
EXPORTING AND IMPORTING *MIRANDA*

CHARLES D. WEISSELBERG*

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INTRODUCTION

*Miranda v. Arizona*¹ just had a milestone birthday. Perhaps the United States Supreme Court's best-known criminal procedure decision, it has been both revered and reviled for over fifty years. I am on record as an estranged former supporter. The Court established *Miranda*'s regime of warnings and waivers of the right to remain silent and the right to counsel in order to protect suspects from compelled self-incrimination during police interrogation in violation of the Fifth Amendment.² My own view is that *Miranda* does not provide meaningful protection for the Fifth Amendment privilege.³ One reason is that the Court has retreated from its original, more robust conception of *Miranda* and has weakened *Miranda*'s safeguards.⁴ Another reason may be the difficulty of integrating *Miranda*'s reforms into existing structures of our criminal justice system and our legal culture.⁵ Yet another explanation is a basic flaw in design: creating one-size-fits-all warnings and waivers simply cannot ensure that suspects—who have varying characteristics, vulnerabilities, and abilities—will all be empowered to choose between speech and silence during a pressure-filled interrogation.⁶ Whatever the explanation, when used as directed, *Miranda* now functions mostly as a “safe harbor” for police. If officers comply with its formalisms and obtain a statement, law enforcement can typically avoid a more searching inquiry into the voluntariness of the statement, and there is rarely a barrier to admissibility.⁷ I am hardly alone in voicing these criticisms of *Miranda*'s practical operation during police questioning and in trial courts,⁸ which I refer to as *Miranda* “on the ground.”

¹ 384 U.S. 436 (1966).

² *Id.* at 467, 477; *see also* U.S. CONST. amend. V (“No person shall be . . . compelled in any criminal case to be a witness against himself.”).

³ *See* Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519, 1590-92 (2008) (arguing that *Miranda* is dead because suspects do not understand the warnings and the safeguards do not meaningfully protect the Fifth Amendment privilege).

⁴ *See generally* Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109 (1998) (examining whether the Supreme Court's original vision of *Miranda* still exists and arguing that courts should retain it).

⁵ *See infra* notes 87-104 and accompanying text.

⁶ *See* Weisselberg, *supra* note 3, at 1563-77 (explaining that *Miranda* warnings are often not understood by suspects because of inadequate education and complex language, and that officers are not required to give further explanations to ensure that suspects understand).

⁷ *See id.* at 1595-96.

⁸ *See, e.g.,* Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 27-28 (2010) (arguing that *Miranda* has proven to be a failure because, while it was designed to help criminal suspects, it actually favors the police); Alfredo Garcia, *Is Miranda Dead, Was It Overruled, or Is It Irrelevant?*, 10 ST. THOMAS L. REV. 461, 496-502 (1998) (positing that *Miranda* prevents courts from evaluating if a confession was involuntary or coerced). Others criticize *Miranda* from a different angle, asserting that it has harmed the ability of law enforcement to investigate and clear crimes.

But despite *Miranda*'s failings in protecting the Fifth Amendment privilege, there is no denying its superficial attraction. *Miranda* shines as a beacon. It is an icon. For the American public, at least, *Miranda* stands for justice. *Miranda* stands for fair play. It is a balm for much of our squeamishness about interrogation tactics because, after all, we do tell suspects that they can ask for a lawyer and do not have to speak. And, for courts and reformers, there is something irresistible about the concept of a simple set of procedures to let us avoid the messiness and discomfort of looking deep into the circumstances of a police interrogation and the psychological manipulation of a suspect.⁹ The late Chief Justice Rehnquist famously observed that *Miranda* warnings "have become part of our national culture."¹⁰

A significant number of nations have implemented or are implementing *Miranda*-like protections, with warnings of the right to remain silent or the right to retain counsel prior to police questioning. Researchers at the Library of Congress recently reported that warnings similar to *Miranda* are now required in 108 jurisdictions around the world.¹¹ This Article seeks to investigate several aspects of this movement. What are different national justice systems seeking to accomplish through warnings or other procedures? How do these protections compare with *Miranda*? When mechanisms are put in place, are justice systems able to implement them effectively, and can other systems point the way to possible improvements in the United States?

Part I addresses aspects of criminal justice systems, legal culture, the function of interrogation, and conditions for reform, comparing Japan and the United States. The World Justice Project recently ranked the criminal justice systems in 113 nations by a variety of factors including: the effectiveness of investigations; whether the adjudicative process is impartial (i.e., free of corruption and improper government influence); and whether the correctional system reduces criminal behavior—all in addition to factors relating to due process of law and the rights of the accused.¹² As these rankings illustrate, different nations face

See, e.g., Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1464-67 (1985); Paul G. Cassell & Richard Fowles, *Still Handcuffing the Cops? A Review of Fifty Years of Empirical Evidence of Miranda's Harmful Effects on Law Enforcement*, 97 B.U. L. REV. 685, 848 (2017).

⁹ *See generally* PETER BROOKS, TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE (2000); George C. Thomas III, *Miranda's Spider Web*, 97 B.U. L. REV. 1215 (2017).

¹⁰ *Dickerson v. United States*, 530 U.S. 428, 443 (2000).

¹¹ *See* LAW LIBRARY OF CONG., MIRANDA WARNING EQUIVALENTS ABROAD 1 (2016), <https://www.loc.gov/law/help/miranda-warning-equivalents-abroad/miranda-warning-equivalents-abroad.pdf> [<https://perma.cc/U8HH-YACC>].

¹² *See* WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2016, at 42-43 (2016), http://worldjusticeproject.org/sites/default/files/media/wjp_rule_of_law_index_2016.pdf [<https://perma.cc/K3ET-RZRW>]. The rankings are based upon answers from representative samples of approximately 1000 respondents per country, plus questionnaires from in-country practitioners and academics. *Id.* at 15-16.

different challenges, and they may have varying goals in regulating police and prosecutors, if, indeed, they are regulated much at all. Part I introduces these complex issues with the example of Japan, then turns to the United States to discuss *Miranda*'s goals and its operation "on the ground" in more detail and to situate *Miranda* within the larger criminal justice system.

Part II describes developments in Europe. A challenge in any comparative analysis is selecting the nations to study. Europe affords an opportunity to examine a regional system, rather than simply a few selected countries. Forty-seven nations—members of the Council of Europe—are signatories to the European Convention on Human Rights (the "Convention").¹³ A series of decisions from the European Court of Human Rights ("ECtHR"), which interprets the Convention, addresses the duties of police in conducting criminal investigations, including interrogations. Because these decisions are relevant to so many nations, they are especially worthy of attention.¹⁴ Twenty-eight nations, all of whom are also signatories to the Convention, are currently members of the European Union.¹⁵ The European Parliament, composed of elected representatives from the Member States of the European Union, with the approval of the Council of the European Union, has issued a series of Directives that most States are expected to implement.¹⁶ Remarkably, the Directives would require *Miranda*-like warnings for suspects.¹⁷ The countries under this series of Directives provide a laboratory for study, because the protections are being implemented in States with widely-varying criminal justice systems, not to mention different legal and social cultures, political structures, priorities, and challenges. Compared to the United States, it is akin to implementing top-down reform of police practices in a significantly more heterogeneous federalist

¹³ See generally Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter Convention on Human Rights]; *Full List, Chart of Signatures and Ratifications of Treaty 005*, COUNCIL EUR., http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=R8AyD7zZ [<https://perma.cc/L2AZ-M58K>] (last visited Jan. 26, 2017).

¹⁴ See *infra* Section II.A.

¹⁵ *Countries, Member Countries of the EU (Year of Entry)*, EUR. UNION, https://europa.eu/european-union/about-eu/countries_en [<https://perma.cc/PA3W-9W3X>] (last visited Jan. 25, 2017).

¹⁶ See *Regulations, Directives and Other Acts*, EUR. UNION, https://europa.eu/european-union/eu-law/legal-acts_en [<https://perma.cc/S8PD-LHJA>] (last visited Jan. 25, 2017) (describing categories of EU law, which categories are binding, and to whom they are binding); *Organisation*, EUR. PARLIAMENT, <http://www.europarl.europa.eu/aboutparliament/en/20150201PVL00010/Organisation-and-rules> (last visited Jan. 25, 2017) (describing political groups and composition of the Parliament). Some nations retain the ability to opt out of the Directives. See *infra* notes 141-42.

¹⁷ See Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the Right to Information in Criminal Proceedings, 2012 O.J. (L 142) 2 [hereinafter Directive 2012/13/EU]. For further discussion, see *infra* Section II.C.

system. Part II ends by contrasting Europe's *Miranda*-like protections with *Miranda* in the United States, both "on the books" and "on the ground."

Part III explores some of the questions with which we started: Has *Miranda*, in fact, influenced the development of the law in other regions and nations? If other countries implement *Miranda*-like protections, can they avoid some of the deficiencies of *Miranda* that are present in the United States? Finally, what do developments in Europe and elsewhere say about our own anemic *Miranda* doctrine? Put another way, what aspects of a European version of *Miranda* might we consider for the United States?

I. SYSTEMS, GOALS, AND *MIRANDA*

It is impossible to reflect on *Miranda*, protections against compelled self-incrimination, and possible reforms without considering the functions of police questioning and confessional speech within a nation's criminal justice system and its society as a whole. One might start by sorting systems using labels such as "adversarial" or "inquisitorial," or by addressing common or civil law roots. Understanding a country's procedural tradition is critical,¹⁸ though this is a complex task that requires us to look beyond simple labels.¹⁹ It is also important to examine a nation's legal culture, which Chrisje Brants calls "a dialectical relationship between society, the political arrangements that shape the organisation and practice of justice, and the (criminal) law that determines its normative limits."²⁰ As we consider the function of *Miranda* and the process of reform in different countries, we should focus on the structures and roles of

¹⁸ See generally John D. Jackson, *Responses to Salduz: Procedural Tradition, Change and the Need for Effective Defence*, 79 MOD. L. REV. 987 (2016) (examining the crucial role of procedural traditions as European nations respond to decisions from the ECtHR on access to counsel during police interrogation).

¹⁹ See, e.g., John D. Jackson, *The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?*, 68 MOD. L. REV. 737, 740-47 (2005) (questioning the accuracy of the labels "adversarial" and "inquisitorial," and noting variation within categories of systems); Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 17-29 (2004) (noting also reforms in various nations within systems sometimes called inquisitorial).

²⁰ Chrisje Brants, *What Limits to Harmonising Justice?*, in EU CRIMINAL JUSTICE AND THE CHALLENGES OF DIVERSITY 221, 221 (Renaud Colson & Stewart Field eds., 2016) (exploring whether legal culture and social constructions at the national level limit whether countries may share conceptions of a fair trial as well as substantive law); see also Renaud Colson & Stewart Field, *Legal Cultures in Europe: Brakes, Motors, and the Rise of EU Criminal Justice*, in EU CRIMINAL JUSTICE AND THE CHALLENGES OF DIVERSITY, *supra*, at 1, 9-10 (arguing that despite the various usages of "legal culture," the concept appropriately encourages comparativists to "identify and analyse the sense of the normative that is present in particular everyday legal practices" and "requires an understanding of institutional and material contexts and implicit assumptions often rooted in a half-articulated common sense and (partly) shared history").

police, prosecutors, defense counsel, and judges; the specific challenges facing a criminal justice system; the society in which a system exists; and the capacity of a system to implement and enforce any new procedures.

A. *Systems and Goals—Japan*

To illustrate the complexity of reform and the significance of procedural traditions and legal culture, it may help to begin with Japan, where reformers have unsuccessfully advocated for *Miranda*-like protections.

Japan's adjudicatory process is trial based. In 2009, the country introduced a new oral trial system, *saiban-in seido*, in which six lay judges (or assessors) sit with three professional judges in certain serious felony prosecutions.²¹ While plea bargaining is not formally permitted,²² a closer look reveals that many trials—even under the *saiban-in* system—are not contested; compared with practices in the United States, a majority of the *saiban-in* trials might be characterized as slow guilty pleas, and the conviction rate is quite high.²³ Fifteen

²¹ See generally Hiroshi Fukurai, *A Step in the Right Direction for Japan's Judicial Reform: Impact of the Justice System Reform Council Recommendations on Criminal Justice and Citizen Participation in Criminal, Civil, and Administrative Litigation*, 36 HASTINGS INT'L & COMP. L. REV. 517 (2013); Makoto Ibusuki, "Quo Vadis?": *First Year Inspection to Japanese Mixed Jury Trial*, 12 ASIAN-PAC. L. & POL'Y J. 25 (2010); Dimitri Vanoverbeke & Takao Suami, *Reforms of the Judiciary in Japan at the Start of the Twenty-First Century: Initial Assessment of an Ongoing Process*, in THE CHANGING ROLE OF LAW IN JAPAN: EMPIRICAL STUDIES IN CULTURE, SOCIETY AND POLICY MAKING 66, 74-76 (Dimitri Vanoverbeke et al. eds., 2014).

²² Article 350 of the Criminal Procedure Code was recently amended to permit plea bargaining for defendants who cooperate in prosecutions against other defendants. SAYURI UMEDA, JAPAN: 2016 CRIMINAL JUSTICE SYSTEM REFORM 5 (2016), <https://www.loc.gov/law/help/criminal-justice-system-reform/japan-criminal-justice-system.pdf> [<https://perma.cc/Z9SS-37TV>] ("Under the amended Criminal Procedure Code, a prosecutor may make an agreement with a suspect or defendant to drop charges, charge the suspect with a less serious crime, seek lesser punishments, or seek a summary judgment in exchange for information or evidence related to another person's case."). The new provision becomes effective in 2018. *Id.* at 6.

²³ From May 2009 (when the new system was implemented) through July 31, 2016, 9310 defendants were tried to verdict in *saiban-in* cases, and 9066 (97.4%) were found guilty. STATISTICS ON SAIBAN-IN TRIALS (COLLECTED BY THE SUPREME COURT FROM MAY 2009 TO JULY 2016, PRELIMINARY FIGURES) 4 tbl.3 (2016), http://www.saibanin.courts.go.jp/vcms_1f/h28_7_saibaninsokuhou.pdf [<https://perma.cc/D2MG-TL7A>]. Of the defendants brought to trial, 4011 (43.9%) contested their guilt on at least one charge while 5120 (56.1%) did not contest guilt on any charge. See *id.* at 6 tbl.5. Some defendants may not contest guilt but may still disagree with some facts, including facts relevant to sentencing. E-mail from Takuya Kawasaki, Visiting Scholar, U.C. Berkeley, to Charles Weisselberg (Nov. 9, 2016, 11:25 PST) (on file with author). Even prior to the *saiban-in* system, if a defendant confessed, declined to contest the evidence, and expressed remorse, a "court [would] ordinarily reward such behavior with a lower sentence." JENIA I. TURNER, PLEA BARGAINING ACROSS BORDERS 189 (2009).

years ago, David Johnson described Japan as “paradise for a prosecutor,”²⁴ and his description remains apt today.

Confessions are central in this process, and the laws facilitate interrogations. As a formal matter, the Constitution of Japan provides that “[n]o person shall be compelled to testify against himself” and a “[c]onfession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence.”²⁵ Despite these provisions, police may detain and question a suspect for two days, and prosecutors then have a day to decide whether to seek detention orders, permitting detention and questioning for up to twenty additional days—all prior to indictment.²⁶ A person may refuse to answer questions, and is advised of such, but she has no right not to be questioned.²⁷ The Code of Criminal Procedure was amended in 2004 to provide for a right to assigned counsel prior to indictment in serious cases.²⁸ However, attorneys are still not permitted to be present and assist during questioning, and they struggle

²⁴ DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN* 21 (2002).

²⁵ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 38, (Japan); *see also* KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.] 1948, art. 319, para. 1 (Japan) (“Confession under compulsion, torture, threat, after unduly prolonged detention or when there is doubt about it being voluntary may not be admitted as evidence.”).

²⁶ *See* Daniel H. Foote, *Confessions and the Right to Silence in Japan*, 21 GA. J. INT’L & COMP. L. 415, 429-31 (1991). Prosecutors may seek an order allowing the defendant to be detained for ten days and then ask to renew the order for up to an additional ten days. KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.] 1948, art. 208 (Japan). Data suggest that judges have become more willing to deny detention requests in recent years, though denials are still statistically rare. *See* Aki Takiguchi, *The Sharp Increase in Dismissals of Detention Claims: A Five Times Increase in the Past 10 Years and the Supreme Court Continues to Issue Such Judgments*, SANKEI (Mar. 28, 2016, 8:25 AM), <http://www.sankei.com/affairs/photos/160328/afr1603280008-p1.html> [<https://perma.cc/3B7H-8F6T>] (showing denials increasing from 0.47% in 2005 to 2.71% in 2014).

²⁷ *See* Saikō Saibansho [Sup. Ct.] Mar. 24, 1999, *Ando v. Japan*, no. 1993 (O) 1189, SAIBANSHO SAIBANREI JŌHŌ [Saibansho web] 1, 1 (Japan), http://www.courts.go.jp/app/hanrei_en/detail?id=433 [<https://perma.cc/M4H4-JQQC>]; Foote, *supra* note 26, at 434-36. Some have interpreted Article 198(1) to permit questioning to continue after a suspect has invoked the right to silence. *See* E-mail from Takehiko Kawame, Visiting Scholar, U.C. Berkeley, to Charles Weisselberg (Nov. 6, 2016, 1:10 PST) (on file with author); *see also* Foote, *supra* note 26, at 435-36.

²⁸ *See* HIROSHI ODA, *JAPANESE LAW* 437 (3d ed. 2009). An attorney is only appointed after a detention order has issued or a prosecutor has asked for a detention court order. *See id.* The Japan Federation of Bar Associations has established a “duty attorney” system to assist arrested individuals prior to the appointment of counsel and in cases where there is no right to the appointment of a lawyer. *See* JAPAN FED’N OF BAR ASS’NS, *WHITE PAPER ON ATTORNEYS* 24 (2013), <http://www.nichibenren.or.jp/library/en/about/data/WhitePaper2013.pdf> [<https://perma.cc/LSH7-27S3>].

to find ways to assist their clients within these limitations.²⁹ It is very difficult for a suspect to remain silent during twenty-three days of interrogation.

Within this system, confessional speech serves at least two important functions. The first is instrumental with respect to the prosecution. A confession is a critical element of proof; prosecutors are expected to obtain one, and they are reluctant to go forward with a case absent a confession.³⁰ Second, and in contrast to the United States, the act of confession is considered integral to the “corrections” process. In Japan, prosecutors seek confessions during the investigation phase as a step towards reforming and reintegrating the offender.³¹ The Justice System Reform Council, which proposed sweeping changes to the civil, criminal, and legal education systems in 2001 (but recommended only one modest change to interrogation procedures), concluded that “[t]he questioning of a suspect, so long as it is conducted properly, contributes to the discovery of the truth, and, in the event the suspect who actually committed the crime truly regrets the crime and confesses, it also contributes to his or her rehabilitation.”³² According to Johnson and Satoru Shinomiya, confessions are considered “the precondition for many of the achievements in Japanese criminal justice . . . the premise that animates the entire system: no confession, no truth, no consistency, no corrections, no convictions, no justice.”³³

In 1995, a group of private criminal defense attorneys organized the “Miranda Association” (*Miranda No Kai*).³⁴ Drawing obvious inspiration from the

²⁹ See Thomas Ginsburg, *The Warren Court in East Asia: An Essay in Comparative Law*, in EARL WARREN AND THE WARREN COURT 265, 279 (Harry N. Scheiber ed., 2007). The Japan Federation of Bar Associations has published a set of materials for lawyers to give to clients so the clients can keep a record of the interrogation because the lawyers cannot attend. See generally JAPAN FED’N OF BAR ASS’NS, SUSPECT’S NOTES: RECORD OF INTERVIEWS (2012), http://www.nichibenren.or.jp/library/ja/legal_aid/on-duty_lawyer/data/higisha_note_en_2012.pdf [https://perma.cc/SK7G-YEFQ].

³⁰ See JOHNSON, *supra* note 24, at 125, 243-45.

³¹ See *id.* at 185-90.

