an answer and may continue to attempt to persuade the suspect to give a statement.703 Similar differences arise when the suspect asks for a lawyer. Miranda established a rigid rule prohibiting further interrogation unless the suspect himself initiates conversation and then waives his right to counsel. The Judges’ Rules contained no such prohibition, and while the Code of Practice now proscribes further questioning once a suspect has asked for legal advice, the new restriction is not absolute. Police may seek the suspect’s agreement “in writing or on tape” to begin the interview without a solicitor present.704 Even if the suspect fails to agree, police may take advantage of numerous exceptions to the restriction, such as finding that postponing the interview will “cause unreasonable delay to the process of investigation.”705

Second, English law allows police a freer rein to take advantage of the pressures associated with custodial questioning. While we have focused attention on reducing these pressures, and therefore reducing the danger of compulsion, the English more readily accept the pressures associated with normal police inquiry. England’s new relaxed “voluntariness” rules provide one example. The traditional two-part English voluntariness test asked whether the confession was obtained (1) by fear of prejudice or hope of advantage or (2) by oppression.706 Older English cases applied these rules separately and strictly, holding that statements produced by threats or promises were involuntary even though the suspect’s will was not sapped such that the statement was deemed to have been obtained by oppression.707 Recent cases have moved away from the strict inducement test toward the more flexible oppression test, which focuses on free will, and thus more closely resembles the American stan-

703. See supra notes 237-38 and accompanying text.
704. See supra note 348 and accompanying text.
705. See supra note 310 and accompanying text.
706. See supra notes 58-60 and accompanying text.
707. See supra notes 61-63 and accompanying text.
The Police and Criminal Evidence Act 1984 continued the movement away from the traditional strict voluntariness standard. Now, confessions will be considered "involuntary" only if obtained by oppression or by conduct likely to render a confession unreliable. Although the new oppression standard embodies the concept of free will, the restrictive list of police conduct that would qualify as oppression suggests that only rather extreme inducements will be viewed by the courts as falling under the automatic exclusionary rule. Also, the new reliability principle shifts the focus from whether the threat or inducement caused the confession to whether the threat or inducement was likely to cause the suspect to confess falsely. This objective reliability standard suggests that only in the most unusual case will a court find that a truthful confession must be excluded on the ground that the attendant police pressures were likely to produce a false one. It should be pointed out that this new test is nearly identical to the standard advocated by Inbau and Reid in their controversial treatise *Criminal Interrogation and Confessions*, which has been the subject of considerable criticism in this country.

Though the new Act retains the traditional stiff "beyond reasonable doubt" standard, the prosecution should now more easily be able to prove that the police conduct was not so extreme that an innocent suspect was likely to incriminate himself, particularly when the charge is serious and the threat or inducement minor. Indeed, the Act may allow substantial inducements such as offers of bail and explanations of adverse consequences from failure to cooperate.

According to the United States Supreme Court, the central question, here as in England, is one of free will—whether the inducements were sufficient to overbear the suspect's will to resist. This focus on free will, together with confusion and inconsistency in the lower courts, has resulted in a greater willingness than exists under the traditional English rules to admit confession evidence when the defendant claimed that the police used threats or promises to induce him to speak. While it is not altogether clear that American voluntariness rules continue to provide greater protection to suspects, the trend in England, both in statutory

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708. See supra notes 79-87 and accompanying text.
709. See supra note 85 and accompanying text.
711. See supra notes 88-89 and accompanying text.
and case law, appears to be toward allowing inducements which would not be acceptable in this country.

English detention rules also permit greater pressures to be brought to bear during questioning of suspects at police stations. English law clearly authorizes police to arrest with evidence affording reasonable suspicion but insufficient to support a charge, and then to use the pressures of arrest and custody to extract admissions of guilt to support the charge. Although the 1984 Act sets time limits on detention prior to charge, police retain significant powers to detain and question suspects. Furthermore, the 1984 Act gives clear authority to detain without charge for the purpose of obtaining a confession. It is significant that the period during which police, without magistrate oversight, may authorize detention without charge for questioning corresponds with the thirty-six hour limit on denial of access to a solicitor. Unless courts limit these authorizations, the process may amount to an informal, preaccusatory "Star Chamber" conducted by police and supervised by magistrates.

In the United States police interrogation of suspects is generally regarded as an incidental consequence rather than as a primary purpose of detention following arrest. Police are expected to arrest for the purpose of commencing a criminal prosecution and are not authorized to detain a suspect without charge for the purpose of questioning. However, this is not to say that police do not engage in such practices, and questioning during unavoidable delays has always been proper.

