

# The Ideal Criminal Justice System:

Due Process, Self-Incrimination,

Problems and Solutions

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The goal of the American criminal justice system is fairness and equality for all. As citizens, we trust our criminal justice system to find the guilty, punish them, and let the innocent go free. We hope the rights that were built into our Constitution will protect us from the mighty arm of the government. Procedure, which are the steps to be followed during any criminal investigation and trial, and due process are the safeguards of our liberty. We have the notion that if the process is fair, the outcome will be fair.

Unfortunately, the safeguard of procedural justice does not always protect people in the criminal justice system. Because there are flaws in our procedural justice system, we run the risk of wrongly convicting people, which diminishes the credibility of the justice system as a whole. Trust in the justice system is important. Without it, individuals will not respect the court's authority over them and could possibly turn to vigilantism to avenge crimes. By examining the flaws in our system of justice and learning from the criminal justice processes in other countries, we can reduce errors in the current American criminal justice system.

The Fifth Amendment protection against self-incrimination is one that is popularized in the media in television shows and movies, and is a controversial subject in the courts. This protection is the epitome of all other procedural protections, and without it, the protections of due process cannot be realized. Flaws in the self-incrimination protections in particular and the U.S. due process system in general threaten the integrity of the criminal justice system. Establishing a “referee” who will be present during criminal investigations and before trial will more fully protect all due process rights, including the privilege against self-incrimination.

In this paper, I will examine procedural justice, due process and the Fifth Amendment protection against self-incrimination. Through an understanding of these topics and the dichotomy between the goals of due process and their application, I will determine what needs to be fixed to create a more ideal criminal justice system.

Procedural justice is the process made up of the rules that dictate how justice is served. According to Justice Frankfurter, the goal of procedural justice is to give a person in jeopardy a description of the charge against him/her which allows the person the chance to defend himself/herself (Glasser 179). The procedural justice protections in the U.S. justice system are the Fourth, Fifth, Sixth and Eighth Amendments of the Constitution. The Fourth Amendment protects against unlawful searches and seizure of evidence by the police. The Fifth Amendment protects against self-incrimination, ensures the right to a grand jury and guarantees due process. The Sixth Amendment assures the right to consult with a lawyer, to have a speedy and public trial, the right to an impartial jury and to be informed of the nature of the charge. The Sixth Amendment also protects the right to be able to confront prosecution witnesses and present defense witnesses. The

Eighth Amendment says there should be no excessive bail or fines and protects against cruel and unusual punishment. These protections provide for how procedural justice should be implemented. The guidelines are not always followed, but they do set forth the parameters for achieving a fair result.

The application of procedural justice in the United States is the protection of due process present in the Fifth Amendment. The assumption that if the process is fair, the result will be fair is what makes due process so essential to the American criminal justice system. Fairness in procedure lends credibility to the U.S. justice system. When procedural justice protections are not followed, the trust Americans have in their justice system is diminished. Not having faith in the results of trials makes people lose faith in the state as a whole. Because there are, at times, holes in due process in the American criminal justice system, an improvement of the system needs to be developed to ensure a fair process and therefore, a fair result. My own understanding of due process is that the fairness in procedure, fairness in result theory is best, and I will call this theory the, “Fair Result Theory” of due process.

There are other theories of due process and procedural protections as well. There were two models of procedural justice described by Herbert Packer in 1968: the crime control model and the due process model. The two models come from different attitudes of the purpose of procedural justice (Reichel 66). The Crime Control model is most concerned with the protection of the public and the minimizing of criminal behavior. It emphasizes the speed and efficiency of arrests and conviction and the finality of the result. Unlike the due process model, the crime control model rests on the assumption of guilt, and the efficiency of the system is trusted to weed out the innocent. The due

process model of procedural justice focuses on the individual rights of the person accused of a crime. It is characterized by the limits on the power of the state, its more formal system and the fact-finding nature of the process (Reichel 71-72).

Both models work to seek justice for society, but they work to achieve justice in different ways. The crime control model focuses on the protection of society through the elimination of crime. The due process model focuses on the protection of society through the limit on the power of the government to interfere with the lives of citizens (Reichel 75).

Due Process has also been described as an obstacle course. People make mistakes, have false assumptions, jump to conclusions and are sometimes misled by evidence. The threat of punishment by the state in criminal cases is serious because it involves the denial of basic fundamental freedoms. Because of the frailty of human nature and the seriousness of criminal prosecutions, due process procedures must be an “obstacle course” that the state must go through to try to protect people from the power of the state. The assumption is that through the obstacles, the human prosecutor will be able to discover the innocent and release them, and the guilty will receive enough protections to be proven guilty beyond a doubt (Cole 106).

Due process as an obstacle course is related to the concept of actual guilt versus legal guilt. Due process is concerned with proving a person to be legally guilty. To do this, the state must go through a designated process complete with obstacles to achieve the fairest outcome. A person may be actually guilty, meaning they committed the crime, but if the state cannot prove it using the legal means set up in the due process obstacle course, the person is not legally guilty (Cole 140).