³² JUSTICE SYS. REFORM COUNCIL, RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL—FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY ch. II, pt. 2.4.2.b (2001), <http://japan.kantei.go.jp/judiciary/2001/0612report.html> [https://perma.cc/8NFC-SPRP]. The modest recommended change was to impose the duty of making a written record about the process and the circumstances of questioning, including measures to ensure the accuracy and objectivity of the records. See *id.*

³³ David T. Johnson & Satoru Shinomiya, *Rights Reforms and Missing Rights in Japanese Criminal Justice*, in EMERGING RIGHTS IN JAPANESE LAW 23, 41 (Harry N. Scheiber & Laurent Mayali eds., 2007); see also Paul Roberts, *On Method: The Ascent of Comparative Criminal Justice*, 22 OXFORD J. LEGAL STUD. 539, 552 (2002) (reviewing DAVID NELKEN, *CONTRASTING CRIMINAL JUSTICE: GETTING FROM HERE TO THERE* (2000)) (“Corresponding to Japanese prosecutors’ rehabilitative ethos are social norms of shame and deference reflected in the behaviour of Japanese defendants . . .”).

³⁴ See Takashi Takano, *The Miranda Experience in Japan*, in THE JAPANESE ADVERSARY SYSTEM IN CONTEXT 128, 130 (Malcolm M. Feeley & Setsuo Miyazawa eds., 2002).

Miranda decision, they sought to provide meaning to the right to remain silent under Japanese law by advising defendants in contested cases to refuse interrogation without counsel present and not to sign any written statements unless they were reviewed by counsel.³⁵ This strategy drew fierce opposition from prosecutors, who pointed to a suspect's inability to refuse to submit to interrogation.³⁶ Japanese attorneys have suggested to me that defense lawyers may perceive that suspects may be harmed by asserting the right to silence, such as through longer periods of pre-indictment detention, and lawyers, therefore, may be hesitant to advise their clients to remain silent.³⁷ The most critical aspects of *Miranda*, particularly the duty of police to cease questioning if a suspect asserts the right to counsel or the right to remain silent, have never taken root in Japan. As Thomas Ginsburg observed, while *Miranda* (and other Warren Court decisions) have had a significant influence, it "has been greatest outside the formal domain of the law and more on the broader culture of lawyers."³⁸ Why might that be so?

One explanation may be a weak commitment to the constitutional privilege against compelled self-incrimination and to the protections against prolonged detention. The Japanese Constitution was a product of the postwar occupation, and these particular provisions came from a draft put forth by General Douglas MacArthur.³⁹ Daniel Foote has argued that it is "simplistic" to conclude that a lack of support for the privilege is due to the transplant of "a foreign concept unsuited to Japan";⁴⁰ he points to some advocacy for the right to remain silent prior to World War II.⁴¹ Yet one cannot dispute significant differences between the Japanese and American societies in which these legal protections operate. Kahei Rokumoto has given some "familiar keywords" associated with the "Japanese ways of social ordering: 'protective collectivism,' 'harmony,' 'trust in authorities,' 'consensus,' [and] 'voluntary submission to obligations,'"⁴² noting that "navigating culture is the most important and complex task in the enterprise of creating a rule-based social order."⁴³ Many of these attributes, such as trust in authorities (including police and prosecutors) and a sense of belonging to a collaborative culture, also carry over to Japanese criminal defense lawyers, the individuals to whom one might look to enforce suspects' rights in a truly

³⁵ *Id.* at 130-31.

³⁶ *See id.* at 131-33; *see also* Ginsburg, *supra* note 29, at 282.

³⁷ *See* E-mail from Takehiko Kawame, *supra* note 27.

³⁸ Ginsburg, *supra* note 29, at 283.

³⁹ *See* DALE M. HELLEGERS, 2 *WE, THE JAPANESE PEOPLE: WORLD WAR II AND THE ORIGINS OF THE JAPANESE CONSTITUTION* 527-44, 686 (2001). Earlier drafts from the Occupying Forces also contained related provisions, including one that would have barred questioning without a lawyer present. *See* Takano, *supra* note 34, at 128-29.

⁴⁰ Foote, *supra* note 26, at 471.

⁴¹ *Id.* at 470.

⁴² Kahei Rokumoto, *Law and Culture in Transition*, 49 *AM. J. COMP. L.* 545, 545 (2001).

⁴³ *Id.* at 559.

adversarial system; indeed, Foote has described Japan's criminal justice process as a "cooperative 'adversary' system."⁴⁴ It is also critical to keep in mind the central role of confessions in the Japanese system and the changes that would occur if the Miranda Association's strategies catch on and suspects regularly refuse to speak to police and prosecutors.

By contrast, other recent successful reforms have targeted different goals; these changes do not undermine the centrality of confessions, the power of prosecutors, or attributes of Japanese society. Perhaps the most significant reform is the participation in *saiban-in*, which also occasioned a shift to trials based on oral evidence. The Justice System Reform Council proposed this change in order to engage the public in the criminal justice system and to increase support for it as well as to "establish the popular base."⁴⁵ In addition, before *saiban-in* trials began, Japan amended its Code of Criminal Procedure to afford crime victims the opportunity to participate in criminal cases.⁴⁶ Victim participation is consistent with the broad reform goal of increasing public engagement in criminal proceedings, and it also strengthens the prosecutor's hand, especially at sentencing.⁴⁷ Further, it enhances the importance of admissions and expressions of remorse, and may penalize defendants who do not confess or exhibit remorse. This is particularly important given that victims may claim to "have been 'further tormented' by defendants' denial or partial denial of the facts, or to have undergone 'further mental anguish' because of defendants' lack of co-operation,"⁴⁸ which "adds to the defendant's blameworthiness."⁴⁹ And, recently, more interrogations are being recorded by both prosecutors and police.⁵⁰ Many reformers have advocated recording; it may

⁴⁴ See Daniel H. Foote, *Reflections on Japan's Cooperative Adversary Process*, in THE JAPANESE ADVERSARY SYSTEM IN CONTEXT, *supra* note 34, at 29, 36-39. One might ask whether this is still a fair characterization of the criminal defense bar, given the recent implementation of *saiban-in* trials and efforts to provide better training for defense lawyers. See JUSTICE SYS. REFORM COUNCIL, *supra* note 32, ch. II, pt. 2.2 (recommending establishing a public defense system). My own sense from conversations with lawyers and scholars is that this characterization is still true, but others may disagree. And it is possible, as one noted scholar suggested to me, that the systemic reforms and improved defense practices in *saiban-in* cases will eventually influence the criminal justice system and the defense bar more generally.

⁴⁵ JUSTICE SYS. REFORM COUNCIL, *supra* note 32, ch. IV, pt. 1.1.

⁴⁶ See generally Shigenori Matsui, *Justice for the Accused or Justice for Victims?: The Protection of Victims' Rights in Japan*, 13 ASIAN-PAC. L. & POL'Y J. 54, 71-79 (2011).

⁴⁷ Erik Herber, *Victim Participation in Japan: When Therapeutic Jurisprudence Meets Prosecutor Justice*, 3 ASIAN J.L. & SOC'Y 135, 148 (2016).

⁴⁸ *Id.* at 145.

⁴⁹ *Id.* at 146.

⁵⁰ See *Japanese Police to Tape All Interrogations of Suspects Facing Lay Judge Trials*, JAPAN TIMES (Sept. 16, 2016), <http://www.japantimes.co.jp/news/2016/09/16/national/crime-legal/japanese-police-tape-interrogations-suspects-facing-lay-judge-trials/#.V-GgXo7k28U> [<https://perma.cc/C3HG-9VGE>] (noting a new guideline of the National Police Agency and

curb abuses in the interrogation room, and it helps ensure that a statement is accurately reported. But the act of recording should not threaten the ability of prosecutors and police to obtain statements, as might reducing the length of detention and questioning from twenty-three days, allowing defense counsel or observers to be present during interrogation, or affording suspects the ability to end all questioning.⁵¹

I began my analysis with Japan in order to make several points. Japan illustrates the gap between the law “on the books” and the law “on the ground.” Japan’s Constitution has a privilege against compelled self-incrimination, but exercising the right to remain silent is exceedingly demanding, requiring a backbone of steel. In addition, Japan’s example illustrates the salience of societal and legal culture. Despite the attraction of *Miranda* as an ideal, implementing meaningful protections for the privilege is quite difficult in a system that places a premium on confessions and in a society and legal system that may value collectivism, submission to obligations, and expressions of remorse as much as or more than individual rights. Richard Leo, for example, has argued that *Miranda*’s requirements of warnings and waivers “can only ‘succeed’ in a truly adversarial criminal justice system and culture” and “[d]espite the Western influence on the Japanese Criminal Code and Constitution, the Japanese criminal justice system is not adversarial.”⁵² He is right about the tension between *Miranda*’s requirements and Japan’s procedural traditions, but one might acknowledge a more general point: implementing a rights-based protocol is exceedingly difficult when it conflicts with a country’s broader societal and legal culture.

Finally, we may note that policymakers in Japan might have priorities other than implementing individuals’ rights through court decisions or legislation. In the World Justice Project’s ranking of 113 nations, Japan is ninth for “order and security” (including absence of crime), thirteenth for “absence of corruption” (though with greater concerns about corruption in the executive and legislative branches than among police), twenty-third for “fundamental rights,” and twenty-first for “criminal justice.”⁵³ Within the “criminal justice” category, rankings

that efforts to record began in 2008). In 2016, the Diet adopted legislation with a new Article 301-2 of the Criminal Procedure Code, which would require recordings in many cases. UMEDA, *supra* note 22, at 3-4. The new provision becomes effective in June 2019. *Id.* at 4.

⁵¹ See Richard A. Leo, *Miranda, Confessions, and Justice: Lessons for Japan?*, in THE JAPANESE ADVERSARY SYSTEM IN CONTEXT, *supra* note 34, at 200, 210-15 (arguing that other changes, such as reducing the period of interrogation and recording, would be more effective reforms); see also JAPAN FED’N OF BAR ASS’NS, OPINION CONCERNING LEGISLATING FOR THE OBSERVER’S PRESENCE AT INTERROGATIONS OF INTELLECTUALLY-CHALLENGED SUSPECTS (2012), <http://www.nichibenren.or.jp/en/document/opinionpapers/20120914.html> [https://perma.cc/92ZG-X28F] (advocating for the presence of an observer during the interrogation of certain vulnerable suspects).

⁵² Leo, *supra* note 51, at 212.

⁵³ WORLD JUSTICE PROJECT, *supra* note 12, at 100.

were highest for “no corruption,” and “no improper government influence.”⁵⁴ These rankings may show Japan in a relatively good position with respect to the rule of law. They also undoubtedly reflect national priorities, history, and aspects of Japan’s societal and legal culture.

B. *Miranda at Home*

If Japan illustrates the complexity of initiating change that may be inconsistent with basic structures, traditions, and culture, our country’s history with *Miranda* provides another example, even when a nation’s highest court seeks to implement systemic reform.

The Supreme Court framed *Miranda* as prescribing necessary protections for the Fifth Amendment privilege. The decision reviews police training manuals and describes police interrogation practices in the United States, in an effort to provide empirical support for the imperative to reform.⁵⁵ The Court found:

[W]ithout proper safeguards the process of in-custody interrogation . . . contains inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.⁵⁶

The Court fashioned its familiar scheme of warnings and waivers, which apply only when a suspect is both in custody and subject to interrogation.⁵⁷ If a custodial suspect “indicates in any manner . . . that he wishes to remain silent” or wants an attorney, “the interrogation must cease.”⁵⁸ The ruling established a conclusive presumption that a violation of *Miranda*’s procedures would violate the Fifth Amendment⁵⁹ and provided a strong evidentiary rule of exclusion.⁶⁰ It also expressly stated a preference for Fifth Amendment values over the interests of law enforcement, rejecting the “recurrent argument . . . that society’s need for interrogation outweighs the privilege.”⁶¹

⁵⁴ *Id.*

⁵⁵ See *Miranda v. Arizona*, 384 U.S. 436, 448-55 (1966).

⁵⁶ *Id.* at 467.

⁵⁷ *Id.* at 467-68; see also *Rhode Island v. Innis*, 446 U.S. 291, 297-98 (1980) (explaining that safeguards apply when there is interrogation); *Oregon v. Mathiason*, 429 U.S. 492, 494-95 (1977) (per curiam) (stating that for the *Miranda* safeguards to apply, custody is required).

⁵⁸ *Miranda*, 384 U.S. at 473-74.

⁵⁹ See Weisselberg, *supra* note 4, at 120-21; see also David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 191-95 (1988).

⁶⁰ See *Miranda*, 384 U.S. at 479 (holding that unless warnings and waiver are proved, “no evidence obtained as a result of interrogation can be used against [the accused]”).

⁶¹ *Id.*

The *Miranda* Court sought to further several overlapping goals. First, as noted, it aimed to give real meaning to Fifth Amendment protections “on the ground.” Second, by implementing these procedures, as a practical matter, there would be many fewer Due Process Clause claims of involuntariness.⁶² Third, these procedures would also protect rights at trial. If counsel is available during questioning, counsel’s presence “enhances the integrity of the fact-finding processes in court.”⁶³ Fourth, interrogation practices would change. The majority disdained the tactics it described.⁶⁴ It is impossible to read the decision and not conclude that the Justices expected *Miranda* to transform interrogation practices; perhaps the Justices assumed that suspects would invoke the privilege and bring the interrogation to an end if officers employed heavy-handed tactics.⁶⁵

Although the majority opinion reads “like a legislative committee report with an accompanying statute,”⁶⁶ the Court declined to wait for state legislatures or advisory groups to act.⁶⁷ Assessing the constitutionality of legislation from fifty states must have been an unappealing prospect for the Court. And, given the sheer number of state and local law enforcement agencies within the United States, local reform efforts would at best be piecemeal.⁶⁸ In contrast to the United States, other countries may be better situated to oversee law enforcement through national legislation and regulation. For example, Japan has a National Public Safety Commission, which provides oversight to the National Police Agency (“NPA”), and the NPA also assists in overseeing prefectural police.⁶⁹

⁶² See Weisselberg, *supra* note 4, at 123, 125 (arguing that *Miranda*’s bright-line rules were intended to prevent Fourteenth Amendment involuntariness claims).

⁶³ *Miranda*, 384 U.S. at 466.

⁶⁴ See *id.* at 457-58 (“To be sure, this is not physical intimidation, but it is equally destructive of human dignity. 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.” (footnote omitted)).

⁶⁵ See Weisselberg, *supra* note 4, at 123, 125.

⁶⁶ Strauss, *supra* note 59, at 190.

⁶⁷ See *Miranda*, 384 U.S. at 490 (“It is also urged upon us that we withhold decision on this issue until state legislative bodies and advisory groups have had an opportunity to deal with these problems by rule making. . . . [H]owever, the issues presented are of constitutional dimensions and must be determined by the courts.”).

⁶⁸ In 1992, there were 17,360 state and local law enforcement agencies in the United States. See BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 1992, at 4 (1993). As of 2008, the number increased to 17,985. See BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 2 (2011).

⁶⁹ See *National Police Agency (NPA)*, FED’N AM. SCIENTISTS, <https://fas.org/irp/world/japan/npa.htm> [<https://perma.cc/DAS7-PLEB>] (last visited Jan. 31, 2017).

Also, public prosecutors are employed by the Ministry of Justice, a national agency.⁷⁰

In the United States, *Miranda* has fared well neither on the books nor on the ground. On the books, the Court no longer equates a violation of *Miranda*'s procedures with a violation of the Fifth Amendment.⁷¹ Legions of articles describe the Court's clear retreat from a robust set of "on the books" protections for the Fifth Amendment privilege. As Chief Justice Rehnquist was able to say in *Dickerson v. United States*,⁷² while upholding *Miranda* against a full-frontal attack, "our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement."⁷³ The list of holdings is quite long, but some highlights include: officers need not advise a suspect of the subject matter of the interrogation⁷⁴ or that a lawyer is trying to see him;⁷⁵ police are not required to obtain a waiver before beginning to interrogate;⁷⁶ the physical fruit of a statement taken in violation of *Miranda* is not excluded⁷⁷ and the statement itself can be used to impeach the defendant at trial.⁷⁸

Perhaps most corrosive, the Court has lowered the bar to finding waivers of rights and, at the same time, established quite demanding requirements for invocations. In *Berghuis v. Thompkins*, the most important *Miranda* decision since *Dickerson*, the defendant was almost entirely silent during his interrogation.⁷⁹ Officers read Thompkins his rights from a form, which Thompkins refused to sign.⁸⁰ Without expressly asking Thompkins if he was willing to waive his rights, officers began the interrogation.⁸¹ After two hours and forty-five minutes, he gave one-word answers to three questions: "Do you believe in God?" "Yes." "Do you pray to God?" "Yes." "Do you pray to God to forgive you for shooting that boy down?" "Yes."⁸² Thompkins's assents were taken as both implied waivers of his rights and, of course, as damaging admissions.⁸³ His silence for almost three hours was not deemed an invocation

⁷⁰ See *Public Prosecutors Office*, MINISTRY JUST., <http://www.moj.go.jp/ENGLISH/PPO/ppo-01.html> [<https://perma.cc/4KPT-94CQ>] (last visited Jan. 31, 2017).

⁷¹ See *Chavez v. Martinez*, 538 U.S. 760, 772-73 (2003) (plurality opinion).

⁷² 530 U.S. 428 (2000).

⁷³ *Id.* at 443.

⁷⁴ *Colorado v. Spring*, 479 U.S. 564, 574-77 (1987).

⁷⁵ *Moran v. Burbine*, 475 U.S. 412, 422 (1986).

⁷⁶ *Berghuis v. Thompkins*, 560 U.S. 370, 387-88 (2010).

⁷⁷ *United States v. Patane*, 542 U.S. 630, 642-44 (2004).

⁷⁸ *Oregon v. Hass*, 420 U.S. 714, 723-24 (1975); *Harris v. New York*, 401 U.S. 222, 226 (1971).

⁷⁹ *Thompkins*, 560 U.S. at 375.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 376.

⁸³ See *id.* at 384-86.

of his right to remain silent, which would then have required officers to cease questioning; the majority held that the right to remain silent (like the right to counsel) must be asserted affirmatively and unequivocally.⁸⁴ Dissenting, Justice Sotomayor disagreed with the notion “that a suspect must clearly invoke his right to silence by speaking.”⁸⁵

In a pre-*Thompkins* article, I assessed *Miranda*'s effectiveness on the ground.⁸⁶ *Miranda*'s protections have also been substantially reduced by police practices that cohere with the desiccated version of *Miranda* that remains on the books. For example, officers have been trained to create situations that courts will find to be “noncustodial,” such as by inviting suspects to the police station and telling them they are not under arrest so that *Miranda* warnings need not be given.⁸⁷ This advice to suspects that they are not under arrest, often termed a “*Beheler* warning,” is a deliberate tactic to avoid giving *Miranda* warnings.⁸⁸ Police also have been trained on at least mild ways to “soften up” suspects prior to giving warnings.⁸⁹ Court decisions are quite generous to law enforcement in allowing warnings to be conveyed in almost any phrasing; the admonitions do, in fact, vary in content and complexity, and the social science literature establishes that many suspects are unable to understand them.⁹⁰ Richard Leo has demonstrated that *Miranda* has not changed officers' basic approach to interrogation,⁹¹ nor has it been effective in reducing the incidents of false confessions; this is in part because many vulnerable suspects are also less likely to be able to understand the warnings and act on them.⁹² Leo has argued that other measures, such as recording and regulating interrogations, protecting more vulnerable populations, and using a modified test for voluntariness, would be far more effective and appropriate reforms.⁹³

It is tempting to attribute *Miranda*'s failings to the Supreme Court's changed composition. *Miranda* was an issue during the 1968 presidential campaign and,

⁸⁴ See *id.* at 381-82 (stating that the right to remain silent must be invoked unambiguously to require police to cut off questioning); *Davis v. United States*, 512 U.S. 452, 459 (1994) (holding that invocation of the right to counsel must be unambiguous).

⁸⁵ *Thompkins*, 560 U.S. at 404 (Sotomayor, J., dissenting).

⁸⁶ See generally Weisberg, *supra* note 3.

⁸⁷ *Id.* at 1540-47.

⁸⁸ See *id.* at 1542-45 (describing training materials). These admonitions are commonly called “*Beheler* warnings” after the holding in *California v. Beheler*, 463 U.S. 1121, 1125-26 (1983) (per curiam).

