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INTERROGATION LAW AND PRACTICE IN COMMON LAW JURISDICTIONS

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Interrogation law and practice in common law jurisdictions*

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I. Interrogation myths

According to popular understanding (and, all too often, professional claims), typical police interrogations have the following characteristics:

Suspects resist questioning and interviews are tense, difficult encounters in which police dominate interaction. Their role is essentially a search for truth. Eventually, as a result of skillful police techniques (including the detection of deception from body language), they will find it, as suspects crack and shift from denial to full confession.

Such confessions are reliable: innocent people would not confess to something they have not done unless they are unusually vulnerable through youth or disability.

Restriction of police interrogation by legal regulation allows the guilty to escape justice. Audio-visual recording provides a simple answer to any concerns about interrogation.

The research literature suggests that such standard beliefs about interrogations are misleading. If police interrogation is to be properly understood, a series of myths has to be confronted.

This chapter seeks to dispel these myths by examining two central, related themes. First, interrogation law and practice are located in the broader fields of criminal process and

* Forthcoming in *The Oxford Handbook of Criminal Process* (Darryl Brown, Jenia I. Turner & Bettina Weißer, eds.),

investigative activity, allowing cross-reference to other chapters in this Handbook. This connection tends to be understated in the psychological research literature that dominates the interrogation field. The discussion will suggest that interrogation practice in common law jurisdictions has been shaped by its criminal process context, which includes: the role of police in investigating and prosecuting crime; the pre-eminence of the guilty plea; criminal law's requirement that particular, provable mental states be included as elements of many offences; responses by criminal justice authorities to failures, problems and embarrassments; and shifting priorities, values, purposes of criminal process in changing political circumstances.

A key lesson of criminal justice scholarship is the need to focus on routine processes and everyday bureaucracy. While the headline cases are, of course, important, they should not distract attention from most suspects' experience of interrogation law and practice.¹ In commonplace criminal process, police questioning is less about dramatic interrogation than the dull slog of statement-taking. As one uniformed officer's quizzical response to my inquiry about 'interrogation' indicated, some police may well not even think that their mundane processing of suspects constitutes anything as significant as interrogation. Nonetheless, the same patterns of construction and coercion discussed below can occur in both low and high policing.

Secondly, this chapter emphasizes the interactive, dialectical relationship between interrogation law and practice, focusing on commonalities and contrasts among common

¹ Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in *Criminal Justice in Our Time* 3-95 (A.E. Dick Howard ed., Va. Univ. Press 1965); Doreen McBarnet, *Conviction*, (McMillan 1981).

law jurisdictions. By the final third of the twentieth century, a model of investigative law and practice had become established, which was broadly shared across these jurisdictions. Police arrested suspects and took them to police stations where they were questioned before being passed on to other actors in the process – guards, prosecutors, judges. This familiar picture was the product of patterns of state formation in the nineteenth century. Police professionalized, developing sections which specialized in crime control and investigation (in which skill in interrogating and success in producing confessions were highly valued). Meanwhile, magistrates withdrew from involvement in investigations to more judicial and administrative functions.

Only in retrospect does this process look natural and inevitable. An example makes clear that this was not so. In the inter-war period in England, the legality of questioning detained suspects *at all* was moot. In 1929, a Royal Commission recommended “a rigid instruction to the Police that no questioning of a person in custody, about any crime or offence with which he is or may be charged, should be permitted.”² How different contemporary policing would be if that recommendation had been implemented.

In similar societies with other legal traditions, civil law developed differently (as Malsch and de Boer show in chapter 19 of this volume). Meanwhile, an increasing divergence between law and practices in the U.S.A. and in other common law jurisdictions emerged towards the end of the twentieth century. Currently, interrogation practice is in a state of flux, with significant changes underway internationally.

² *Report of the Royal Commission on Police Powers and Procedure*, Cmd. 3297 (Home Office 1929) para 169. For the context, see David Dixon, *Law in Policing: Legal Regulation and Police Practices* 130-34 (Oxford Univ. Press 1997).

II. Researching and understanding interrogation

The literature on interrogation law and practice falls into several general categories:

- Legal discussion of interrogation is dominated by the vast body of U.S. law review articles analyzing constitutional law issues. As regards legal analysis, Leo's complaint from two decades ago still rings true: "virtually all scholarship on American police interrogation is relegated to doctrinal analysis."³
- Official inquiries: while sometimes these have buried issues in stereotypical style, some – notably Royal Commission reports in England and Senate committee reports in the U.S.A. – have been important in giving authority to informed and critical accounts of state practices.⁴
- Socio-legal, sociological, criminological fieldwork: research commissioned by official inquiries into criminal justice in England and Wales provided a major boost to knowledge about interrogation, providing both funding for researchers and access to police organizations. Socio-legal scholars were able to provide accounts, overlapping with work by psychologists, of police interrogation in the context of broader projects on criminal investigation and the treatment of suspects. A particular focus was the politically charged issue of the right to silence.⁵ Elsewhere, empirical work on interrogation has been less common. Significant exceptions are work on audio-visual

³ Richard A. Leo, *Miranda's Revenge: Police Interrogation as a Confidence Game*, 30 L. & Soc'y Rev. 259, 262 (1996).

⁴ E.g., *Report of the Royal Commission on Criminal Procedure* (H.M.S.O. 1981); Senate Select Comm. on Intelligence, *The Senate Intelligence Committee Report on Torture* (2014).

⁵ For overviews, see Mandy Burton et al., *Sanders & Young's Criminal Justice* (Oxford Univ. Press 2017); Dixon, *supra* note 2, at pp228-66.

recording of interrogation in Australia⁶ and, most importantly, Richard Leo's *Police Interrogation and American Justice*⁷ (and his continuing stream of high quality journal articles and book chapters). Leo's work is vital, but limited by its focus on opportunity samples of serious cases.⁸ There have also been some valuable studies focusing on the interrogation of young people.⁹

- In science, psychology dominates. There is now very extensive expertise in psychological research, particularly experimental work. Much has been done to increase our understanding of why suspects confess, sometimes to crimes they did not commit.¹⁰ Such work has significantly contributed to campaigns surrounding miscarriages of justice. In recent years, considerable resources have been put into psychological research sponsored by the High-Value Detainee Interrogation Group (see below). However, psychologists tend to underestimate the significance of the criminal process context and to focus on serious and dramatic rather than everyday cases.
- Training manuals: the most well-known and influential is Inbau and Reid's *Criminal Interrogation and Confessions*.¹¹ It has had great impact across common law and other jurisdictions, whether through the text, training courses based on it, or

⁶ David Dixon, *Interrogating Images* (Sydney Inst. of Criminology 2007).

⁷ Richard Leo, *Police Interrogation and American Justice* (Harvard Univ. Press 2009).

⁸ See David Dixon, *Questioning Suspects*, 26 J. Contemp. Crim. Just. 426, 426-40 (2010).

⁹ Barry C. Feld, *Kids, Cops and Confessions*, (N.Y. Univ. Press 2013); Hayley M. D. Cleary, *Police Interviewing and Interrogation of Juvenile Suspects*, 38 L. & Hum. Behav. 271, 271-82 (2014).