In *Rochin v California*, Justice Frankfurter discussed how words fail to describe due process in enough detail to prevent there from being disagreement. He described due process by saying that it “requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on a detailed consideration of conflicting claims...” (*Rochin v California* 342 U.S. 165, 173 (1952)). Justice Black, in the same opinion said due process must promote a “community sense of fair play and decency” (*Id* at 175). Due process is meant to promote the rights protected in the Constitution and give the illusion of fairness of law. In the case *Goldberg v Kelly* (1970), the Supreme Court said that due process must be provided for when a person is “condemned to suffer a grievous loss” by the actions of the state (*Goldberg v Kelly* 397 U.S 254, 263 (1970)).

There are different understandings of the protections of due process such as those mentioned above: due process as a protection of the innocent, as the protection of society from dangerous defendants, as an obstacle course or as a process to be followed when a person is in danger of loss of liberty. Due process is first and foremost the protection of the integrity of the criminal justice system. In addition, due process protections create a wall between the powers of the state and the individual. Due process gives guidelines to the state of how it must treat the defendant to achieve a fair result. The Fair Result Theory of due process is the theory that best encapsulates the protection of the integrity of the system and the protection of the individual from the state.

The Fifth Amendment protection against self-incrimination is one of the most vital of the due process protections. Although there are different interpretations of due process, the essential element of the protection is to ensure a fair process that protects the

individual from the state. Because ours is an adversarial system, the individual and the state are on opposite sides. The state is trying to discover the truth, but the individual has no requirement to assist its adversary, the state, in proving guilt. By protecting the individual from giving over any “damning” information, the Fifth Amendment protects the adversarial nature of the system, protects the individual from the state and strengthens the autonomy of the individual over his/her freedom . The individual retains his/her freedom through the privilege against self-incrimination because it separates the individual and the state and prevents the state from entering the private life of the individual, while at the same time decreasing the power the state has over the individual to compel him/her to provide evidence to the state. The state has the right to bring an individual to the criminal justice system, but the state must have enough correctly obtained evidence to be able to prove its case against the individual without the help of the accused. Without the right against self-incrimination, our system would move more towards the inquisitorial nature of other criminal justice systems (Berger 36-37). The inquisitorial system is more of a collaborative system in which both “sides” are working together to discover the truth. The inquisitorial system relies on evidence gathered in an “inquisitorial” way; it relies on the free sharing of information. The accused remaining silent in this type of system is possible, but it is contrary to the purpose of the system. Again, if following the *process* is what ensures a fair result, and the process in the U.S. criminal justice system is based on the adversarial system and its values, then we do not want to move in the direction of the inquisitorial system because it would undermine the *process*.

The purpose of the privilege against self-incrimination is to protect an innocent person from being compelled to give testimony that could be used to convict him/her. A person cannot be forced to admit to something that he/she did not do (Anderson Thompson 227). Due process protections in general can be seen as the protection of the innocent. (Thomas 45). All of the protections described in the Bill of Rights are to safeguard against prosecution of the innocent. The protection against self-incrimination in due process creates a safeguard around the defendant to diminish the likelihood that an innocent person will make a confession that is false (Thomas 50). In addition to the protection of the innocent, the protection against self-incrimination ensures people do not have to admit association with a group which is not approved of by the government (Anderson Thompson 227).

The Fifth Amendment of the Constitution states: “No person shall... be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...” The protection against self-incrimination is no better articulated than in the landmark Supreme Court decision *Miranda v Arizona* (1966). Ernesto Miranda was arrested for kidnapping and rape and taken to the police station. After being interrogated by police for two hours, he signed a confession (Miranda v Arizona 384 U.S 436, 493 (1966)). His case was combined with four similar cases that all had one thing in common: all defendants were subject to police interrogation. They were under arrest, unable to leave, in an interrogation room with no assistance of counsel or assistance from a third party, and their interrogations were not recorded (Id at 437). In its ruling, the Court found that the protection against self-incrimination extended to police interrogations and defendants must be given a verbal



explanation of their right against self-incrimination and the right to have a lawyer present (Id at 445).

The provisions outlined in *Miranda* are applications of the Fifth Amendment protection against self-incrimination. They are not a new set of rules, as some critics say, but rather an implementation of the already existing protection against self-incrimination (Israel LaFave 197). *Miranda* lays out a number of protections. The individual must be informed of his/her right to remain silent (*Miranda*, supra at 445) and that all statements may be used against the defendant in court (*Miranda*, supra at 445). The individual must also be informed of the right to a lawyer and must be informed that a lawyer can be provided at no cost (*Miranda*, supra at 445). A person must be told of these rights “when the individual is first subjected to police interrogation while in custody of the state or otherwise deprived of his freedom of action in any way” (*Miranda*, supra at 445). *Miranda* also holds that a person is able to exercise his/her right to remain silent at any time, even if the individual has already begun to make a statement (*Miranda*, supra at 445). In addition, if an individual does make a statement without the presence of a lawyer, the burden shifts to the state to be able to prove that the person knew of his/her rights and knowingly waived those rights (*Miranda*, supra at 476). If the state cannot prove this or if there is any other violation of *Miranda*, evidence seized from the violation may not be admitted at trial (*Miranda*, supra at 480). Finally, if an individual chooses to remain silent, this cannot be made known during trial to insinuate guilt. (*Miranda*, supra at 469) The Court describes *Miranda* warnings as important because “...whatever the background of the person interrogated, a warning at the time of the interrogation is

indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time” (Miranda, supra at 470).