⁸⁹ See Weisberg, *supra* note 3, at 1547-63.

⁹⁰ See *id.* at 1563-77; *infra* notes 198-200, 279-86 and accompanying text.

⁹¹ See RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* 123-32, 280-82 (2008).

⁹² See Richard A. Leo, *Miranda and the Problem of False Confessions*, in *THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING* 271, 275-76 (Richard A. Leo & George C. Thomas III eds., 1998).

⁹³ See LEO, *supra* note 91, at 272-317.

as Yale Kamisar explains, President Nixon appointed Justices who were not fans of *Miranda*.⁹⁴ Even so, we might consider the difficulty of accomplishing top-down reform to interrogation practices within our criminal justice system and society. While confessional speech in the United States is not valued as part of the corrections process, as it is in Japan, police and prosecutors still consider confessions to be critical and reliable evidence.⁹⁵ *Miranda* did nothing to diminish the instrumental value placed upon confessions; even with the advent of much better modes of proof, the criminal justice system still relies significantly on suspects' statements, and the public still credits them.⁹⁶ *Miranda* also did not forbid officers from using the tactics described in the decision, so long as suspects also received warnings and waived their rights. *Miranda* inserted its ritual of warnings and waivers within an interrogation process that, the Court also concluded, contains inherently compelling pressures.⁹⁷ But, instead of requiring the presence of lawyers during custodial interrogation,⁹⁸ the Justices placed police—the actors in our system with primary responsibility for leading investigations and collecting evidence—in the hopelessly conflicted role of both advising suspects that they may remain silent and then seeking a confession to make or gild a case.⁹⁹ That is, the Justices sought to force top-down reform without altering basic structures, incentives, or actors. While I believe that the *Miranda* Court's strong measures cohere with Fifth Amendment principles and values,¹⁰⁰ *Miranda* has proved only partially successful in reforming America's legal culture, even if it is thought to be embedded in our societal culture.

Finally, while revising interrogation practices may be a priority for some individuals in the United States today, it takes a back seat to other reform goals. It is interesting to compare the rankings of the U.S. criminal justice system with those of other nations. Overall, the U.S. criminal justice system is ranked 22 out of 113 nations by the World Justice Project.¹⁰¹ But it fares less well in comparison with select cohorts: it is ranked fourteenth of a group of twenty-four

⁹⁴ See Yale Kamisar, *The Rise, Decline, and Fall (?) of Miranda*, 87 WASH. L. REV. 965, 974-80 (2012).

⁹⁵ See Cassell & Fowles, *supra* note 8, at 702-03.

⁹⁶ See LEO, *supra* note 91, at 186-89, 248-52.

⁹⁷ See *Miranda v. Arizona*, 384 U.S. 384, 468 (1966).

⁹⁸ See *id.* at 474.

⁹⁹ See Andrew Guthrie Ferguson & Richard A. Leo, *The Miranda App: Metaphor and Machine*, 97 B.U. L. REV. 935, 940-44 (2017); Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 881-82 (1981); see also DAVID SIMON, *HOMICIDE: A YEAR ON THE KILLING STREETS* 193-207 (1991) (describing strategies used by homicide detectives in Baltimore).

¹⁰⁰ See Weisselberg, *supra* note 4, at 140-49 (explaining that the decision sought to establish a minimum level of respect for Fifth Amendment values such as preserving a predominantly adversarial system and individual autonomy).

¹⁰¹ WORLD JUSTICE PROJECT, *supra* note 12, at 153.

nations from the European Union, European Free Trade Association, and North America, and twenty-second of thirty-six high-income nations.¹⁰² The factors of “effective investigations” and “timely and effective adjudication” outperform the mean of these nation groups, but the United States is below the mean for “due process of law,” “effective correctional system,” and “no corruption.”¹⁰³ It is substantially below the mean for “no discrimination.”¹⁰⁴ One may thus suggest that the highest reform priorities in the United States should be reducing discrimination, reviewing modes of policing in minority communities, and working to rebuild trust between law enforcement and those communities. *Miranda* does not directly speak to these pressing goals.

In sum, as a protection for the Fifth Amendment privilege, and even as a device to prevent false confessions, *Miranda* is weak on the books and falls short on the ground. To the extent that *Miranda* is an inspiration to courts and reformers outside this country, they might do well to consider the United States’ full experience with the *Miranda* rule. And, as both Japan and the United States demonstrate, in thinking of how a regime of warnings and waivers might actually be implemented, it is critical to consider how those procedures cohere with the structures, institutions, and culture of a legal system and nation, as well as reform priorities.

II. DEVELOPMENTS IN EUROPE

There have been significant movements regarding *Miranda*-like protections in decisions from the ECtHR and Directives of the European Parliament and the Council of the European Union. While these have occurred at least partly in tandem, it may help to start with several rulings from the ECtHR.¹⁰⁵ They begin a bit earlier, apply to a broader set of nations, and have influenced the development of EU Directives.¹⁰⁶ This Article then moves to the Directives, and compares the ECtHR’s decisions and the Directives to aspects of the *Miranda* doctrine both “on the books” and “on the ground.”

¹⁰² *Id.*

¹⁰³ *See id.*

¹⁰⁴ *See id.*

¹⁰⁵ There are other judicial bodies, such as national courts, that also interpret aspects of the European Convention and the EU Directives. *See generally* McGowan v. B, [2011] UKSC 54 (appeal taken from Scot.). The Court of Justice of the European Union also interprets EU law. *See generally* *Court of Justice of the European Union (CJEU)*, EUROPA.EU, https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en#overview [<https://perma.cc/UG2C-856J>] (last visited Feb. 3, 2017). Nevertheless, the ECtHR has taken the lead.

¹⁰⁶ *See* John Jackson, *Cultural Barriers on the Road to Providing Suspects with Access to a Lawyer*, in *EU CRIMINAL JUSTICE AND THE CHALLENGES OF DIVERSITY*, *supra* note 20, at 181, 184-87 (describing the influence of the ECtHR on the original proposal for the Directive on the Right of Access to a Lawyer).

A. *The European Convention and the European Court of Human Rights*

For context, the ECtHR does not exercise appellate review over criminal cases; it decides applications by individuals who may claim that they were investigated and convicted in criminal cases in ways that violate the European Convention.¹⁰⁷ The Court is divided into “sections” from which judges issue decisions as a “Chamber” of seven judges.¹⁰⁸ In cases that raise serious questions about the interpretation of the Convention, that are suitable for development of the law, or that have serious issues of general importance, a party may seek a referral to the “Grand Chamber,” with seventeen judges participating in the decision.¹⁰⁹

The relevant decisions from the ECtHR apply Article 6 of the Convention, which addresses the right to a fair trial.¹¹⁰ Article 6(1) provides that “[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing . . . by an independent and impartial tribunal established by law.”¹¹¹ Section 2 provides “[e]veryone charged with a criminal offence” with the presumption of innocence.¹¹² Section 3(c) further demands that “[e]veryone charged with a criminal offence” has the right “to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.”¹¹³ Notably, while the text refers to “any criminal charge” and people “charged with a criminal offence,” it does not specify whether these provisions apply *prior* to the filing of formal charges, nor does Article 6 expressly contain a privilege against self-incrimination. In 1993, the ECtHR held in *Imbrioscia v. Switzerland*¹¹⁴ that a suspect was not

¹⁰⁷ See Convention on Human Rights, *supra* note 13, arts. 19, 32, 34 (governing the establishment and jurisdiction of the Court, as well as the individual application process). In addition to individual applications, States may also bring matters before the Court involving breaches of the Convention and Protocols by other States. See *id.* art. 33 (relating to inter-State cases).

¹⁰⁸ *Composition of the Court*, EUR. CT. HUM. RTS., <http://www.echr.coe.int/Pages/home.aspx?p=court/judges&c=> [https://perma.cc/4WGD-TDFA] (last visited Jan. 26, 2017).

¹⁰⁹ Convention on Human Rights, *supra* note 13, art. 43. See generally *Composition of the Court*, *supra* note 108; EUROPEAN COURT OF HUMAN RIGHTS, THE GENERAL PRACTICE FOLLOWED BY THE PANEL OF THE GRAND CHAMBER WHEN DECIDING ON REQUESTS FOR REFERRAL IN ACCORDANCE WITH ARTICLE 43 OF THE CONVENTION (2011), http://www.echr.coe.int/Documents/Note_GC_ENG.pdf [https://perma.cc/NWF4-YH8B]. Decisions of the ECtHR are available at: <http://hudoc.echr.coe.int/eng>.

¹¹⁰ Convention on Human Rights, *supra* note 13, art. 6.

¹¹¹ *Id.* art. 6(1) (emphasis added).

¹¹² *Id.* art. 6(2) (emphasis added).

¹¹³ *Id.* art. 6(3)(c) (emphasis added).

¹¹⁴ 275 Eur. Ct. H.R. (ser. A) [¶ 44] (1993), <http://hudoc.echr.coe.int/eng?i=001-57852> [https://perma.cc/LC93-HKR7].

denied his rights under Article 6 when he was questioned without counsel during a preliminary investigation.¹¹⁵ While the Court noted that Article 6 may be relevant to pre-trial proceedings, it concluded that the States may choose how to secure the right to counsel in their systems so that there is a fair trial and, on the whole, concluded that the defendant in the case was not denied a fair trial.¹¹⁶ Judge De Meyer dissented, arguing unsuccessfully that *Miranda*'s principles "belong to the very essence of fair trial."¹¹⁷ But change would come.

In several decisions, mostly from the Grand Chamber, the ECtHR began to construe the right to a fair trial to include the right to remain silent and the right not to be compelled to incriminate oneself, at least where the degree of compulsion is quite strong. Though "not specifically mentioned in Article 6," these rights "are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6."¹¹⁸ Further, the right against self-incrimination "presupposes that the prosecution . . . seek[s] to prove their case . . . without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused" and, "[i]n this sense the right is closely linked to the presumption of innocence."¹¹⁹ Article 6 is violated when the State "extinguishes the very essence of the . . . rights to silence and against self-incrimination."¹²⁰ The ECtHR has sometimes given these principles a broad meaning, finding violations where coercion has been used to gain evidence.¹²¹

¹¹⁵ *Id.* at 15 [¶¶ 42-44].

¹¹⁶ *See id.* at 13-14, 15 [¶¶ 36-44].

¹¹⁷ *Id.* at 19 (De Meyer, J., dissenting). *Miranda* was also cited in dissent in *Galstyan v. Armenia*, App. No. 26986/03, at *45-46 (Eur. Ct. H.R. Nov. 15, 2007) (Fura-Sandström, J., dissenting), <http://hudoc.echr.coe.int/eng?i=001-83297> [<https://perma.cc/7BAW-JVAC>].

¹¹⁸ *Saunders v. United Kingdom* [GC], 1996-VI Eur. Ct. H.R. 2044, 2064 [¶ 68], <http://hudoc.echr.coe.int/eng?i=001-58009> [<https://perma.cc/BT8V-M8MS>]; *see also* International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, art. 14 § 3(g) (providing an individual the right "[n]ot to be compelled to testify against himself or to confess guilt"); *John Murray v. United Kingdom* [GC], 1996-I Eur. Ct. H.R. 30, 48-53 [¶¶ 44-58], <http://hudoc.echr.coe.int/eng?i=001-57980> [<https://perma.cc/Z74Y-MKBC>] (finding no violation of Article 6 where adverse inferences were drawn because a suspect exercised the right to remain silent); *Funke v. France*, 256 Eur. Ct. H.R. (ser. A) 7, 21-22 [¶¶ 41-44] (1993), <http://hudoc.echr.coe.int/eng?i=001-57809> [<https://perma.cc/83WU-G5DV>] (finding a violation of Article 6 where an individual was convicted for refusing to disclose documents demanded by customs).

¹¹⁹ *Saunders*, 1996-VI Eur. Ct. H.R. at 2064 [¶¶ 20, 23].

¹²⁰ *Heaney & McGuinness v. Ireland*, 2000-XII Eur. Ct. H.R. 419, 439 [¶ 58], <http://hudoc.echr.coe.int/eng?i=001-59097> [<https://perma.cc/Q8L2-2G6Y>].

¹²¹ *See Jalloh v. Germany* [GC], 2006-IX Eur. Ct. H.R. 281, 318, 320 [¶¶ 111, 121], <http://hudoc.echr.coe.int/eng?i=001-76307> [<https://perma.cc/T4B8-SEB8>] (finding a violation of Article 6(1) where the "decisive evidence" used to secure a conviction had been obtained after the forced administration of emetics).

Then, in 2008, the Grand Chamber decided *Salduz v. Turkey*.¹²² After Yusuf Salduz was taken into custody for allegedly participating in an unlawful demonstration and hanging an illegal banner, he was interrogated without a lawyer.¹²³ Salduz signed a form that advised him of the rights of arrested persons, including the right to remain silent.¹²⁴ However, he later alleged that he had been beaten by police and that his statement was made under duress.¹²⁵ Salduz was convicted following a trial in which the domestic court heard all the evidence, including his original statement and a subsequent retraction.¹²⁶ Although Article 6 of the Convention comes into play when a person is “charged” with a criminal offense, and formal charges had not yet been filed against Salduz, the ECtHR held that “Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.”¹²⁷ Even where there are compelling reasons, denying access to a lawyer “must not unduly prejudice the rights of the accused under Article 6.”¹²⁸ *Salduz* does not cite the United States Supreme Court, but the decision—like *Miranda*—is a primer on the significance of confessions, the vulnerability of suspects during interrogation, and the role of counsel.

Just as *Miranda* made clear that the Fifth Amendment extends into the stationhouse even before charges are filed,¹²⁹ *Salduz* provides that Article 6 of the Convention, and especially its right to counsel, “may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced.”¹³⁰ Statements taken from a suspect may be critical:

National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances, Article 6 will normally require that the accused be allowed to benefit from

¹²² [GC], 2008-V Eur. Ct. H.R. 59, http://www.echr.coe.int/Documents/Reports_Recueil_2008-V.pdf [<https://perma.cc/T8UU-3F74>].

¹²³ *See id.* at 65 [¶¶ 12, 14].

¹²⁴ *Id.* [¶ 14].

¹²⁵ *See id.* at 66 [¶ 17].

¹²⁶ *See id.* 66-67 [¶¶ 20, 22].

¹²⁷ *Id.* at 78 [¶ 55].

¹²⁸ *Id.*

¹²⁹ *See Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (explaining that the Fifth Amendment right against self-incrimination applies “outside of criminal court proceedings” and protects people “in all settings in which their freedom of action is curtailed in any significant way”).

¹³⁰ *Salduz*, 2008-V Eur. Ct. H.R. at 76 [¶ 50]. Further, the right to counsel “is one element . . . of the concept of a fair trial in criminal proceedings contained in Article 6 § 1.” *Id.*

the assistance of a lawyer already at the initial stages of police interrogation.¹³¹

Evidence obtained during the investigation stage determines the framework for considering the evidence at trial. But “an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex,” especially with respect to evidence.¹³² The Court tied the right to counsel during interrogation to the earlier decisions developing the right against compelled self-incrimination, noting that “[i]n most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself.”¹³³

Salduz is a landmark case for the ECtHR, a remarkable ruling that directly applies the protections of the Convention to pre-charge police interrogations. Over the past fifty years, the United States Supreme Court has issued scores of opinions defining custody, interrogation, invocation, waiver, and other aspects of *Miranda*'s regime. Likewise, subsequent decisions from the ECtHR have shaped facets of the *Salduz* doctrine. Before turning to those later rulings, this Article describes the EU Directives, and then explores how the developing *Salduz* doctrine and the Directives—taken together—compare with *Miranda* “on the books” and “on the ground.”

B. *The European Parliament and the Council of the European Union*

The Treaty on the Functioning of the European Union (“TFEU”) generally provides for the cooperation of EU Member States in criminal matters.¹³⁴ While this includes the mutual recognition of decisions, as well as police and judicial cooperation in cross-border matters, the TFEU also authorizes the European Parliament and the Council of the European Union to adopt directives on other topics, including “the rights of individuals in criminal procedure.”¹³⁵ In July 2009, the Presidency of the Council of the European Union proposed a “Roadmap on procedural rights,” calling on the European Union to develop “specific measures . . . in order to ensure the fairness of criminal proceedings.”¹³⁶ The Roadmap notes that progress had been made in areas of

¹³¹ *Id.* at 77 [¶ 52].

¹³² *Id.* [¶ 54].

¹³³ *Id.*

¹³⁴ See Consolidated Version of the Treaty on the Functioning of the European Union art. 82, July 6, 2016, 2016 O.J. (C 202) 79-80 [hereinafter TFEU], <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/TXT&from=EN> [https://perma.cc/J8ZP-Y2X3].

¹³⁵ *Id.* art. 82(2)(b).

¹³⁶ PRESIDENCY OF THE COUNCIL OF THE EUROPEAN UNION, NOTE NO. 11457/09, ROADMAP WITH A VIEW TO FOSTERING PROTECTION OF SUSPECTED AND ACCUSED PERSONS IN CRIMINAL PROCEEDINGS ¶ 6, Annex (2009),

cooperation that facilitate prosecution, but “[i]t is now time to take action to improve the balance between these measures and the protection of procedural rights of the individual.”¹³⁷ The proposal was approved by the Council of the European Union in December 2009 as part of the *Stockholm Programme*, a broader multi-year agenda.¹³⁸

Within the next few years, the European Parliament and the Council approved a series of directives initially suggested in the Roadmap. While the ECtHR expanded protections for individuals through *Salduz* and related cases, the “EU measures are more normative, prescriptive and enforceable.”¹³⁹ The first Directive related to the right to interpretation and translation in criminal prosecutions (“Directive on the Right to Interpretation”).¹⁴⁰ Next, in 2012, the Parliament and Council promulgated the Directive “on the right to information in criminal proceedings” (“Directive on the Right to Information”).¹⁴¹ The following year saw a new Directive on “the right of access to a lawyer in criminal proceedings” (“Directive on the Right of Access to a Lawyer”).¹⁴² Two

<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2011457%202009%20INIT> [<https://perma.cc/GU9J-9UZA>]. The Annex to the Roadmap listed proposed specific measures. *See id.* Annex.

¹³⁷ *Id.* ¶ 10.

¹³⁸ *See* PRESIDENCY OF THE COUNCIL OF THE EUROPEAN UNION, NOTE NO. 17024/09, THE STOCKHOLM PROGRAMME—AN OPEN AND SECURE EUROPE SERVING AND PROTECTING THE CITIZENS ¶ 2.4 (2009), <https://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2017024%202009%20INIT> [<https://perma.cc/RW7K-BGUC>]. *See generally* Steven Cras & Luca De Matteis, *The Directive on the Right to Interpretation and Translation in Criminal Proceedings: Genesis and Description*, 2010 EUR. CRIM. L. ASS’NS’ F. 153 (providing a more detailed historical background of the Roadmap and description of its main provisions); Mar Jimeno-Bulnes, *The EU Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings*, 2009 EUR. CRIM. L. ASS’NS’ F. 157 (providing a brief background on the Roadmap and analysis of its specific provisions).

¹³⁹ Jacqueline S. Hodgson, *From the Domestic to the European: An Empirical Approach to Comparative Legal Advice*, in *COMPARATIVE CRIMINAL PROCEDURE* 258, 264 (Jacqueline E. Ross & Stephen C. Thaman eds., 2016); *see also* VALSAMIS MITSILEGAS, *EU CRIMINAL LAW AFTER LISBON: RIGHTS, TRUST AND THE TRANSFORMATION OF JUSTICE IN EUROPE* 168 (2016).

¹⁴⁰ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the Right to Interpretation and Translation in Criminal Proceedings, 2010 O.J. (L 280) 1, 1 [hereinafter Directive 2010/64/EU]. This Directive required Member States to bring into force the laws in their own countries necessary to comply by October 27, 2013. *Id.* art. 9. *See generally* Cras & De Matteis, *supra* note 138 (providing background on the Directive).

¹⁴¹ Directive 2012/13/EU, *supra* note 17, at 1. This Directive does not apply to Denmark, which exercised its option to opt out under Articles 1 and 22 of Protocol No. 22 to the TFEU. *See id.* Recital 45.