Limitations on the English right to silence also allow greater pressures to be brought against suspects. While the legal principles of both countries prohibit the trier of fact from using silence after advice of rights as evidence against the accused, the actual consequence of such silence is quite different. In the United States, the trier of fact never hears of the accused's failure to make a statement or his claim to silence or request for counsel. English courts, on the other hand, admit such evidence and instruct the jury that no adverse inferences should be drawn from it. It is widely recognized, however, that often the trier of fact will nevertheless draw adverse inferences from unjustified refusals to answer questions. Furthermore, in England, evidence of silence in the face of caution and accusation comes before the jury whether or not the accused takes

713. See supra notes 437-38 and accompanying text.
714. V. Bevan & K. Lidstone, supra note 158, §§ 7.53-.54, ,80-.82; G. Powell & C. McGrath, supra note 97, at 120; M. Zander, supra note 53, §§ 58-59, at 74.
715. See supra notes 445-46 and accompanying text.
716. See supra notes 39-43 and accompanying text.
As a result, in practice, while not in theory, the English suspect's assertion of his right is more apt to hurt him. Since silence can thus be costly, the pressures to speak to police during the interrogation process are far greater than in the United States where the suspect is assured that the jury will never hear of his refusal to talk.

Both countries impose restrictions on police questioning of suspects once they have been charged with an offense, but, in some respects, English rules give police a freer rein to question charged persons. English rules prohibit questioning with respect to the offense charged, while our sixth amendment forbids the elicitation of statements from charged persons absent a knowing waiver of their right to counsel; however, the English restriction is subject to broad exceptions which authorize the questioning of charged persons regardless of whether they waive their rights or agree to be interrogated. Furthermore, the English rules do not cover elicitation of statements by an informant or secret agent outside the ordinary context of police questioning, as the sixth amendment does.

English rules give the defendant fewer tools as well as fewer incentives to challenge confession evidence. First, the automatic exclusionary rule applies only to those statements found "involuntary." While courts may retain some discretion to exclude voluntary statements on other grounds, this residual discretion is extremely limited and rarely exercised, falling far short of the automatic Miranda or the per se Edwards exclusionary rules. Furthermore, when a confession is suppressed as involuntary, the English reliability principle prevents the exclusionary rule from reaching physical evidence obtained as a result of the confession. In the United States, suppressing a confession as involuntary or as violating the fifth or sixth amendments may require excluding highly reliable evidence discovered through it, such as stolen property in the suspect's home or the murder victim's body in a location known only to the perpetrator. Similarly, in England, a confession will not be suppressed on the ground that it was obtained as a result of an improper arrest or after unreasonable detention, whereas United States courts must suppress a confession if it is found to be the "fruit" or prod-

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717. See supra notes 44-53 and accompanying text.
718. See supra notes 306-12 and accompanying text.
719. See supra notes 353-70 and accompanying text.
720. See supra note 517 and accompanying text.
721. See supra notes 143-46 and accompanying text.
722. See supra notes 129-37 and accompanying text.
723. See supra notes 125-28 and accompanying text.
uct of such illegality. 724

Finally, English impeachment rules significantly deter suspects with criminal records from challenging the admissibility of their confessions, since such an attack may allow the prosecutor to bring to the jury's attention the prior criminal convictions. As a consequence, defendants with criminal records are placed at a particular disadvantage when faced with overbearing police pressures. If they refuse to make a statement when cautioned and questioned, the jury will know of this refusal. On the other hand, if they succumb to extreme pressures and make a statement, they will be threatened with impeachment by their prior convictions if they attempt to prove coercion. 725

The new protections afforded by the 1984 Act and Code will probably not change matters appreciably. Supervision of the detention and interrogation process by the "independent" custody officer and tape recording of interviews at police stations may deter, and on occasion reveal, oppressive police conduct, but might also simply convince police to offer inducements prior to interrogation. 726 In any event, suspects may feel even more pressure to make statements with the awareness that a refusal to deny or explain an accusation will be tape recorded and made available to the judge and jury.

Nor is it likely that the new solicitor access rules will measurably reduce the pressures to make statements. Suspects often are not advised of their right of access until they arrive at the station house. Whether or not a solicitor is present, police are not required to terminate questioning following a suspect's assertion of his right to silence, but may continue to try to persuade the suspect to make a statement. 727 The new restrictions on questioning those who do request legal advice may reduce somewhat the incidence of confessions, but exceptions to these restrictions are broad, and police may convince suspects that they do not need legal advice or that they should make statements prior to the arrival of their solicitor. Even if solicitors are called and made available more often, the traditional rules and attitudes of the English criminal justice system make it unlikely that a solicitor's presence will eliminate the pressures to speak or reduce the incidence of confessions.

