
REFUSING TO BE ONE'S OWN WITNESS: HOW THE
PRIVILEGE AGAINST SELF-INCRIMINATION DIFFERS IN
CHINA, FRANCE, AND THE UNITED STATES

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I. INTRODUCTION

If asked to consider those rights afforded persons in the United States, the privilege against self-incrimination would likely materialize quickly and foremost in our minds, just as would the right to freedom of speech—the privilege is an unalterable tenet upon which our Constitution is based, fundamental to us as citizens, and necessarily pervasive within our criminal justice system. Unsurprisingly, the so-called “right to remain silent” continues to be a popular topic of law review articles¹ and other scholarly publications. Case law involving the right also frequently ignites and shapes the discussion in myriad ways.² Yet both the debate over and the importance of the privilege extend outside the United States to countries whose lawmakers also grant their citizens this right.

This Comment purports to expound upon the idea that the privilege against self-incrimination is intrinsically and inexorably associated with the U.S. Constitution’s Fifth Amendment. To do so, the Fifth Amendment’s Self-Incrimination Clause will be compared with and

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¹ See, e.g., Harvey Gee, *Salinas v. Texas: Pre-Miranda Silence Can Be Used Against a Defendant*, 47 SUFFOLK U. L. REV. 727 (2014).

² See, e.g., *Bryant v. State*, No. 90A04-1501-CR-11, 2015 Ind. App. LEXIS 552, at *10 (Ind. Ct. App. Aug. 7, 2015) (holding that the prosecutor’s comments did not violate defendant’s Fifth Amendment right against self-incrimination because they did not refer to the defendant’s decision not to testify).

distinguished from the privilege as it exists in France and the People's Republic of China, two States that, in relation to each other and the United States, vary widely on both legal and socio-economic issues. I propose that, in spite of these and other differences, the privilege against self-incrimination is important to and will remain pertinent for the foreseeable future in China, France, and the United States.

Part II will proceed with an examination of the sources of and policies behind the privilege against self-incrimination in the three subject countries. Part III will turn to a more in-depth analysis of the areas in which each country's privilege is both comparable and distinguishable. Finally, in Part IV, the benefits and consequences of asserting the privilege in each country will be discussed.

II. SOURCES OF AND POLICIES BEHIND THE PRIVILEGE

Unsurprisingly, given the disparities alluded to above between China, France, and the United States, both the source of and policy behind each country's respective privilege against self-incrimination differ noticeably, as do their dates of enactment. As it currently stands, two of the three provisions discussed herein find as their source the criminal procedure codes of their respective countries,³ while one exists enacted as an amendment to its country's federal constitution.⁴

Prior to January 1, 2013, when an amendment to Chinese criminal procedure law that had been enacted by the National Congress of the Communist Party of China went into effect, an accused's right to protect herself from self-incrimination did not exist.⁵ In fact, under what

³ See Decision of the National People's Congress on the Amendment of the Criminal Procedure Law of the People's Republic of China (promulgated by Nat'l People's Cong. Beijing Municipality, Mar. 14, 2012, effective Jan. 1, 2013) (China), <http://lawprofessors.typepad.com/files/130101-crim-pro-law-as-amended-en.pdf> (containing an amendment to THE CRIMINAL PROCEDURE LAW AND THE CRIMINAL COURT RULES OF THE PEOPLE'S REPUBLIC OF CHINA); CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 116 (Fr.), <http://www.legislationline.org/download/action/download/id/1674/file/848f4569851e2ea7eabfb2ffcd70.htm/preview>.

⁴ See U.S. CONST. amend. V.

⁵ Decision of the National People's Congress on the Amendment of the Criminal Procedure Law of the People's Republic of China (promulgated by Nat'l People's Cong. Beijing Municipality, Mar. 14, 2012, effective Jan. 1, 2013) (China), <http://lawprofessors.typepad.com/files/130101-crim-pro-law-as-amended-en.pdf> (containing an amendment to THE CRIMINAL PROCEDURE LAW AND THE CRIMINAL COURT RULES OF THE PEOPLE'S REPUBLIC OF CHINA); see Diane Marie Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 UCLA L. REV. 1201, 1273 (1998).

was formerly Article 93 of the Criminal Procedure Law of the People's Republic of China,⁶ “suspects not only ha[d] no right to remain silent, but [were also] obliged to answer questions which [were deemed] ‘relevant’ to the investigation.”⁷ In enacting such a policy, Chinese lawmakers relied heavily upon Confucian principles, which place an emphasis on protecting society above all, even at the expense of individual rights.⁸

The safeguarding of community, according to Chinese beliefs, necessarily must include confessions, which are “considered a desirable, if not essential, step toward a defendant’s reconciliation with society.”⁹ Appropriately, a phrase promising “Lenience to Those Who Confess, Severity to Those Who Resist” is painted on cell walls in China,¹⁰ offering a reminder of one’s moral obligation in the place in which it resounds most loudly.

The People’s Congress, along with a number of unrelated amendments, enacted China’s privilege against self-incrimination on March 14, 2012.¹¹ Article 93, now known as Article 50, of China’s newly amended Criminal Procedure Law states, “No person may be forced to prove his own guilt.”¹² The purpose of this significant change in Chinese law, as reflected in Article 54 of China’s criminal code, is the offi-

⁶ Article 93 specifically held that “[a] criminal suspect shall truthfully answer the questions raised by an investigative functionary based on facts, but he has the right to refuse to answer the questions *which are not relevant to the case.*” THE AMENDED CRIMINAL PROCEDURE LAW AND THE CRIMINAL COURT RULES OF THE PEOPLE’S REPUBLIC OF CHINA 77 (Wei Luo trans., William S. Hein & Co., Inc. 2000) (1996) [hereinafter “CHINA CRIMINAL PROCEDURE LAW”] (emphasis added).

⁷ Hilary K. Josephs, *The Upright and Low-Down: An Examination of Official Corruption in the United States and the People’s Republic of China*, 27 SYRACUSE J. INT’L L. & COM. 269, 272 n.13 (2000). Put differently, “suspects not only have no right to remain silent, but are obliged to answer questions which are ‘relevant’ to the investigation.” Mark A. Godsey, *Miranda’s Final Frontier—The International Arena: A Critical Analysis of United States v. Bin Laden, and a Proposal for a New Miranda Exception Abroad*, 51 DUKE L.J. 1703, 1763 n.271 (2002).

⁸ See Amann, *supra* note 5, at 1273–74 n.453.

⁹ *Id.* at 1274.

¹⁰ *Id.* (internal quotations omitted).

¹¹ Decision of the National People’s Congress on the Amendment of the Criminal Procedure Law of the People’s Republic of China (promulgated by Nat’l People’s Cong. Beijing Municipality, Mar. 14, 2012, effective Jan. 1, 2013) (China), <http://law professors.typepad.com/files/130101-crim-pro-law-as-amended-en.pdf> (containing an amendment to THE CRIMINAL PROCEDURE LAW AND THE CRIMINAL COURT RULES OF THE PEOPLE’S REPUBLIC OF CHINA).

¹² *Id.*

cial disavowing of confessions obtained through torture, extortion, and other illegal means.¹³

In spite of its newly enacted law, China's provision for self-incrimination protection remains somewhat muddled and ambiguous due to both the imprecise scope afforded by new Article 50 and the apparent continued enforcement of old Article 93.¹⁴ Thus, as will be discussed below, determining who is covered, when a person is covered, and under what circumstances a person is covered not only proves difficult, but it also implicitly questions the efficacy of this new law.