The privilege against self-incrimination is applicable when an individual is in “real and substantial” risk of criminal accusation and prosecution (Waltz 140). Miranda warnings must be given when a suspect is taken into custody and when a person is being questioned by police regarding his/her involvement in a crime. When a suspect is not in custody, he/she does not need to have Miranda warnings (Miranda, supra at 445).

The purpose of Miranda protections is to be a safeguard for the police to guarantee that any spoken evidence they collect is legally obtained without any violation of the privilege against self-incrimination. Miranda protections are also there to protect individuals from being coerced by police officers (Anderson Thompson 220).

For a confession to be admissible, Miranda warnings must be given when a suspect is in custody and under police interrogation (Miranda, supra at 445). The confession obtained must be given voluntarily and without coercion (Miranda, supra at 445). If a confession is given after a suspect receives Miranda warnings, the police must be able to produce a waiver and must be able to show that the waiver was given voluntarily and without coercion (Miranda, supra at 445).

There have been multiple questions regarding the applicability of the *Miranda* protections. First, there is the question whether an individual is in the custody of police. Secondly, there is the question of what constitutes interrogation. Finally, once these two issues are decided, there is the question of whether a statement was made voluntarily and without coercion.

In *Miranda*, the Court defined custodial interrogation as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of freedom of action in any significant way” (*Miranda*, *supra* at 445). In *Stansbury v California*, the Court held a police officer’s “subjective and undisclosed view” of whether a person being interrogated is a suspect to be irrelevant to the determination of whether that person is in custody (*Stansbury v California* 511 U.S 318 (1994)). The police officer’s subjective view of or beliefs about the individual being questioned is just one of the facts used to determine whether an individual is in custody, “but only if the officer’s views or beliefs were some way manifested to the individual...and would have affected how a reasonable person in that position would perceive his or her freedom to leave” (*Id* at 325). In other words, the police officer’s conclusion that the person being questioned is a suspect does not necessarily mean the person is in custody, and does not trigger *Miranda* protections.

The Supreme Court has also addressed the issue of what is meant by interrogation. Interrogation received scrutiny by the Court in *Rhode Island v Innis*. In that case the Court decided that interrogation includes not only direct questioning but also its “functional equivalent” (*Rhode Island v Innis* 446 U.S. 291, 302 (1980)). This includes any words or actions the police “should reasonably know” will get some kind of incriminating response out of the suspect (*Id* at 302). In *Rhode Island v Innis*, the Court developed a two prong test to determine what constitutes interrogation and if questioning of a suspect by police officers required *Miranda* protections. First, *Miranda* protections must be given when a suspect is under “express questioning” by the police. Second, *Miranda* protections must also be given when a “functional equivalent” of questioning

exists that police “should have known” would illicit an incriminating response” (Id at 301-302).

A voluntary confession must be the result of a free will and a rational mind (Waltz 228). In *Colorado v Connelly*, the Court found that there must be some sort of coercive state action for a confession to be considered involuntary. A person walking into the police station on his/her own free will and confessing does not involve state action, and therefore, makes the confession voluntary (*Colorado v Connelly* 479 US 157, 165 (1986)).

In his book “Introduction to Criminal Evidence”, Jon R. Waltz outlines the “complex of values” which is behind the voluntariness rule the Court found in the 1960 case *Blackburn v Alabama* (*Blackburn v Alabama* 361 U.S. 199, 207 (1960), Waltz 230). First, without voluntary confession, the values of the Fifth Amendment privilege are undermined. Second, requiring voluntary confessions encourages decent police practices. Third, voluntary confessions maintain a proper balance in criminal cases between the defendant and the police. Finally, requiring confessions to be voluntary prevents jurors from being contaminated by false or unfair confessions and protects defendants from having their cases decided based on those unreliable confessions (Waltz 230).

A confession that may have been determined to be voluntary can be excluded from evidence if it was found to be coerced. There are certain circumstances that are inherently coercive. These include physical violence, length of questioning, failure to present the defendant to a judicial officer in an appropriate amount of time, not allowing a defendant to contact a lawyer, family member or friends, failure of police to advise a defendant of their Miranda rights, police wanting to obtain a confession that matches

their version of events and a lack of justification for the belief that the defendant was involved in the incident (Waltz 232).

Aside from those inherently coercive situations discussed above, there are also subjectively coercive circumstances. Waltz discusses the way in which the Court determines if a situation is subjectively coercive, including the individual's understanding of the right to remain silent and the individual's ability to resist police pressure to give up the privilege against self-incrimination (Waltz 232). Factors that can contribute to subjectively coercive situation include the suspect's age, race and sex, an individual's physical condition, his/her mental condition, level of education, understanding of police procedures and the advice the person received about their legal rights (Waltz 233-235).