In contrast to the United States, where it is likely that "any lawyer worth his salt will tell the suspect in no uncertain terms to make no state-

724. See supra notes 132-41 and accompanying text.
725. See supra notes 150-52 and accompanying text.
726. See supra note 412 and accompanying text.
727. See supra notes 306-12 and accompanying text.
ment to police under any circumstances," lawyers in England, aware that silence during interrogation may become known to the trier of fact and be taken into account despite the judge's instructions to the contrary, may well advise suspects who assert their innocence to make statements at this point. Further incentives are provided by the new "voluntariness" rules, which may allow police to grant pre-trial release or similar favors in exchange for a statement. As all lawyers well know, early assertions of innocence often conflict with proven facts and are used at trial with devastating effects on the defendant's case. Nevertheless, a lawyer faced with a suspect who asserts his innocence is less apt to advise him to remain silent when the lawyer knows such action may lead to considerable harm at trial.

Differences between the roles adopted by English and American defense lawyers are also important in this context. Lawyers in this country generally consider themselves aggressive advocates whose first duty is to obtain an acquittal, and often regard discovery of the truth as incidental or even irrelevant to this pursuit. They have more direct contact with their clients and are more likely to subscribe to their clients' "causes." Observers generally agree that English lawyers, on the other hand, are more restrained in their approach and more detached from their clients and from the fray of trial combat. Certainly, the defendant's barrister also desires an acquittal, but generally the English lawyer is more willing to settle for a fair and just determination rather than to object and enforce each and every rule in the hope of frustrating the prosecution. These differences are matters of style and degree but nevertheless are sig-

728. Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in result). Judges continue to assume that lawyers will try to persuade suspects to make no statement to the police. See, e.g., Moran v. Burbine, 753 F.2d 178, 185 (1st Cir. 1985) rev'd, 106 S. Ct. 1135 (1986). Some English lawyers have expressed similar views. See, e.g., Williams, Questioning by Police, supra note 12, at 340.

729. See United States v. Wade, 388 U.S. 218, 256-57 (1967) (White, J., concurring and dissenting.); M. Freedman, supra note 19, at 43-49. Some lawyers put it quite simply:

As a prosecutor, I always had my own opinion as my guide. I could dismiss a case, if I felt a defendant was innocent. As a defense attorney, I have tried many cases and never even formed a personal opinion as to the guilt or innocence of my client. That is not my job; that is not my function; that is irrelevant to my responsibility.


730. See Steinberg, A Comparative Examination of the Role of the Criminal Lawyer in Our Present-Day Society, 15 Case W. Res. 479, 485-86 (1964); see also P. Collier & D. Horowitz, Requiem for a Radical 64 (1981) (discussing the life and work of Fay Stender).

731. See M. Graham, supra note 19, at 235-40; M. Freedman, supra note 19, at 105-12. Historical explanations for the "calmer" advocacy of barristers can be found in 1 J. Stephen, supra note 8, at 451-53.
significant in rendering the entire criminal process somewhat less aggressive and less confrontational. This moderation makes it less likely that a solicitor representing a suspect under interrogation will frustrate the questioning process by inserting distracting objections or by advising his client to refuse to cooperate. Indeed, preliminary results of the new duty solicitor schemes and access rules indicate that, although solicitors are likely to be present at more interviews and sometimes will advise against making a statement, they often act to "help the interview along" rather than to impede or prevent it.\textsuperscript{732} Certainly, this would not be the normal approach of an American lawyer representing a suspect during police interrogation.\textsuperscript{733}

In sum, given the realities of the situation and the more moderate and less confrontational nature of the English lawyer, the solicitor is less likely than an American lawyer to advise his client to stand on his privilege and remain silent in the face of accusatory questioning.\textsuperscript{734} One can see that, in comparison with American law, the English system allows considerably more pressure to be brought on suspects to make statements and provides fewer incentives to challenge their admissibility at trial. These differences demonstrate the greater respect the English accord to reliable fact-finding as well as the greater reluctance of English courts to accept the role of disciplining police through manipulating the rules of evidence. The differences also reflect the English view that the exclusionary rule has limited usefulness and should be applied with a gentle rather than a rigid and aggressive hand. The stronger pressures on English suspects to talk to police may account for the fact that a greater proportion of English than American suspects make statements and confess. Other reasons for the difference might include greater reliance by English law

\textsuperscript{732} Author's Interview with Alan Harding, Home Office, Feb. 1986. One study found that solicitors tended to take a more aggressive role, challenging questions and placing restraints on interrogators. Nevertheless, the interviews proceeded with solicitors taking notes of questions and answers. B. Irving, \textit{supra} note 246, at 126-27.