Similar to Article 50 of China's Criminal Procedure Law, the French privilege against self-incrimination can be found in its criminal procedure code, which is known as the "*Code de procédure pénale*."¹⁵ Article 116, the lengthiest of the three provisions discussed within this note, requires "[t]he investigating judge [to] inform[] the [accused] person of his choice to remain silent, to make a statement, or to be interrogated. A record of this information is [then] made in the official record."¹⁶

What began as a compromise between France's pre-revolutionary inquisitorial procedure and the accusatory system that was adopted from England ended up creating what is known today as the privilege against self-incrimination.¹⁷ This change was brought on in large part by France's "desire to abolish the brutalities of the old procedure, especially interrogation under torture, for the purpose of extracting a confession," because, at that time, "[i]t had become evident that confessions obtained by the threat or use of force were not freely made and tended to be lacking in trustworthiness."¹⁸ Unsurprisingly, the privilege as it exists today is premised on the desire of the French gov-

¹³ See *id.* art. 54. Article 54 states in part, "Confessions by a suspect or a defendant obtained through torture and extortion and other illegal means and witness testimonies and victim statements obtained through the use of violence, threats and other illegal means should be excluded." *Id.*

¹⁴ Compare *id.* art. 50 with CHINA CRIMINAL PROCEDURE LAW, *supra* note 6, at 77.

¹⁵ See CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CODE OF CRIMINAL PROCEDURE] (Fr.), <http://www.legislationline.org/download/action/download/id/1674/file/848f4569851e2ea7eabfb2ffc70.htm/preview>.

¹⁶ *Id.* art. 116.

¹⁷ See Manfred Pieck, *The Accused's Privilege Against Self-Incrimination in the Civil Law*, 11 AM. J. COMP. L. 585, 589 (1962). According to Pieck, "The [French] Code abolished the accused's obligations to take the oath and to answer questions, and, since there were no longer any legal means to force an accused to answer, it, in effect, created the privilege [against self-incrimination]." *Id.*

¹⁸ See *id.*

ernment to prevent persons from being subjected to either physical or psychological torture, or both, during interrogation.¹⁹

In contrast to both the Chinese and French rights, the United States' privilege against self-incrimination comes from its Constitution, specifically the Fifth Amendment. Enacted in 1791 and contained in the Bill of Rights, the Fifth Amendment states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."²⁰ Nonetheless, the Self-Incrimination Clause of the Fifth Amendment is premised on many of the same policies as the self-incrimination laws of China and France—namely, the elimination of torture as a governmental practice.²¹

Impactful molding of the privilege against self-incrimination took place in 1998, when *United States v. Balsys* was decided.²² The *Balsys* Court held, among other things, that the privilege offers protection of "testimonial privacy,"²³ prevents government overreaching,²⁴ and prevents subjecting an individual to inhumane treatment as a consequence of her testimony.²⁵

III. AREAS OF COMPARISON

Having now established a factual framework whereby by the privilege, as it exists in three highly disparate countries, can be better understood, this Comment will proceed by comparing the privilege as it exists in those countries.

A. *Scope of the Privilege*

In spite of its congress's progressive legislation, the Chinese privilege against self-incrimination is far from an absolute right.²⁶ Notably,

¹⁹ *See id.*

²⁰ U.S. CONST. amend. V.

²¹ *See* Melinda S. Blackman, *Constitutional Law: United States v. Balsys: Setting a Boundary for the Self-Incrimination Clause*, 53 OKLA. L. REV. 127, 127 (2000).

²² *United States v. Balsys*, 524 U.S. 666 (1998).

²³ *Id.* at 692.

²⁴ *See id.* at 693.

²⁵ *See id.* at 713 (Breyer, J., dissenting) (stating that "the unseemliness, the insult to human dignity, created when a person must convict himself out of his own mouth" justified the privilege). *See generally* David Dolinko, *Is There a Rationale For the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063 (1986).

²⁶ *See* Decision of the National People's Congress on the Amendment of the Criminal Procedure Law of the People's Republic of China (promulgated by Nat'l People's Cong. Beijing Municipality, Mar. 14, 2012, effective Jan. 1, 2013) (China), <http://lawprofessors.typepad.com/files/130101-crim-pro-law-as-amended-en.pdf> (containing an

new Article 50 only limits the measures interrogators can take to force interrogees to talk, which means persons still have an obligation to answer truthfully all questions posed to them.²⁷ This principle extends to the trial itself, where “the court calls the witnesses rather than the parties.”²⁸ Because of this procedural nuance, accused persons in China are left unprotected and may be compelled to testify.²⁹

Furthermore, the language contained in old Article 93, which required all suspects with connections to an investigation to answer those questions deemed “relevant” to the matter, further disadvantaged the accused.³⁰ For example, including the term “suspects” in the article withholds the privilege from witnesses who testify at trial.³¹ Even considering the newly amended Article 50, whether the right applies to persons subject to pre-arrest or post-arrest interrogation, or a defendant at trial, is left unanswered.³² Therefore, it seems reasonable to conclude China’s Criminal Procedure Law only provides to those persons suspected of committing a crime—and thus are subject to questioning—protection from forceful interrogation tactics. Consequently, China’s new law offers no safe haven to suspects from otherwise legitimate inquiries whose answers pose the threat of self-incrimination.

Similar to China’s laws, France’s privilege against self-incrimination once entailed only a partial right to remain silent, which was the

amendment to THE CRIMINAL PROCEDURE LAW AND THE CRIMINAL COURT RULES OF THE PEOPLE’S REPUBLIC OF CHINA).

²⁷ See Guo Zhiyuan, *Criminal Procedure, Law Reform and Stability*, in THE POLITICS OF LAW AND STABILITY IN CHINA 171 (Susan Trevaskes et al. eds., 2014). An accused at trial must answer such questions because “the location of the trial, not the location of the interrogation, is the dispositive factor [in determining when the privilege against self-incrimination applies].” See Godsey, *supra* note 7, at 1727.

²⁸ Bernice B. Donald, *A Comparative Justice Protect: The United States, German, and Chinese Trial Demonstration*, 40 JUDGES J. 30, 30 (2001).

²⁹ See *id.*

³⁰ See Josephs, *supra* note 7, at 272 n.13; see also CHINA CRIMINAL PROCEDURE LAW, *supra* note 6, at 77 (“A criminal suspect shall truthfully answer the questions raised by an investigative functionary based on facts, but he has the right to refuse to answer the questions which are not relevant to the case.”).

³¹ See Josephs, *supra* note 7, at 272 n.13 (“[S]uspects not only have no right to remain silent, but are obliged to answer questions which are ‘relevant’ to the investigation.” (emphasis added)).

³² Decision of the National People’s Congress on the Amendment of the Criminal Procedure Law of the People’s Republic of China (promulgated by Nat’l People’s Cong. Beijing Municipality, Mar. 14, 2012, effective Jan. 1, 2013) (China), <http://law professors.typepad.com/files/130101-crim-pro-law-as-amended-en.pdf> (containing an amendment to THE CRIMINAL PROCEDURE LAW AND THE CRIMINAL COURT RULES OF THE PEOPLE’S REPUBLIC OF CHINA).

“privilege not to answer specific questions.”³³ The consequence of this limitation was that, under certain circumstances, a person could be compelled to respond to inquiries posed to her during an official interrogation.³⁴ However, in just the past few decades, such particulars—*when*, and *to whom* the privilege applied—have undergone significant changes, such that the right now encompasses much more than it once did.³⁵ Of principal concern is determining just who is considered an “accused” (known as “*inculpé*”), which is significant because a person obtains the privilege against self-incrimination only once she is formally charged.³⁶

France’s unique regulations once provided police and prosecutors with a marked advantage in the adjudication process.³⁷ Prior to 2000, a person who was detained by the police for fewer than forty-eight hours—a period known as “custody” (or “*garde à vue*”)—was not considered an accused.³⁸ Instead, only once they were brought before the investigating judge and charged with committing a crime did the individual obtain the label of “accused” and the accompanying rights.³⁹

The ramifications of custody—and what could occur during those two days and nights—were tremendously impactful. For example, during this time, both the police and the public prosecutor (the “*procureur*”) could interrogate and question the perceived suspect without affording the suspect the ability to assert her legal right to remain

³³ Stephen C. Thaman, *Miranda in Comparative Law*, 45 ST. LOUIS U. L.J. 581, 596 (2001).