¹⁰ Saul M. Kassin et al., *Police-induced Confessions*, 34 L. & Hum. Behav., 3, 3-38 (2010); Christian A. Meissner et al. *Improving the Effectiveness of Suspect Interrogations*, 11 Ann. Rev. L. & Soc. Sci., 211, 211-33 (2015).

¹¹ Fred E. Inbau et al., *Criminal Interrogation and Confessions* (5th ed. 2011).

derivatives, such as the publication of extracts from or work inspired by Inbau and Reid's work.¹² More recently, their critics have also published manuals and texts on investigative interviewing.¹³

- Investigative journalism and NGOs: community activists and investigative journalists have done much to expose problems in interrogation, notably in miscarriage of justice cases.¹⁴ The contribution of the Innocence Project in uncovering miscarriages of justice is legendary. Other NGOs, such as Human Rights Watch, are often the only source of information on some jurisdictions.
- Film: it might be thought trivial to include fictional, on-screen representations. Unfortunately, fiction and reality have become an unlikely duo in this field. There has been a circular process in which fictions have both reflected and influenced interrogation practice. A few examples: *The Bill* publicized the reforms to English policing in the 1990s; *NYPD Blue* used Inbau and Reid as source material; and *Lie to Me* has given a generation of officers inappropriate confidence in their ability to detect deception. More disconcertingly, the use of torture was legitimized by *24* and by movies such as *Man on Fire*, *Taken*, and, notoriously, *Zero Dark Thirty*. At the time

¹² J. Pete Blair, *What do We Know about Interrogation in the United States?*, 20 *J. Police & Crim. Psychol.* 44, 44-57 (2005). On Inbau & Reid's impact on continental Europe, see Malsch & de Boer, *Interviews of Suspects of Crime, this volume*, chapter 19.

¹³ E.g., Eric Shepherd & Andy Griffiths, *Investigative Interviewing* (Oxford Univ. Press 2d ed. 2013).

¹⁴ Some notable examples: Sarah Burns, *The Central Park Five* (Vintage House 2012); Colleen Egan, *Murderer No More* (Allen & Unwin 2010); Satish Sekar, *Fitted In: The Cardiff Three and the Lynette White Inquiry* (The Fitted-In Inquiry 1997); Estelle Blackburn, *Broken Lives* (Hardie Grant 2005).

of writing, the first movie to feature the new ‘investigative interrogation,’ *Patriots (sic) Day*, is being screened.

Cumulatively, this material requires reconsideration of the myths outlined at the beginning. As Feld suggests, “Most of what appellate judges, criminologists, legal scholars, and the public think we know about interrogation derives from aberrational cases of egregious abuses, false confessions and wrongful convictions, or television drama programs, ‘reality’ shows, and movies that misleadingly depict how police question suspects.”¹⁵ The conclusion will summarize a very different account of interrogation law and practice.

The very uneven coverage of common law jurisdictions in the literature must be acknowledged. While there is plenty on England and Wales and the U.S.A., and some on Canada, Australia and New Zealand, there is no relevant academic research tradition in others. India, the most populous common law jurisdiction, is represented only in highly critical reports by N.G.O.s.¹⁶

III. Why interrogate?

This section will discuss the purposes, uses and functions of interrogation.

- *Evidence*

Although there has been some research on the significance of confessional evidence in producing convictions, asking whether a confession was *necessary* in order to

¹⁵ Feld, *supra* note 9, at 3.

¹⁶ E.g., Human Rights Watch, *Bound by Brotherhood: India’s Failure to End Killings in Police Custody* (2016); Asian Centre for Human Rights, *Torture in India* (2010). There are also several professional guides, such as Uday Kumar, *Questioning and Interrogation: An Art of Establishing the Truth* (Raj Publications 2013).

obtain a conviction can be misleading. Confessions can provide a shortcut to a conviction potentially obtainable by other means. The need to collect witness statements and physical evidence becomes less pressing if a confession is obtained. It can also be part of a routine bureaucratic practice of case construction (see below). A denial which can be shown to be a lie may be even more useful to a prosecutor than an incomplete or vague admission.

- *Guilty pleas*

There is a direct connection between confessions and a defining characteristic of common law jurisdictions – their reliance on guilty pleas rather than contested trials (see below). If suspects confess, they are likely to plead guilty. Both confessions and guilty pleas are often made in expectation of reduced charges and preferential treatment, despite prohibitions on the offering of inducements to confess. Furthermore, investigators can improve detection statistics by getting suspects to accept responsibility for offences that they may or may not have committed which will be ‘taken into consideration’ or written off without effect on sentence.

- *Truth-finding*

Asking what interrogation is for may seem unnecessary: isn’t interrogation obviously about getting a suspect to tell the truth? When police officers are asked to explain their purpose in questioning suspects, they typically refer to the process as ‘a search for the truth’. However, this explanation’s simplicity and apparent indisputability are misleading.

First, it is almost trite to say that any account involves selection and construction. Memory works by selection and construction: it does not simply replay. Even a full, freely-given confession is not an unmediated view of reality or

'truth'. All describing and accounting for action involves active interpretive work. Incidents are reconstructed as stories, in which legal definitions and requirements provide cues, plots and character development. More than one account may be available: an adversary system of justice deals in contested versions of reality, not in absolute truths.

In police questioning, suspects' accounts are guided and molded in various ways. These range from benign but inevitable direction and focus to more potentially problematic interventions by investigators in the selection and construction process. These range from excessive use of closed questions (which prompt simple yes or no answers) to the use of legal closure questions (whose apparent purpose is "to invite the suspect to provide information but in reality force information into a legally significant category in the hope that the suspect will 'adopt' it ... so that it now 'fits' into an appropriate legal category"¹⁷) to comprehensive interrogation strategies in which suspects are eased to confession by being offered accounts of their (alleged) actions which minimize their moral (although not legal) responsibility (see below).

Secondly, "searching for the truth" has too often been the gloss on a method of interrogation which consists of the interrogator seeking the suspect's confirmation of (confession to) an account of events (a truth) to which the interrogator is already committed. As the discussion of miscarriages of justice will show, well-known psychological and social processes have repeatedly caused problems in criminal process.

- *Legalization*

¹⁷ Michael McConville et al., *The Case for the Prosecution* 70 (Routledge 1991).

Police questioning of suspects involves a very particular form of account construction, “legalization,” which involves the interviewer organizing and framing the suspect’s account according to legal criteria.¹⁸ Normally, this involves mundane processes of translating material into form appropriate for use downstream in the process, although malevolent manipulation has too often been evident in miscarriage cases.