\textsuperscript{733} See Stephens, Flanders & Cannan, \textit{Law Enforcement and the Supreme Court: Police Perceptions of the Miranda Requirements}, 39 Tenn. L. Rev 407, 428 (1972) ("Most of the detectives insisted that the presence of a lawyer during questioning usually prevented completion of the interrogation process.").

\textsuperscript{734} Another influence on solicitors has been the fact that until this year English police acted both as investigators and as prosecutors. The police, rather than the prosecuting solicitor, determined the charge and controlled the plea bargaining process. In this environment a defense decision not to cooperate by making a statement might have more direct adverse consequences on the severity of the charge and the eventual sentence than it would in the United States. Under the 1984 Act, use of the Crown Prosecution Service will result in removal of most prosecution duties from the police, but it remains to be seen what lingering effects the old system will have on suspects' new right of access to a solicitor. See Lee, \textit{Crown Prosecution Service}, The Times (London), Mar. 31, 1986; The Times (London), May 11, 1985, at 1, col. 4.
enforcement officials on interrogation as a source of proof, as well as the possibility that character differences between English and American suspects are such that the English are more likely to cooperate with authorities and to acknowledge responsibility for their misdeeds. Whatever the causes, the fact that the confession rate is somewhat greater in England and that confessions play a more important role in English prosecutions is not widely recognized in this country. Rather, our courts and scholars generally have assumed that the contrary is true.

What can we learn from the English approach to our common problems? First, we should recognize that such labels as "right to silence," "right to counsel," and "adversary system of justice" often are useless platitudes unless defined by application to specific factual contexts. Each is part of the English and American systems of justice but significant differences appear in their practical applications.

Second, we should realize that emotional or absolutist approaches toward confession problems are both unrealistic and unproductive. Extreme positions are less common in England where, as demonstrated by the acceptance of a comprehensive scheme for the treatment and questioning of suspects, people more readily accept the need to compromise between liberty and the demands of law enforcement:

[English] writers do not reflexively oppose every proposal to increase police powers, nor do their opponents treat every criticism of the police as evidence of treason. Both sides are prepared to consider

735. See supra section IV.C. Because of a more homogeneous society and less concern with law enforcement abuses, the English may be more likely to cooperate with the police, such as by consenting to searches and volunteering to come to the station for questioning. See P. Devlin, supra note 22, at 15; D. Karlen, supra note 161, at 98, 118, 130. The American approach may stem from our skeptical attitude toward authority in general. Political commentator Anthony Lewis recently observed:

[T]here is something special in the American climate. Other countries are free. Here, freedom has an intense, almost aggressive quality. Our literature does not celebrate social order. We have no reverence for history; we act as if we were liberated from its strictures. What we revere is law: law not as the repressive arm of authority that it is in so many countries, but as the guardian of liberty.

San Francisco Chron., July 7, 1986, at 47, col. 4. But times are changing for the English, see supra notes 687-89 and accompanying text, and explanations based on differences between the character of English and American suspects may no longer be as valid as they once were.

736. See authorities cited supra notes 19-20. This assumption is not accepted by scholars who have seriously studied the English criminal justice process. See, e.g., M. Graham, supra note 19, at 228 ("[English] police interrogation is extremely effective.").

English researchers reviewing English studies on confession rates have noted that they suggest higher proportions of defendants making admissions than have been reported by American researchers. J. Baldwin & M. McConville, supra note 153, at 3-4.

737. See Lidstone & Early, supra note 20, at 488-89 (arguing that the English and Continental systems tend to converge at the pre-trial stage, and that the labels "accusatorial" and "inquisitorial" have little meaning in this context).
the prosecution and defense as each having advantages and disadvantages of an incommensurable sort, and to seek a fair balance between them.

While this kind of middle position is also common in the United States among large but inarticulate segments of the public, it tends to be under-represented in legal literature and in judicial decision.738

Taking a more objective as well as a more balanced analysis of both the importance and legitimacy of police questioning, we should recognize the limited part played by confessions in most prosecutions. Both English and American studies demonstrate that the majority of criminal cases can succeed without them. However, these same studies caution that we should be fully aware of the importance of suspect statements to a very significant number of prosecutions. Accordingly, we should disabuse ourselves of the thought that our system of justice can get along just as well without questioning and obtaining answers from those who are suspected of crime and who, therefore, are likely to be in the best position to know the relevant facts. Though confessions appear to be less frequent and less important in this country than in England, still, a good portion of our criminal cases depend on suspect statements.739 In absolute terms these cases are substantial in number. For example, 35,353 criminal convictions resulting in incarceration occurred in Los Angeles in 1980.740 If only ten percent had been unsuccessful because of the lack of confessions, 3535 otherwise successful prosecutions would have resulted in dismissals or acquittals. Similarly, 38,530 defendants were convicted in the United States District Courts during the twelve month period ending June 30, 1985.741 A ten percent loss would have resulted in erroneous dismissals or acquittals in 3853 cases. With such significant numbers of criminal cases dependent on suspect statements, there appears to be little support for the assertion of some English researchers that in both England and the United States confessions are only of slight significance and the role of interrogation of little overall importance.742 Furthermore, the importance of suspect statements apart from their role in the prosecution's case, although not subject to accurate measurement, is not insignificant.