³⁴ See Edward A. Tomlinson, *Nonadversarial Justice: The French Experience*, 42 MD. L. REV. 131, 161 (1983) (stating that a person may be detained “whenever ‘necessary’ for the purpose of a police inquiry” and that “the threat to detain or the actual detention of an individual is thus a potent weapon for inducing him to furnish a statement”).

³⁵ CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CODE OF CRIMINAL PROCEDURE] art. 63-1 (Fr.), <http://www.legislationline.org/download/action/download/id/1674/file/848f4569851e2ea7eabfb2ffcd70.htm/preview>.

³⁶ See Pieck, *supra* note 17, at 591. Despite the fact that Article 116 can be read to provide the privilege only at the stage where the former interrogee is formally accused, scholars have asserted that the privilege has broader applicability. See, e.g., *id.* at 585 (“While Article [116] relates only to the first appearance before the investigating judge, it seems well understood (though not spelled out in the literature) that the accused’s privilege recognized by Article [116] extends to all judicial phases of a criminal proceeding.”).

³⁷ See *id.* at 591–92.

³⁸ See *id.* at 592.

³⁹ *Id.* at 591.

silent.⁴⁰ Even more striking, any statements made by the suspect during this time were entered into her *dossier* and could later be admitted at trial.⁴¹ The only safeguard against abuse during custody was the trial judge's discretion to disregard an accused's statements if she believed them to be a product of coercion.⁴²

The concept of custody significantly changed on June 5, 2000, when Article 63-1 of the French Criminal Procedure Code was amended to provide that a person held for *fewer than* forty-eight hours has the right to invoke the privilege against self-incrimination.⁴³ Importantly, this amendment also deemphasized the distinction between an accused and an interrogee,⁴⁴ thereby greatly broadening the notion of to whom France's privilege against self-incrimination applies and when it can be asserted.

Further limiting the right is the time period during which it applies, which, according to French law, is the first appearance before the investigating judge (the "*juge d'instruction*").⁴⁵ As such, the scope of this protection, which is contained in the French *Code de procédure pénale*, has been likened to the right given to a witness testifying in the United States before a grand jury.⁴⁶

Contained in the Fifth Amendment to the U.S. Constitution is the language regarding to whom in the United States the privilege applies: "No person . . . shall be compelled in any *criminal* case to be a witness against himself."⁴⁷ Two things can be gleaned from this short statement, and as supported by subsequent case law. First, it applies only to natural persons.⁴⁸ Organizations may not assert the privilege, nor may a person assert the privilege on behalf of a business in order to protect

⁴⁰ See Jeffrey K. Walker, *A Comparative Discussion of the Privilege Against Self-Incrimination*, 14 N.Y.L. SCH. J. INT'L & COMP. L. 1, 19-20 (1993).

⁴¹ *Id.* at 20.

⁴² See *id.* at 20 n.134.

⁴³ See CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CODE OF CRIMINAL PROCEDURE] art. 63-1 (Fr.), <http://www.legislationline.org/download/action/download/id/1674/file/848f4569851e2ea7eabfb2ffcd70.htm/preview>.

⁴⁴ *Id.* ("Any person placed under police custody is immediately informed . . . of the rights . . . under articles 63-2, 63-3, and 63-4" (emphasis added)).

⁴⁵ However, this limitation is the source of some contention, as was previously discussed. See *supra* notes 36-43.

⁴⁶ See Thaman, *supra* note 33, at 596; see also *Counselman v. Hitchcock*, 142 U.S. 547, 564 (1892).

⁴⁷ U.S. CONST. amend. V (emphasis added).

⁴⁸ *United States v. White*, 322 U.S. 694, 698 (1944).

its interests.⁴⁹ Second, it is only available to an accused facing criminal charges,⁵⁰ though what is considered a “criminal case” is not limited to the trial itself. For example, the Court in *Counselman v. Hitchcock* held that this term also covers grand jury proceedings.⁵¹ Therefore, in the United States, an accused who has been charged with committing a crime, or who is facing criminal charges during a grand jury proceeding, may assert the privilege against self-incrimination at times when her own testimony could subject her to criminal prosecution.⁵²

Among the three countries surveyed, the United States’ privilege provides the broadest application. Through sweeping language, the Fifth Amendment’s Self-Incrimination Clause “assures individuals that they will not be forced to reveal information that could possibly result in a criminal action against them.”⁵³ One possible explanation for this breadth is the accusatorial nature of the United States’ criminal justice system, of which the Self-Incrimination Clause is considered the foundation.⁵⁴

B. *At What Point Must Authorities Notify the Accused of the Privilege?*

At what point authorities must notify the accused of the privilege against self-incrimination is another point of differentiation between China, France, and the United States. Like most of the aspects of the privilege discussed within this Comment, the time at which the accused must be notified is influenced by the type of law followed by a particular State; while China and France are governed by civil law, the United States adheres to the common law.⁵⁵

⁴⁹ Lisa Tarallo, Note, *The Fifth Amendment Privilege Against Self-Incrimination: The Time Has Come For the United States Supreme Court to End its Silence on the Rationale Behind the Contemporary Application of the Privilege*, 27 NEW ENG. L. REV. 137, 144 (1992) (“The [Supreme] Court held [in *United States v. White*] that when the privilege is invoked to protect the impersonal interests of an organization, rather than the personal and private interests of an individual within the organization, the protection of the Fifth Amendment is not available.”).

⁵⁰ *Minnesota v. Marshall*, 465 U.S. 420, 426 (1984); *see also* *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (holding that the privilege applies when providing a response during a civil proceeding could subject the speaker to future criminal liability).

⁵¹ *See Counselman*, 142 U.S. at 564.

⁵² *See Marshall*, 465 U.S. at 426; *White*, 322 U.S. at 701.

⁵³ *Blackman*, *supra* note 21, at 127.

⁵⁴ *See id.*

⁵⁵ *The World Factbook*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html>.

The distinction between civil and common law is readily apparent in, for example, each system's conception of when the criminal adjudication process begins, and this has bearing on the point at which a person must be informed of her right to remain silent. For civil law countries like France, it is the summons that initiates a criminal proceeding.⁵⁶ According to civilian thinking, an arrest is never required to begin adjudication of the accused because "physical arrest as a routine measure against a suspect who has not yet been tried and who, consequently, must be presumed innocent," is "unthinkable."⁵⁷ It is therefore entirely possible that this interpretation of criminal procedure can account for the delayed time, relative to both China and the United States, at which a suspect is informed of her rights, as is discussed below.

Through examination of both old Article 93⁵⁸ and new Article 50⁵⁹ of China's Criminal Code, at what point Chinese authorities must notify persons of their right to silence (or lack thereof) is unclear. Article 93 simply states, "A criminal suspect . . . has the right to refuse to answer the questions which are not relevant to the case," and it gives no mention to when such a suspect should be told that this right even exists.⁶⁰ Article 50 is even more muddled, containing only the following plain statement: "[N]o person may be forced to prove his own guilt."⁶¹ Indeed, it is even possible, based on the complete lack of any statement by Chinese officials interpreting Article 50 and the nearly complete absence of work published on this matter, to read Article 50 as a blanket provision requiring no notification whatsoever by a Chinese official to an interrogatee.

⁵⁶ Rudolf B. Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 *BUFF. L. REV.* 361, 370 (1977).

⁵⁷ *Id.*

⁵⁸ CHINA CRIMINAL PROCEDURE LAW, *supra* note 6, at 77.

⁵⁹ Decision of the National People's Congress on the Amendment of the Criminal Procedure Law of the People's Republic of China (promulgated by Nat'l People's Cong. Beijing Municipality, Mar. 14, 2012, effective Jan. 1, 2013) (China), <http://lawprofessors.typepad.com/files/130101-crim-pro-law-as-amended-en.pdf> (containing an amendment to THE CRIMINAL PROCEDURE LAW AND THE CRIMINAL COURT RULES OF THE PEOPLE'S REPUBLIC OF CHINA).