An arrest becomes legal matter in tangible and recognizable, standard form as an offence file is opened, information is entered and interpreted, previous documents (e.g., relating to earlier interrogations) are included or cross-referenced, and revisions and additions are subsequently made. Chatterton demonstrated the importance of “paperwork” in policing: the time spent creating prosecution files “produces the cases which enable the police organisation to interface with the courts and other organisations. Events, incidents and encounters are shaped, ordered and transformed through this paperwork into recognisable, typical cases.”¹⁹ Far from being residual or “marginal practices, mastery of paperwork and the ability to manipulate the ‘paper reality’ are core police skills... The ability of the police to create a convincing paper record is a necessary part of successful case construction. Cases against individuals ... are cases made out on paper, subject to assessment on paper and, for the most part, decided upon paper.”²⁰ The rules of substantive and procedural law provide the language and framework of the accounts which must be given of suspects’ action and

¹⁸ Dixon, *supra* note 2, at 270-74.

¹⁹ M.R. Chatterton, *Managing Paperwork, in Police Research* 110 (Mollie Weatheritt ed., Avebury 1989).

²⁰ McConville et al., *supra* note 17, at 98 (quoting Goffman). This assessment is dated only by its reference to paper rather than e-files.

police reaction. Most detective work is not detection, but the transformation of an incident into a case and an individual into a defendant by the collection, categorization and presentation of evidence. The creation of a record of interrogation - whether on paper or electronically for subsequent transcription – is a vital part of this process of “legalizing” accounts.

Most importantly, suspects have to be led to speak an account of their actions which satisfies legal requirements of *mens rea*, so that, for example, reference is made to deliberate stealing, rather than simply to taking, or to acting recklessly, rather than accidentally. In preparing a file for prosecutors, police investigators have to cover the “points to prove” for the particular offence. So, for example, a suspect who had admitted to assaulting a homicide victim was asked:

Q ... when I asked you why you killed Nikki you said you didn't mean to kill her is that right?

A Yes.

Q Well George you hit Nikki with a brick across the head ... on a number of occasions and you stabbed Nikki in the body, a number of times, when you did those actions, did you mean to kill her?

A No.

Q Well I put it to you that you must have done George ... That to me shows a clear intention on your part to kill her at that stage.²¹

A confession to murder is not just 'I killed her' but acknowledgment of the required elements of *actus reus* (striking, stabbing) and *mens rea* (intending to kill). The monosyllabic responses in this exchange are significant. The suspect will often be invited to agree with the investigator's statement: "you intended to sell the drugs found in your car: do you agree?" Many police interviews are long sequences of closed "Do you agree?" questions which have to be understood as pre-trial work.²²

The legal (re)construction is of course not a neutral process: as the police construct the case in their terms, so the suspect's version of reality may be marginalized, all too often producing suspects and defendants who are passive.

- *The social roles of interrogations and confession*

While this chapter's focus is on the legal (and political) aspects of interrogation and confession, understanding their social role is also necessary, not least because this explains why they are symbolically as well as instrumentally significant in criminal justice. Most obviously, the practice of confession has moral and religious dimensions which feed into social expectations and lay valuations of "owning up" and "getting it off your chest." Japanese police speak of using interrogation as the

²¹ From the transcript of Northumbria Police questioning George Heron, see David Dixon, *Integrity, Interrogation and Criminal Injustice*, in *The Integrity of Criminal Process* 75-97 (Jill Hunter et al. eds., Hart 2016).

²² Dixon, *supra* note 6, at 166-72.

first stage in the process of rehabilitating the criminal.²³ The problematic nature of the assumption that the suspect is guilty and the potential for miscarriages of justice should be obvious.

Interrogation may also be about punishment, particularly at extremes involving coercive interrogation and torture.²⁴ More mundanely, it can be about social discipline: bringing a person to a police station and subjecting them to the process of detention and interrogation can be about the imposition and validation of power over individuals and communities.²⁵

IV. **Beyond the Police**

While this chapter focuses on interrogation by police officers, the significance of interrogation by other state agents and private parties which operate at the edges of criminal process or beyond should also be noted. On one hand, many state agencies (such as tax and welfare investigators) question suspects, relying on skills and training which originated in policing. Supervision and scrutiny of their activities and practices are scant compared to the attention given to police interrogation.²⁶ On the other hand, there is the role of security agencies of various types (including private contractors) which are involved in the interrogation of terrorist suspects and detainees. In recent years, the gap between security and police has reduced, disappearing at higher levels (not always in quite the way

²³ Taeko Wachi et al., *Japanese Suspect Interviews, Confessions and Related Factors*, 31 *J. Police & Crim. Psychol.* 217, 217-27 (2016).

²⁴ Charles Weisselberg, *Against Innocence*, in *The Integrity of Criminal Process* 354 (Hunter et al. eds., 2016).

²⁵ Satnam Choongh, *Policing as Social Discipline* (Oxford Univ. Press 1997).

²⁶ For a rare study, see David W. Walsh & Rebecca Milne, *Keeping the PEACE?*, 13 *Legal & Criminological Psychol.* 39 (2008).

one might expect, see below). There is a significant interplay of influence, as each sector has affected the other.

A crucial difference between security and police investigators is that the former may not expect or even be seeking a confession in anti-terrorist and other pre-emptive operations. Rather, they may be seeking information as a basis for actionable intelligence, indicating a shift of paradigm from criminal justice to control process. In the criminal justice paradigm, police question a suspect between arrest and charge in order to obtain evidence about specific offences allegedly committed by the suspect which may later be admissible in court. In the control process paradigm, the focus of interrogation is not (or not just) on the suspect's past actions but on what he or she knows about potential future action by others. If an interrogator does not anticipate the requirements for successful presentation, examination and admission to evidence of interrogation in court, problems arise when attempts are made to cross paradigms. In several common law jurisdictions, authorities have faced significant problems when trying to use for evidential purposes material which had been collected for intelligence purposes.²⁷

The admissibility of material obtained by violence is obviously problematic in the criminal justice paradigm. More complex issues are raised by confessions or admissions obtained during lengthy detention. In criminal justice, interrogation is normally confined to the period between arrest and charge. The permissible active investigative period is usually

²⁷ David Dixon, *From Criminal Justice to Control Process*, in *Handbook of Psychology of Investigative Interviewing* 91-106 (Ray Bull et al. eds., Wiley 2009); *A and Others v. Secretary of State for the Home Department* [2005] *U.K.H.L.* 71; *U.S.A. v. Khalid Sheikh Mohammed, Walid Muhammad Salih Mubarak Bin 'Attash, Ramzi Bin Al Shibh, Ali Abdul-Aziz Ali, and Mustafa Ahmed Adam Al Hawsawi*, (Guantánamo Bay Military Commission, ongoing - their trial is expected to begin when pre-trial hearings conclude... in 2021).

limited to a few hours, and even anti-terrorism laws allow only a few days. However, security detention may be much longer, even potentially infinite. As will be noted below, there has been a spill-over of interrogation methods from criminal justice to security and back, as security officials appreciate the benefits of rapport-based methods. The problem is that rapport is most unlikely to be established with terrorist suspects in the short periods allowed under standard criminal justice regimes. As Gelles et al. suggest, “A rapport-building (or relationship-based) approach will yield the best results in an interview/interrogation that occurs over days/weeks/months.”²⁸ Yet this runs counter to one of the basic principles of modern criminal justice regimes which were constructed on an understanding that extended detention *in itself* could make confessions unreliable because people would say anything (even at long term cost) to win a short term reprieve from investigative detention.