One may argue that curtailing interrogations and reducing confes-

738. D. KARLEN, supra note 161, at 100.
739. See supra section IV.B(3).
740. Excluded from this figure are juvenile and traffic offenses as well as those resulting in fine or probation only. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, THE PROSECUTION OF FELONY ARRESTS, 1980, at 29 (1985).
742. See M. MCCONVILLE & J. BALDWIN, supra note 21, at 139, 147.
sions would lead to greater use of alternative means of crime detection, but the fact is no one really knows whether alternatives of equivalent reliability would be available or whether law enforcement resources would be sufficient to take advantage of them. 743 In some cases, alternative sources of evidence would be less trustworthy than a confession. In others, such evidence could not be found at all. The extent of the harm to law enforcement that would be encountered by reduced confessions remains “both unanswered and perhaps unanswerable.” 744 It would be folly to dismiss the importance of confessions when our system of justice relies on them to such a significant degree without firm assurance that other equally reliable sources of proof could take their place. 745

Looking at the fair yet effective English rules governing police interrogation and recognizing our own significant reliance on suspects’ statements, we might more readily accept the fact that the pressures inherent in custodial questioning often are necessary to obtain those statements. In particular, we might consider whether these pressures should continue to be regarded as constitutionally suspect.

Perpetrators of crime generally do not walk into police stations and confess. Some initiative by police, such as arrest and questioning, is usually necessary to obtain an admission. The traditional view was that police questioning per se did not involve compulsion in violation of the fifth amendment since the police have no legal power to compel answers. 746 Miranda dispensed with the requirement that compulsion be of a legal

743. As put by Judge Friendly, “[D]oes anyone truly know ... about such things as the possibilities of ‘skilful investigation’ of crimes without witnesses, about the increases in the police force necessary if interrogation were curtailed, and about the risk that this curtailment might lead to increased dependence on unreliable identifications?” Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929, 955 n.138 (1965).

744. Developments, supra note 20, at 944-45.

745. Comparative scholars have recognized in America an exaggerated notion of the feasibility of police detection by means other than interrogation. There are some crimes in which there is no extrinsic evidence on which a case can be built. The best the police can do, if they can do anything, is to use their knowledge of likely culprits based on patterns in method or tips of informers, and try to obtain a confession. The alternative is to leave such crimes unsolved. The English generally regard this alternative as undesirable, as do most Americans. But there is a strong minority view in the United States to the effect that failing to solve crime is preferable to solving them through the use of confessions.

D. Karlen, supra note 161, at 129.

746. “It is a settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer.” Kolender v. Lawson, 461 U.S. 352, 360 n.9 (1983) (quoting Davis v. Mississippi, 394 U.S. 721, 727 n.6 (1969)). Since only a court or other legal entity has the authority to compel testimony, police interrogation was viewed as beyond the protection of the self-incrimination privilege. See C. McCormick, Law of Evidence § 125 (E. Clary ed. 1984).
nature in order to violate the fifth amendment privilege against self-incrimination. It also broadened the notion of compulsion by finding it present in the normal custodial interrogation process and required that it be dispelled by the safeguards of warning and waiver. The Supreme Court continues to follow Miranda’s suggestion that custodial interrogation is inherently coercive and that, absent procedural safeguards, responses are presumed to be compelled and coerced except in the narrow public safety context. The Court distinguishes this presumption of compulsion from actual compulsion which violates due process, but nevertheless holds the presumption conclusive for purposes of the prosecution’s case-in-chief and requires automatic suppression.

One may readily understand Miranda’s application of the fifth amendment privilege to nonlegal forms of compulsion, but what justifies a conclusive presumption, in essence an automatic and irrebuttable rule of law, that the ordinary process of custodial questioning absent the “safeguards” of warnings and waiver invariably entails compulsion? Certainly, the process is likely to be stressful and to bring about a degree of pressure, but why should the natural pressures associated with arrest be regarded as coercive as a matter of law? Some pressures to confess are not imposed from without but owe their source to the natural “compulsion to confess” within the human character. Wigmore made the point with a dramatic flair:

The nervous pressure of guilt is enormous; the load of the deed done is heavy; the fear of detection fills the consciousness; and when detection comes, the pressure is relieved; and the deep sense of relief makes confession a satisfaction. At that moment, he will tell all, and tell it truly. To forbid soliciting him, to seek to prevent this relief, is to fly in the face of human nature.