⁶⁰ CHINA CRIMINAL PROCEDURE LAW, *supra* note 6, at 77.

⁶¹ Decision of the National People's Congress on the Amendment of the Criminal Procedure Law of the People's Republic of China (promulgated by Nat'l People's Cong. Beijing Municipality, Mar. 14, 2012, effective Jan. 1, 2013) (China), <http://lawprofessors.typepad.com/files/130101-crim-pro-law-as-amended-en.pdf> (containing an amendment to THE CRIMINAL PROCEDURE LAW AND THE CRIMINAL COURT RULES OF THE PEOPLE'S REPUBLIC OF CHINA).

Prior to the beginning of the twenty-first century, French authorities were not required to notify a suspect of her right to silence until after the custody period had passed and the investigating judge had formally charged her.⁶² However, as mentioned previously, Article 63-1 of the French Criminal Procedure Code formally altered this rule by granting to persons in *garde à vue* the right to be “immediately informed [that they have the] right not to answer the questions put to [them] by investigators.”⁶³

France further substantiated the need for—and its recognition of—the privilege against self-incrimination by ratifying the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “European Convention”).⁶⁴ Specifically, Article 6, Section 3(a) of the European Convention requires that all persons charged with a criminal offense “be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him[.]”⁶⁵ As a result of both the European Convention and amended Article 63-1, police interrogations in France can no longer take place without the interrogee having first been informed of her privilege against self-incrimination.⁶⁶

Unlike China and France, the United States follows the common law.⁶⁷ In contrast to other common law-governed countries, however, the United States maintains an accusatorial criminal procedure system, which means adjudication of criminal matters almost always begins “with the harsh, and in itself degrading, measure of physical arrest.”⁶⁸ This of course is in sharp distinction with civil law countries like

⁶² See Pieck, *supra* note 17, at 591. Pieck also discusses the problems inherent in pre-2000 French criminal procedure, stating that, at the first appearance before the investigating judge, “the accused may have been, and often has been, already interrogated by the police, and by the prosecuting and judicial authorities in another capacity without the benefit of counsel and without having been notified that he cannot legally be compelled to make any statements.” *Id.* at 596.

⁶³ CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 63-1, *amended by* Loi 2000-516 du 15 Juin 2000 [Law No. 2000-516 of June 15, 2000].

⁶⁴ *France: Press Country Profile*, EUR. CT. HUM. RTS., http://www.echr.coe.int/Documents/CP_France_ENG.pdf (last updated July 2015).

⁶⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, EUR. CT. HUM. RTS., art. 6, Dec. 10, 1948, 213 U.N.T.S. 211, http://www.echr.coe.int/Documents/Convention_ENG.pdf.

⁶⁶ *Cf.* Walker, *supra* note 40, at 19 (asserting that, as of 1993, “this right [did] not extend to police interrogations”).

⁶⁷ See *The World Factbook*, *supra* note 55.

⁶⁸ Schlesinger, *supra* note 56, at 369. In spite of this, there are provisions allowing for the issuance of a summons in lieu of a formal arrest. See *id.*

France, where, as mentioned above, the process starts once a summons is executed.⁶⁹

The law in the United States governing when a suspect must be notified of her privilege against self-incrimination is contained in *Miranda v. Arizona*, one of the U.S. Supreme Court's landmark decisions.⁷⁰ In that case, the Court addressed the problem of using at trial an accused's statements made against her will during formal police interrogation.⁷¹ The holding that followed is likely as familiar in American society to lawyers as it is to non-lawyers; the most important component of it, for this Comment, held that the accused must be warned, prior to any questioning, that she has the right to remain silent.⁷²

Though they came about by contrary means—through different political branches and separated by thirty-four years—and despite the distinctions in the way the two laws were written, the moment at which authorities in both France and the United States must notify persons subject to interrogation is now the same.⁷³ That moment is prior to any questioning by either police or prosecutors and once the criminal process has begun—for France, upon a summons, and in the United States, post-arrest.⁷⁴ On the other hand, it is difficult to draw any tangible comparisons between Chinese law and either French or U.S. law with respect to time of notification. Careful examination of both Article 93 (of the old Chinese criminal code) and Article 50 (of the new code), particularly of the words “suspect”⁷⁵ and “person,”⁷⁶ may help provide insight into the intent of the drafters. Without additional in-

⁶⁹ See *id.* at 370.

⁷⁰ *Miranda v. Arizona*, 384 U.S. 435, 439 (1966) (“The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime.”).

⁷¹ See *id.* at 445.

⁷² *Id.* at 444.

⁷³ *Id.*; Schlesinger, *supra* note 56, at 370.

⁷⁴ *Miranda*, 384 U.S. at 444; Schlesinger, *supra* note 56, at 370.

⁷⁵ CHINA CRIMINAL PROCEDURE LAW, *supra* note 6, at 77.

⁷⁶ Decision of the National People's Congress on the Amendment of the Criminal Procedure Law of the People's Republic of China (promulgated by Nat'l People's Cong. Beijing Municipality, Mar. 14, 2012, effective Jan. 1, 2013) (China), <http://lawprofessors.typepad.com/files/130101-crim-pro-law-as-amended-en.pdf> (containing an amendment to THE CRIMINAL PROCEDURE LAW AND THE CRIMINAL COURT RULES OF THE PEOPLE'S REPUBLIC OF CHINA).

formation, however, a more comprehensive comparison and evaluation are impossible.

IV. BENEFITS AND CONSEQUENCES

The previous parts have provided an overview of, as well as a comparison and distinction between, the privileges against self-incrimination in China, France, and the United States. In the two sections that follow, first, the costs and benefits of all three will be addressed, which are premised heavily on the principles contained within and the policies behind each country's law. Second, the consequences at trial of police misconduct will be discussed to show the disparate ways these three countries deal at trial with violations of their respective privileges against self-incrimination.

A. *Costs and Benefits of Asserting the Privilege*

A court's reaction to an accused's assertion of the privilege against self-incrimination represents the key distinction between the United States' legal system and the legal system of virtually any other country.⁷⁷ Put simply, as will be explained in greater detail below, it is to an accused's disadvantage to assert the privilege against self-incrimination in both the common and civil law systems of Europe, while in the United States, abstaining from responding to a question posed at trial may not only be in the accused's best interest, but is often encouraged.⁷⁸ Nonetheless, as demonstrated in *Condrón v. United Kingdom*, which in 2000 was heard on appeal by the European Court of Human Rights (hereinafter "European Court"),⁷⁹ an accused's assertion in France of her right to silence may still be of some benefit to her case.⁸⁰

Explicitly contrary to the policy in the United States surrounding the privilege against self-incrimination,⁸¹ and similar to that in China,⁸² is France's policy of discouraging silence.⁸³ Given the choice, culpable persons who find themselves accused of a crime generally choose to speak because of the consequences of remaining silent.⁸⁴ The period

⁷⁷ See Schlesinger, *supra* note 56, at 378 (stating that in "encouraging the accused to remain silent, [the United States'] legal system stands virtually alone").

⁷⁸ *Id.*

⁷⁹ *Condrón v. United Kingdom*, 31 Eur. Ct. H.R. 1, 1 (2000).

⁸⁰ See *id.* at 19.

⁸¹ See Schlesinger, *supra* note 56, at 378.

⁸² See Amann, *supra* note 5, at 1273.

⁸³ See *id.* at 1254.