If interrogation is intended to produce confessions and admissions which are acceptable to a criminal justice paradigm, lengthy pre-charge detention is unacceptable because it undermines the voluntariness which is a precondition of evidential admissibility. If interrogation is primarily intended to produce information and actionable intelligence rather than admissible evidence, then the concerns of criminal justice will not be paramount. But what happens when the lengthy interrogation for intelligence is over? If use of regular criminal process is impossible, the options are permanent detention, release under administrative control orders limiting movements and contact, or the creation of an ersatz criminal justice, dressing up a militaristic control process with some trappings of

²⁸ Michael G. Gelles et al., *Al-Qaeda-related subjects*, in *Investigative Interviewing* 31 (Tom Williamson ed., Willan 2006).

legality. These are, of course, the questions which the U.S.A. has been grappling with in resolving the fate of detainees at Guantánamo Bay.²⁹

It is worth adding a note on the purpose of torture and coercive interrogation. For centuries, critics have pointed out that torture produces unreliable confessions. However, torture may be intended not to produce reliable information immediately, but as part of a long-term strategy to deplete the detainee's personality, leaving him or her open to a new dependent relationship with captors who may then be able to obtain reliable information. Despite all the debate about the need to use torture in "ticking-bomb" cases, its more significant "potential" may be elsewhere. The use of torture as part of or preliminary to long-term detention and interrogation raises very substantial issues of human rights and morality. It does not, however, raise legal issues: torture is unreservedly illegal under international law.

V. Judges and Rules

This section is concerned with the impact and significance of differing judicial and regulatory modes of attempting to control interrogation practice. While the U.S. relies primarily on *ex post facto* judicial rulings to oversee police investigative practice, jurisdictions such as England and Australia have attempted to regulate *ex ante* by developing legislative and other regulatory controls. In the U.S., courts have developed an elaborate constitutional law jurisprudence. *Miranda v. Arizona*³⁰ has been endlessly dissected and analyzed in a huge library of cases, reports and academic papers. Elsewhere, judges have developed concepts

²⁹ Lou Dubose, *Trial without end in Guantánamo*, Washington Spectator (April 7, 2016),

<https://washingtonspectator.org/ksm-guantanamo-war-terror/>.

³⁰ *Miranda v. Arizona*, 384 U. S. 436 (1966).

in the common law, while in Britain and Canada, judges have also increasingly used human rights standards from international conventions and domestic human rights instruments.

Judges have potentially potent, but essentially defensive, powers with which to regulate police interrogation. Of particular relevance here is judicial control over admissibility of confessions and admissions. Courts can insist that a confession should be obtained by methods which meet standards such as systemic integrity, voluntariness, reliability, lack of oppression, and fairness. Such standards vary across jurisdictions. For example, English and Australian courts have been much stricter than their U.S. counterparts in disapproving of deception by interrogators: standard U.S. practices such as lying to a suspect that incriminating physical evidence has been found should lead to exclusion by Anglo-Australian judges of a subsequent confession.³¹ Another area of notable contrasts is the treatment of vulnerable suspects, such as young people, people with an intellectual or developmental disability, and those suffering from a mental illness.³²

In addition, judges can indirectly influence police evidence-gathering practices. As noted above, when courts demand that the prosecution prove beyond reasonable doubt that a defendant intended an act, police are strongly encouraged to obtain a confession, providing a direct way of establishing intention. There was a significant (but, as yet, inadequately traced) relationship between the trend in areas of substantive criminal law

³¹ Dixon, *supra* note 21, at 91; Jill Hunter et al., *The Trial* (Federation Press 2015); Paul Roberts & Adrian Zuckerman, *Criminal Evidence* (Oxford Univ. Press 2d ed. 2010).

³² Burton et al., *supra* note 5; Leo, *supra* note 7.

towards requiring proof of subjective intention and police use of interrogation in order to obtain confessions.³³

There are a number of intrinsic limitations stemming from the nature of the judicial function and the actual (rather than the rhetorical) position of judges in the criminal process. Judicial power focuses on the regulation of court proceedings. A court can regulate how its processes are used and judges can rule on material brought before them, but the criminal process is constructed around avoidance of court proceedings. If Anglo-American criminal justice has a defining characteristic, it is that the great majority of investigations end in guilty pleas which are administratively processed rather than judicially tested.³⁴ There are multiple pressures on suspects and defendants to confess and plead guilty and consequences for not doing so promptly. Equally, interrogators and prosecutors are constrained in their dealings with suspects by the need to ensure admissibility of confessions.

Secondly, courts cannot ensure the implementation of changes which they recommend or rule as necessary. The dominance of executive-controlled legislatures in contemporary states makes most judges take a realistically modest view of what they can achieve. For example, in a crucial decision by Australia's High Court, Justices Mason and Brennan refused to interpret the common law so as to provide authority for police to detain

³³ Nicola Lacey, *In Search of Criminal Responsibility* (Oxford Univ. Press 2016).

³⁴ George Fisher, *Plea Bargaining's Triumph* (Stanford Univ. Press 2003); Michael McConville & Luke March, *Factory Farming and State-induced Pleas*, in *The Integrity of Criminal Process* 99-116 (Jill Hunter et al. eds., Hart 2016); Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent* (Pub. L. and Legal Theory Working Papers, 2017), http://chicagounbound.uchicago.edu/public_law_and_legal_theory/602 (viewed April 10, 2017).

suspects for questioning, arguing that it was the legislature's responsibility to deal with such matters both as a matter of constitutional principle and because it "is able – as the courts are not - to prescribe some safeguards which might ameliorate the risk of unconscionable pressure being applied to persons under interrogation." ³⁵

As a mode of positive, prospective regulation, judicial control is confined by the vagaries of the case law process. Judges have to wait for a case to come before them. In criminal processes characterized by heavy reliance on guilty pleas and financial as well as legal barriers to appeals, an appropriate vehicle for an attempt at judicial regulation of interrogation may not come along. When it does, any judicial interest in regulating police may be tempered by the prospect of acquitting or allowing an appeal by someone they think is factually guilty. This familiar dilemma can be recognized by anyone other than ostrich-like legal formalists. Despite the persistent complaints from some police officers and many conservative media commentators about judicial liberalism and "softness to criminals," the historical record tells a rather different story.³⁶ Fine rhetoric about the liberty of the suspect has been mirrored by reluctance to engage in active regulation of custodial interrogation and disapproval of defense lawyers who criticize police. Even at the highest level, courts balance justice in the specific case, the general public interest, and the broader regulatory implications of the issues raised. There have also been serious problems of deficient communication and understanding on both sides: a striking characteristic of judicial decisions on police interrogation at least until the closing decades of the twentieth century was the evident lack of basic knowledge about how the processes of arrest,

³⁵ *Williams v R.* (1986) 385 ALR 398, 400 (Austl.).