¹⁴² Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings, 2013 O.J. (L 294) 1, 1 [hereinafter Directive 2013/48/EU]. This

additional measures were issued in 2016, including a Directive addressing the presumption of innocence (“Directive on the Presumption of Innocence”) (collectively, the “Directives”).¹⁴³ The Directives require all Member States to ensure that national laws comply with their terms, though several States exercised a right to “opt out” of selected Directives.¹⁴⁴

The Directive on the Right to Information applies from the time individuals are “made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence.”¹⁴⁵ “Member States shall ensure that suspects or accused persons are provided promptly with information” about, at least, “(a) the right of access to a lawyer; (b) any entitlement to free legal advice . . . ; (c) the right to be informed of the accusation . . . ; [and] (e) the right to remain silent.”¹⁴⁶ The information must be provided “in order to allow for those rights to be exercised effectively.”¹⁴⁷ The Directive on the Right of Information recites that “the information should be provided promptly in the course of the proceedings and at the latest before the first official interview of the suspect or accused person by the police or by another competent authority.”¹⁴⁸ Additionally, it requires Member States to provide a written “Letter of Rights” to persons actually arrested or detained.¹⁴⁹ An annex to the Directive contains an “Indicative model Letter of Rights,” containing sample language advising a person of the right “to speak confidentially to a lawyer” and that “[w]hile questioned by the police or other competent authorities, you do not have to answer questions about the alleged offence. Your lawyer can help you decide on that.”¹⁵⁰ Member States were required to enact statutes or other provisions to comply with this Directive by June 2014.¹⁵¹

Directive does not apply to the United Kingdom, Ireland, or Denmark, which opted out under Articles 1 and 2 of Protocol Nos. 21 and 22 to the TFEU. *See id.* Recitals 58-59.

¹⁴³ Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to be Present at the Trial in Criminal Proceedings, 2016 O.J. (L 65) 1, 7 [hereinafter Directive (EU) 2016/343]. *See generally* Steven Cras & Anže Erbežnik, *The Directive on the Presumption of Innocence and the Right to Be Present at Trial*, 2016 EUR. CRIM. L. ASS’NS’ F. 25. The Parliament and Council also approved a proposed Directive with safeguards for children accused or suspected of crime. *See id.* at 25-26 (explaining that this was one of three measures presented as a package “to complete the rollout of the Roadmap”).

¹⁴⁴ *See supra* notes 141-42 (regarding opt-out provisions relating to Denmark, the United Kingdom, and Ireland).

¹⁴⁵ Directive 2012/13/EU, *supra* note 17, art. 2(1).

¹⁴⁶ *Id.* art. 3(1).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* Recital 19.

¹⁴⁹ *Id.* art. 4(1).

¹⁵⁰ *Id.* Annex I.

¹⁵¹ *Id.* art. 11.

The Directive on the Right of Access to a Lawyer works in tandem with the Directive on the Right to Information. The former applies “to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities . . . by official notification or otherwise, that they are suspected or accused” of a criminal offense.¹⁵² The right of access applies to individuals even “before they are questioned by the police” or another authority.¹⁵³ Member States must ensure the right for the lawyer “to be present and participate effectively when questioned.”¹⁵⁴ A person may waive the right to counsel, so long as the person has been provided with sufficient information “about the content of the right concerned and the possible consequences of waiving it; and . . . the waiver is given voluntarily and unequivocally.”¹⁵⁵ The Member States were required to comply by November 27, 2016.¹⁵⁶

Finally, the recent Directive on the Presumption of Innocence also expressly addresses the right to remain silent and the right not to incriminate oneself. Member States must ensure that suspects and accused persons have those rights, the exercise of which “shall not be used against them and shall not be considered to be evidence that they have committed the criminal offence concerned.”¹⁵⁷ The Directive’s Recitals indicate that when people are given information under the earlier Directives, or when they receive a “Letter of Rights,” they should be provided information concerning the right not to incriminate oneself.¹⁵⁸ States are required to comply by April 1, 2018.¹⁵⁹

C. *Miranda*, *Salduz*, and the Directives “On the Books”

While the *Salduz* doctrine is still developing, and not all of the Directives have yet been implemented, they appear in theory to provide more robust protection for suspects than *Miranda*, particularly with respect to noncustodial questioning, the content of warnings, waiver, and invocation.

1. Noncustodial Questioning

Miranda applies only to *custodial* questioning.¹⁶⁰ The *Miranda* Court used the element of custody to identify that set of police interrogations where inherently compelling pressures could be presumed to exist, thus jeopardizing the Fifth Amendment privilege and requiring the protections of warnings and

¹⁵² Directive 2013/48/EU, *supra* note 142, art. 2(1).

¹⁵³ *Id.* art. 3(2)(a).

¹⁵⁴ *Id.* art. 3(3)(b).

¹⁵⁵ *Id.* art. 9(1)(a)-(b).

¹⁵⁶ *Id.* art. 15.

¹⁵⁷ Directive (EU) 2016/343, *supra* note 143, art. 7(5).

¹⁵⁸ *See id.* Recitals 31-32.

¹⁵⁹ *See id.* art. 14.

¹⁶⁰ *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (expressly limiting its holding to statements “stemming from custodial interrogation of the defendant”).

waivers.¹⁶¹ By contrast, both the Convention and the Directives apply to a broader set of interactions with police.

While *Salduz* was questioned postarrest, subsequent decisions make clear that custody (either formal arrest or some form of detention) is not required under the Convention, at least with respect to warnings. In *Zaichenko v. Russia*,¹⁶² the ECtHR held that a person is “charged” within the meaning of Article 6 of the Convention when the individual is “officially notified” that he or she will be prosecuted, or when the person’s situation “has been substantially affected.”¹⁶³ Aleksandr Zaichenko’s situation was substantially affected and “there should have been a suspicion of theft” against him when he was questioned about the theft of diesel fuel during a roadside check.¹⁶⁴ Though he was not in custody, Zaichenko should have been warned of the privilege against self-incrimination and the right to remain silent.¹⁶⁵

*Ibrahim and Others v. United Kingdom*¹⁶⁶ builds upon *Zaichenko*, holding that “in principle there can be no justification for a failure to notify a suspect of these rights.”¹⁶⁷ The contrast with *Miranda* is perhaps clearest with respect to the fourth defendant in *Ibrahim*, Ismail Abdurahman. Abdurahman was invited to the police station by officers who expressly sought his help as a witness.¹⁶⁸ He voluntarily went to the station, where he was initially interviewed as a witness, without warnings.¹⁶⁹ After about an hour, the officers determined that Abdurahman was in danger of incriminating himself, but continued to question him without warnings and he gave a statement.¹⁷⁰ Focusing on the status and disadvantage of an individual as a *suspect*, as opposed to the attributes of *detention*, the ECtHR restated that a “criminal charge” exists when a person is officially notified of an allegation of a criminal offense or “from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him.”¹⁷¹ The judges determined that

¹⁶¹ *See id.* at 458.

¹⁶² App. No. 39660/02 (Eur. Ct. H.R. Feb. 18, 2010), <http://hudoc.echr.coe.int/eng?i=001-97346> [<https://perma.cc/TSSB-CXSQ>].

¹⁶³ *Id.* ¶ 42 (citations omitted).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* ¶ 52. However, the Court separately considered the matter of Zaichenko’s actual right to the assistance of counsel, and held that the right did not yet apply, as he had not yet been detained. *See id.* ¶¶ 46-48.

¹⁶⁶ [GC], App. Nos. 50541/8, 50571/08, 50573/08 & 40351/09 (Eur. Ct. H.R. Sept. 13, 2016), <http://hudoc.echr.coe.int/eng?i=001-166680> [<https://perma.cc/QD4D-ZU7V>].

¹⁶⁷ *Id.* ¶ 273.

¹⁶⁸ *Id.* ¶ 139.

¹⁶⁹ *Id.* ¶ 140.

¹⁷⁰ *Id.* ¶¶ 139-42.

¹⁷¹ *Id.* ¶ 249 (citations omitted). One judge disagreed with this formulation and the lack of a legal distinction between persons suspected of and charged with offenses. *See id.* at *91 (Mahoney, J., concurring).

the fourth defendant should have been advised of his rights and provided access to a lawyer.¹⁷² In the United States, the entire questioning of Abdurahman would have been considered noncustodial, and *Miranda* warnings would not have been required, because he was invited to the police station, and it was made clear to him that his assistance was sought as a witness only. Under the *Miranda* doctrine, the officers' belief that Abdurahman was a suspect would not be relevant to an objective determination that his interrogation was noncustodial.¹⁷³

In addition to the Convention, the Directives also extend to much noncustodial questioning. The Directive on the Right to Information requires warning of the rights to remain silent and to access to a lawyer, regardless of whether a person is in custody, though a *written* Letter of Rights only needs to be given to an individual who has been arrested or detained.¹⁷⁴ The information should be provided "before the first official interview of the *suspect*."¹⁷⁵ The Directive on the Right of Access to a Lawyer similarly extends to "suspects or accused [persons] . . . irrespective of whether they are deprived of liberty" and "before they are questioned by the police or by another law enforcement or judicial authority."¹⁷⁶ The similarities between the Directives and the ECtHR's construction of "criminal charge" are not coincidental. The Directives recite that where their provisions correspond to rights under the Convention, their provisions should be implemented consistently with the Convention and the case law of the ECtHR.¹⁷⁷ In *Ibrahim* and other cases, the ECtHR has cited to the Directives (and other international instruments) as it has assessed the obligations of States under the Convention.¹⁷⁸

In one related respect, however, the Directives and the decisions of the ECtHR are similar to *Miranda*. In *Berkemer v. McCarty*,¹⁷⁹ the United States Supreme

¹⁷² See *id.* ¶¶ 299-300, 311.

¹⁷³ See *Stansbury v. California*, 511 U.S. 318, 324 (1994) ("[A] police officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question whether the individual is in custody for purposes of *Miranda*.").

¹⁷⁴ See Directive 2012/13/EU, *supra* note 17, arts. 2(1), 3(1), 4(1).

¹⁷⁵ *Id.* Recital 19 (emphasis added).

¹⁷⁶ Directive 2013/48/EU, *supra* note 142, arts. 2(1), 3(2)(a).

¹⁷⁷ See *id.* Recital 53; see also Directive 2012/13/EU, *supra* note 17, Recitals 18, 42.

¹⁷⁸ See, e.g., *Ibrahim and Others v. United Kingdom* [GC], App. Nos. 50541/8, 50571/08, 50573/08 & 40351/09, ¶¶ 203-27, 259, 261, 271 (Eur. Ct. H.R. Sept. 13, 2016), <http://hudoc.echr.coe.int/eng?i=001-166680> [<https://perma.cc/QD4D-ZU7V>] (citing the Directives on the Right to Information, the Right of Access to a Lawyer, and the Presumption of Innocence, among other authorities); *A.T. v. Luxembourg*, App. No. 30460/13, ¶ 37 (Eur. Ct. H.R. Sept. 14, 2015), <http://hudoc.echr.coe.int/eng?i=001-153960> [<https://perma.cc/YR8Z-LYU3>] (citing the Directive on the Right to Information); *Dvorski v. Croatia* [GC], App. No. 25703/11, at *39-41 (Eur. Ct. H.R. Oct. 20, 2015) (Kalaydjieva, Pinto de Albuquerque & Turković, JJ., concurring), <http://hudoc.echr.coe.int/eng?i=001-158266> [<https://perma.cc/S4HD-6ETE>] (citing the Directive on the Right of Access to a Lawyer, among other authorities).

¹⁷⁹ 468 U.S. 420 (1984).

Court held that a person is not in custody within the meaning of *Miranda* during a routine traffic stop.¹⁸⁰ Likewise, the Directive on the Right to Information does not apply to minor offenses handled by noncriminal courts.¹⁸¹ The Directive on the Right of Access to a Lawyer has a similar provision; it also exempts offenses where deprivation of liberty is not a sanction, and situations such as preliminary questioning to establish identity or to decide whether to start an investigation during the course of a road-side check.¹⁸² In addition, while the ECtHR in *Zaichenko* found that the defendant should have been advised of his rights during a road-side check, the check was a nonroutine traffic stop because he was already suspected of the fuel theft.¹⁸³

2. Quantum of Information Provided with Advice of Rights

The United States Supreme Court has a narrow view of the information that must be provided in order for a *Miranda* waiver to be deemed knowing and intelligent. *Moran v. Burbine*¹⁸⁴ held that officers were not required to tell Brian Burbine that a lawyer had telephoned the police station seeking to represent him during his custodial interrogation.¹⁸⁵ Even though “the additional information would have been useful” to the defendant, and “might have convinced [him] not to speak at all,” the Court concluded that “[e]vents occurring outside of 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.”¹⁸⁶ Likewise, in *Colorado v. Spring*,¹⁸⁷ the Justices ruled that a suspect need not be informed of the crime under investigation, stating that the information about the suspected offense “could affect only the wisdom of a *Miranda* waiver, not its essentially voluntary and knowing nature.”¹⁸⁸ Under *Spring* and *Burbine*, *Miranda* waivers will be found knowing and intelligent so long as a suspect understands the formal contours of her procedural rights, even if she lacks specific information that any rational person would find essential in deciding whether to waive those rights. In *Burbine*, the majority rejected the

¹⁸⁰ *Id.* at 438-40 (citing the “noncoercive” nature of such stops as justification for the Court’s conclusion, and observing that “the atmosphere surrounding an ordinary traffic stop is substantially less ‘police dominated’” than in the custodial interrogations addressed in *Miranda*).

¹⁸¹ See Directive 2012/13/EU, *supra* note 17, art. 2(2).

¹⁸² See Directive 2013/48/EU, *supra* note 142, Recitals 17, 20, art. 2(4).

¹⁸³ *Zaichenko v. Russia*, App. No. 39660/02, ¶ 52 (Eur. Ct. H.R. Feb. 18, 2010), <http://hudoc.echr.coe.int/eng?i=001-97346> [<https://perma.cc/TS5B-CXSQ>].

¹⁸⁴ 475 U.S. 412 (1986).

¹⁸⁵ *Id.* at 425-27.

¹⁸⁶ *Id.* at 422, 427.

¹⁸⁷ 479 U.S. 564 (1987).

¹⁸⁸ *Id.* at 577.

argument for greater information, saying it would place an “additional handicap on otherwise permissible investigatory efforts.”¹⁸⁹

The ECtHR and the European Parliament and Council have a more robust conception of an informed waiver. They require greater information than simply a theoretical description of procedural rights. By contrast with *Burbine*, in *Dvorski v. Croatia*,¹⁹⁰ the Grand Chamber found that a waiver of the right to counsel of choice was not knowing and intelligent where officers failed to tell a suspect under questioning that an attorney had been retained by his parents and that the lawyer had come to the police station.¹⁹¹ And, compared to *Spring*, the Directive on the Right to Information demands that suspects be provided, prior to the first official interview by police, “[a] description of the facts . . . relating to the criminal act that the persons are suspected or accused of having committed” in addition to advice about procedural rights.¹⁹² In *Zachar & Čierny v. Slovakia*,¹⁹³ the ECtHR, citing the Directives on the Right to Information and Right of Access to a Lawyer, found that waivers of the right to counsel were obtained in violation of the Convention because the suspects were not informed prior to questioning that they might be charged with aggravated offenses, rather than mere ordinary crimes.¹⁹⁴ Moreover, while Martin Zachar and Tibor Čierny were advised of their rights with pre-printed forms, no “individualised advice about their situation and rights was provided” to them.¹⁹⁵ Given the rulings in *Dvorski* and *Zachar & Čierny*—coupled with the Directives—the ECtHR and the European Parliament and Council appear to reject the United States Supreme Court’s crabbed conception of a knowing and intelligent waiver. In addition to understanding their rights as theoretical legal constructs, suspects in these European systems must be provided additional relevant information to enable them to decide whether the exercise of their rights is a wise choice, not merely a permissible one.

¹⁸⁹ *Burbine*, 475 U.S. at 427. The Court also opined that informing a suspect of counsel’s attempts to reach him “would contribute to the protection of the Fifth Amendment privilege only incidentally, if at all.” *Id.*

¹⁹⁰ [GC], App. No. 25703/11 (Eur. Ct. H.R. Oct. 20, 2015), <http://hudoc.echr.coe.int/eng?i=001-158266> [<https://perma.cc/S4HD-6ETE>].

¹⁹¹ *Id.* ¶¶ 100-02. The ECtHR noted that the right to counsel was a “prime example” of rights due “the special protection of the ‘knowing and intelligent waiver’” test. *Id.* ¶ 101. The Court also concluded that the suspect’s choice of a different lawyer was not informed because the suspect had no knowledge that the other lawyer had been hired by his parents. *See id.* ¶ 93.

¹⁹² Directive 2012/13/EU, *supra* note 17, Recital 28; *see also id.* arts. 6(1)-(2).

¹⁹³ App. Nos. 29376/12 & 29384/12 (Eur. Ct. H.R. July 21, 2015), <http://hudoc.echr.coe.int/eng?i=001-156270> [<https://perma.cc/NBP9-X94B>].

¹⁹⁴ *Id.* ¶¶ 49, 56, 73-74, 81-82. As the Court ruled, “there is no indication that . . . the attendant risk of a significantly heavier penalty” was explained to the suspects, and thus “any waiver on the applicants’ part of their right to legal representation was not attended by minimum safeguards commensurate with the waiver’s importance.” *Id.* ¶¶ 73-74.

¹⁹⁵ *Id.* ¶ 70.

3. Complexity of Language in Advice of Rights

The Directive on the Right to Information also speaks to the complexity of the advice. It requires Member States to ensure that the advice of rights “shall be given orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons.”¹⁹⁶ The Directive on the Right of Access to a Lawyer likewise requires the provision of “clear and sufficient information in simple and understandable language” before any waiver may be accepted.¹⁹⁷

We may again contrast this with decisions from the United States Supreme Court, which appear to tolerate any language in the warnings so long as the contents “touch[] all of the bases required by *Miranda*.”¹⁹⁸ That is, lower courts are instructed to assess the adequacy of warnings by whether they reference key rights, not whether the warnings are phrased in terms that suspects can understand.¹⁹⁹ There is no requirement or, indeed, even an expressed *preference* for simple language or for warnings tailored to particular, vulnerable populations. This deficiency has led the American Bar Association to recommend the development of simplified *Miranda* warning language for juveniles.²⁰⁰ Although the prosecution must establish that a waiver is knowing, intelligent, and voluntary, the Supreme Court has held that a written or oral statement of waiver “is usually strong proof of the validity of that waiver.”²⁰¹ And in *Thompkins*, the Justices relied upon circumstantial evidence—the officers read an advice form to the defendant, handed him a copy, and determined that he could read and understand English—to find that his

¹⁹⁶ *Id.* art. 3(2).

¹⁹⁷ Directive 2013/48/EU, *supra* note 142, art. 9(1)(a).

¹⁹⁸ *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989). In *Eagan*, the Court determined that warnings in their totality reasonably conveyed the rights required by *Miranda*, even though the officers told the suspect that they had no way of giving him a lawyer, but one could be appointed for him “if and when you go to court.” *Id.* at 198, 203-05. More recently, the Court upheld a warning that lacked an express statement that an attorney could be appointed prior to the interrogation. *Florida v. Powell*, 559 U.S. 50, 63 (2010). The Justices looked at the advisements as a whole and concluded that while “the warnings were not the *clearest possible* formulation of *Miranda*’s right-to-counsel advisement, they were sufficiently comprehensive and comprehensible when given a commonsense reading.” *Id.*

¹⁹⁹ *See* Weisselberg, *supra* note 3, at 1564. Moreover, “[t]he Supreme Court has made clear that officers are not required to provide additional information that might enable suspects to make a more informed choice.” *Id.*

²⁰⁰ *See* AM. BAR ASS’N, RESOLUTION 102B: SIMPLIFIED MIRANDA WARNINGS FOR JUVENILES (2010), http://www.americanbar.org/content/dam/aba/directories/policy/2010_my_102b.authcheckdam.pdf [<https://perma.cc/Z8KS-ETFN>]; *see also* *Policy Statement: Interviewing and Interrogating Juvenile Suspects*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (Mar. 7, 2013), http://www.aacap.org/aacap/policy_statements/2013/Interviewing_and_Interrogating_Juvenile_Suspects.aspx.