Other pressures are natural consequences of custodial police questioning, whether friendly or accusatory. But the normal encouragement of suspects to make statements can hardly be regarded as the equivalent of

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749. As noted by former California Chief Justice Roger Traynor, “[i]t is casuistic to pretend that because the police have no legal authority to compel statements of any kind, there is nothing to counteract and hence no need of a privilege against self-incrimination during police interrogation.” Traynor, supra note 12, at 674. Furthermore, custodial interrogation has been regarded as involving “implicit legal compulsion” on the ground that police “act pursuant to implicit judicial authority.” Saltzburg, Foreword, The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts, 69 GEO. L.J. 151, 202-03 (1980).
compulsion. Professor Kamisar strains the term when he argues that "[i]f the police conduct is designed and likely to pressure or persuade, or even 'to exert a tug on,' a suspect to incriminate himself . . . then that conduct is 'compulsion' as Miranda defines the self-incrimination clause."\(^752\) To persuade, to push, or to tug may encourage but does not compel, whether physically or psychologically.\(^753\)

Former California Supreme Court Chief Justice Roger Traynor emphasized the importance of allowing the normal interrogation process to operate free of compulsion, but free as well of artificial restraints on police efforts to obtain confessions:

> Only overwhelming social policies can justify the exclusion of such vital evidence. In the case of coerced confessions, the evidence may be unreliable; even if reliable, a free society cannot condone police methods that outrage the rights and dignity of a person whether they include physical brutality or psychological coercion. . . . [W]hen a confession is voluntary, however, courts are reluctant to exclude it. "Interrogation per se is not, while violence per se is, an outlaw . . . ."

So long as the methods used comply with due process standards, it is in the public interest for the police to encourage confessions and admissions during interrogation.\(^754\)

Furthermore, even if the pressures involved in custodial police questioning can properly be characterized as "compulsion" in some circumstances, they cannot necessarily be so characterized in every case. As Judge Friendly pointed out with respect to Miranda's list of interrogation horrors, "[n]ot every person in custody is 'swept from familiar surroundings, surrounded by antagonistic forces and subjected' to unfair techniques of persuasion; if all these factors are essential ingredients to the presumption of compulsion, the presumption should be so limited."\(^755\)

The English experience reinforces the argument against regarding products of ordinary custodial questioning as presumptively compelled. Despite their concern with the fair treatment of those accused of crime,
the English have not accepted the proposition that suspect statements will still be available as a source of evidence when the pressures on suspects to make them have been significantly reduced. Far from curtailing the process of interrogation, England has embraced it with enthusiasm and endowed it with the ability to exert greater pressures on suspects than would be tolerated under our laws.

In our system, the absence of important countervailing protections found in England such as the independent custody officer’s monitoring of suspect statements should caution us against a wholesale adoption of this English approach toward encouragement of confessions. However, the English experience demonstrates that an accusatory system of justice which is sensitive to the rights of the accused is not incompatible with a system which places considerable reliance on the natural inclination of suspects to admit wrongdoing and accepts the normal pressures inherent in custodial questioning. Long before the new protections of the 1984 Act, Lord Devlin noted that “while the English system undoubtedly does give the accused man the right to be silent, it does nothing to urge him to take advantage of his right or even to make the course invariably the attractive one.” Defending the pressure to speak generated by a suspect’s fear of jury awareness of his failure to respond, Lord Devlin remarked, “this dilemma in which the law puts the suspect . . . seems to be a perfectly fair one.”756

Other examples of British moderation and pragmatism might also assist us in more clearly evaluating our own rules. In particular, the English reluctance to impose rigid interrogation rules which stand as barriers to questioning suspects contrasts sharply with our per se Edwards rule prohibiting further questioning once a suspect has asked for a lawyer and our strict Massiah-sixth amendment rule prohibiting the “elicitation” by police informants of wholly voluntary statements from those who have been formally charged in the absence of counsel.757 The English equivalent to our Edwards rule is subject to numerous exceptions which allow police to question suspects before the arrival of their solicitors.758 The English restriction on questioning charged persons does not apply beyond traditional station house questioning and is also limited by exceptions unknown to our system.759 In short, comparable English rules are less absolute and less restrictive of police interrogation efforts.