*Rhode Island v Innis* is an example of a subjectively coercive situation. Thomas J Innis, an armed robbery suspect, was being transported to the police station after he had been read his Miranda rights and requested a lawyer. While in the car, the police officers with him began discussing the shotgun that was used in the robbery and how it would be horrible if a child from the handicapped school nearby found the gun by accident and was hurt. At this point, Innis told the policemen where they could find the shotgun (Innis, *supra* at 294-295). The Court held that the situation in *Innis* was not a functional equivalent of interrogation, and therefore, the incriminating statements made by Innis were admissible (Innis, *supra* at 303). The Court found against Innis and allowed his statements and the shotgun to be presented at trial.

I disagree with the Supreme Court in this case, because, in my opinion, the police officers in this case were trying to illicit a response from the defendant by appealing to his sense of guilt and responsibility for the welfare of handicapped children. The police

were trying to manipulate the defendant. It is clear from the example in this case that coercion does not need to be physical or direct to coerce a defendant into sacrificing his/her right against self-incrimination.

*Brewer v Williams*, or the “Christian Burial Case”, is an example of a case in which the Court did find coercion. Robert Williams, a deeply religious and mentally ill man who escaped from a mental institution, was apprehended in Davenport, Iowa, for the kidnap and murder of nine year old Pamela Powers in Des Moines, Iowa. When he was arrested in Davenport, Williams requested and consulted with his lawyer, Henry McKnight. At that time, two detectives, Detective Leaming and another, came to drive Williams back to Des Moines. Before leaving, McKnight instructed the officers not to ask Williams any questions about the crime on the drive back (*Brewer v Williams* 430 U.S. 387, 391 (1977)). However, while in the car, Leaming began talking to Williams and addressing him as Reverend. Leaming told Williams it was going to be a cold night and asked him to think of the victim’s parents, and how Pamela Powers deserved a “Christian Burial”. Leaming urged Williams to think about telling him where the victim’s body was. At that point, Williams directed Leaming to the body (*Id* at 393-394). In this case, the Court did find the methods used by Detective Leaming to be a “functional equivalent” of interrogation because the Court held Detective Leaming should not have questioned Williams without his attorney present (*Id* at 405). Although the main issue in this case is the right to counsel, it is clear Detective Leaming overstepped the boundary established when Williams invoked his right to counsel in order to get Williams to incriminate himself on the drive back to Des Moines. The situation was clearly subjectively coercive because of Williams’ mental state and his strong religious beliefs.

There are a number of exceptions to the *Miranda* protections. This first is the “public safety” exception described in *New York v Quarles*. In the case, while apprehending a suspected rapist in a supermarket, police asked the suspect where he had hidden his gun in the store before informing him of his *Miranda* rights. While handcuffed, the suspect responded to the officers and directed them to the gun (*New York v Quarles* 467 U.S. 649, 653 (1984)). The Court held that for matters of “public safety”, it was acceptable to question a suspect if the public is somehow at risk (*Id* at 654). The dissent in the case questioned whether there was actually any danger to the public in this particular situation (*Id* at 676). In addition, Justice O’Conner questioned whether the decision would “make *Miranda*’s requirements more difficult to understand” (*Id* at 664) and create the type of “hairsplitting” that exists in the Fourth Amendment cases (*Id* at 665).

There is also an inevitable discovery exception to *Miranda* developed in *Nix v Williams*, a follow-up case to *Brewer v Williams*. The Court found that although Detective Leaming used improper tactics to obtain William’s incriminating statements that led to the discovery of the victim’s body, the body could still be used as evidence because it would have been “inevitably discovered” by search teams (*Nix v Williams* 467 U.S. 431, 445 (1984)). Therefore, the Court created an inevitable discovery exception for evidence that is found through illegally obtained incriminating statements.

Now that we know the full law regarding the privilege against self-incrimination, we must discuss its inadequacies before we can discuss the steps needed to fix those shortcomings. The first issue is when *Miranda* warnings must be read. *Miranda* rights must only be given once a person is at “real and substantial risk” of criminal prosecution.

However, to be get to the point of being at “real and substantial risk” of criminal prosecution, it can be assumed that through that point in their investigation, the police spoke with the defendant, and the defendant may have said or done something to raise police suspicions enough to put the defendant in the place of “risk of prosecution”. In other words, once a person is at the point of needing his/her Miranda rights read, he/she may have already said or done something to incriminate himself/herself. Although this is not always the case, as sometimes police may decide to arrest a suspect because of physical evidence, it is still important for a defendant to know his/her rights at all points when having contact with the police.

This is similar to the case *Oregon v Elstad*. In *Elstad*, police executed a search warrant in the home of a robbery suspect. Before telling the suspect that he was under arrest, a police officer told the suspect that he “felt” the suspect was involved. The suspect then admitted to police that he was involved in the crime. The police officers put the suspect under arrest, took him to the police station, read him his *Miranda* rights and the suspect stated again that he was involved and signed a confession (*Oregon v Elstad* 470 U.S. 298, 302 (1985)). The Court ruled that although the first confession was not admissible, the second confession after the suspect was read his Miranda rights was admissible (*Id* at 318).