⁸⁴ *Id.*

during which invoking the privilege against self-incrimination could be to the accused's detriment begins at the earliest stages of criminal prosecution: self-identification to the police.⁸⁵

In France, persons under arrest or subject to interrogation have a legal obligation to identify themselves to the police, despite the fact that no penalty is provided for in the French Criminal Procedure Code should an accused refuse to do so.⁸⁶ Irrespective of the lack of a tangible penalty for withholding his name, it is perhaps in the accused's best interest to provide police with this most basic information, on the grounds that refusing to speak will "only prejudice [the accused], because it will be noted in his dossier and [will] inevitably come to the attention of the court in the event he is tried."⁸⁷ Furthermore, silence during interrogation brings with it the possibility that the accused will be taken into custody in anticipation of trial ("*détention préventive*"), a punitive measure investigating judges are more inclined to impose when dealing with a noncompliant defendant.⁸⁸

A refusal to speak, coupled with the accused's demeanor exhibited when invoking this privilege, is frequently and lawfully a matter about which the judge and prosecutor will speak at trial.⁸⁹ Such a policy even goes so far as to permit comment on the accused's silence during questioning to reinforce the prosecution's case against her, something that in the United States is expressly outlawed by its Supreme Court.⁹⁰

Furthermore, by asserting the privilege at her trial, a defendant in France is very likely placing herself at a disadvantage because of the relaxed standards governing perjury, as well as the ability of the prosecution to prove an accused's previous conviction without requiring her

⁸⁵ See Pieck, *supra* note 17, at 587–88.

⁸⁶ *Id.* at 587. Along with not covering an accused's decision to not reveal her name at the onset of the adjudicatory procedure, the privilege also "does not provide the accused with immunity from being searched, photographed, finger printed, physically and mentally examined, shaved, measured, and subjected to like procedures." *Id.* "In France . . . an accused [also] must submit to a blood test." *Id.* at 588.

⁸⁷ *Id.* at 587–88.

⁸⁸ *Id.* at 598.

⁸⁹ See Walker, *supra* note 40, at 20–21; see also Pieck, *supra* note 17, at 598 ("[U]nder French law all evidence, including the demeanor and attitude of the accused, is subject to the uncontrolled evaluation of the court . . . Accordingly, although [the accused's] silence itself does not legally amount to a tacit confession or admission of guilt, it will not only result in the court drawing an inference adverse to the accused, but also reinforce the evidence introduced by the prosecution.").

⁹⁰ See *Griffin v. California*, 380 U.S. 609, 615 (1965).

to take the stand.⁹¹ In France, as is the case in many other European nations, the accused may speak on her own behalf without first swearing an oath.⁹²

The effect of allowing testimony not given under oath is, of course, that an accused who elects to testify is in no danger of prosecution for perjury.⁹³ By exempting testifying witnesses, including the accused, from the possibility of facing perjury charges, the French legal system has made electing to take the stand a much easier (and more practical) decision.⁹⁴ Likewise, it is of no benefit to the accused to remain silent when faced with the possibility that the prosecution will introduce evidence of previous convictions. In France, the prosecutor may prove previous crimes for which a defendant has been found guilty, regardless of whether the defendant refuses to take the stand.⁹⁵

It should therefore come as no surprise that “the inducement to speak, and not to stand mute, is very strong in . . . civil law systems [like France’s]. Experience shows that ‘almost all continental [European] defendants choose to testify’ at trial.”⁹⁶ In other words,

the accused normally has little to lose and much to gain by presenting his side of the story not only at trial, but also in the earlier phases of the proceeding. If the accused is innocent, this may lead to an early dismissal of the charges. In any event, the combination of a talking defendant and unlimited discovery will clarify the issues well before trial and make the trial both shorter and more informative—much to the benefit of an innocent defendant.⁹⁷

The regulations of such a policy are explained by “the civil law’s preference for a free evaluation of evidence,” which, taken together with its “expansive relevancy criteria,” permit the admissibility of cer-

⁹¹ See John H. Langbeint & Lloyd L. Weinreb, *Continental Criminal Procedure: “Myth” and Reality*, 87 *YALE L.J.* 1549, 1552–54 (1978).

⁹² Amann, *supra* note 5, at 1254.

⁹³ See *id.*; see also Schlesinger, *supra* note 56, at 380 (holding that, because a defendant’s statements in her defense are not under oath, a defendant need not “dread that a prosecution for perjury might arise out of such testimony”); Frank Terrier, *Proceedings Before the Trial Chamber, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1277, 1308 (Antonio Cassese et al. eds., 2002) (“In civil law systems, an accused is not a witness in the strict sense, and he cannot be punished for perjury.”).

⁹⁴ See, e.g., Walker, *supra* note 40, at 21 (stating that “the threat of perjury does not reinforce any desire to remain silent”).

⁹⁵ See Schlesinger, *supra* note 56, at 380 (“[T]he admissibility of previous convictions never hinges on whether or not the defendant testifies.”).

⁹⁶ *Id.* at 381.

⁹⁷ *Id.*

tain types of evidence that common law systems might ordinarily prohibit.⁹⁸ Nevertheless, in European countries, there are circumstances where asserting the privilege is in the accused's best interest, which the following case exemplifies.

In *Condron v. United Kingdom*, the defendants were arrested for possession of narcotics.⁹⁹ At the conclusion of the trial, the jury was instructed "that it could use the defendants' silence [post-arrest and during interrogation] to prove [their] guilt."¹⁰⁰ After reviewing the case, the European Court held that the lower court's jury instruction was in violation of Article 6 of the European Convention because "the jury had not been instructed . . . that silence *could not be the only evidence showing guilt* and that there must [first] be a prima facie showing of guilt for the silence to be admissible."¹⁰¹

What is clear in light of the *Condron* ruling is that a court's conviction of an accused cannot alone be premised on the accused's refusal to submit to questions. While this seems fairly obvious (and as will soon be shown is well-developed law in the United States), implicit in the European Court's ruling is that conviction should be legally impossible in cases where the prosecution was either unable or unwilling to obtain evidence sufficient to support a conviction beyond a reasonable doubt, as well as where the accused's silence during interrogation is the only damning evidence against her.

By the same token, an accused who is not guilty will likely have her innocence magnified through the absence of incriminating evidence against her—because in most cases there can be no incriminating evidence against someone who is not guilty—and her silence alone will rightfully not be seen as an evasive action that portends her guilt. Because of this interplay, it is likely the privilege will remain of critical importance in France, even in light of the civil law's preference for inclusion of evidence.

United States law likewise prohibits a jury from convicting a person based solely on her refusal to answer questions.¹⁰² However, through several cases that were heard during the second half of the

⁹⁸ Walker, *supra* note 40, at 34; *see also* *Condron v. United Kingdom*, 31 Eur. Ct. H.R. 1, 25 (2000).

⁹⁹ Thaman, *supra* note 33, at 617.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (emphasis added).

¹⁰² *Chavez v. Martinez*, 538 U.S. 760, 768–69 (2003).

twentieth century, this policy has been magnified and broadened to encompass more than the French system does.¹⁰³ Unsurprisingly, it is the custom of many attorneys in the U.S. to “tell the suspect in no uncertain terms to make no statement to police under any circumstances.”¹⁰⁴

The U.S. Supreme Court first addressed in-court reaction to an accused’s invocation of the privilege against self-incrimination in the 1965 case *Griffin v. California*, which held that no state may permit intelligent judicial comment upon an accused’s failure to testify.¹⁰⁵ The defendant in *Griffin*, who was charged with murder, did not testify on the issue of guilt at his trial.¹⁰⁶ Nonetheless, the trial judge’s jury instructions held that each juror could take the defendant’s refusal to testify as an indication that any facts unfavorable against him were therefore more likely to be true.¹⁰⁷

In its review of the case, the *Griffin* Court considered the jury instructions and analogized to evidentiary rules their words and effect on the trial over which the instructing judge presided, stating that the orders were “in substance a rule of evidence that allow[ed] the State the privilege of tendering to the jury for its consideration the failure of the accused to testify.”¹⁰⁸ The Court then went further, claiming that judicial comment on the defendant’s refusal to testify “is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.”¹⁰⁹ With this basis for its decision, the Court concluded, “The Fifth Amendment . . . forbids ei-

¹⁰³ See Thaman, *supra* note 33, at 618 n.216 (2001).