³⁶ Dixon, *supra* note 2, pp126-227.

detention, questioning, charge and bail really worked. If judges were ignorant about policing, then police were also often ignorant about judicial decisions. The way in which court decisions are – or are not - communicated to operational officers deserves much more attention than it has received.

All too often, the result is frustrating for officers seeking clear regulatory guidance on interrogation. A legalistic slice through issues which are complex and interrelated is often unsatisfying for those whose concerns go beyond the individual case. Particularly problematic in regard to interrogation is the court's practice of giving police broad, vague instructions on what they *should not* do, rather than specific guidance on what they *should* do. Take the key issue of defining "oppression," the category of behavior which will render confessional evidence inadmissible under common law. Characteristically, when facing problems of definition, courts say that words should be given their ordinary meaning, and turn to the dictionary. Doing so is unlikely to be much help to an officer planning to interrogate a difficult suspect. In a much-quoted ruling in *Heron*, [Judge/ Justice?] Judge Mitchell said that police questioning can be "persistent, searching and robust."³⁷ But an officer seeking guidance on what this means will be disappointed: "Where the line is to be drawn between proper and robust persistence and oppressive interrogation can only be identified in general terms." The interview must be considered as a whole: "occasional transgressions will not necessarily convert an otherwise properly conducted interrogation into an unfair one, let alone an oppressive one." The "age and character" of the suspect will also be relevant. What might lead a court to determine that "the admission of the evidence

³⁷Leeds Crown Court, 1 November 1993, unreported.

would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it” is even harder to predict.³⁸

What impact judicial regulation has had on police practice and effectiveness has been the subject of much controversy in the U.S. The most convincing interpretation of the extensive research evidence is that heroic Supreme Court cases such as *Mapp*, *Miranda*, and *Escobedo* did not significantly reduce police ability to investigate crime, with officers soon finding ways to minimize their impact.³⁹ However, they did have substantial indirect effects, hastening shifts in police training, supervision and general professionalism. Leo argues that “*Miranda* has had profound impact in at least four different ways: first (it) has exercised a civilizing influence on police interrogation behavior, and in so doing has professionalized police practices; second (it) has transformed the culture and discourse of police detecting; third, (it) has increased popular awareness of constitutional rights; and fourth (it) has inspired police to develop more specialized, more sophisticated and seemingly more effective interrogation techniques.”⁴⁰

This experience suggests broader lessons about potential judicial contributions to regulation of interrogation. Judicial control tends to be distanced, unwieldy, non-responsive. If judges want their decisions to have more positive impact, they have to know more about the world they seek to regulate and to express them more clearly and more positively, and with

³⁸ Leeds Crown Court, 1 November 1993, unreported.

³⁹ Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. Crim. L. & Criminology 621 (1996); see also *The Miranda Debate* (Richard A. Leo & George C. Thomas eds., Northeastern Univ. Press 1998); George C. Thomas & Richard A. Leo, *Confessions of Guilt: From Torture to Miranda and Beyond* (Oxford Univ. Press 2012); Albert W. Alschuler, *Miranda’s Fourfold Failure*, 97 B.U. L. Rev. 849 (2017).

⁴⁰ Leo, *supra* note 39, at 668.

more emphasis on policy and less on the individual case. (Appeal courts, particularly at more senior levels, are obviously more able to do this than are trial judges.) They should be aware of the need to communicate decisions and to participate in processes which review their impact. Attention should be paid to indirect as well as direct effects.

In 1984, England and Wales took a different regulatory course, introducing a structure of statutory and other rules which provided a new framework of police powers. Crucially for present purposes, the Police and Criminal Evidence Act 1984 (PACE) regulated the context in which interrogation takes place – the arrest, detention and treatment in custody of suspects.⁴¹ Broadly similar legislation was subsequently introduced in Australia⁴² and New Zealand.⁴³

Regulatory measures should not be considered in isolation from each other. Judicial regulation will be affected by other pressures, particularly the structure of rules provided for the detention and interrogation of suspects which are considered in the next section. It is appropriate to point out here that there was a significant shift in judges' approach to the regulation of interrogation following the introduction of PACE in England and Wales. Clearer statements of what was expected contributed here. But a change in rules is unlikely to be enough in itself: in both Britain and New South Wales, new legislation provided the tools, but it was disclosures of police malpractice that impelled judges into a more critical and active regulation of interrogation.

VI. The impact of miscarriages of justice

⁴¹ Burton et al., *supra* note 5.

⁴² Francine Feld et al., *Criminal Procedure in Australia* (LexisNexis 2014).

⁴³ Jeremy Finn & Don Mathias, *Criminal Procedure in New Zealand* (Thomson Reuters 2d ed. 2015).

Coerced confessions, miscarriages of justice, wrongful convictions and failed prosecutions have driven change in interrogation law and practice in the U.K., playing a major role in some of the most prominent and notorious cases. This was not just because people like the Birmingham Six were finally shown to be innocent, but also because the perpetrators of some of England's worst crimes have never been brought to justice. This is a vital point: the state fails when it convicts the innocent not just by inflicting injustice on them, but also because the wrongful conviction usually means that the guilty escape justice: it is a matter of crime control and public safety, not "just" due process and suspects' rights.

The typical causes of miscarriages of justice involving interrogation and false confessions in the twentieth century became familiar. Investigators were under pressure from their superiors, the media and the public to solve the crime. The culture and organization of the police department – valuing independent, charismatic detectives – encouraged sole action. Investigators (and prosecutors) became committed to an account of the crime too early, thereafter developing tunnel vision which selected material which confirmed the case theory and ignored or neglected other possibilities. Suspects' accounts were contaminated by police leaking information about their alleged crime to them. Interrogators thought they were much more skilled at their job than they were. Investigators then found what they expected to find, in textbook expressions of confirmation bias.⁴⁴

All of these problems are well known and all have remedies which should be relatively simple matters of training and organization. Investigators have to recognize and

⁴⁴ Leo, *supra* note 7, at 263-66; Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. L. Rev. 291 (2006); Dan Simon, *In Doubt* 22-25 (Harvard Univ. Press 2012).

avoid the temptations to back hunches slavishly, to sideline inconsistent evidence, to push evidence into supporting hunches, to ignore alternative hypotheses. In addition to training individuals, the police organization must make itself resistant to tunnel vision by institutionalizing review and sharing authority. Police managers in England have tried to spread responsibility from the senior investigating officer to a team in which, it is hoped, case theories will be more critically assessed. Similarly, the product of an important interview will be reviewed by more than one person. Indeed, the interrogation itself may be conducted not by an officer previously involved in the investigation, but by a specialist in interrogating suspects. While other methods may help to limit the impact of case theories during an interrogation, such organizational change can have early impact, preventing inevitable, possibly productive hunches from degenerating into inaccurate, misleading case theories.⁴⁵

This is not to say that false confessions are the major reason for documented miscarriages: the Innocence Projects report a rate of around 25%,⁴⁶ while in the Exonerations Project collection of 1900 cases, 56% involve perjury or false accusation, 51% official misconduct, 30% mistaken witness identification, and only 12% false confessions.⁴⁷

These probably understate false confessions for two reasons. First, innocence and exoneration cases largely rely on DNA evidence, and so sexual offences in which DNA evidence is particularly significant are overstated: confessions, true or false, may be less likely in such cases. When the Exoneration Project narrowed the focus to miscarriages in

⁴⁵ Michael Innes, *Investigating Murder* (Oxford Univ. Press 2003).