This case was a violation of the spirit of Miranda protections because the suspect had no reason to remain silent after his *Miranda* rights were given because the “cat was out of the bag”. If a person incriminates himself/herself before Miranda rights are read, the person has no reason to remain silent after he/she is read Miranda rights because the police already have the incriminating information. Allowing incriminating evidence at



trial that was obtained pre-Miranda is inconsistent with the purpose of due process, that is, the fairness of the process. It is not fair to obtain evidence from a suspect who may not be aware of his/her rights while giving the evidence to the police. This bypasses the privilege against self-incrimination that Miranda warnings are meant to protect.

Again, in *Rhode Island v Innis*, the Court developed a two prong test to determine what constitutes interrogation: when a suspect is under “express questioning” by the police or when a “functional equivalent” of questioning exists that police “should have known” would illicit an incriminating response” (Innis, supra at 302). Although the *Innis* test does further the rights of the accused because it does not limit Miranda protections to express questioning, it does not take into account subjectively coercive circumstances like age and race mentioned previously that may make an otherwise non-coercive environment coercive (Waltz 233). For example, in the case *Fare v Michael C*, a juvenile defendant was taken into custody by police for questioning about a murder. The juvenile was on probation in Juvenile Court, had spent time in a youth correction center and had a juvenile criminal record ((*Fare v Michael C* 442 U.S. 707, 711 (1979)). After being read his Miranda rights, the juvenile asked to speak with his probation officer. This request was denied, and the juvenile went on to speak to police without a lawyer and made incriminating statements about the murder (Id at 711-712). Before the case went to the Supreme Court, the California Supreme Court held in favor of Michael C. because it said the probation officer “occupies a position as a trusted guardian figure” in the life of a juvenile defendant (Id at 714). The Supreme Court reversed that ruling and held that a request for a probation officer is not a invocation of the right to remain silent because the

probation officer does not have the ability to protect the juvenile's "legal rights" (Id at 723).

Although the Court did not address age as a factor in its decision in *Fare v Michael C*, the age of the defendant Michael C clearly did lead to a subjectively coercive situation in this case. The juvenile defendant was sixteen years old at the time of his arrest and already had a record with the criminal justice system. He was most likely intimidated by the police and asking for his probation officer was a clear sign that he wanted an adult who was a "trusted guardian figure" present because he knew he was in trouble. He may not have understood his Fifth Amendment right to remain silent and his right to consult with counsel meant only the right to consult with an attorney, rather than a "trusted guardian figure". The inherent power imbalance between a delinquent child and police officer creates a subjectively coercive environment that begs for Miranda's protections. Unfortunately, the Supreme Court stuck to the limiting two-prong test of *Innis* and failed to see the due process danger of subjectively coercive circumstances.

The situation in *Fare v Michael C* and other similarly subjectively coercive circumstances cases such as *Beecher v Alabama*, a case in which a black man was suspected of a rape and murder of a white woman (*Beecher v Alabama* 389 U.S. 35 (1967)) or *Lynum v Illinois*, a case in which a woman was questioned with sexist overtones by police (*Lynum v Illinois* 372 U.S. 528 (1963)) ask the question of whether there can ever be truly voluntary confessions. The anxiety of being in a police station and being questioned about a crime by a law enforcement officer is subjectively coercive in itself because of the power imbalance between the individual and the police officer. Individuals must be able to understand their right to remain silent and be able to stand up

to pressure given by police for a situation not to be subjectively coercive (Waltz 232). If a situation is not coercive, the individual is able to effectively waive his/her Miranda rights.

Again, a non-subjectively coercive situation is unlikely to exist. After being arrested and walking into a police station, a person is in custody. Before he/she is to be questioned by police, Miranda warnings are supposed to be given. It is clear that the police suspect the person of a crime. At this point, the suspect is already in a coercive environment. The person is under pressure and very likely is afraid of being charged with a crime. This pressure and fear exists even if a person is innocent. Although a person can ask for an attorney and ask for all questioning to be stopped, the fear of appearing guilty or the desire to finish the process of questioning as soon as possible, combined with police pressure may cause the person to resist asking for an attorney. The power of state in the form of the police versus the power of the individual who is in a police station, arrested and afraid creates a subjectively coercive circumstance that pressures the individual to waive his/her rights.

Before discussing solutions to the problems present in the criminal process, it is useful to examine the due process protections in other countries, namely, England, France and Saudi Arabia. .

The due process protections in England are similar to those in the United States as both countries have a common law tradition and an adversarial justice system. In England, defendants have the absolute right to remain silent (Terrill 58). Defendants have the right to see a lawyer when they are charged with a “serious arrestable offense”, but that right can be delayed up to thirty-six hours (Terrill 59). This means that the police are allowed to delay a suspect from speaking to a lawyer for an extended period of time, and

they can continue to question the suspect during that period if the defendant does not invoke his/her right to remain silent. In addition, there is no right to free counsel; England does not provide a lawyer if the defendant cannot afford one (Milovanich 379). Once a person requests a lawyer, he/she cannot be questioned by police. A person must be informed of the right to remain silent at the point of arrest or when suspected of a crime by the police (Terrill 59).