¹⁰⁴ Schlesinger, *supra* note 56, at 378.

¹⁰⁵ See *Griffin v. California*, 380 U.S. 609, 615 (1965). Despite this, the issue of commenting on a defendant’s Fifth Amendment assertion was first dealt with in the U.S. nearly 100 years prior to *Griffin*, in the Commonwealth of Massachusetts. See Peter W. Tague, *The Fifth Amendment: If an Aid to the Guilty Defendant, an Impediment to the Innocent One*, 78 GEO. L.J. 1, 20 n.94 (1989).

¹⁰⁶ See *Griffin*, 380 U.S. at 609.

¹⁰⁷ See *id.* at 610. The jury instructions read, in part, “As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify . . . the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.” *Id.* (internal quotations omitted). Nevertheless, the judge also held that the defendant’s refusal to deny any evidence of which the defendant had no knowledge should *not* create a presumption of guilt. See *id.* (emphasis added).

¹⁰⁸ *Id.* at 613.

¹⁰⁹ *Id.*

ther comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."¹¹⁰

At the time *Griffin* was decided, an accused's right to have neither the judge nor the prosecutor comment on her refusal to testify existed in the United States as a potentially all-encompassing rule. In the early 1980s, however, the Supreme Court heard several cases that expressly led to a reduction in the time period of the defendant's adjudication about which there could be no comment. For example, in *Jenkins v. Anderson*, the Court ruled that the prosecutor could comment on an accused's pre-arrest silence, as well as her silence when confronted with incriminating evidence.¹¹¹

This principle was reaffirmed in 2013, when the Court in *Salinas v. Texas* concluded that the defendant's pre-Miranda silence could be used as evidence against him.¹¹² Similarly, in *Fletcher v. Weir*, the Court found the prosecutor could comment on the silence of a post-arrest, pre-Miranda rights period.¹¹³

The rules stated in *Griffin*,¹¹⁴ *Jenkins*,¹¹⁵ *Fletcher*,¹¹⁶ and *Salinas*¹¹⁷ remain binding law in the U.S. today, as does the Court's *Carter v. Kentucky* ruling.¹¹⁸ This line of precedent regarding a prosecutor's right in the United States to comment on an accused's silence during certain pre- and post-arrest periods follows closely the law in France, where comment at trial by the judge or prosecutor on an accused's demeanor during her interrogation is allowed.¹¹⁹ However, the United States' law is comparatively limited,¹²⁰ permitting comment solely on moments oc-

¹¹⁰ *Id.* at 615.

¹¹¹ *See* *Jenkins v. Anderson*, 447 U.S. 231, 238–39 (1980).

¹¹² *See* *Salinas v. Texas*, 570 U.S. ___, ___, 133 S. Ct. 2174, 2178–84 (2013). The Court's decision rested on the defendant's failure, by remaining silent, to assert his privilege against self-incrimination. *Id.*

¹¹³ *See* *Fletcher v. Weir*, 455 U.S. 603, 607 (1982).

¹¹⁴ 380 U.S. at 615.

¹¹⁵ 447 U.S. at 238–39.

¹¹⁶ 455 U.S. at 607.

¹¹⁷ 133 S. Ct. at 2174.

¹¹⁸ *See* *Carter v. Kentucky*, 450 U.S. 288, 305 (1981) (holding that the Constitution requires all courts to instruct criminal juries to draw no adverse inferences from a defendant's failure to testify); *see also* Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules That Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851, 875 (2008).

¹¹⁹ *See* Walker, *supra* note 40, at 21.

¹²⁰ This is because the time period between an arrest and the state of custodial interrogation generally and by necessity is marginal: an arrest, for purposes of the *Miranda*

curring in the midst of an interrogation rather than on the interrogation as a whole.¹²¹

Within the United States, an assertion of the privilege against self-incrimination may be of consequence, but only in certain types of cases. As stated previously, the Fifth Amendment to the U.S. Constitution provides, “No person . . . shall be compelled *in any criminal case* to be a witness against himself [.]”¹²² Because of this careful wording, proper invocation of this right “will not, in any criminal action against [a defendant], give rise to an inference that he is guilty of a crime or of acts tending to connect him with a crime.”¹²³ Despite this, as will be discussed, an accused’s past convictions may nonetheless be introduced.¹²⁴ Finally, because of the explicit language of the Fifth Amendment, a defendant’s invocation of the privilege in a civil case may permit the prosecutor to draw adverse inferences.¹²⁵

The means by which a prosecutor in the U.S. may present, as evidence, the accused’s past crimes—even in the face of a valid invocation of the privilege against self-incrimination—also mirrors to some degree the rule in France, which allows the prosecutor to prove a defendant’s past criminal convictions.¹²⁶ In the United States, the Federal Rules of Evidence and its state counterparts prohibit evidence of a defendant’s past criminal convictions from being introduced to show bad character.¹²⁷ However, the federal and state rules provide an exception

rule, constitutes custody, and just about any questioning thereafter is considered interrogation. *See* *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

¹²¹ *Compare* *Jenkins v. Anderson*, 447 U.S. 231, 238–39 (1980) (basing its holding, in part, on the common law tradition allowing “witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted”), *and* *Fletcher*, 455 U.S. at 604–07 (finding no due process violation to impeach with post-arrest, pre-Miranda silence when prosecutor cross-examined defendant as to why he had, when arrested, failed to offer an exculpatory version of the alleged crime), *with* *Walker*, *supra* note 40, at 21 (under French law, an accused’s silence “will generally reinforce the state’s case and may be commented upon unfavorably by the judge and prosecutor”).

¹²² U.S. CONST. amend. V (emphasis added).

¹²³ Leonard G. Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 U. CHI. L. REV. 472, 473 (1957).

¹²⁴ FED. R. EVID. 404(b)(2).

¹²⁵ *United States ex rel. Zapp v. Dist. Dir. of Immigration*, 120 F.2d 762, 764 (2d Cir. 1941).

¹²⁶ *See* *Schlesinger*, *supra* note 56, at 380.

¹²⁷ *See* FED. R. EVID. 404(b)(1) (“Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.”).

to this: Rule 404(b)(2) of the Federal Rules allows introduction of the defendant's past crimes only for purposes of showing "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."¹²⁸ To further safeguard against abuse, this rule is subject to limitation or exclusion, either where such evidence would be highly prejudicial to the defendant,¹²⁹ or where the defendant's testimony would be required in order to introduce it.¹³⁰

Aside from trials in which the prosecution seeks to introduce evidence in accordance with Rule 404(b)(2), asserting the privilege in a criminal prosecution may only be consequential to the defendant where she is charged with larceny. In the 1936 case *State v. Wolfe*, the South Dakota Supreme Court found that the failure of the defendant to explain his possession of the stolen property (in this case, public funds)¹³¹ could be used as evidence against him.¹³²

Within the realm of civil lawsuits, a party's invocation of the privilege may lawfully carry with it unfavorable inferences, and furthermore, such inferences may be explicitly acknowledged by the judge or an attorney. In *United States ex rel. Zapp v. District Director of Immigration*, a deportation proceeding from 1941, the Second Circuit Court of Appeals held that, upon invocation of the privilege, "the [defendant]'s silence may be evidence against him."¹³³ Similarly, the Michigan Supreme Court ruled in *Warren v. Holbrook*, another civil lawsuit, that the defendant's silence "must be construed most strongly against him," because of the court's belief that "[a]n honest man would, under such circumstances [as the defendant was in here], be impelled to testify in his own behalf."¹³⁴

Given the wording of the Fifth Amendment,¹³⁵ as well as the provisions of the Federal Rules of Evidence,¹³⁶ invocation of the privilege against self-incrimination in the United States carries with it few of the

¹²⁸ *Id.* at 404(b)(2).