²⁰¹ *North Carolina v. Butler*, 441 U.S. 369, 373 (1979).

admissions were also knowing and intelligent waivers.²⁰² These are relatively low bars to establish waiver and, of course, the waiver analysis is made by courts *post hoc*. The Directives take a more proactive approach by requiring warnings in simple and understandable language.

4. Implied Waivers and Advice of Rights

Salduz left open that an individual may waive “of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial.”²⁰³ However, a waiver “must be established in an *unequivocal* manner and be attended by minimum safeguards commensurate to its importance.”²⁰⁴ In a later case, *Pishchalnikov v. Russia*,²⁰⁵ the ECtHR expressly held that the right to counsel “require[s] the special protection of the knowing and intelligent waiver standard.”²⁰⁶ The Directive on the Right of Access to a Lawyer demands that a waiver be given “voluntarily and unequivocally.”²⁰⁷ *Salduz* and *Thompkins* illustrate the difference between European and American approaches, particularly with respect to “tacit” or “implied” waivers. In part due to its waiver jurisprudence, the protections of the ECtHR appears “significantly stronger than that articulated in *Miranda*, or its diluted post-Warren-Court progeny.”²⁰⁸

When he was questioned by police, Salduz signed a form acknowledging his rights, which is translated below²⁰⁹:

²⁰² See *Berghuis v. Thompkins*, 560 U.S. 370, 385-87 (2010). The Court also observed there is a legal presumption of a valid waiver if a suspect understands her rights and acts “in a manner inconsistent with” the exercise of those rights. *Id.* at 385.

²⁰³ *Salduz v. Turkey* [GC], 2008-V Eur. Ct. H.R. 59, 79 [¶ 59], http://www.echr.coe.int/Documents/Reports_Recueil_2008-V.pdf [<https://perma.cc/T8UU-3F74>].

²⁰⁴ *Id.* (emphasis added).

²⁰⁵ App. No. 7025/04 (Eur. Ct. H.R. Sept. 24, 2009), <http://hudoc.echr.coe.int/eng?i=001-94293> [<https://perma.cc/E2LE-PEE3>].

²⁰⁶ *Id.* ¶ 78.

²⁰⁷ Directive 2013/48/EU, *supra* note 142, art. 9(1)(b).

²⁰⁸ Stephen C. Thaman, *Balancing Truth Against Human Rights: A Theory of Modern Exclusionary Rules*, in *EXCLUSIONARY RULES IN COMPARATIVE LAW* 403, 424 (Stephen C. Thaman ed., 2013) (footnote omitted).

²⁰⁹ Suspects’ and Accused Persons’ Rights Form, *Salduz v. Turkey* [GC], (App. No. 36391/02) (on file with author).

**REPUBLIC OF TURKEY
MINISTRY OF THE INTERIOR
SUSPECTS' AND ACCUSED PERSONS' RIGHTS FORM**

Identity of the individual

Surname	: Salduz	Date of birth	: 02/02/1984
First name	: Yusuf	Place of birth	: Aralık
Mother's name	: Güllüzar	Sex	: Male
Father's name	: İbrahim	Place regd. (prov./dist./vill.)	: Iğdır, Aralık, Kırçıçeği

Detention of Individual

Date/Time	: 30/05/2001	Time	: 01.05
Place (road/street etc.)		Bornova	

You have been apprehended/taken into custody on suspicion of /on the instructions of the prosecuting authorities in relation to the incident The investigation also covers the possibility that you may have been involved in other offences.

You have the following rights under the legislation currently in force:

1. You must give correct answers to questions relating to your identity. It is an offence to withhold information or give false information relating to your identity.
2. You have the right not to make statements about the alleged offence, ie, the right to remain silent.
3. You have the right to inform your relatives that you have been apprehended and/or taken into custody. As long as there is no clear objection from the point of view of the confidentiality of the investigation, your relatives or your embassy/consulate will be informed of the situation immediately.
4. You may put forward points in your favour in order to remove the suspicions against you.
5. You have the right to appoint a defence counsel. If you are not in a position to do so, you may benefit from the legal assistance of a defence counsel appointed by the bar association. You have the right to meet and speak with your defence counsel. Your defence counsel may be present when statements are taken from you. (If you have been taken into custody for an offence within the jurisdiction of the State Security Courts, you may meet with your defence counsel only when you are remanded in custody or your period of non-remand custody is extended by a judge).
6. You have the right to appeal to a judge against your apprehension and any extension of your period of non-remand custody.

I understand my rights in relation to the alleged offence, which have been read out to me and of which a copy has been given to me in the shape of a form.

Yusuf Salduz (signed)
Signature of detainee

2

I have explained to the suspect whose name and detailed identity are given above his/her rights in relation to the alleged offence and s/he has fully understood them and signed/declined to sign this form, a copy of which has been given to him/her.

Officer's

Registration No.	: [illegible]
Unit	: [illegible]
Signature	: [illegible]

The second paragraph of the form clearly advised Salduz that he had the right to remain silent, and the interrogating officer signed the form to confirm that these rights were explained to Salduz, which the Government pointed out to the

ECtHR.²¹⁰ Yet, the Court ruled that “no reliance can be placed on the assertion in the form” that Salduz had been reminded of his right to remain silent.²¹¹ Perhaps other aspects of his treatment or police practices in Turkey led the Court to eschew reliance on the document. But nothing in the form itself undermines a claim that Salduz was told his rights. Further, in the later ruling in *Zaichenko*, the judges emphasized that, for a waiver to be implied from a suspect’s conduct, “it must be shown that he could reasonably have foreseen what the consequences of his conduct would be,” including what would appear to be an appreciation of how the suspect’s noncustodial questioning “in a rather stressful situation” could form the basis for a criminal prosecution.²¹² This is consistent with a knowing and intelligent waiver requiring some understanding of the nature of the investigation and the wisdom of speaking with police, not just a theoretical grasp of the legal contours of procedural rights.

We may compare *Salduz* and *Zaichenko* with the United States Supreme Court’s implied waiver decisions. In *Miranda*, the Court said that the prosecution would have a “heavy burden” to show waiver,²¹³ though—as we have seen—the burden has been lightened considerably, particularly after *Thompkins*. This is the advice of rights form from the interrogation of Van Chester Thompkins²¹⁴:

²¹⁰ *Id.*; *Salduz v. Turkey* [GC], 2008-V Eur. Ct. H.R. 59, 76 [¶ 49], http://www.echr.coe.int/Documents/Reports_Recueil_2008-V.pdf [<https://perma.cc/T8UU-3F74>].

²¹¹ *Salduz*, 2008-V Eur. Ct. H.R. at 80 [¶ 59]; *see also* *Borg v. Malta*, App. No. 37537/13, ¶ 61 (Eur. Ct. H.R. Jan. 12, 2016), <http://hudoc.echr.coe.int/eng?i=001-159924> [<https://perma.cc/5CE2-9SWC>] (finding a violation of the Convention for not affording access to counsel during interrogation and, citing *Salduz*, placing no reliance on allegation that suspect was reminded of his right to remain silent); *Zachar & Čierny v. Slovakia*, App. Nos. 29376/12 & 29384/12, ¶ 71 (Eur. Ct. H.R. July 21, 2015), <http://hudoc.echr.coe.int/eng?i=001-156270> [<https://perma.cc/NBP9-X94B>] (eschewing reliance on a pre-printed form absent individualized advice about the suspects’ situation and rights); *Panovits v. Cyprus*, App. No. 4268/04, ¶ 74 (Eur. Ct. H.R. Dec. 11, 2008), <http://hudoc.echr.coe.int/eng?i=001-90244> [<https://perma.cc/VK33-HK3K>] (holding that, given that applicant was seventeen years old, questioned without his legal guardian and without being informed of his right to seek legal representation, “it was unlikely that a mere caution” that he did not have to say anything and that what he said could be used against him “would be enough to enable him to sufficiently comprehend the nature of his rights”).

²¹² *Zaichenko v. Russia*, App. No. 39660/02, ¶¶ 40, 55 (Eur. Ct. H.R. Feb. 18, 2010) (citation omitted), <http://hudoc.echr.coe.int/eng?i=001-97346> [<https://perma.cc/TSSB-CXSQ>]. For a synthesis of the ECtHR’s rulings on waiver, see the decision of the Supreme Court of the United Kingdom in *McGowan v. B* [2011] UKSC 54 [15]-[36] (appeal taken from Scot.).

²¹³ *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

²¹⁴ Brief for Petitioner at 60, *Berghuis v. Thompkins*, 560 U.S. 370 (2010) (No. 08-1470).

NOTIFICATION OF CONSTITUTIONAL RIGHTS AND STATEMENT

1. YOU HAVE THE RIGHT TO REMAIN SILENT.
2. ANYTHING YOU SAY CAN AND WILL BE USED AGAINST YOU IN A COURT OF LAW.
3. YOU HAVE A RIGHT TO TALK TO A LAWYER BEFORE ANSWERING ANY QUESTIONS AND YOU HAVE THE RIGHT TO HAVE A LAWYER PRESENT WITH YOU WHILE YOU ARE ANSWERING ANY QUESTIONS.
4. IF YOU CANNOT AFFORD TO HIRE A LAWYER, ONE WILL BE APPOINTED TO REPRESENT YOU BEFORE ANY QUESTIONING, IF YOU WISH ONE.
5. YOU HAVE THE RIGHT TO DECIDE AT ANY TIME BEFORE OR DURING QUESTIONING TO USE YOUR RIGHT TO REMAIN SILENT AND YOUR RIGHT TO TALK WITH A LAWYER WHILE YOU ARE BEING QUESTIONED.

DO YOU UNDERSTAND EACH OF THESE RIGHTS THAT I HAVE EXPLAINED TO YOU? _____

SIGNATURE _____

DATE/TIME _____

*Δ read 5 aloud; 1-5 read by CA to Δ.
 Δ asked to initial 1-5, refused to sign "I'm
 not going to sign anything."*

Although *Thompkins* refused to sign the document, the Court still pointed to it as evidence that he understood his rights and made a valid implied waiver.²¹⁵ The Court ruled that to uphold an implied *Miranda* waiver, a court must only find that a suspect was given *Miranda* warnings, understood them, and made an uncoerced statement.²¹⁶ Thus, there is no requirement that a suspect reasonably foresee the consequences of making a statement beyond knowing that speaking amounts to a waiver. Nor is a waiver undermined by the “stressful situation” of an interrogation, unless the circumstances rise to the level of actual coercion that would make a statement involuntary within the meaning of the Due Process Clause.

5. Invocation of the Right to Counsel

For European suspects, invocation of the right to counsel may also be simpler to establish than it is under the *Miranda* doctrine. As noted, an *invocation* of the *Miranda* right to remain silent or right to counsel must be clear and unambiguous, while in Europe under the Convention and the Directive on the Right of Access to a Lawyer it is the *waiver* that must be unambiguous.²¹⁷ In *Pishchalnikov*, the ECtHR ruled that a suspect who merely notifies the authorities of his *intention* to retain a lawyer has made his desire for counsel “sufficiently clear to make it imperative for the investigating authorities to give

²¹⁵ *Thompkins*, 560 U.S. at 385-86.

²¹⁶ *See id.* at 384.

²¹⁷ *See supra* notes 78-84, 204-16 and accompanying text (contrasting the evolution of the *Miranda* standard, especially as seen in *Thompkins*, with the move to grant more access to counsel in Europe).

him the benefit of legal assistance.”²¹⁸ In the United States, an expressed intention to retain a lawyer in the future is not a clear invocation of the right to have counsel present during the interrogation itself.²¹⁹

Strikingly, when a suspect has invoked the right to counsel, law enforcement’s obligations under the Convention are the same as under *Miranda*. While not citing the United States Supreme Court, the ECtHR in *Pishchalnikov* adopted virtually verbatim the protections of *Edwards v. Arizona*,²²⁰ demonstrated in the table below.

<p>“[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.”</p> <p>“[A]n accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.”</p> <p><i>Edwards v. Arizona</i>, 451 U.S. 477, 484-85 (1981).</p>	<p>“[W]hen an accused has invoked his right to be assisted by counsel during interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated interrogation even if he has been advised of his rights.”</p> <p>“[A]n accused . . . who had expressed his desire to participate in investigative steps only through counsel, should not be subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police or prosecution.”</p> <p><i>Pishchalnikov v. Russia</i>, App. No. 7025/04, ¶ 79 (Eur. Ct. H.R. Sept. 24, 2009).</p>
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6. The Public Safety Exception

In *New York v. Quarles*,²²¹ the Supreme Court established an exception to the warning requirement for “questions reasonably prompted by a concern for the public safety.”²²²

²¹⁸ *Pishchalnikov v. Russia*, App. No. 7025/04, ¶ 73 (Eur. Ct. H.R. Sept. 24, 2009), <http://hudoc.echr.coe.int/eng?i=001-94293> [<https://perma.cc/E2LE-PEE3>].

²¹⁹ See, e.g., *Davis v. United States*, 512 U.S. 452, 462 (1994) (holding that the statement, “[m]aybe I should talk to a lawyer” was not an unambiguous invocation of the right to counsel); *Burket v. Angelone*, 208 F.3d 172, 197-98 (4th Cir. 2000) (finding that “I think I need a lawyer” was not an unambiguous request for counsel); *United States v. Scarpa*, 897 F.2d 63, 68-69 (2d Cir. 1990) (holding that the defendant did not request counsel when he said he “was going to get a lawyer”).

²²⁰ 451 U.S. 477, 477-78 (1981).

²²¹ 467 U.S. 649 (1984).

²²² *Id.* at 656.

The Directive on the Right of Access to a Lawyer provides that “[i]n exceptional circumstances and only at the pre-trial stage . . . Member States may temporarily derogate from the application of the[se] rights . . . where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person” or “to prevent substantial jeopardy to criminal proceedings.”²²³ However, any such derogation must not go beyond what is necessary, must be limited in time, and must not prejudice the overall fairness of the criminal case.²²⁴ This Directive also recites that under these circumstances, suspects or accused people can be questioned without counsel “provided that they have been informed of their right to remain silent and can exercise that right, and provided that such questioning does not prejudice the rights of the defence, including the privilege against self-incrimination.”²²⁵ Thus, under this Directive, safety questioning may temporarily negate the right of access to counsel, but suspects must still be warned of the right to remain silent.

In *Ibrahim*, the ECtHR reviewed the investigation and questioning of suspects following the July 2005 bombings in London. The Court determined that the right to a fair trial under Article 6 of the Convention is an unqualified right.²²⁶ After reviewing European, international, and comparative authorities (including the Directives, *Miranda*, and *Quarles*), the judges concluded that when the Government convincingly demonstrates an urgent need to avert serious consequences to life, liberty, or physical integrity, there can be compelling reasons to restrict access to legal advice.²²⁷ As with the Directive on the Right of Access to a Lawyer, the ECtHR in *Ibrahim* found that “in principle there can be no justification” for failing to *advise* a person of the right to silence and the right to legal assistance.²²⁸ The Court found compelling reasons for temporarily restricting the right of *access* to legal advice for the first three applicants, though there was no violation of the Convention because, notwithstanding the delay in affording access to counsel, the proceedings were fair overall.²²⁹ However, there were no compelling reasons to restrict the right of access to legal advice for the fourth defendant (Abdurahman), and the Convention was violated because the Government could not meet its burden of showing that the overall proceedings were fair with respect to him.²³⁰

²²³ Directive 2013/48/EU, *supra* note 142, art. 3(5)-(6).

²²⁴ *Id.* art. 8(1).

²²⁵ *Id.* Recital 31.

²²⁶ See *Ibrahim and Others v. United Kingdom* [GC], App. Nos. 50541/8, 50571/08, 50573/08 & 40351/09, ¶ 250 (Eur. Ct. H.R. Sept. 13, 2016), <http://hudoc.echr.coe.int/eng?i=001-166680> [<https://perma.cc/QD4D-ZU7V>].

²²⁷ See *id.* ¶¶ 202-33, 259.

²²⁸ *Id.* ¶ 273.

²²⁹ See *id.* ¶¶ 279, 294.

²³⁰ See *id.* ¶¶ 300, 311.

Thus, while the *Miranda* doctrine, the Convention, and the Directive on the Right of Access to a Lawyer all provide for public safety questioning, the Convention and the Directive afford greater protections in some respects, requiring that suspects at least be *advised* of their rights (even if *actual access* to counsel is temporarily delayed). And, while several judges of the ECtHR wrote separately in *Ibrahim* to argue that the Court's application of a test of overall fairness was a retreat from *Salduz* and undermined the rights themselves,²³¹ it is notable that the Convention and the Directive both require an assessment of overall fairness even when the Government has established compelling circumstances that permit safety questioning without access to counsel. By contrast, when a case fits within the *Quarles* exception, *Miranda*'s protections are taken wholly out of the picture, and there is no assessment of the impact of the public safety questioning on the fairness of the proceedings as a whole. In this respect, the ECtHR's assessment of overall fairness in *Ibrahim* cuts in two directions: it affirms a layer of protection not present in the United States, though time will tell if *Ibrahim* will lead to a substantial weakening of *Salduz*.

7. Role of Counsel

The *Miranda* Court appeared to consider that a lawyer might actually assist a suspect in giving a statement during an interrogation. The majority opinion provides the right "to have counsel present during any questioning," and notes that that counsel's presence may reduce the use of coercion and afford a witness assistance regarding police practices and the accuracy of any statement.²³² Dissenting, Justice Harlan wrote that "any lawyer worth his salt" would just tell a suspect not to speak with police.²³³ Time has proven Justice Harlan right. In the United States, it is clear what a lawyer will do when called to assist a person during a custodial interrogation. A competent attorney will advise the client not to speak, especially because it is unlikely that the lawyer will have had sufficient time to review police reports or other discovery or to consult meaningfully with the client.²³⁴ Officers understand that defense lawyers will advise their clients

²³¹ See *id.* at *92 (Sajó & Laffranque, JJ., dissenting in part) (arguing that, under *Salduz*, a violation cannot be balanced against the overall fairness of the trial because when a suspect is interrogated without access to counsel and makes an incriminating statement, later used for a conviction, the defendant's rights are irretrievably prejudiced). These judges' fears may not be misplaced. In *Director of Public Prosecutions v. Doyle*, [2017] IESC 1, a justice of the Irish Supreme Court observed that *Salduz* does not establish a bright-line rule precluding the use of statements without legal advice, citing *Ibrahim* and the ECtHR's focus on whether the proceedings as a whole were fair. *Id.* [¶ 57] (MacMenamin, J.); see *infra* notes 266-68, 319-22 and accompanying text.

²³² *Miranda v. Arizona*, 384 U.S. 436, 470 (1966).

²³³ *Id.* at 516 n.12 (Harlan, J., dissenting) (quoting *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring)).

²³⁴ Indeed, some courts have found that defense lawyers provided ineffective assistance of

not to speak; thus, police will end an interrogation rather than go through the hollow ritual of obtaining counsel for a suspect who will then follow the lawyer's advice and assert the right to remain silent, ending the questioning.²³⁵

By contrast, the ECtHR and the European Parliament and Council contemplate a meaningful role for counsel before and during an interrogation. *Salduz* speaks in terms of right of access to a lawyer "as from the first interrogation of a suspect by the police."²³⁶ Later decisions, including *A.T. v. Luxembourg*,²³⁷ make clear that the right of access includes the right to have a lawyer present *during* the interrogation.²³⁸ The assistance of counsel must be meaningful. In *Dayanan v. Turkey*,²³⁹ the ECtHR found that an accused is entitled to assistance of counsel as soon as the person is taken into custody, and the assistance includes consultation and "preparation for questioning."²⁴⁰ In a subsequent case, *Aras v. Turkey*,²⁴¹ the Court ruled that a suspect was deprived of access to counsel where the lawyer was allowed to be present in the room during questioning but could not consult with the suspect and "was a passive presence without any possibility at all to intervene to ensure respect for the

counsel in advising clients to speak with police and waive their right to remain silent. *See, e.g., State v. Joseph*, 128 P.3d 795, 801-05 (Haw. 2006) (reporting trial court's finding of ineffective assistance of counsel); *Commonwealth v. Celester*, 45 N.E.3d 539, 554-57 (Mass. 2016).