Voluntariness of confessions is also at issue in the English system. A confession in England is excluded as involuntary if the prosecution cannot prove the confession was not obtained through oppression of the defendant or under circumstances which would make the confession unreliable at the time it was made. A “reliable confession” is one that was made without a “threat, inducement or oppression”, but this stipulation does not “apply to all threats or inducements but only to those likely to produce an unreliable confession” (Milovanviach 380). It seems from this rule that confessions are considered voluntary only if the pressure put upon the defendant to make them is not too great.

Pressure to give up the right against self-incrimination was changed in England in 1995. Prior to 1995, a person’s choice to remain silent during police questioning could not be mentioned at trial to infer guilt. After a new law was passed in 1995, judges and juries could consider a defendant’s choice to remain silent as evidence of guilt in four situations. First, if the defendant does not inform police of a fact during interrogation that is given by defense at trial that the defendant would have been “reasonably expected” to give to police. The rationale for this provision is for prosecutors to be able to understand defense details before trial so they are able to craft a response to the defense. Second, juries and judges can infer guilt of a defendant if a situation “calls for an explanation”

and the defendant refuses to give one. Third, “adverse inferences” can be drawn if a suspect refuses to respond to police questioning. Finally, guilt can be inferred if a defendant refuses to explain to police why they were present at a crime scene or a place that would involve them in a crime (Milovanovich 381-382).

The problems with England’s new law are clear. By allowing judges and juries to draw “adverse inferences” of the defendant, the law puts pressure on defendants to give a statement to police. The voluntary nature of confessions is put in jeopardy because the new law creates a subjectively coercive situation in which the defendant is pressured to make a statement so his/her guilt will not be inferred by the jury later.

England and the United States have similar due process protections because of their similar justice systems. France has a different system from the other two countries. France is an inquisitorial system built on civil law. When a crime is committed in France, the police undertake an investigation. The goal of the investigation is a discovering of the facts by an impartial officer. A person being questioned by police at the initial stages of investigation, a process known as *garde a vue*, does not need to be told if he/she is a suspect or about the nature of the police questioning. A person can be held between twenty-four and forty-eight hours by police for questioning and does not have the right to a lawyer, an *avocat*, in the first twenty hours of questioning. Although the right to remain silent exists in France’s system, a suspect does not need to be informed of that right (Terrill 250).

After the initial investigation, the information gathered by the police is handed over to the prosecutor (Terrill 250). At this point, the defendant can be informed of the right to remain silent, but the defendant *must* be informed of the right to remain silent

when the person is charged with a crime. Although no inference can be made about the defendant's choice to remain silent, the judge and the prosecutor are allowed to comment about the defendant's silence, which may place the defendant in a negative light (Milovanovich 386).

A confession obtained through physical coercion is not admissible at trial, but the police are allowed to pressure a person to confess. If there is a question of whether a confession should have been admitted to evidence, the judge sends the question to the Chamber of Accusations. The Chamber of Accusations then determines if the confession should be excluded. If it decides yes, then the evidence, whether it is a confession or incriminating evidence obtained from a statement, is nullified, as is any proceeding coming from the tainted evidence. In addition, at trial, a defendant has the right to remain silent, but he/she does not have the right to refuse questioning. Therefore, a prosecutor or a judge may ask the defendant a direct question, and although the defendant does not need to answer, he/she is under intense pressure to do so (Milovanovich 387).

The criminal justice system in Saudi Arabia is unique and is very different from the systems in England, France and the United States. Saudi Arabia's justice system comes from Islamic Law, a type of religious law that is built on laws found in the Qur'an. Islamic Law is called Shari'a law and is made up not just of criminal law, but is seen as a code of how to live. Law in Saudi Arabia is very rarely written down and any conflict that arises between Shari'a law and modern life is decided by the Judicial Council, made up of religious leaders (Fairchild Dammer 87).

Criminal procedure in Saudi Arabia is taken on a case to case basis, which is known as "*quadi*" justice (Fairchild Dammer 159). To prove a person guilty in Saudi

Arabia, most crimes call for witnesses to speak of the defendant's guilt or a confession by the defendant. A person has the right to retract a confession during trial, and the confession cannot be used as evidence. However, partly because each case is taken under advisement and there is no concrete rule to follow, some confessions that are obtained through force or coercion can be used at trial. Under Shari'a law, a person does not need to testify against himself/herself during trial. Interestingly, if the person does testify, he/she does not need to tell the truth because there are no laws against perjury (Fairchild, Dammer 160).

Learning from the due process protections and self-incrimination privileges of other countries provides a useful backdrop into the improvement of the American criminal justice system. Although due process is handled differently in the three case studies examined, the American system is still the best of the systems. It guarantees a process that must be followed, unlike the system in Saudi Arabia. It guarantees the right to remain silent without any kind of judgment during trial proceedings, unlike in France and England. It requires suspects to be told of their rights, unlike suspects in France. It also provides the right to an attorney free of charge, unlike the English system.

We have seen the problems with the current American criminal justice system, including subjectively coercive circumstances, the definitions of custody and coercion and when Miranda protections are applicable. To combat these problems, a new provision must be added to look after the fundamental fairness present in American due process protections. A "referee" should be implemented during the police investigation and pre-trial proceedings to safeguard the protections of due process present in the Constitution.