¹²⁹ *See id.* at 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice[.]").

¹³⁰ *See* John T. Noonan, Jr., *Inferences From the Invocation of the Privilege Against Self-Incrimination*, 41 VA. L. REV. 311, 319 (1955).

¹³¹ *State v. Wolfe*, 266 N.W. 116, 121 (S.D. 1936).

¹³² *See* Noonan, *supra* note 130, at 337.

¹³³ *United States ex rel. Zapp v. Dist. Dir. of Immigration*, 120 F.2d 762, 764 (2d Cir. 1941).

¹³⁴ *Warren v. Holbrook*, 54 N.W. 712, 713 (Mich. 1893).

¹³⁵ U.S. CONST. amend. V.

¹³⁶ *See* FED. R. EVID. 404(b)(1).

consequences present in “free evaluation of evidence” civil law jurisdictions like France.¹³⁷ Regardless, persons who rely on the privilege in civil matters will find not only that they may be compelled to answer questions, but also that doing so could result in potentially impactful and unfavorable inferences being drawn against them.¹³⁸ As such, the privilege in the United States—continually shaped by and featured in myriad case law like *Salinas v. Texas*¹³⁹ and often discussed in today’s legal publications¹⁴⁰—can be summed up as follows: It can only be a benefit where permitted, and it will likely be consequential where inapplicable.

Despite China’s very recent enactment and provision of the privilege against self-incrimination, benefits do extend to those persons compelled to testify by virtue of the country’s relatively relaxed rules regarding cross-examination of defendants and admission of evidence. Rather than being subject to the inquisitorial questioning commonplace in American courtrooms, in China, the defendant, when called to testify, “is effectively granted a second opportunity to state his version of the facts,” in spite of how self-serving they may be.¹⁴¹ Should the accused instead cite as a rationale for remaining silent the privilege against self-incrimination, which is permitted in both France¹⁴² and the United States,¹⁴³ such an opportunity would not present itself.

Likewise, being compelled in China to testify permits the accused to directly question the victim, if there is one.¹⁴⁴ During this examination, the accused “may explore any area remotely relevant in the search for the truth,” as there is no hearsay objection in Chinese law.¹⁴⁵ Perhaps even more notable is the discretion given to the accused regarding the veracity of the statements she wishes to make, as both true

¹³⁷ See Walker, *supra* note 40, at 34 (stating that civil law jurisdictions like France “guarantee[] an absolute right to silence, but exert[] a kind of *de facto* compulsion for the defendant to testify through the civil law’s preference for a free evaluation of evidence coupled with expansive relevancy criteria”).

¹³⁸ See *Zapp*, 120 F.2d at 764.

¹³⁹ 570 U.S. ___, 133 S. Ct. 2174 (2013).

¹⁴⁰ See, e.g., Gee, *supra* note 1.

¹⁴¹ Donald, *supra* note 28, at 30.

¹⁴² See CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CODE OF CRIMINAL PROCEDURE] art. 116 (Fr.), <http://www.legislationline.org/download/action/download/id/1674/file/848f4569851e2ea7eabfb2ffcd70.htm/preview>.

¹⁴³ See U.S. CONST. amend. V.

¹⁴⁴ Donald, *supra* note 28, at 30.

¹⁴⁵ *Id.*

and false statements are admissible without consequence before the court.¹⁴⁶

In China, remaining silent when faced with inquiry regarding an alleged crime also carries with it adverse consequences. When suspected of committing an ordinary crime, Article 93 of the Criminal Procedure Law of China requires the accused to confess her crime truthfully to her interrogator.¹⁴⁷ Should the accused refuse to respond to a question that is deemed relevant to her case, the judge presiding over the matter has the discretion to consider the accused's reticence as an aggravating factor in her sentence.¹⁴⁸

In spite of China's unique historical policy toward confession, it is likely that new Article 50—particularly when compounded with China's softened evidentiary standards—will, in the foreseeable future, not only change the way courts interpret and utilize an accused's silence, but will also provide to Chinese citizens new strategies and avenues by which to present their cases before tribunals. New Article 50 is a harbinger of social change within China's criminal justice system—its enactment not only sets the stage for future amendment to China's laws, but it also evidences the direction in which China's legislators appear to be taking their country.

B. *Consequences at Trial of Police Misconduct*

Though China delayed until 2013 its enactment of a privilege against self-incrimination,¹⁴⁹ it has been at the forefront regarding policies that exclude tainted evidence from trial. However, this progression only came about as a result of the decade-long insistence of non-governmental parties whose focus is, and was, on human rights gener-

¹⁴⁶ See *id.* at 31.

¹⁴⁷ Lijn Yang, *On the Principle of Complementarity in the Rome Statute of the International Criminal Court*, 4 CHINESE J. INT'L L. 121, 128 (2005). Article 93 reads, "A criminal suspect shall truthfully answer the questions raised by an investigative functionary based on facts, but he has the right to refuse to answer the questions which are not relevant to the case." CHINA CRIMINAL PROCEDURE LAW, *supra* note 6, at 77.

¹⁴⁸ Yang, *supra* note 147, at 128–29.

¹⁴⁹ Decision of the National People's Congress on the Amendment of the Criminal Procedure Law of the People's Republic of China (promulgated by Nat'l People's Cong. Beijing Municipality, Mar. 14, 2012, effective Jan. 1, 2013) (China), <http://lawprofessors.typepad.com/files/130101-crim-pro-law-as-amended-en.pdf> (containing an amendment to THE CRIMINAL PROCEDURE LAW AND THE CRIMINAL COURT RULES OF THE PEOPLE'S REPUBLIC OF CHINA).

ally¹⁵⁰ and publicized cases of coerced or wrongful confessions specifically.¹⁵¹ The effect that China's ratification of new exclusionary rules has had is apparent in many circumstances, including deterring conduct that leads to inaccurate fact-finding,¹⁵² improving governmental integrity,¹⁵³ and symbolizing the enhancement of honesty and reliability.¹⁵⁴

New Article 54, which became effective on the same date as new Article 50, provides for the exclusion of evidence in the event the State has taken any one of a broad number of illegal actions to obtain it, including "through torture and extortion," as well as "through the use of violence, threats[,] and other illegal means[.]"¹⁵⁵ This law, however, does not provide for the automatic exclusion of physical or documentary evidence. Instead, it requires that "corrections . . . be made or justifications provided" in order to alleviate any wrongdoing, but it is unclear the extent to which such misbehavior must be remedied.¹⁵⁶ Nonetheless, complete exclusion exists as a fallback option, in the

¹⁵⁰ See Jia Li & Zhuhao Wang, *A Trail to Modernity: Observations on the New Developments of China's Evidence Legislation Movement in a Global Context*, 21 *IND. J. GLOBAL LEGAL STUD.* 683, 697 (2014).

¹⁵¹ See Margaret K. Lewis, *Controlling Abuse to Maintain Control: The Exclusionary Rule in China*, 43 *N.Y.U. J. INT'L L. & POL.* 629, 675–76 (2011) (discussing how the Chinese government should seek to put an end to forced confessions and better protect and promote just law enforcement partially due to famous Chinese cases involving forced confessions).

¹⁵² See *id.* at 680 ("[T]he focus is on deterring conduct that decreases the accuracy of verdicts (i.e., convicting a person who did not engage in the alleged criminal activity), not on deterring conduct because it violates constitutional rights or notions of procedural justice.").

¹⁵³ See *id.* at 685 ("The [People's Republic of China] Government has recognized that some of its agents have indeed been breaking the law through their methods of obtaining evidence, and it is trying to turn the tide of public opinion.").

¹⁵⁴ See *id.* at 687 ("[I]t appears that the [People's Republic of China] Government is aiming to reap integrity-enhancing benefits of reforms and use the 2010 Evidence Rules as a distancing mechanism to show the public that they (the central authorities) are confronting the problem of police abuse even if local authorities do not always heed orders from the center.").