⁴⁶ See False Confessions or Admissions, <https://www.innocenceproject.org/causes/false-confessions-admissions/>; Brandon L. Garrett, *Convicting the Innocent* (Harvard Univ. Press 2011).

⁴⁷ Samuel R. Gross, *What we Think, What we Know and What we Think we Know about False Convictions*, 14 Ohio St. J. Crim. L. 753 (2017).

homicide cases, the rate of false confessions rose to 21%. Secondly, false confessions may be more common in everyday, less serious cases than is usually assumed. Gross, the leading enumerator of exonerations, suggests that “the most common cause of false convictions, by far, is the prospect of prolonged pre-trial detention of innocent defendants who are unable to post bail in comparatively low-level prosecutions.”⁴⁸ They do so because those “charged with misdemeanors and light felonies may face months, even years in jail waiting for trial, but get weeks or days – or no time at all – if they plead guilty.”⁴⁹ False confessions and guilty pleas of this kind must be understood from a perspective which is only irrational to those fortunate to live different lives. The point is captured by Cohen:

It was less trouble to Brian to plead guilty and get it over and done with, even if it meant admitting to something which subjectively, he felt he hadn't done. The alternative meant the trouble of dealing with lawyers, of being on remand, and possibly having to report to the local police station, above all the trouble of having the case hanging over his head, for a few weeks or even months. In addition,... if he was seen by the police to be making trouble for them in court, contesting the case, making counter allegations, then he would be, in his own words ‘a marked man’, the Law would get its own back by getting him sent down for something else later on, and that might mean more and bigger trouble. Even if the case was contested he might not win, and then he would get an even stiffer sentence as a charge against the court's time. And then all the aggravation would have been for nothing. Brian was not interested in abstract principles of justice, but in minimizing the interruption

⁴⁸ *Id.* at 777.

⁴⁹ *Id.* at 26.

to his real life. Such logics therefore incorporate the defendant's perceptions of the police perceptions of his situation with remarkable accuracy.⁵⁰

Confessions (true, false or a bit of each) have to be understood as constituent parts of the guilty plea process.

A chastening lesson is that the authorities may have higher priorities than rectifying miscarriages of justice. When apparently thinking that doing so would undermine the reputational integrity of the justice process, some have demonstrated an unfortunately pragmatic approach, preferring to turn a blind eye to police misconduct rather than to admit to systemic failure.⁵¹ This may help to explain the slow pace of reform in the U.S., despite evidence that false confessions have sent innocent people to death row.

VII. **Electronic recording as a panacea**

In the U.S., calls for video recording have become ubiquitous in the literature on responses to miscarriages of justice. Increasing numbers of jurisdictions require video-recording in some form.⁵² There are similar trends elsewhere: video-recording is being promoted as the way to counter police torture in India.⁵³ It is attractive as an apparently objective technology, another in the long line which includes lie detectors, C.C.T.V., D.N.A. analysis,

⁵⁰ P. Cohen, *The Great Chinese Takeaway Massacre*, unpublished, quoted in David Brown et al., *Criminal Laws* (Federation Press 1990).

⁵¹ Dixon, *supra* note 21, 93-97.

⁵² Some recording is required in 20 states and the District of Columbia. See Richard A. Leo, *Police Interrogations and Suspect Confessions*, Univ. of San Francisco Law Research Paper No. 2017-06 (2017).

⁵³ Asian Human Rights Commission, *India: Police Modernisation in Kerala, a Model for Asia* (April 10, 2017, 9.15 PM), <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-017-2017>.

Tasers, facial-recognition systems, body cameras, shotspotters, and license plate readers. Often police have initially been wary about or opposed to electronic recording, but become strong advocates for it when they gain experience of its use. All too often, audio-visual recording is regarded as a panacea, a reform which will right all ills by itself. American commentators would do well to pay more attention to other jurisdictions which have extensive experience of electronic recording. England and Wales has used audio-recording since the late 1980s, while Australia has done so since the early 1990s. Extensive empirical research has been carried out in these jurisdictions which should be taken into account by anyone considering electronic recording.⁵⁴

Such research shows that recording can be valuable and effective in improving investigative performance. However, it also demonstrates that if relied upon excessively or inappropriately, electronic recording can be counter-productive. There are two key issues: the regulatory context of recording and its potential encouragement of problematic attempts at detection of deception.

First, recording requires much more than the provision of some technology in police stations. Useful and effective electronic recording must be part of effectively and comprehensively regulated treatment of suspects, including clear separation between the roles of custody officers and investigators during the detention and investigation of suspects. Crucially, regulation must ensure comprehensive recording of a suspect's treatment during detention (and, as body-worn technology improves, from the beginning of contact between police and suspect outside the station⁵⁵). If, as is common in the U.S., in-

⁵⁴ Dixon, *supra* note 6.

⁵⁵ Christopher Slobogin, *Manipulation of Suspects and Unrecorded Questioning*, 97 B.U. L. Rev. 1157 (2017).

station electronic recording is required only of the final, often rehearsed, confession, it is counterproductive in giving a gloss of authenticity to confessions that are little more reliable than those not recorded. Useful video-recording has to show how the suspect came to make a confession, not merely its utterance. If this is not done, problems in interrogation practice are hidden.

The security of the audio-visual record must be assured. This has not been as great a problem as some expected: technology can deter or detect adulteration. Complete loss of records (e.g. the C.I.A.'s destruction of film recording water-boarding and other torture⁵⁶) is less possible in a digital age. Of more everyday significance, what is recorded must be regulated: cameras must capture the image both of suspect and the investigators, not, as is too often the case, only or principally the suspect. Such regulation is possible: the records of how England and Wales reformed their process of custodial interrogation and how Australian jurisdiction introduced audio-visual recording provide useful experience of what and what not to do. However, it is not simple or easy, especially in a balkanized criminal justice process such as that in the United States.

A second potential problem is that video-recording encourages its audience to interpret images by reading the 'body language' of the suspect. Feeding off cultural beliefs in the power and meaning of images which are encouraged by schlock psychology, people - police, lawyers, jurors, judges - too often make assumptions about their ability to assess credibility and guilt by reading 'body language'. Reliable psychological research is unequivocal in rejecting this: such evaluations are as often wrong as they are right. Rejecting the widespread reliance on reading body language in the U.S.A., leading researchers have

⁵⁶ Senate Select Committee on Intelligence, *supra* note 4, at 332-33.

moved on to study how deception may be detectable not from a twitching eyebrow but from discrepancies and contradictions in what suspects say.⁵⁷

VIII. Policy and training

Learning how to question suspects was long regarded as a matter of absorbing a craft skill, one to be learnt by watching and learning from senior colleagues. An Australian police inspector advised young officers in the following terms:

Most outstanding interrogators will be able to help you with certain advice, but rarely are they able to define themselves just what makes them so successful in this field. It is an ability developed over the years, coupled with experience of all types of criminals, which enables them to sum up the suspect and ask the right questions at the appropriate time.⁵⁸

This was not a skill that all could acquire equally well: Innes found that “at the heart of police notions of ‘the good detective’ was the sense that certain individuals had a particular flair for the work. The most valuable skills were held to be those developed through natural instinct and experience.”⁵⁹ The policing craft has now been supplemented by a variety of training programs.