Differences in the way the English enforce their rules also provide us

756. P. DEVLIN, supra note 22, at 59, 61.
757. See supra notes 324-26 and accompanying text.
758. See supra notes 292-93, 306-12 and accompanying text.
759. See supra notes 351-70 and accompanying text.
with another helpful perspective. In their efforts to make effective the rules governing the treatment and questioning of suspects, the English clearly prefer the use of police discipline over the exclusionary sanction. In part, this choice stems from the tradition of respect accorded the police and the assumption that disciplinary rules will be of some consequence. A unified law enforcement system enables the English to impose a comprehensive nationwide disciplinary scheme which recently has been revised for enhanced objectivity and effectiveness.760

Nevertheless, confidence in police discipline cannot alone account for the English reluctance to use the exclusionary sanction. The greater respect the English accord reliable evidence and the greater importance they place on trustworthy verdicts also play a role. This is suggested by the manner in which the exclusionary sanction is used in the context of “involuntary” confessions.

First, the new Act has narrowed the category of “involuntary” statements subject to automatic exclusion, defining such statements in terms of their likelihood of unreliability.761 Second, even when a confession must be excluded as involuntary, all physical evidence discovered as a result of the statement is still admitted.762 Thus, even when the English find the exclusionary sanction appropriate, it is kept within narrow limits. In balancing the need for trustworthy verdicts against the competing values which support the exclusionary sanction, the English system appears to give more weight to the former than does our own.

We might benefit by considering whether our unbending exclusionary rules are always appropriate when applied to highly reliable and probative “fruit” of confessions. As the pragmatism and moderation of the English approach demonstrate, and as some American scholars point out, fairness to the accused can be maintained while interrogation rules, often complex and technical, are “enforced with a sense of proportion.”763

Perhaps most important, from the English perspective we can readily see the narrow focus of our own rules. Our rules are principally concerned with reducing the pressures associated with custodial questioning

760. See supra notes 491-94 and accompanying text.
761. See supra note 80 and accompanying text.
762. See supra notes 129-31 and accompanying text.
763. See Johnson, The Return of the “Christian Burial Speech” Case, 32 EMORY L.J. 349, 381 (1983). The Supreme Court has taken a step in this direction by holding that the “fruit” rule does not apply to products of confessions resulting from failure to give Miranda warnings. But the Court suggested it would still apply to products of fifth amendment and due process violations as well as to more serious breaches of the Miranda rules. Oregon v. Elstad, 105 S. Ct. 1285, 1288 n.3 (1985).
by requiring that police warn suspects of their rights and that they respect a suspect's assertion of those rights. The English, on the other hand, while placing limits on pressures that can be used to obtain statements, are not as concerned with totally eliminating those pressures, but recognize other means of assuring fairness to the accused. Imposing specific rules governing the treatment of suspects and entrusting their enforcement to an independent custody officer are two examples. Others include detailed record-keeping rules and the new tape recording requirements.

We might also consider whether our one-dimensional approach is adequate to deal with the complexities of interrogation. Custodial questioning of a suspect is essentially a secret, inquisitorial process, the result of which often determines the outcome of the case by affecting both plea bargaining and trial. This inquisitorial process is sometimes viewed as alien to our accusatorial system of justice. Some have proposed abolishing it altogether, while others have suggested various forms of judicial supervision. However, because of the significance we place on confession evidence as well as the reluctance of judges to take on an investigative or quasi-prosecutorial role, the current structure of the interrogation process is likely to be with us in the same form for some time. It is most important, then, to correct those most glaring deficiencies that now exist.

Two of the most serious objections to the interrogation process are, first, that it is conducted in secret solely by the investigating police officers and, second, that the results, often crucial to the outcome of the case, may not be subject to independent verification. Opening the process to outside scrutiny and supervision and requiring a reliable means of verifying what occurred would go far toward enhancing overall fairness. The English have taken solid steps in this direction by requiring that an independent custody officer be responsible for the conditions of detention and questioning, and that the police maintain detailed records and eventually tape record all station house interrogations.

Shifting the focus of our concern away from the natural pressures inherent in police questioning and toward reducing the secrecy which surrounds it would benefit both the prosecution and the defense in a number of respects. It would enhance public confidence in our system of

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764. See supra notes 6-9 and accompanying text.
766. See W. SCHAEFER, supra note 20, at 76-81; Friendly, supra note 643, at 671, 713; Kauper, supra note 19, at 1235.
justice and, ultimately, bolster respect for law enforcement. Opening suspect interrogation to outside scrutiny would provide more reliable evidence, reduce court contests over what occurred during the questioning process, and reduce the need for jury trials. Finally, it would tend to ensure greater fairness by encouraging police to follow prescribed rules and deterring them from bringing excessive pressures on suspects.