²³⁵ *See* Albert W. Alschuler, *Miranda's Fourfold Failure*, 97 B.U. L. REV. 849, 874 (2017) (noting that instead of providing for a meaningful role for an attorney during an interrogation, *Miranda's* right to counsel is simply "an incantation that suspects can use to shut down questioning").

²³⁶ *Salduz v. Turkey* [GC], 2008-V Eur. Ct. H.R. 59, 78 [¶ 55], http://www.echr.coe.int/Documents/Reports_Recueil_2008-V.pdf [<https://perma.cc/T8UU-3F74>].

²³⁷ App. No. 30460/13 (Eur. Ct. H.R. Sept. 14, 2015), <http://hudoc.echr.coe.int/eng?i=001-153960> [<https://perma.cc/YR8Z-LYU3>].

²³⁸ *Id.* ¶ 65 (stating that a person is entitled to legal assistance from the time of being taken into custody "and, as the case may be, during questioning by police or an investigating judge"); *see also Mader v. Croatia*, App. No. 56185/07, ¶¶ 153-54, 158 (Eur. Ct. H.R. June 21, 2011), <http://hudoc.echr.coe.int/eng?i=001-105293> [<https://perma.cc/2KTT-4R64>] (holding that an accused must be provided with the assistance of counsel "from the time of his arrest," and finding a violation of the Convention because "the applicant was questioned by the police" and confessed "without consulting with a lawyer or having one present"); *Panovits v. Cyprus*, App. No. 4268/04, ¶¶ 66, 77 (Eur. Ct. H.R. Dec. 11, 2008), <http://hudoc.echr.coe.int/eng?i=001-90244> [<https://perma.cc/VK33-HK3K>] (finding that the Convention "requires that the accused be given the benefit of the assistance of a lawyer already at the initial stages of police interrogation").

²³⁹ App. No. 7377/03 (Eur. Ct. H.R. Oct. 13, 2009), <http://hudoc.echr.coe.int/eng?i=001-95015> [<https://perma.cc/4AXS-FW6L>].

²⁴⁰ *Id.* ¶¶ 32, 34 (finding a violation of the Convention where the accused did not have legal assistance while in police custody).

²⁴¹ App. No. 15065/07 (Eur. Ct. H.R. Feb. 18, 2015), <http://hudoc.echr.coe.int/eng?i=001-168874> [<https://perma.cc/H4JZ-SVKR>].

applicant's rights."²⁴² And, as already noted, the Directive on the Right of Access to a Lawyer assures access even before individuals are questioned, and counsel must be able to be present and participate effectively.²⁴³

One scholar points to these ECtHR cases as setting out an even "broader vision of the defence role" than described in *Salduz*, though "there has been little subsequent Strasbourg jurisprudence fleshing out its implications."²⁴⁴ At the supranational level, then, the ECtHR cases and the Directive appear "on the books" to provide for a meaningful and engaged role for counsel at a very early stage of a police investigation. This is quite different from the United States, where a request for counsel typically brings the interrogation to an end.

8. Other Issues

A few other points bear mentioning. I have not addressed exclusionary rules. In the United States, statements taken in violation of *Miranda* are excluded from the prosecution's case-in-chief, though the physical fruits of the statements are admitted.²⁴⁵ In Europe, the relevant Directives do not require exclusion as a remedy, nor might one expect such a remedy to be required system wide as the rights specified by the Directives are implemented within the different countries' criminal justice systems with varying rules of procedure and evidence.²⁴⁶ The Directive on the Right to Information affords defendants the right to challenge

²⁴² *Id.* ¶¶ 39-42.

²⁴³ Directive 2013/48/EU, *supra* note 142, arts. 3(2)(a), 3(3)(b).

²⁴⁴ Jackson, *supra* note 18, at 1008; *see also* Dimitrios Giannouloupoulos, "Falling on Deaf Ears": Looking for the *Salduz* Jurisprudence in Greece (forthcoming in OBSTACLES TO FAIRNESS IN CRIMINAL PROCEEDINGS: INDIVIDUAL RIGHTS AND INSTITUTIONAL FORMS (John Jackson & Sarah J. Summers eds., 2017)) (manuscript at 1-2) (on file with author) [hereinafter Giannouloupoulos, *Falling on Deaf Ears*] (noting that *Dayanan* and *Aras* show "the Court's desire to transform the lawyer's presence into a substantive guarantee," though *Aras* "does not seem to have received much attention"); Dimitrios Giannouloupoulos, *Strasbourg Jurisprudence, Law Reform and Comparative Law: A Tale of the Right to Custodial Legal Assistance in Five Countries*, 16 HUM. RTS. L. REV. 103, 105 (2016) [hereinafter Giannouloupoulos, *Strasbourg Jurisprudence*] (stating that the Court in *Dayanan* "considerably extended the scope of the application of the right to legal assistance").

²⁴⁵ *See supra* note 77 and accompanying text.

²⁴⁶ Some nations in Europe have adopted exclusionary rules modeled in part on procedures in the United States, though the rules may be modified to serve different objectives. *See* Elisabetta Grande, *Legal Transplants and the Inoculation Effect: How American Criminal Procedure Has Affected Continental Europe*, 64 AM. J. COMP. L. 583, 600-09 (2016) (describing ways that exclusionary rules in some European countries may be shaped by the goals of safeguarding official fact-finding accuracy and, sometimes, respect for human dignity, rather than furthering adversarial fairness); Thaman, *supra* note 208, at 403-16, 426-41 (examining the origins of European and American law, and comparing remedies); *see also* Jason Mazzone, *Silence, Self-Incrimination, and Hazards of Globalization*, in COMPARATIVE CRIMINAL PROCEDURE, *supra* note 139, at 308, 321-23, 329, 333-34 (discussing exclusion of statements in the United Kingdom, France, and Germany).

breaches “in accordance with procedures in national law.”²⁴⁷ The Directive on the Right of Access to a Lawyer provides that the Member States “shall ensure that suspects or accused persons . . . have an effective remedy under national law” but that is “[w]ithout prejudice to national rules and systems on the admissibility of evidence.”²⁴⁸ For its part, the ECtHR addresses claims of violations of rights and may order awards of damages and other relief. The Court does not have the power to vacate a criminal conviction, much less order a retrial with evidence excluded.²⁴⁹

Finally, decisions from the ECtHR do not forbid adverse inferences from a suspect’s exercise of the right to remain silent, so long as a conviction is not based primarily on the accused’s silence or refusal to answer questions.²⁵⁰ The recent Directive on the Presumption of Innocence appears to prohibit adverse inferences from the exercise of the right to remain silent,²⁵¹ though Steven Cras

²⁴⁷ Directive 2012/13/EU, *supra* note 17, art. 7(4).

²⁴⁸ Directive 2013/48/EU, *supra* note 142, art. 12. For an overview of the various proposals and compromises leading to the final versions of the Directives, see ANDREA RYAN, TOWARDS A SYSTEM OF EUROPEAN CRIMINAL JUSTICE: THE PROBLEM OF ADMISSIBILITY OF EVIDENCE 36-44 (2014).

²⁴⁹ See *Dvorski v. Croatia* [GC], App. No. 25703/11, ¶ 117 (Eur. Ct. H.R. Oct. 20, 2015), <http://hudoc.echr.coe.int/eng?i=001-158266> [<https://perma.cc/S4HD-6ETE>] (noting that Croatian law provides that criminal proceedings may be reopened if there is a violation of the Convention); *id.* at *35-36 (Zupančič, J., concurring) (emphasizing the domestic court’s duty to correct the violation, and suggesting that evidence should be excluded at a retrial to prevent a new violation); Valerio Colandrea, *On the Power of the European Court of Human Rights to Order Specific Non-Monetary Measures: Some Remarks in Light of the Assanidze, Broniowski and Sejdovic Cases*, 7 HUM. RTS. L. REV. 396, 398-400 (2007). See generally Convention on Human Rights, *supra* note 13, arts. 32, 41, 46 (covering jurisdiction, just satisfaction, and execution of judgments).

²⁵⁰ See *O’Donnell v. United Kingdom*, App. No. 16667/10, ¶¶ 48-51 (Eur. Ct. H.R. Apr. 7, 2015), <http://hudoc.echr.coe.int/eng?i=001-153474> [<https://perma.cc/BWC5-45R3>] (noting that whether such an inference violates the Convention will be determined by all of the circumstances, including the weight attached to the inference by the national courts); *Condrón v. United Kingdom*, 2000-V Eur. Ct. H.R. 1, 23-24, 26 [¶¶ 61, 68], <http://hudoc.echr.coe.int/eng?i=001-58798> [<https://perma.cc/4YTB-YUXX>] (noting that adverse inferences may be allowed, but finding a violation of the Convention because the jury was not instructed that it could only draw an adverse inference if satisfied that silence “could only sensibly be attributed” to the applicants’ “having no answer or none that would stand up to cross-examination”). These decisions are particularly important for England and Wales, where adverse inferences may be drawn if the accused was provided an opportunity to consult with a solicitor prior to being questioned. See Criminal Justice and Public Order Act 1994, c. 33, §§ 34(1), (2), (2A) (Eng.), <http://www.legislation.gov.uk/ukpga/1994/33> [<https://perma.cc/3KV6-AV9P>] (setting forth circumstances in which inferences may be drawn from the accused’s failure to mention facts when questioned or charged).

²⁵¹ See Directive (EU) 2016/343, *supra* note 143, art. 7(5) (providing that exercise of the right “shall not be considered to be evidence” that a suspect has committed the criminal offense).

and Anže Erbežnik point to language in a Recital that may qualify what otherwise would appear to be such a prohibition.²⁵² In the United States, *Miranda* warnings carry the implicit assurance that they may be invoked without penalty, and so no adverse inference may be drawn from post-arrest, post-warning silence.²⁵³ However, the Supreme Court allows the prosecution to comment on the silence of a *noncustodial* suspect who has not unequivocally asserted the Fifth Amendment privilege.²⁵⁴

* * *

Five years ago, in an insightful article, Tom van de Laar and Regien de Graaff compared aspects of the *Salduz* and *Miranda* doctrines. Writing just a few years after *Salduz*, the authors examined *Zaichenko*, *Pishchalnikov*, and some of the early cases, and they asked whether the ECtHR would follow the United States Supreme Court or set different requirements, especially with respect to waiver.²⁵⁵ In the past five years, the ECtHR has issued additional rulings that clarify key parts of *Salduz*, and the European Parliament and Council of the European Union have promulgated Directives that operate largely in harmony with the ECtHR's construction of the Convention. It now seems clear that, on the details of *Miranda*-like protections, Europe will follow its own path. At this level, these protections are stronger "on the books" than the current *Miranda* doctrine in the United States.

D. *Miranda*, *Salduz*, and the Directives "On the Ground"

While nations in the Council of Europe have an obligation to respect rights guaranteed by the Convention, and countries within the European Union have a duty to enact laws consistent with applicable Directives (absent an opt-out), neither the ECtHR nor the European Parliament and EU Council draft domestic

²⁵² See Cras & Erbežnik, *supra* note 143, at 32 (noting language in Recital 28 that the exercise of the right should not "in itself" be considered evidence that the person has committed the crime, and that the Recital also refers to national rules on assessment of evidence, some of which may allow adverse inferences).

²⁵³ See *Doyle v. Ohio*, 426 U.S. 610, 617-19 (1976) (holding that after officers tell a suspect that he or she may remain silent, postarrest silence "is insolubly ambiguous" and "it would be fundamentally unfair" to use that silence to impeach the defendant at trial).

²⁵⁴ See *Salinas v. Texas*, 133 S. Ct. 2174, 2180-84 (2013) (ruling that prosecutors may introduce evidence of a suspect's silence when the suspect voluntarily accompanies officers to the police station and has not received *Miranda* warnings). The California Supreme Court has extended *Salinas* and upheld comment on the silence of a *custodial* suspect who has not yet been warned and who has not unequivocally invoked the privilege. See *People v. Tom*, 331 P.3d 303, 314-17, 319-20 (Cal. 2014).

²⁵⁵ See T.A.H.M. van de Laar & R.L. de Graaff, *Salduz and Miranda: Is the US Supreme Court Pointing the Way?*, 2011 EUR. HUM. RTS. L. REV. 304, 306-08, 316-17 (discussing aspects of custody, interrogation, and waiver, and noting a trend toward affording greater protections under decisions of the ECtHR than in the United States).

legislation or decide cases in national courts. The decisions of the ECtHR and the Directives operate at the supranational level. In assessing how the ECtHR's decisions and the Directives will play out "on the ground," there are at least two levels of "ground" to consider. First, one may ask whether individual nations within Europe have adopted domestic legislation or regulations, or have issued judicial decisions in national courts, that are consistent with the ECtHR's case law and the Directives.²⁵⁶ Second, one may seek to assess how the key actors and institutions—police, prosecutors, defense counsel, courts—are in fact implementing the national legislation, regulations, and judicial rulings. In this respect, assessing practices "on the ground" within Europe is significantly more complex than assessing *Miranda* on the ground in the United States because *Miranda*'s legal principles apply across all U.S. jurisdictions without the need for implementing legislation or decisional law in the individual states. There is an additional layer of analysis in Europe.

While evaluating implementation on both levels of "ground" is challenging and beyond the scope of this Article, it may be useful to describe some research to date, as well as additional aspects for future inquiry. It is encouraging that scholars are already undertaking this work, documenting developments in national courts and legislatures, as well as practices by police officers and lawyers.

Before turning to the first level of "ground," it is critical to consider the diversity in systems among the various nations in Europe. If Japan reveals some of the challenges in implementing robust protections for the privilege against compelled self-incrimination within a single country that has the privilege on the books, those challenges are surely magnified in any effort to implement reforms in the groups of States in the European Union and the Council of Europe. Their criminal justice systems have fundamentally different procedural and cultural attributes. For example, in Ireland, which operates under the common-law system, police may question a suspect during the relatively short time that she is in police custody.²⁵⁷ In France, which has what may be termed a "mixed system," a person may be questioned by police during an initial period of custody (*garde à vue*) and in later proceedings, such as in an investigation

²⁵⁶ Prior to the passage of the Directives, researchers surveyed nations within the European Union to assess compliance with procedural rights under the Convention. They determined that the right to remain silent was not afforded under legislation of all nations and that there were doubts as to whether other rights (such as the right to information and to legal advice) were provided in accordance with the standards of the ECtHR. See TARU SPRONKEN ET AL., EU PROCEDURAL RIGHTS IN CRIMINAL PROCEEDINGS 117-20 (2009), <http://digitalarchive.maastrichtuniversity.nl/fedora/get/guid:b4e7b80c-e2f0-446f-9b0e-12c12de337e1/ASSET1> [<https://perma.cc/UQF2-MEXX>].

²⁵⁷ See RYAN, *supra* note 248, at 87-96 (reporting that in the Irish system, police can obtain statements or forensic evidence from a suspect in custody following a valid arrest, but the norm for such detention is a maximum of twenty-four hours, though it can be longer for certain serious offenses, including drug trafficking).

supervised by a prosecutor (*procureur*) or judge (*juge d'instruction*).²⁵⁸ While the Convention and the Directives now provide a right to counsel during questioning in each of these settings, the nature of counsel's role, societal and legal expectations, and the practices that have developed over time surely vary between countries. John Jackson has argued that it is difficult to obtain the endorsement of Member States for the principles of *Salduz* and the Directives unless the ECtHR and other European institutions are able to "put forward a rationale for a procedural right which can be justified as coming within a broad domestic procedural tradition."²⁵⁹ I agree with Jackson, if such rationales for procedural rights also speak to more expansive notions of legal and societal culture (of which procedural traditions are an important part).

Salduz and the Directives have had a substantial impact on national law in Europe, though the process of implementation is ongoing and not uniform. Dimitrios Giannouloupoulos has summarized legislation after *Salduz* in Scotland, France, Belgium, and the Netherlands, and he also notes significant variations in these national responses.²⁶⁰ The reforms in France—which eventually provided the right to counsel during the *garde à vue* and advice of the right to remain silent—came as part of a dialogue between the ECtHR, the Constitutional Council (*Conseil constitutionnel*) and the Supreme Court (*Cour de cassation*).²⁶¹ National courts have been critical in implementing reform in other States as well. In *Cadder v. Her Majesty's Advocate*,²⁶² the Supreme Court of the United Kingdom found that Scotland's practice of detaining and questioning suspects for six hours without access to counsel violated *Salduz* and the Convention.²⁶³ In *Director of Public Prosecutions v. Gormley*,²⁶⁴ the Supreme Court of Ireland likewise discussed *Salduz* (and *Cadder*), and overturned a conviction based upon a confession obtained without counsel.²⁶⁵

²⁵⁸ See *id.* at 133, 140-55; see also JODIE BLACKSTOCK ET AL., INSIDE POLICE CUSTODY: AN EMPIRICAL ACCOUNT OF SUSPECTS' RIGHTS IN FOUR JURISDICTIONS 83-84 (2014).

²⁵⁹ Jackson, *supra* note 18, at 1004-05.

²⁶⁰ See Giannouloupoulos, *Strasbourg Jurisprudence*, *supra* note 244, at 112-20 (reporting and contrasting national responses).

²⁶¹ See Dimitrios Giannouloupoulos, *Custodial Legal Assistance and Notification of the Right to Silence in France: Legal Cosmopolitanism and Local Resistance*, 24 CRIM. L.F. 291, 310-15 (2013) (describing France's history, procedural traditions, and the process of reform).

²⁶² [2010] UKSC 43 (appeal taken from Scot.).

²⁶³ See *id.* at [20]-[25], [37], [40]-[41], [50], [55], [63], [65]-[66], [93], [107]-[10] (finding the procedure violates *Salduz* and the Convention despite protections such as temporal limitations on questioning); Jackson, *supra* note 18, at 1002-03 (discussing *Cadder*).

²⁶⁴ [2014] IESC 17.

²⁶⁵ See *id.* at [6.3], [6.6], [8.8], [9.1], [13.1], [13.2] (finding that Raymond Gormley's conviction breached the constitutional guarantee of fair process because he was convicted on the basis of an admission made during interrogation after he requested a solicitor but before the solicitor arrived).

Movement has not always been forward or positive. Earlier this year, in *Director of Public Prosecutions v. Doyle*,²⁶⁶ the Irish Supreme Court rejected an appeal from a defendant who received advice from a solicitor but who was not afforded the presence of his counsel during interrogation.²⁶⁷ Remarkably, several of the justices suggested that post-*Salduz* rulings from the ECtHR do *not* require the presence of counsel during questioning.²⁶⁸ Greece appears not to have attempted to address *Salduz* in any meaningful way, and a legislative effort to implement the Directive on the Right to Information actually resulted in reducing suspects' access to the investigation file.²⁶⁹ These developments (and their variations) are fascinating to observe, and reform efforts will continue over years if not decades. Undoubtedly there is much more research to be done with respect to other States, the contours of national law, and the conditions that may

²⁶⁶ [2017] IESC 1.

²⁶⁷ *Id.* at [14]-[18] (Denham, C.J.); *id.* at [17]-[18] (O'Donnell, J.); *id.* at [84]-[85] (MacMenamin, J.); *id.* at [50], [56] (Charleton, J.); *id.* at [1], [75] (O'Malley, J.).

²⁶⁸ In perhaps the most significant of the opinions, Justice Charleton wrote that there is "ample authority to support the requirement for legal advice from the time of arrest for questioning," but "there is no decision of the European Court of Human Rights stating that there must be a solicitor in the room during the time when a person is being questioned by police in relation to a crime." *Id.* at [43] (Charleton, J.); *see also id.* at [8] (O'Donnell, J.) (suggesting that the *Salduz* line of cases might be limited to the context of civil law systems, particularly since the ECtHR has looked at the overall fairness of a proceeding rather than requiring that evidence obtained in violation of the Convention is always inadmissible).