⁵⁷ Aldert Vrij et al., *Deception Traits in Psychological Interviewing*, 28 J. Police & Crim. Psychol. 115, 115-26 (2013).

⁵⁸ William D. Crowley, *The Interrogation of Suspects*, in *The Australian Criminal Justice System* 419-20 (Duncan Chappell & Paul Wilson eds., Butterworths 1972).

⁵⁹ Innes, *supra* note 45, at 9.

In a world characterized by policy transfer and globalization, it is unusual to find as sharp a contrast as that amongst leading common law jurisdictions on how suspects should be questioned. While the U.S. has long been dominated by persuasive and psychologically coercive confession-focused interrogation exemplified by the “Reid Technique,” since the 1990s, England and Wales has emphasized the information gathering priority of questioning through “investigative interviewing.” Jurisdictions in Canada⁶⁰ and Australia⁶¹ have been influenced by both. This section will comment on these contrasting styles and on a recent adaptation of investigative interviewing, “intelligence interrogation.” Each developed in response to problems: the Reid Technique was produced as an alternative to physically coercive questioning, investigative interviewing to miscarriages of justice and failed prosecutions, and intelligence interrogation to controversies surrounding post 9/11 mistreatment of terrorist suspects. As this section will show, investigative interviewing is now strongly in the ascendant. While police transfers usually travel from the U.S. to Europe, in this case, the direction is reversed.

1. The Reid Technique

Training in questioning suspects developed in the U.S. in response to the interwar challenge to the use of violence in questioning suspects, the “third degree.” Notably and most influentially, the Reid Technique was developed as an alternative to such physical coercion, one which relied on lay psychology and professional experience. According to Leo, “virtually

⁶⁰ Brent Snook et al., *Interviewing Suspects in Canada*, in *International Developments and Practices in Investigative Interviewing and Interrogation: Volume 2: Suspects* 229 (David Walsh et al. eds., Routledge 2016).

⁶¹ Dixon, *supra* note 6, at pp.174-218.; Brian Ord et al., *Investigative Interviewing Explained* (LexisNexis 4th ed. 2014).

all modern American interrogation is a variation of the Reid method.”⁶² As well as being widely used in the U.S., police and other agencies around the world have been trained in its use. The Reid Technique is a commercial product, offered by Reid & Associates, a Chicago-based firm. The commercial nature of the product is vital to understanding the way in which the brand has been maintained, including strong attacks on critics.

The purpose of the Reid Technique is to ease suspects towards confession once investigators have become convinced of their guilt. This is done by methods such as accusing, suggesting possible accounts and explanations of the offence to suspects, avoiding denials, minimizing culpability and misrepresenting evidence.

While critics point to the lack of research basis for the Reid Technique, there is no doubt that it does lead suspects to confess. The problem is that the accuracy of these confessions is not assured. Despite Reid & Associate’s attempts to refute this, the connection between persuasive and psychologically manipulative interrogation and wrongful convictions is now widely recognized⁶³ and has led to the development of the alternatives discussed below. Because this critique is so well known, it will not be dwelt on here. Rather, it is appropriate to highlight other problems in the Reid Technique. Wrongful conviction is not the only problem in the U.S. criminal process.⁶⁴

A perplexing characteristic of the Reid Technique is its surprising indifference to “the truth” of any suspect’s confession. Having already decided in preliminary interview or other investigation that a particular suspect committed the crime under investigation, the

⁶² Leo, *supra* note 52, at 12.

⁶³ Kassin et al., *supra* note 10.

⁶⁴ Weisselberg, *supra* note 24.

interrogator's primary objective is to ease the suspect into confessing by suggesting an account of what might have happened which the suspect is able to accept and adopt. The recommended tactic is to minimize the suspect's culpability or in some other way "normalize" their offending, almost irrespective of what was actually done, through "theme development," wherein the interrogator presents "a 'moral excuse' for the suspect's commission of the offense or minimizing the moral implications of the conduct."⁶⁵ Some themes, it advises, "may offer a 'crutch' for the suspect as he moves towards a confession"⁶⁶ by "presenting reasons and excuses that will serve to psychologically (not legally) justify the suspect's behavior":

Additionally, the interrogator minimizes the moral seriousness of the suspect's criminal behavior. Blame is shifted from the suspect to some other person or set of circumstances that prompted him to commit the crime ... It is highly recommended that the interrogator be prepared to present at least five reasons and excuses to the suspect as to why he committed the crime and at least five additional ways to minimize the suspect's criminal behavior.⁶⁷

While this approach may well produce confessions, it does so at a serious cost to fundamental principles – the commitments that the integrity of the criminal process is paramount, that criminals should get their just deserts for what they have done, and that victims' interests should be taken seriously. These problems are particularly apparent in sexual assault investigations. Reid & Associates provide a long list of 'rape themes' for

⁶⁵ Inbau et al., *supra* note 11, at 202.

⁶⁶ Inbau et al., *supra* note 11, at 202.

⁶⁷ Louis C. Senese, *Anatomy of Interrogation Themes* 28-29 (John E Reid & Associates 2009).

interrogators to deploy, most of which explicitly shift blame to the victim. Investigators are advised, for example, to “[b]lame the victim’s style of dress for leading the suspect on’ or ‘[b]lame the victim’s actions ... such as ... rejecting the suspect’s advances.”⁶⁸ While such victim-blaming has been roundly condemned and rejected in modern criminal justice, Reid & Associates *train* interrogators to blame victims.

A clear distinction must be drawn here between the inevitable selection involved in constructing any account and the deliberate elicitation of an untrue account. As noted above, investigators distinguish between relevant and irrelevant information by selecting from a world of facts those which make sense in building an emergent account. What is not acceptable is that suspects should be brought to confess to crimes that they did not commit (even if they did do something else). Although it is not always possible to access full truth, a criminal justice system built on integrity would surely seek to minimize the gap between what actually happened and what the process records. Whilst it might be naive and idealistic to expect justice systems reliant on negotiated confessions, charges and guilty pleas to take truth-finding so seriously, a criminal process committed to integrity should embrace that as its goal.

2. PEACE and investigative interviewing.

Investigative interviewing, usually associated with the acronym PEACE,⁶⁹ was developed in the 1990s in response to the problem of miscarriages of justice and failed prosecutions in

⁶⁸ *Id.* at 219–20.