The referee can be implemented into the current system through legislative statute. Because the referee is in place to protect due process at every level, including federal, state and local, Congress should pass a law creating the Office of the Referee to be present at all court levels. States will be required to create their own Office of the Referee and each jurisdiction will have its own Office of the Referee, similar to the Office of the Prosecutor present in each jurisdiction. It may be difficult to gather the needed amount of votes to make such a novel change to the criminal justice system. Some politicians may be afraid they will be seen as “soft on crime”. Some constituents may prescribe to the “crime control model” of due process which focuses on the prosecution of criminals, rather than the protection of procedural rights. However, politicians must realize the creation of the referee will not be a hindrance to the fight on crime, but rather, a celebration of the due process protections outlined in the Constitution. The referee will also advance the Fair Result Theory of due process, which will protect all citizens from crime and wrongful convictions.

The purpose of a “referee” is to ensure all protections of due process are followed in criminal investigations and prosecutions. The “referee” will prevent abuses of the criminal justice system. By preventing these abuses, the “referee” will help to ensure a fair process is being followed, which helps to ensure a fair result. More guarantees about fair results in the criminal justice system will give more creditability to the system and will foster more trust of the system among individuals.

To become a referee, a person must have gone to law school and received a JD. The referee must also have passed the bar exam and be a practicing lawyer in that jurisdiction. These stipulations are in place because the referee is representing a client,



the criminal justice system. If a person is to represent a client in the courts, that person must be a practicing attorney. In addition to being a lawyer, the referee must also have completed training at the College of Referees. The College of Referees is a post-graduate program for existing lawyers to learn how to become a referee. The College of Referees offers courses in both substantive and theoretical criminal procedural justice. These courses are more in-depth than the procedural justice courses taken in law school and give knowledge of the American system of procedural justice, international systems and theoretical systems that offer alternatives to current procedures of justice. In addition to these courses, lawyers at the College of Referees will also be trained in police interrogation tactics and police procedure to familiarize themselves with how police officers gather evidence and obtain confessions. Aside from these courses, students will also learn about constitutional law protections and Supreme Court precedent regarding procedural rights. Each jurisdiction has a referee's office, similar to the prosecutor's office, which will be made up of a district referee and assistant district referees.

The role of the referee pre-trial is similar to that of a judge during trial. Referees are to be mediators between the state actors and the defendant. They are the representative of the criminal justice system, so they are to be completely neutral to the investigation. The referee is to be present at the beginning of any investigation. The referee will follow the progress of the police while not impeding in the investigation. At this point in the process, the referee is concerned mainly with how the police gather physical evidence and the way the police question witnesses. The referee will not offer advice on who committed the crime or the quality or efficiency of the investigation being conducted, unless the investigation is violating the rights of an individual or violating the

protections of due process. For example, if a police officer sees a piece of evidence through a window of a private residence and makes an effort to enter the residence without a search warrant, the referee is allowed to stop the police officer and instruct him/her to obtain a search warrant before entering the residence.

The referee will make a record of all the actions of the police and will document the investigation through notes, tape recordings and photographs that are impartial. The way in which the referee will make his/her record of events is similar to the investigation process in the French criminal justice system, which is a gathering of evidence and facts before making any interpretation of the evidence. The account of police procedure and investigation made by the referee will create an unbiased account of the investigation for both sides to be able to see how the police ran the investigation and if any of the suspect's due process rights were violated.

Once the police have identified a suspect and have decided to question that suspect, the referee will go with the police to the questioning. If the police have identified a suspect, they must inform the suspect of his/her Miranda rights, even if the person is not in custody. This allows the individual to be aware of his/her rights at all times and will make any statement the person makes more legitimate. It will also prevent the type of confession made in *Oregon v Elstad*, which I believe circumvents the spirit of the protection against self-incrimination.

Subjectively coercive circumstances are also lessened by the presence of the referee because the referee will be guarding against potentially subjectively coercive characteristics such as race and age and will make sure defendants are not coerced based on these characteristics. The referee is meant to ensure a fair process and will protect the

individual from the state if the state is going to violate individual rights. This is not meant to weaken the power of the state, but rather, increase the individual's sense of fairness, which decreases the sense of control the police may have over an individual. The overwhelming authority of the police may have been used to put pressure on an individual to make a confession before the referee. After the referee is implemented, he/she will share with the police an air of authority, thereby lessening the pressure the police can put on an individual.

Aside from being present when the police question a suspect, the referee must also be present when police are executing a search of a suspect's personal space. This is to guarantee there are no abuses of the Fourth Amendment protections against unlawful search and seizure.

The referee determines if there is a violation of procedural justice similar to the way the Chamber of Accusations in France determines if there was a violation of rights. The referee looks at the circumstances of a particular situation impartially and decides if a violation of procedural justice protections took place. The referee then stops the action and the investigation moves on as though nothing occurred.

If there is a violation of procedural rights during an investigation, there does not need to be an objection raised by an attorney. The referee watches the entire investigation and if the referee determines there has been a violation of procedure, then he/she will instruct the perpetrator stop the behavior. For example, if a police officer begins to question a suspect who has already invoked the right to counsel and uses a questioning tactic the referee feels is meant to elicit an incriminating response, the referee can stop the line of questioning. If there is a defense attorney present and he/she feels the referee

missed a violation of the suspect's rights, the attorney may make an objection, just as would be done during a trial. The referee can then decide if the objection is valid and rule whether a violation did take place.