Dissenting, Justice McKechnie cited post-*Salduz* decisions of the ECtHR, including *Dayanan and A.T.* to counter the claim that the Convention does not assure the presence of counsel during questioning. *Id.* at [146]-[50] (McKechnie, J., dissenting). Justice McKechnie also quoted *Navone and Others v. Monaco*, where the ECtHR emphasized—with some apparent exasperation—that its prior judgments had specified that the assistance of counsel during police custody means assistance during questioning. *Id.* at [147] (quoting *Navone and Others v. Monaco*, App. Nos. 62880/11, 62892/11 & 62899/11, ¶ 79 (Eur. Ct. H.R. Oct. 24, 2013)); *see also* Giannouloupoulos, *Strasbourg Jurisprudence*, *supra* note 244, at 106 n.22 (noting this aspect of *Navone*). As for Justice O'Donnell's suggestion that the *Salduz* doctrine might apply in civil but not common law jurisdictions, one might note that *Ibrahim* applied *Salduz* and its progeny to cases generated in a common law jurisdiction without suggesting that *Salduz* was subject to any such limitations, though it is of course true that the ECtHR in *Ibrahim* examined the overall fairness of the proceeding. *Compare Doyle*, [2017] IESC 1, [8] (O'Donnell, J.), with *Ibrahim and Others v. United Kingdom [GC]*, App. Nos. 50541/8, 50571/08, 50573/08 & 40351/09, ¶ 235 (Eur. Ct. H.R. Sept. 13, 2016), <http://hudoc.echr.coe.int/eng?i=001-166680> [<https://perma.cc/QD4D-ZU7V>].

Finally, while Ireland has opted out of the Directive on Access to a Lawyer, which would provide the right for counsel to be present and participate effectively, the opt-out cannot explain the judges' reading of ECtHR jurisprudence. *See supra* notes 142, 154.

²⁶⁹ *See* Giannouloupoulos, *Falling on Deaf Ears*, *supra* note 244 (manuscript at 14-16) (describing the lack of dialogue about the ECtHR jurisprudence and hurried legislation about the right to information).

facilitate or impede the harmonization of ECtHR decisions, the Directives, and national law.²⁷⁰

It is also vital to examine the other level of “ground”²⁷¹—what actually happens in police stations and trial courts—though practices at this level are less transparent and more difficult to characterize than national legislation or decisions from the highest national courts. The recent study by Jodie Blackstock and her colleagues, exploring practices in England and Wales, France, the Netherlands, and Scotland, is especially noteworthy and underscores the complexity of the task at hand. The study examines practices among police officers and, critically, the defense bar.²⁷² In assessing the value and implementation of the right to remain silent and right of access to counsel, a key question is how lawyers will actually advise their clients in these different countries and settings.²⁷³ As noted, a competent lawyer in the United States will advise the client not to speak.²⁷⁴ In Japan, as we have observed, a lawyer might not advise a client to remain silent, because of the risk of lengthier detention, and we know that a confession is largely expected in Japan, which highly values rehabilitation and expressions of remorse.

The actual value of a lawyer in investigative settings will turn on a variety of factors, including the consequences of remaining silent (such as any evidentiary use of silence by the prosecution, or possible impact upon the charging decision, length of detention, or potential sentence), societal custom, professional norms, barriers placed by police, and the status, independence, and availability of defense counsel. The study by Blackstock and colleagues is rich in detail about the jurisdictions they studied. For example, they note that in cases they observed, lawyers in France, England, and Wales attended interrogations of suspects who asked for counsel, but not in Scotland or the Netherlands.²⁷⁵ Many lawyers in Scotland felt their presence was unnecessary if they advised their clients to remain silent.²⁷⁶ Attorneys in the Netherlands and France played a particularly

²⁷⁰ A study of *Salduz* and the Directives at the national level might also address remedies within domestic law for breaches. The Directive on the Right of Access to a Lawyer requires nations to have an effective remedy under national laws. See Directive 2013/48/EU, *supra* note 142, art. 12(1). It would be important to examine not just the legal availability of remedies, such as exclusion of evidence or monetary penalties, but the extent to which the remedies are actually made available and employed within different countries.

²⁷¹ As Giannouloupoulos has noted, the fact that “countries have legislated some or all of the rights . . . does not say much about how effectively they implement them in practice.” Giannouloupoulos, *supra* note 261, at 306.

²⁷² See generally BLACKSTOCK ET AL., *supra* note 258.

²⁷³ I am grateful to Albert Alschuler for framing this question so clearly.

²⁷⁴ See *supra* notes 233-35 and accompanying text.

²⁷⁵ See BLACKSTOCK ET AL., *supra* note 258, at 385-87.

²⁷⁶ See *id.* at 392. The authors also suggest that this perceived lack of need for lawyers to be present may be harmful to suspects because the suspects may not be able to remain silent without a lawyer’s help, and there may be adverse consequences for the accused. See *id.*

passive role during interrogations, perhaps as a result of acquiescence to an instruction from the prosecutor (the Netherlands) or statute (France).²⁷⁷ And, as Jacqueline Hodgson reports, the police also engaged in some rights-avoidance strategies, including “implementing due process or defence rights in ways that served police interests rather than those of the suspect.”²⁷⁸

One area of “on-the-ground” analysis, suggested by the United States’ experience with *Miranda* warnings, may be whether warnings are provided in languages that suspects can understand, coupled with safeguards to ensure that individuals truly do comprehend their rights and choices and are able to act on them. In the United States, the Supreme Court’s tolerant approach to the sufficiency of warnings has led to a remarkable proliferation of warning language. Psychologist Richard Rogers and his colleagues have collected warnings and analyzed the complexity of their language. In two articles, they examine over 800 unique general *Miranda* warnings.²⁷⁹ The number of words in the warning and waiver portions ranged from 49 to 547.²⁸⁰ They measured the understandability of *Miranda* warnings by assessing the level of education a person would need to read and understand most of the text.²⁸¹ The education levels varied substantially from one warning to the next and even among the legal concepts expressed in single warnings. For example, the education level required to understand a warning of the right to remain silent ranged from first grade to college, with the mean at the third grade level.²⁸² The mean for the right to free legal services was a tenth grade reading level.²⁸³ Perhaps paradoxically,

²⁷⁷ See *id.* at 397-400, 405-08; Jackson, *supra* note 18, at 1010-11 (discussing the roles of lawyers post-*Salduz* in France, Belgium, the Netherlands, and England and Wales).

²⁷⁸ Hodgson, *supra* note 139, at 274. For example, officers in the Netherlands and France often called for an interpreter during questioning only when police thought they needed one in order to succeed with the interrogation, even if the suspect had an impaired understanding of the process and the charges. *Id.*

²⁷⁹ Richard Rogers et al., *An Analysis of Miranda Warnings and Waivers: Comprehension and Coverage*, 31 LAW & HUM. BEHAV. 177, 180-81 (2007) [hereinafter Rogers et al., *Comprehension and Coverage*] (analyzing “577 *Miranda* warnings written in English and intended for general (i.e., non-juvenile) suspects”); Richard Rogers et al., *The Language of Miranda Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 LAW & HUM. BEHAV. 124, 125-26 (2008) [hereinafter Rogers et al., *Vocabulary Analysis*] (analyzing both the earlier sets of warnings and 356 additional unique warnings); see also RICHARD ROGERS & ERIC DROGIN, *MIRANDIZED STATEMENTS: SUCCESSFULLY NAVIGATING THE LEGAL AND PSYCHOLOGICAL ISSUES* 13-14 (2014) (describing their findings); Weisselberg, *supra* note 3, at 1565-68.

²⁸⁰ See Rogers et al., *Vocabulary Analysis*, *supra* note 279, at 128 tbl.2.

²⁸¹ See *id.* at 127-29 (using the Flesch-Kincaid estimate of grade-equivalent reading ability, which classifies material at a specific grade level if readers at that level are able to comprehend seventy-five percent of the material, as the primary measure).

²⁸² See ROGERS & DROGIN, *supra* note 279, at 14 (summarizing research with warnings of different lengths).

²⁸³ See *id.*; Rogers et al., *Vocabulary Analysis*, *supra* note 279, at 129 tbl.3.

warnings designed for juveniles often contain additional concepts and more complex language, making them even more challenging to comprehend.²⁸⁴ Warnings in Spanish were shorter in length on average but often contained errors or failed to include required components of the warnings.²⁸⁵ There is also now a rich psychological literature with studies assessing the ability of different populations to understand the legal concepts within *Miranda* warnings.²⁸⁶

The Convention and the Directives require advice of rights to suspects, and the Directive on the Right to Information both provides a model “Letter of Rights” and demands the use of simple and understandable language.²⁸⁷ Yet without firm direction and leadership within each relevant country, we might expect the same proliferation of warnings as in the United States as well as a range of complexity in language. An assessment on the ground might include a comparison of forms of warnings in use between countries in addition to research with respect to variations in warnings within individual States. Researchers may explore whether warnings are, in fact, being provided in simple language, orally or in writing, and whether there is particular regard for vulnerable populations. Blackstock and her colleagues noted “significant differences in all jurisdictions” when they could observe how suspects were given their rights orally.²⁸⁸ This is a vital area for future research.

Finally, a study of practices “on the ground” should also consider the context for reform within individual nations, including legal and societal culture, and

²⁸⁴ See ROGERS & DROGIN, *supra* note 279, at 14-15; Richard Rogers et al., *Juvenile Miranda Warnings: Perfunctory Rituals or Procedural Safeguards?*, 39 CRIM. JUST. & BEHAV. 229, 235-46 (2012) (analyzing 293 sets of juvenile *Miranda* warnings).

²⁸⁵ See ROGERS & DROGIN, *supra* note 279, at 16; Richard Rogers et al., *Spanish Translations of Miranda Warnings and the Totality of the Circumstances*, 33 LAW & HUM. BEHAV. 61, 62-68 (2009) (analyzing 121 sets of warnings in Spanish).

²⁸⁶ See, e.g., Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 535, 538 (2002) (reporting a study of forty-nine individuals with intellectual deficits, and concluding that the subjects “simply did not understand the *Miranda* warnings”); Virginia G. Cooper & Patricia A. Zapf, *Psychiatric Patients’ Comprehension of Miranda Rights*, 32 LAW & HUM. BEHAV. 390, 392-93, 400 (2008) (discussing a study of seventy-five psychiatric inpatients, and finding that approximately sixty percent of the subjects “did not understand at least one *Miranda* right”); Jodi L. Viljoen, Patricia A. Zapf & Ronald Roesch, *Adjudicative Competence and Comprehension of Miranda Rights in Adolescent Defendants: A Comparison of Legal Standards*, 25 BEHAV. SCI. & L. 1, 4, 14 (2007) (describing a study of 152 detained adolescents and reporting impairments, particularly in the ability to appreciate the significance of *Miranda* rights); Heather Zelle, Christina L. Riggs Romaine & Naomi E.S. Goldstein, *Juveniles’ Miranda Comprehension: Understanding, Appreciation and Totality of Circumstances Factors*, 39 LAW & HUM. BEHAV. 281, 283, 288-90 (2015) (reporting a study of 183 youths, and concluding that the majority of the subjects had difficulty in understanding at least one *Miranda* warning and in appreciating the significance of their rights).

²⁸⁷ Directive 2012/13/EU, *supra* note 17, Annex 1.

²⁸⁸ BLACKSTOCK ET AL., *supra* note 258, at 228.

criminal justice system challenges. The example of Japan shows that some improvements in the interrogation process, such as recording interrogations in serious cases, became possible when there was momentum for change and when recording was consistent with other reform priorities. Different nations face different challenges and undoubtedly have different reform priorities. According to the World Justice Project's survey of 113 countries, four of the five highest ranked criminal justice systems are Finland, Denmark, Norway, and Austria, all of which belong to the Council of Europe.²⁸⁹ Other Council nations fare less well: Greece, Albania, Turkey, Ukraine, Russia, and Turkey are fiftieth, fifty-seventh, seventy-fifth, seventy-seventh, and ninety-eighth, respectively.²⁹⁰ Drilling down further, the deficiencies are not uniform. For example, Russia and Turkey rank extremely low with respect to the absence of improper government influences in criminal proceedings, but are closer to other nations in Europe on the factor of effective investigations.²⁹¹ In Turkey, lack of prosecutorial independence was listed as most significant, while in Russia the issues of lack of prosecutorial independence, corrupt investigators, and corrupt prosecutors were equally considered very significant.²⁹² National reform priorities may or may not align with increased protection for the right of suspects to remain silent and to access to counsel. Even if States enact legislation or regulations, or national courts issue decisions, to assure those rights in theory, safeguards that are effective on the ground may be more or less difficult to implement in light of the existing structures of their criminal justice systems, challenges, and societal and legal culture.

III. EXPORTING AND IMPORTING *MIRANDA*

This final Part of this Article explores the influence of *Miranda*, if any, and what we may learn from other systems' *Miranda*-like protections. Reformers in Japan unsuccessfully invoked *Miranda* to reshape interrogation practices. Has *Miranda* played a role in the recent developments in Europe? Are there aspects of protections being implemented in other countries or systems that might be useful to consider for the United States? In asking if *Miranda* has been "exported," I have deliberately chosen a somewhat provocative metaphor. Comparativists may prefer "transplantation" or "migration," signaling that legal institutions and concepts rarely move from one place to another without modification or without considering existing norms, institutions, and principles.²⁹³ It is clear from the decisions of the ECtHR and the Directives that

²⁸⁹ See WORLD JUSTICE PROJECT, *supra* note 12, at 43.

²⁹⁰ *Id.*

²⁹¹ See *id.* at 130, 148.

²⁹² See *id.*

²⁹³ See Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 1, 16-22 (Sujit Choudhry ed., 2006) (discussing the concept of migration, and critiquing the metaphors of "transplantation" and "borrowing"); Grande, *supra* note 246, at 585-88 (discussing shifts in terminology); Langer, *supra* note 19,

the *Miranda* rule has not been transplanted wholesale throughout Europe. I use “export” as a rhetorical device to prompt a natural reciprocal inquiry: Might we also ask whether European principles are suitable for “import” to the United States or, perhaps more accurately, for in-bound migration?

A. “Exporting” *Miranda*

In their 2011 article, van de Laar and de Graaff write that many in Europe know about *Miranda* from American police dramas. They argue that the ECtHR has drawn inspiration from *Miranda* case law, pointing to several explicit citations to *Miranda* and the appearance in *Pishchalnikov* of language drawn from *Edwards*.²⁹⁴ It is difficult to deny that American television and movies have made *Miranda* warnings familiar around the world.²⁹⁵ Because the ECtHR has moved to implement some *Miranda*-like protections, I attempted to assess whether *Miranda* directly influenced the ruling in *Salduz* and several key decisions that followed it. As part of this research, I sought to review the briefs (which the Court terms “observations”) and underlying documents to see whether and how they addressed the *Miranda* doctrine. In addition to exploring the power (if any) of *Miranda* as an icon, I was especially interested in any analysis of *Miranda*’s progeny in light of values, systems, and priorities in Europe. The ECtHR afforded me access to its files for five cases that I requested: *Salduz*, *Pishchalnikov*, *Zaichenko*, *Dvorski*, and *Blokhin v. Russia*.²⁹⁶

at 29-35 (critiquing the “transplant” metaphor); Allegra M. McLeod, *Exporting U.S. Criminal Justice*, 29 YALE L. & POL’Y REV. 83, 85 (2010) (explaining reasons for using the term “export” in contrast to the dominant approach).

²⁹⁴ See van de Laar & de Graaff, *supra* note 255, at 304-05, 316.

²⁹⁵ See Frederick Schauer, *The Miranda Warning*, 88 WASH. L. REV. 155, 155 (2013) (citing an example of officers on Russian television giving *Miranda* warnings and reports of suspects demanding their *Miranda* rights in countries outside of the United States); see also STEFAN TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS 352 (2005) (“‘*Miranda*’ has become a household word throughout the world [for lawyers and] those who watch American detective movies.”).

²⁹⁶ Four of the cases have already been discussed: *Dvorski*, *Zaichenko*, *Pishchalnikov*, and *Salduz*. The fifth is *Blokhin v. Russia* [GC], App. No. 47152/06 (Eur. Ct. H.R. Mar. 23, 2016), <http://hudoc.echr.coe.int/eng?i=001-161822> [<https://perma.cc/74QS-LYFU>].

The decisions of the European Court of Human Rights are available online. However, the underlying public materials in the case files—such as documents from the applicants’ domestic prosecutions and the observations of the parties—are available for review with permission at the Court in Strasbourg. The Court’s internal documents, such as research memoranda and draft decisions, are not available at all. See *Access to Case Files*, EUR. CT. HUM. RTS., http://www.echr.coe.int/Documents/Practical_arrangements_ENG.pdf [<https://perma.cc/HA3N-TB4A>]. I reviewed case files at the Court on June 22-23, 2016. Older cases, such as *Salduz*, had modest files; at some point, portions of the files (such as records from the national prosecutions) were purged. The more recent cases, *Dvorski* and *Blokhin*, contained more materials from the national prosecutions. In all the files I reviewed, the Court retained official correspondence and the observations of the parties.

The Grand Chamber judgment in *Salduz* cites a number of international instruments, but does not reference *Miranda*.²⁹⁷ *Salduz*'s counsel argued that "the aim of the Convention is to protect the rights that are not theoretical and illusory but practical and effective,"²⁹⁸ boilerplate language the Court reiterates.²⁹⁹ But neither party referenced *Miranda* or any decision from other nations.³⁰⁰ So too with the observations and the Court's ruling in *Zaichenko*.³⁰¹ Perhaps even more striking, the parties' observations in *Pishchalnikov*—the case that cribbed from *Edwards v. Arizona*—do not reference *Miranda* or even *Edwards*.³⁰² *Edwards* clearly influenced the judgment in *Pishchalnikov*, because the ECtHR adopted the *Edwards* rule wholesale. But we cannot isolate the specific source for that influence, other than that it must have been internal to the Court, and there is no available evidence as to how the Court considered *Edwards* in construing the duty of investigators under the Convention.

Dvorski, the case that is contrary to *Burbine*, is more interesting. The Government of Croatia argued the same legal theory as in *Burbine*: "the police didn't have the obligation to inform the applicant" that a lawyer wanted to represent him, and "this is not information which would hinder the applicant's ability to make fully informed choice or violate his defence rights."³⁰³ Neither the Grand Chamber nor the parties cited *Miranda* or U.S. law.³⁰⁴ But we see

²⁹⁷ See *Salduz v. Turkey* [GC], 2008-V Eur. Ct. H.R. 59, 68-74 [¶¶ 32-44], http://www.echr.coe.int/Documents/Reports_Recueil_2008-V.pdf [<https://perma.cc/T8UU-3F74>].

²⁹⁸ Observations by Turkan Aslan, Representative of Mr. Salduz, ¶ 16, *Salduz v. Turkey* [GC], (App. No. 36391/02) (Nov. 30, 2007) (on file with author).

²⁹⁹ See *Salduz* [GC], 2008-V Eur. Ct. H.R. at 76 [¶ 51].

³⁰⁰ See generally Observations of the Government, *Salduz v. Turkey* (App. No. 36391/02) (Nov. 30, 2007) (on file with author); Observations by Turkan Aslan, *supra* note 298.

³⁰¹ See generally *Zaichenko v. Russia*, App. No. 39660/02 (Eur. Ct. H.R. Feb. 18, 2010), <http://hudoc.echr.coe.int/eng?i=001-97346> [<https://perma.cc/TS5B-CXSQ>]; Observations of *Zaichenko, Zaichenko v. Russia* (App. No. 39660/02) (Apr. 27, 2006) (on file with author); Observations of the Russian Federation, *Zaichenko v. Russia* (App. No. 39660/02) (Mar. 6, 2006) (on file with author).

³⁰² The parties disputed the facts, such as whether Aleksandr Pishchalnikov had asked to be represented by counsel, but generally cited no authorities other than the Convention and Russian law. See generally Observations of the Russian Federation, *Pishchalnikov v. Russia* (App. No. 7025/04) (Oct. 23, 2007) (on file with author); Observations of Ekaterina Krutikova, Representative of Pishchalnikov, *Pishchalnikov v. Russia* (App. No. 7025/04) (May 22, 2007) (on file with author).

³⁰³ Written Submissions of the Government of the Republic of Croatia, ¶ 42, *Dvorski v. Croatia* (App. No. 25703/11) (Sept. 29, 2014) (on file with author).