¹⁵⁵ Decision of the National People's Congress on the Amendment of the Criminal Procedure Law of the People's Republic of China (promulgated by Nat'l People's Cong. Beijing Municipality, Mar. 14, 2012, effective Jan. 1, 2013) (China), <http://lawprofessors.typepad.com/files/130101-crim-pro-law-as-amended-en.pdf> (containing an amendment to THE CRIMINAL PROCEDURE LAW AND THE CRIMINAL COURT RULES OF THE PEOPLE'S REPUBLIC OF CHINA).

¹⁵⁶ *Id.*

event neither correction nor justification of the tainted evidence cures the deficiency.¹⁵⁷

At perhaps the other end of the spectrum (from China and the U.S.) for remedying illegally obtained evidence is the policy in France, which is based on a bureaucratic system contained within the police force.¹⁵⁸ The difference in remedial measures between the three countries is based on two interrelated factors: (1) the disinclination of French courts to inquire into police misconduct; and (2) the tradition of handling such matters exclusively within the police force.

Within the French legal system, procedural police errors are considered “nullities,” the effect of which is to remove from the accused’s *dossier* the tainted evidence.¹⁵⁹ However, those violations that can result in the exclusion of tainted evidence must affect the interests of the party concerned, and consequently the scope of this rule is limited.¹⁶⁰ Just what violations affect the interests of the accused, such that they are within the scope of this rule, has yet to be defined with any specificity or even a bright-line rule, making some decisions difficult to reconcile. For example, the French Supreme Court (“*Cour de cassation*”), in a December 1995 ruling, determined that “a failure of the police to have the accused sign [a] document attesting to his having been advised of his rights prior to questioning in *garde à vue* did *not* affect the accused’s rights.”¹⁶¹ On the other hand, a December 1996 case held that “a failure to advise the suspect of his rights *before garde à vue* because of the lack of an interpreter” *did* affect the accused’s rights, an outcome that “led to the suppression of the confession he had made.”¹⁶²

¹⁵⁷ *See id.*

¹⁵⁸ *See* Walker, *supra* note 40, at 21.

¹⁵⁹ *See* Thaman, *supra* note 33, at 602–03. Article 171 of the French Code of Criminal Procedure states, “[t]here is a nullity when the breach of an essential formality provided for by a provision of the present Code or by any other rule of criminal procedure has harmed the interests of the party it concerns.” CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CODE OF CRIMINAL PROCEDURE] art. 171 (Fr.) <http://www.legislationline.org/download/action/download/id/1674/file/848f4569851e2ea7eabfb2ffcd70.htm/preview> (referencing France’s CODE DE PROCÉDURE PÉNALE).

¹⁶⁰ *See* Thaman, *supra* note 33, at 603.

¹⁶¹ *Id.* (emphasis added).

¹⁶² *Id.* (emphasis added).

In spite of French tradition, the *juge d'instruction* has the authority to “nullify” an illegal act.¹⁶³ Yet, because such judges rarely elect to exclude illegally obtained evidence—as is the practice in the United States¹⁶⁴—this authority is impliedly deferred to the heads of police forces, who then internally regulate such matters.¹⁶⁵ Once alleged police misconduct occurs, and after it is sufficiently investigated by the police force, the responsible officer will be “disciplined by his superiors within the police bureaucracy.”¹⁶⁶ The effects of such allegations vary. However, an officer who is found to have violated the individual rights due an accused may, if convicted, face both civil and criminal liability.¹⁶⁷

Of the three countries surveyed here, the United States provides perhaps the broadest and most defendant-friendly rule concerning the exclusion of evidence obtained by police misconduct.¹⁶⁸ First applied within the context of unlawful searches and seizures in the Supreme Court's 1961 *Mapp v. Ohio* decision,¹⁶⁹ *Miranda v. Arizona* later held the exclusionary rule to govern the admissibility of evidence acquired through custodial interrogation.¹⁷⁰ According to the *Miranda* Court, extending the exclusionary rule into Fifth Amendment jurisprudence was based on the Court's determination “that custodial surroundings and interrogation procedures blurred the line between voluntary and involuntary statements, thus heightening the risk that an individual's Fifth Amendment privilege against self-incrimination would not be protected.”¹⁷¹

As it stands now, the Fifth Amendment's exclusionary rule requires the prosecution to demonstrate at trial that *Miranda* warnings

¹⁶³ John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: “Myth” and Reality*, 87 *YALE L. J.* 1549, 1554 (1978).

¹⁶⁴ *See id.* (“[T]he exclusion of evidence is not applied as a remedy for police misconduct in France as it is [in the United States].”).

¹⁶⁵ *See id.*

¹⁶⁶ Walker, *supra* note 40, at 21.

¹⁶⁷ *See id.*

¹⁶⁸ *See Oregon v. Elstad*, 470 U.S. 298, 306–07 (1985) (“The *Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation. The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony.”).

¹⁶⁹ *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

¹⁷⁰ *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *see also* Kirsten Lela Ambach, *Miranda's Poisoned Fruit Tree: The Admissibility of Physical Evidence Derived From an Unwarned Statement*, 78 *WASH. L. REV.* 757, 763 (2003).

¹⁷¹ Ambach, *supra* note 170, at 763.

were given to and waived by the defendant prior to custodial interrogation.¹⁷² Failure to meet this requirement results in the exclusion of any and all evidence obtained by the police stemming from the interrogation.¹⁷³ There are, however, a few exceptions to the United States' exclusionary rule.¹⁷⁴ For example, the *Michigan v. Moseley* Court held that police officers could return and interrogate a suspect about the same crime after a sufficient period had passed since the suspect invoked her right to remain silent.¹⁷⁵ Additionally, exceptions to the so-called "fruit of the poisonous tree" doctrine allow, in certain circumstances, the introduction of otherwise inadmissible evidence, such as where subsequent, legally obtained evidence corroborates the information conveyed by the illegally obtained evidence.¹⁷⁶

V. CONCLUSION

Having examined in detail the privilege against self-incrimination, as it exists in three disparate States, it becomes clear that, despite widely varying policy rationales and historical practices between China, France, and the United States, the right is significant and will remain pertinent for the foreseeable future in each of those countries. Perhaps more importantly, comparison of these three States has exemplified the fact that this right has been developed and become accepted in many corners of the globe,¹⁷⁷ lending credibility to the idea that it will one day be considered a universal right.

It is also apparent that the scope of this privilege is not only today worthy of some debate, but will also likely in the years to come be refined and developed. The recent enactment in China of new Article 50 is *prima facie* evidence of this. The three subject States analyzed

¹⁷² See *Miranda*, 384 U.S. at 479.

¹⁷³ See *id.* at 444 ("[T]he prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.").

¹⁷⁴ See, e.g., *State v. Gonzales*, 337 P.3d 129, 131–32 (Or. Ct. App. 2014) (discussing the good-faith exception to the exclusionary rule under the Fourth Amendment).

¹⁷⁵ See *Michigan v. Moseley*, 423 U.S. 96, 106–07 (1975).

¹⁷⁶ See *Thaman*, *supra* note 33, at 610 ("If the statement without [*Miranda*] warnings is followed by proper admonitions, and then a statement affirming the facts that were revealed in the illegal statement is made, the second statement will also be admissible.").

¹⁷⁷ A cursory search on the Comparative Constitutions Project's website finds that 102 constitutions include a clause regarding the privilege against self-incrimination. See CONSTITUTE PROJECT, <https://www.constituteproject.org/search?lang=EN&key=miranda> (last visited Aug. 10, 2015).

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within this Comment can all take cues from one another in order to best ensure that trials continue to be conducted fairly, laws are abided by both citizen and State, and perhaps most importantly, human rights remain a foremost concern in not just their own countries, but in all legal systems worldwide.