Once a referee makes a ruling, whether through observation or stemming from an objection, either side can appeal. All appeals are heard by the trial judge pre-trial. The appeal process works just as all other appeals work and can be taken all the way to the Supreme Court. Once an appeal is heard and the judge makes the ruling, the losing side can appeal to the next highest court. If the losing side decides not the appeal, the issue is considered fully litigated and cannot be brought up again post-trial. In other words, there is no appeal post-trial for issues that were decided pre-trial or could have been decided pre-trial.

The reason for this provision is so all matters of fact and evidence are completely litigated before evidence is presented to the jury. All evidence and incriminating statements that are presented at trial should be completely litigated pre-trial to ensure the defendant gets as fair of a trial as possible. Admitting evidence that should not have been admitted yet helped to convict the defendant is unfair, and trying to litigate an evidence issue after a person has already been convicted is very difficult because a person already convicted of a crime is presumed guilty on appeal. On the other hand, excluding evidence that should not have been excluded may help to let a person go free who should have been convicted. The person cannot be tried again for the same crime according to the protection against double jeopardy. Therefore, it is important to thoroughly examine all potential evidentiary problems before the trial so as to not make a mistake in verdict and trying to correct it post-trial.

If, during an appeal process, a defendant's new attorney thinks the defendant's previous attorney should have objected to a referee during the investigation, did not, and the defendant's rights were in some way violated, the new defense can raise an appeal under the claim of ineffective counsel. The substance of what should have been objected to is not at issue, but the mistake by a previous defense attorney during the investigation process can be grounds for appeal, just as it is currently.

There will be some criticism of the addition of the referee in the criminal justice system. Some may argue that a referee will slow down the investigation process and will conflict with a defendant's right a speedy trial. In addition, some may argue the referee will be creating another step in the process. These are valid points. However, police investigations will continue just as they do now; the only difference will be the referee, who will not impede in the investigation in any way. The referee is merely there as an observer, meant to oversee the actions of the agents of the state to make sure no violation of due process rights are taking place and will not change his/her position as an observer unless a violation takes place. The only new "step" in the process will be the possibility of appeals pre-trial. Currently, there are already appeals pre-trial for other issues. The appeals that will result from the referee's rulings are the only new appeals that will take place, and will most likely not affect most defendants. However, if a violation did take place, it is worth the extra time to correct the violation before the trial begins.

Some may also argue the referee will make due process protections more like the obstacle course version of due process described earlier. This is not the case. The purpose of due process protections is to protect the individual from the power of the state and create a process which ensures the fairest result. The referee is not creating a hurdle of

any kind that the state must get around to convict an individual. Rather, the referee is there to safeguard due process protections that already exist and are at times violated. There is nothing new that is coming about from the addition of the referee. The system is exactly the same; except there is a person watching over the system to make sure it is followed.

A final matter that could be raised in opposition to the position of the referee is it will make it more difficult for innocent defendants wrongly convicted to be released on appeal. The referee's job is to safeguard our due process protections. If we assume the process is fair and just and the referee is there as an extra protection, we assume the result is even more fair and just than it was before the referee. Therefore, anyone who is convicted is most likely guilty because any person who was innocent would have had his/her rights protected by the referee during the investigation stage and false incriminating evidence would not have been obtained. Of course, with the referee in place, it is likely the number of wrongly convicted persons will decrease. However, even if all the evidence presented at trial was rightfully obtained, juries can still make incorrect decisions about the guilt of the defendant. We must ensure that those few who do fall through the cracks are given all the chances currently available to wrongly convicted persons. The procedural system is still fraught with human error, and although we are working to make the system as fair as possible, there will still be mistakes made. Appellate judges, defense attorneys and prosecutors must still remember this fact, and work to free wrongly convicted person with the same fervor they currently use.

Even with these possible problems, the referee is a much needed and highly valuable tool to the current criminal justice system. The referee will protect the process,

which will protect the underlying assumption that a fair process will produce a fair result. By protecting the due process system, the referee is helping to ensure a fair result and more just convictions. The referee also lessens the chance of procedural violations by the police, which further protects the individual from the state. The referee, while protecting the criminal justice process, will give people more faith in the criminal justice system. An increase in faith in the criminal justice system will help individuals to accept the decisions of the courts and will increase the reputation of the court system as legitimate.

To have a successful criminal justice system, we must protect the process. Due process protections are extremely important because they legitimize the criminal justice system and help to create the fairest results. The Fifth Amendment protection against self-incrimination is one of the most important of the procedural protections. The essence of the privilege against self-incrimination is that individuals do not need to provide evidence of their own guilt to the state. It protects the sovereignty of the individual and separates them from the power of the state. By identifying problems with the privilege against self-incrimination and learning from the lessons of other countries in the area of due process, the addition of the referee will hopefully help to eliminate some of these issues. By eliminating the problems with the Fifth Amendment protection against self-incrimination, the privilege itself is strengthened and due process protections are secured.

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