³⁰⁴ See generally *Dvorski v. Croatia* [GC], App. No. 25703/11 (Eur. Ct. H.R. Oct. 20, 2015), <http://hudoc.echr.coe.int/eng?i=001-158266> [<https://perma.cc/S4HD-6ETE>]; Written Submissions of the Government of the Republic of Croatia, *supra* note 303; Statement of Reply by Ivan Dvorski, *Dvorski v. Croatia* (App. No. 25703/11) (Jan. 3, 2012) (on file with author); Observations of the Government of the Republic of Croatia, *Dvorski v. Croatia* (App.

some individual judges' familiarity with U.S. law in the concurring opinion of three jurists who discussed the Supreme Court's jurisprudence on structural error and the denial of counsel of choice.³⁰⁵

In *Ibrahim*, the ECtHR took an overtly comparative approach, reviewing EU law, international legal materials, and authorities from nations within the Council of Europe, as well as the United States and Canada.³⁰⁶ Given the offenses in *Ibrahim*, it may have been natural for the Court to examine the approach of other jurisdictions to questioning suspects allegedly linked to terrorist acts.

Blokhin reveals a debate within the ECtHR about the use of foreign law. There, the applicant challenged the process relating to his placement in a detention center during juvenile proceedings.³⁰⁷ The Grand Chamber determined that "when a child enters the criminal justice system his procedural rights must be guaranteed and his innocence or guilt established, in accordance with the requirements of due process and the principle of legality," and the child cannot be deprived of procedural safeguards because the proceedings are considered "protective of his interests as a child . . . rather than penal."³⁰⁸ Neither the majority nor the parties (including amici) cited to U.S. law,³⁰⁹ though a judge concurred to describe the U.S. Supreme Court's cases as "defin[ing] the scope of due process requirements of the juvenile court."³¹⁰ One judge, who dissented in part, wrote separately to accuse the majority of borrowing without citation "ideas from the US Supreme Court expressed in several cases In this sense [this part of the holding] operates a legal transplant or a 'cross-fertilisation of

No. 25703/11) (Oct. 24, 2011) (on file with author); Statement of Facts for Dvorski, *Dvorski v. Croatia* (App. No. 25703/11) (Apr. 16, 2011) (on file with author).

³⁰⁵ See *Dvorski*, App. No. 25703/11, at *44-46 (Kalaydjieva, Pinto de Albuquerque & Turković, JJ., concurring).

³⁰⁶ See *Ibrahim and Others v. United Kingdom* [GC], App. Nos. 50541/8, 50571/08, 50573/08 & 40351/09, ¶¶ 203-33 (Eur. Ct. H.R. Sept. 13, 2016), <http://hudoc.echr.coe.int/eng?i=001-166680> [<https://perma.cc/QD4D-ZU7V>].

³⁰⁷ See *Blokhin v. Russia* [GC], App. No. 47152/06, ¶ 173 (Eur. Ct. H.R. Mar. 23, 2016), <http://hudoc.echr.coe.int/eng?i=001-161822> [<https://perma.cc/74QS-LYFU>].

³⁰⁸ *Id.* ¶ 196.

³⁰⁹ See *id.*; see also Written Comments of the Mental Disability Advocacy Center, *Blokhin v. Russia* (App. No. 47152/06) (July 16, 2014) (on file with author); Written Submission of the League of Human Rights, *Blokhin v. Russia* (App. No. 47152/06) (July 3, 2014) (on file with author); Written Submission to the Grand Chamber of the Russian Federation, *Blokhin v. Russia* (App. No. 47152/06) (May 20, 2014) (on file with author); Memorandum from G.O. Matyushkin, Representative of Blokhin, *Blokhin v. Russia* (App. No. 47152/06) (Jan. 20, 2011) (on file with author).

³¹⁰ *Blokhin*, App. No. 47152/06, at *71 (Zupančič, J., concurring) (citing *In re Winship*, 397 U.S. 358, 364 (1970); *In re Gault*, 387 U.S. 1, 36 (1967); *Kent v. United States*, 383 U.S. 541, 554-56 (1966); *Robinson v. California*, 370 U.S. 660, 666-67 (1962)).

the case-law'.³¹¹ She cautioned that “[i]t is essential that the cross-fertilisation take into account the differences between legal cultures.”³¹²

So has *Miranda* influenced the jurisprudence of the ECtHR? Clearly the Court took from *Edwards in Pishchalnikov*. However, it is also clear that *Miranda* and its progeny were not “exported” to Europe in their current form. The ECtHR has departed significantly from a number of the weakened aspects of the *Miranda* doctrine. We can also surmise that some judges are familiar with U.S. law, and are willing to look to our Supreme Court, as *Blokhin* reveals. Perhaps this is understandable. While the lawyers who practice before the ECtHR (at least in the cases I examined) are generally from the same countries as their clients and steeped in national law, the judges are from the different nations within the Council of Europe and may be distinguished scholars. Because they regularly assess the law in jurisdictions that are not their own, they may naturally have a comfort level with the law in other countries, including the United States. In addition, a number of the judges have visited, received degrees from, or even practiced in the United States.³¹³

I also examined several foundational documents for the European Union Directives, including some basic research on practices within European Union nations³¹⁴ and the European Commission’s *Green Paper* on the presumption of innocence.³¹⁵ Neither these materials nor the Directives themselves reference *Miranda*. However, articles published by staff within the Council of the European Union and the European Parliament highlight the inclusion of advice of the right to remain silent in the Directive on the Right to Information, observing that “it is probably the most important” of the *Miranda* rights³¹⁶ and that the Directive “introduce[ed] a kind of ‘EU Miranda warnings.’”³¹⁷ As with

³¹¹ *Blokhin*, App. No. 47152/06, at *84 (Motoc, J., dissenting in part) (criticizing the court’s borrowing from *Gault, Kent, and Robinson*).

³¹² *Id.* (footnote omitted).

³¹³ As just one example, Judges Pinto de Albuquerque and Turković concurred in *Dvorski* and discussed U.S. law on structural error and the right to counsel of choice. See *supra* note 305 and accompanying text. Judge Pinto de Albuquerque (from Portugal) has served as an adjunct professor at the University of Illinois since 2009. See *Composition of the Court, supra* note 108. Judge Turković has a J.S.D. degree from Yale and is a member of the New York Bar, where she also practiced. *Id.*

³¹⁴ See generally SPONKEN ET AL., *supra* note 256. The European Commission drew on their research. See RYAN, *supra* note 248, at 38 n.123.

³¹⁵ See generally COMM’N OF THE EUROPEAN CMTYS., GREEN PAPER: THE PRESUMPTION OF INNOCENCE (2006), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006DC0174&from=EN> [https://perma.cc/78PX-HDEP] (detailing the different components of the right to a presumption of innocence in European law). The *Green Paper* includes sections on the privilege against self-incrimination and the right of silence. See *id.* at 7-8.

³¹⁶ Steven Cras & Luca De Matteis, *The Directive on the Right to Information: Genesis and Short Description*, 2013 EUR. CRIM. L. ASS’NS’ F. 22, 26.

³¹⁷ Anže Erbežnik, *The Principle of Mutual Recognition as a Utilitarian Solution, and the*

the ECtHR, we may infer awareness of *Miranda* but not lineage. But we may also see that the European Parliament and the Council broke from *Miranda*'s progeny; the *Miranda* doctrine was not exported or transplanted in its current weak state. The Directives provide stronger protections, at least "on the books."

One final note: *Miranda* has been invoked by at least one national court in a decision providing fewer protections for suspects during interrogation, characterizing *Miranda* as a product of its time and place. In *Doyle*, a justice of the Irish Supreme Court noted that the *Miranda* decision sought to address concerns arising from the secretive and coercive nature of police interrogation as then practiced in the United States.³¹⁸ Justice Charleton underscored that interrogations in Ireland no longer take place in secret.³¹⁹ That fact "completely undermines" the defendant's *Miranda*-based argument, "whereby this Court is asked to unthinkingly apply a ruling backed by circumstances which existed two generations ago and designed to lance a poisoned boil of secret compulsion which is utterly foreign to modern police methods."³²⁰ Moreover, fundamental to the rationale in *Miranda* "is the absence in 1966 America of precisely what has been achieved through an accretion of protections in the Ireland of today."³²¹ Despite Justice Charleton's praise for Ireland's advancements, one might observe that while the interrogations in *Doyle* were recorded, they lasted twenty hours over the course of four days, and the uncounseled confession came in the *fifteenth* of twenty-three custodial interviews.³²²

B. "Importing" *Miranda*

Let us turn now to possible in-bound migration of European principles. It may help to consider two separate questions. First, as European nations implement a warning requirement, are there any practical insights that may help us ameliorate some of the structural difficulties with *Miranda* or that may make warnings more effective? Second, what do the contours of Europe's *Miranda*-like protections

Way Forward, 2012 EUR. CRIM. L. REV. 3, 10; see also *id.* at 11 (referring to "the famous *Miranda* case").

³¹⁸ Dir. of Pub. Prosecutions v. *Doyle*, [2017] IESC 1, [49] (Charleton, J.) (stating that *Miranda* "is cogently reasoned and is no doubt persuasive as to its particular time and context").

³¹⁹ See *id.* at [48].

³²⁰ *Id.*

³²¹ *Id.*; see also *id.* at [12] (O'Donnell, J.) (arguing that *Miranda* was decided "in the context of a significantly different criminal justice system" than in Ireland, it focused on interrogation practices that "are certainly not the norm" in Ireland, and it appeared to rest "as much if not more on policy than principle").

³²² See *id.* at [6], [7], [15], [17] (McKechnie, J., dissenting) (explaining that there were twenty-three interviews between the time of arrest on February 24, 2009 at 7:15 a.m. and the charging decision on February 28, and that the damaging admissions came in interview fifteen on February 26, between 7:43 and 7:49 p.m., sixty hours after *Doyle*'s arrest); *id.* at [7] (Charleton, J.) (stating that there were twenty hours of video-recorded interviews).

say about the nature of the rights and protections that individuals in a free society should enjoy, and might we revisit aspects of our *Miranda* doctrine in light of that knowledge?

With respect to the first question, it seems too early to tell whether Europe may lead the way with pragmatic innovations. As noted, *Miranda* operates on the assumption that one-size-fits-all warnings will enable suspects to understand their rights and empower them to choose between speech and silence. Yet we know that suspects have varying abilities and vulnerabilities.³²³ If States in Europe are able to implement measures to protect vulnerable individuals, we should surely study their improvements. Likewise, the United States Supreme Court's framework for assessing the adequacy of warnings has led to a proliferation of warnings and remarkable variation in length and complexity.³²⁴ If the proactive requirement of "simple and accessible" language promotes greater consistency and comprehension, that too would be worthy of close examination.³²⁵ The four-country study suggests that there is not yet a consistent approach to assisting vulnerable people nor have the different systems yet regularized the provision of information to a sufficient degree.³²⁶ But we should continue to watch closely. If innovations in warning language or police procedures succeed across Europe's criminal justice systems, they may afford insight for the United States, where there is much less variation in processes among our States.

The second question is more difficult—and it is certainly controversial, especially in light of the outright hostility on the part of a number of Supreme Court Justices, politicians, and writers towards the use of foreign authority in interpreting the U.S. Constitution.³²⁷ But there are several ways to consider the relevance of European and international law.

Miranda was theorized as necessary to protect the privilege against compelled self-incrimination and, in so doing, it provides a right to remain silent and to counsel during a custodial police interrogation. The ECtHR, now in harmony with EU Directives, has deemed a stronger version of these protections to be necessary to a fair proceeding. The United States Supreme Court has described the Fifth Amendment privilege as "founded on a complex of values,"³²⁸ some aimed at preserving the structure of our adversarial criminal justice system (such as requiring the government to bear the burden of proof and maintaining a

³²³ See *supra* notes 286 and accompanying text.

³²⁴ See *supra* notes 279, 284, 285 and accompanying text (discussing the various types of warnings that police use and the various degrees of comprehensibility).

³²⁵ Directive 2012/13/EU, *supra* note 17, art. 3(2).

³²⁶ See BLACKSTOCK ET AL., *supra* note 258, at 214-46.

³²⁷ See generally Choudhry, *supra* note 293, at 1-13; Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 133-39 (2006); Mark Tushnet, *When Is Knowing Less Better Than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275 (2006).

³²⁸ *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (citation omitted).

balance between the State and the defendant) and some relating to our regard for individuals (such as “our respect for the inviolability of the human personality” and privacy).³²⁹ The *Miranda* Court emphasized that “the constitutional foundation underlying the privilege is the respect a government . . . must accord to the dignity and integrity of its citizens.”³³⁰ We may see the Supreme Court’s subsequent remaking of the *Miranda* doctrine as lessening these values in order to further other institutional priorities.³³¹

To at least some degree, the more robust protections of Europe “on the books” may be a product of a different weighing of the values bound up in the privilege, perhaps more in line with those values of the *Miranda* Court in 1966. Germany, for example, has long had statutory and constitutional protections for the privilege against self-incrimination and the right to silence out of concern for human dignity.³³² While post-*Salduz* cases and the Directives contemplate a meaningful and perhaps more adversarial role for counsel across States in Europe, lawyers must still operate within the varying structures and procedures of the domestic courts; that is, the ECtHR and the Directives do not seek to transform whole systems from “inquisitorial” to “adversarial.” Because the decisions of the ECtHR and the Directives apply across criminal justice systems with different procedural traditions and models, Europe’s stronger protections appear aimed at furthering the privilege’s individual-oriented values, such as human dignity, rather than as preserving a particular criminal justice system model. As such, we might view the decisions and Directives as a signal that an advanced group of nations deems individuals to merit greater protection than we now afford under *Miranda* (though the signal is not without “noise,” as *Doyle* reveals³³³). But the decisions of the ECtHR and the Directives apply broadly across Europe. Perhaps we can take them as a call to revisit our own post-*Miranda* reweighing of values.

There may be another, more focused way to consider the developments in Europe. To me, the most striking difference between the *Miranda* doctrine and Europe’s protections is with respect to information and waiver. Both the United States Supreme Court and the ECtHR expressly hold that waivers must be knowing and intelligent. Yet, under the ECtHR’s decisions and the Directives, a knowing and intelligent waiver requires substantially more information than

³²⁹ *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55 (1964).

³³⁰ *Miranda*, 384 U.S. at 460; see also Alan C. Michaels, *Rights Knowledge: Values and Tradeoffs*, 39 TEX. TECH. L. REV. 1355, 1362-71 (2007).

³³¹ See, e.g., *Dickerson v. United States*, 530 U.S. 428, 443-44 (2000) (“[O]ur subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision’s core ruling that unwarned statements may not be used as evidence in the prosecution’s case in chief.”); Weisselberg, *supra* note 4, at 145-49 (discussing the extent to which Fifth Amendment values are actually utilized in the criminal justice system of the United States).

³³² See Mazzone, *supra* note 246, at 331-35.

³³³ *Dir. of Pub. Prosecutions v. Doyle*, [2017] IESC 1.

Miranda demands, and the waiver must be unequivocal. What might these decisions and Directives inform us on the narrower question of what constitutes a knowing and intelligent waiver of the right to counsel and the right to remain silent?

The decisions of the ECtHR describe the minimum protections for rights under Article 6 of the Convention for the forty-seven countries within the Council of Europe. The Directives require at least twenty-five Member States (also members of the Council of Europe) to promulgate consistent national laws.³³⁴ Assuming that in decisions of national courts and in legislation, the States eventually follow the ECtHR and the Directives, this is a substantial number of countries with applicable law on the books that includes a more robust construction of the legal standard for knowing and intelligent waiver than in the United States.

While this alone should give us reason to question our construct of a knowing and intelligent waiver, Eric Posner and Cass Sunstein have theorized a useful framework for considering foreign law. They suggest that decisions of foreign courts (or legislative bodies) may be relevant to a domestic court's ruling on a similar question if three conditions are met. First, the foreign decision must reflect a judgment based on that jurisdiction's information about how a question should be answered. Second, the foreign question must be sufficiently similar to that before the domestic court. Finally, the law of the foreign state must reflect an independent judgment.³³⁵ Applying the Condorcet Jury Theorem, Posner and Sunstein note that the probability of a correct outcome increases with the size of the group so long as a majority rule and each decisional body is more likely than not to be correct.³³⁶ In a follow-up article, they provide an example of the application of this approach to a Fourth Amendment question:

[S]uppose that the word "unreasonable" in the Fourth Amendment requires courts to make judgments of both fact and value in order to decide whether a certain search is reasonable. If all other (relevant) courts believe that it is "reasonable" to undertake administrative searches under provisions that require an assessment of the reasonableness of searches and seizures, the [Condorcet Jury Theorem] approach deserves attention. The experiences of other states may provide courts with information about whether such searches are likely to be intrusive or not, whether less restrictive substitutes are available, and whether the searches provide valuable information.³³⁷

³³⁴ See *supra* note 151 and accompanying text. I am not including Denmark, the United Kingdom, and Ireland as bound by the Directives. See *supra* notes 141-42.

³³⁵ Posner & Sunstein, *supra* note 327, at 140, 144-45.

³³⁶ See *id.* at 141. The authors also assume that the absence of information cascades, that the voter has private information and acts on it, and that the foreign country is sufficiently similar to the United States in the right way (meaning that the foreign law "offer[s] relevant information for an American court addressing a factual, moral, or institutional problem that is similar" between the United States and the foreign country). See *id.* at 146-48, 160-64.

³³⁷ Eric A. Posner & Cass R. Sunstein, Response, *On Learning from Others*, 59 STAN. L.

Assessing the content of a knowing and intelligent waiver of the right to remain silent and right to counsel requires courts to make judgments of fact (what information was actually conveyed to and understood by a suspect) and value (what categories of information are necessary for an informed decision). If other relevant nations express a different view of waiver, particularly of the values embedded in the legal standard, that view may surely be relevant. And to the extent that the Supreme Court sometimes expresses skepticism about whether it is practicable for law enforcement to impart greater amounts of information before obtaining a waiver,³³⁸ the determinations of other courts and legislative bodies provide evidence that it is possible to operate under a system that affords more information to suspects. While there is room to argue about how to count decisions of the ECtHR and the Directives under the Posner and Sunstein approach (for example, one might ask whether the decision to sign the Convention or join the European Union counts, or whether one must examine implementation on the ground in each individual Member State), this is a helpful way to consider the relevance of these foreign authorities to the content of a knowing and intelligent waiver in the United States.³³⁹

CONCLUSION

There are certain issues endemic to the operation of criminal justice systems around the world. Regardless of the structure of a nation's system, every country must decide whether a suspect's statement may be used in a criminal investigation or prosecution, the procedures that surround an interview or interrogation, and what protections suspects may have in this process.

For fifty years, *Miranda* has provided the dominant focus for these issues in the United States. It is likely our nation's best-known criminal procedure decision. It is an icon for the United States and, perhaps, the world. And now we have seen the development of *Miranda*-like protections in other countries. The

REV. 1309, 1311 (2007).

³³⁸ See, e.g., *Colorado v. Spring*, 479 U.S. 564, 577 n.9 (1987) (requiring officers to inform suspects of the potential subjects of interrogation "would spawn numerous problems of interpretation"); *Schneekloth v. Bustamonte*, 412 U.S. 218, 231 (1973) ("[I]t would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning.").

³³⁹ Posner and Sunstein discuss whether a decision of the ECtHR, for example, counts as a single vote or whether the Convention and the decisions reflect the aggregate judgment of the nations within the Council of Europe. See Posner & Sunstein, *supra* note 327, at 165-66. One might think that the act of implementing changes to national laws within the countries of the Council of Europe and the European Union are not decisions independent of the ECtHR's decisions and Directives. On the other hand, nations have decided independently whether to agree on the Convention, and the European Parliament has elected representatives from Member States. That the ECtHR has issued a series of decisions consistently interpreting the Convention, and that the European Union has issued Directives in harmony with those decisions, is surely worth significant weight.

implementation of these protections in Europe is especially interesting to observe. Whether *Miranda* has influenced the promulgation of warnings and waivers in Europe is difficult to assess. But what is striking is that Europe, at the supranational level, has developed substantially more robust “on the books” protections for the privilege against compelled self-incrimination than we have under our anemic *Miranda* doctrine in the United States.

I previously wrote that *Miranda* was dead.³⁴⁰ Perhaps I was wrong after all. It may have simply moved to Europe, where it is living under an assumed name. Might we welcome it back?

³⁴⁰ See Weisselberg, *supra* note 3, at 1521.