This is not to say that we should adopt the identical approach of the English. Objective monitoring of interrogations may be better accomplished by an individual independent of the police or by videotape rather than by audio tape. Also, our own system presents more formidable barriers to monitoring interrogation because of the presence of defense counsel. Without substantial alteration of our rules regarding the consequences of silence and our understanding of the role of the defense attorney, counsel's presence would ensure, not that questioning would take place fairly, but that it would not take place at all. Furthermore, we would do well to maintain many of our existing rules. For example, Miranda's warning requirements enhance the overall fairness of the process and do not significantly reduce the frequency of confessions. The Supreme Court recently assumed that Miranda warnings tend to deter suspects from responding to police questioning, but it cited no evidence in support of this view.767 Most studies conducted in the aftermath of Miranda found some increase in refusals to make statements as well as a lowering of confession rates, but generally the amount of change was not substantial. The experience of Justice O'Connor as a trial judge, recounted by her during her Senate Judiciary Committee confirmation hearing, is probably typical:

My experience on a trial court is that application of Miranda has not resulted in an inability of police to still be reasonably successful in their efforts to gain information and obtain statements. It has, no doubt, precluded some, but on a broad general basis I cannot say that I think police have been unable to cope with it .... People continued to make statements despite the fact that they had been warned of the consequences, in large measure.768

Furthermore, Miranda warnings may significantly benefit the prosecution. Prior to Miranda the prosecutor was required to establish that a confession was voluntary without any guidelines as to what specific facts

767. See Oregon v. Elstad, 105 S. Ct. 1285, 1293 (1985). In New York v. Quarles, 467 U.S. 649 (1984), the assumption was used as a basis for concluding that Miranda warnings need not be given in situations posing a threat to the public safety. In Moran v. Burbine, 106 S. Ct. 1135 (1986), the assumption was stated as a basis for holding that Miranda does not require that police inform a suspect of his attorney's efforts to contact him.

would satisfy this burden. Now, compliance with *Miranda*’s dictates often assists the prosecution in meeting its burden of proving the statement voluntary and, thus, admissible. The Supreme Court recently stated:

“We do not suggest that compliance with *Miranda* conclusively establishes the voluntariness of a subsequent confession. But cases in which a defendant can make a colorable argument that a self-incriminating statement was “compelled” despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare.”

In conclusion, although *Miranda*’s warning requirements should not be abandoned, they should be placed in their proper perspective in relation to other means of promoting a fair and reliable interrogation process. Seeking to dispel all pressures associated with interrogation may not be the best means of attaining this goal. Focusing on opening the process to independent monitoring and verification would go farther in promoting reliability and efficiency as well as fairness. Furthermore, the establishment of such protections would lay a foundation for reconsidering some of *Miranda*’s harsh and inflexible rules, such as the requirement of automatic exclusion regardless of the extent of the impropriety or the seriousness of the case and importance of the statement.

The *Miranda* Court disclaimed any intent to create a “constitutional straitjacket” and invited suggestions of “potential alternatives for protecting the [fifth amendment] privilege.” However, we have adapted to our “nonconstitutional” straitjacket and now feel comfortable in it, often not realizing the extent of our confinement. The English example should awaken us to new approaches which would not only protect the

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769. Berkemer v. McCarty, 468 U.S. 420, 433 (1984); see also Moran v. Burbine, 106 S.Ct. 1135, 1142 (1986). A study of the reaction of Denver, Colorado trial courts to *Miranda* found that *Miranda* aided the prosecution in meeting its burden of proving confessions admissible. See Leiken, *supra* note 532. Even strong critics of *Miranda* have recognized that a warning that the suspect is not required to make a statement “will serve to facilitate the confession's admissibility.” F. INBAU & J. REID, *supra* note 710, at 798-800.

770. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). The 1968 Omnibus Crime Control Act purported to modify *Miranda* by providing that confessions shall be admissible in evidence if voluntarily given. The guidelines to be applied in determining voluntariness included whether the suspect was advised of the right of silence and the right to the assistance of counsel. 18 U.S.C. § 3501 (1983). Appellate courts have been reluctant to apply the Act in light of *Miranda*’s admonition that “the issues presented are of Constitutional dimensions.” *Miranda*, 384 U.S. at 490.

With the Court later characterizing *Miranda* rules as “procedural safeguards” rather than rights protected by the Constitution, Michigan v. Tucker, 417 U.S. 433, 444 (1974), a foundation has been established for returning to a more flexible standard of admissibility. This path has evoked strong support, but that support is often unaccompanied by suggested alternatives for protecting the privilege. See, e.g., Inbau, *supra* note 534, at 798-800.
privilege, but offer a fairer, more flexible, and more efficient process for the questioning of suspects.