⁶⁹ An acronym for Prepare, Engage, Account, Close, Evaluate. See Colin Clarke & Rebecca Milne, *Interviewing Suspects in England and Wales*, in *International Developments and Practices in Investigative Interviewing and Interrogation: Volume 2: Suspects* 101-18 (David Walsh et al. eds., Routledge 2016).

England and Wales. These failures were attributed to investigative weakness, including the use of practices drawn from the Reid Technique. The critique of interrogation practice had a strong interdisciplinary and inter-professional character: researchers from sociology, law, criminology and psychology collaborated in research programs with police officers, some of them notably impressive academic-practitioners. They built and developed PEACE as a method applicable to various types of criminal investigation. The use of PEACE has spread and variants are now widely used in Europe as well as Australia and New Zealand. Its recommendation as the basis for worldwide standards on interrogation by the U.N. Special Rapporteur on Torture in 2016 is likely to spread its influence further.⁷⁰

At its heart is a simple, but crucial shift of emphasis: rather than setting out to gain a confession which confirms a case theory to which the officer is firmly committed, the interrogating officer is encouraged to elicit the suspect's account and then to check its authenticity by questioning and by testing it against other evidence. Rapport-building replaces confrontation as the method, while information replaces confession as the goal. While officers may not in practice structure their interrogations according to the cognitive methodology of PEACE, more important is the fact that many officers are now trained to replace inefficient and/or coercive techniques with an approach which incorporates basic elements of effective interviewing in any context, such as asking clear, open questions, listening to what the suspect has to say, responding appropriately, and treating the suspect decently. Crucially, new role models for the young officer become available: the tradition of arresting on hunches, interrogating, and giving weak cases a run has been challenged by

⁷⁰ Juan E. Mendez (Special Rapporteur on Torture), *Interim Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/71/298 (Aug. 5, 2016).

according status to officers who investigate and collect evidence carefully, find ways of working within the rules, interrogate skillfully, and get convictions which are not overturned on appeal.⁷¹

PEACE was provided as a way of interrogating that would both withstand judicial scrutiny and would produce results. Rather than imposing rules backed by threat of sanction – the classic command/control mode – PEACE provides a way of doing the job. The challenge was to provide an alternative to established working practices which were connected to cultural norms and values and beliefs – the imperative of obtaining confessions, the working style of the detective, the expectation that suspects will crack under coercive, persuasive questioning. The toehold that PEACE could exploit was the evidence that traditional practices were inefficient, leading to the conviction of the innocent and the evasion of justice by the really guilty. This provided an opportunity for a new approach to interrogation to become the standard way of working, making the crucial transition from externally imposed standard to working norm and self-regulation.⁷²

3. Intelligence interrogation and H.I.G.

A significant feature of the reaction against the documented failures of torture and other coercive interrogation in the years following 9/11 as U.S. agencies and their allies fought the “war on terror” has been the promotion of PEACE-style interrogation. A now standard part of critiques of torture and related techniques is that other methods are more effective, even in questioning those allegedly involved in terrorism. In particular, it is argued that

⁷¹ Dixon, *supra* note 2, at 164-66.

⁷² Clarke & Milne, *supra* note 69.

interviewers with appropriate language skills, cultural knowledge and training can build rapport with suspects and thereby produce results.⁷³

This critique led to the development of “Intelligence interrogation.” The High-Value Detainee Interrogation Group (H.I.G.) was set up in 2009 with President Obama’s mandate to develop effective, lawful alternatives to torture and coercion.⁷⁴ The high point to date is its statement of “Interrogation best practices”, published in 2016.⁷⁵ H.I.G. is used specifically for interrogation designed to get actionable intelligence from detainees held under anti-terrorist powers. However, a significant effort has been made to spread its lessons to regular law enforcement departments across the U.S. Typically, the flow from military to criminal justice has been of hardware, militarizing civil law enforcement. Paradoxically, here we see non-coercive methods being spread from the security sector to civil police. After all, if a method is shown to work in interrogating terrorist suspects, it is reasonable to expect that it will work in those being investigated for lesser crimes. Despite the acknowledged differences, this is realistic because rather than treating terrorist detainees as group requiring extreme measures, “Intelligence interrogation” is founded on the belief that basic principles of investigative interviewing are applicable.

⁷³ Gelles et al., *supra* note 28; John Pearse, *The Investigation of Terrorist Offences in the United Kingdom*, in *Handbook of Psychology of Investigative Interviewing* (Ray Bull et al. eds., Wiley 2009).

⁷⁴ High-Value Detainee Interrogation Group, <https://www.fbi.gov/about/leadership-and-structure/national-security-branch/high-value-detainee-interrogation-group> (last visited April 10, 2017, 8.30 PM). *See also* Rupert Stone, *Beyond Torture*, *Newsweek*, June 9, 2015, <http://www.newsweek.com/2015/06/19/beyond-torture-new-science-interrogating-terrorists-340944.html>.

⁷⁵ *See* High-Value Detainee Interrogation Group, *Interrogation Best Practices Report*, <https://www.fbi.gov/file-repository/hig-report-august-2016.pdf/view> (last visited Apr. 10, 2017).

H.I.G.'s work grew out of *Educing Information*, a notable essay-collection on intelligence interrogation provided by a group advising "senior intelligence community leaders on emerging scientific and technical issues."⁷⁶ A key message was that lack of research constrained the development of good policy. The response has been a substantial investment in interrogation psychological research: the H.I.G. has funded "world-renowned Ph.D.-level scientists known for their expertise in interrogations and other related fields. To date, the H.I.G. has funded more than 100 interrogation research projects."⁷⁷ This has been primarily psychological research: the interdisciplinary style of research which led to PEACE has been less influential.

4. Takeover or confluence?

A recent survey claimed that "a paradigm shift is underway across the globe, from the traditional interrogation model, with an emphasis on persuading suspects to confess, to the investigative interviewing model emphasizing a search for the truth and the collection of accurate and reliable information from interviewees."⁷⁸ In the U.S., there have been two notable developments. First, the H.I.G. claimed a major scalp when the Los Angeles Police

⁷⁶ Intelligence Science Board, *Educing Information*, (National Defence Intelligence College 2006).

⁷⁷ H.I.G., *supra* note 74.

⁷⁸ Alison Redlich et al., *Introduction*, in *International Developments and Practices in Investigative Interviewing and Interrogation: Volume 2: Suspects 1-2* (David Walsh et al. eds., Routledge 2016). This collection includes useful summaries of the situation in various common law jurisdictions including Canada, the USA, England and Wales, New Zealand. Coverage of Australia, given its leading role in audio-visual recording, is surprisingly thin. There is nothing on the Asian sub-continent or Africa which both include major common law jurisdictions.

Department stated its intention to adopt investigative interviewing methods.⁷⁹ Second, a major commercial provider of interrogation training, Wicklander-Zulawski, very publicly announced that it was abandoning the Reid Technique and adopting investigative interviewing.⁸⁰ The influence of such big players is likely to be considerable: in turn, the change in the U.S. will encourage change in other jurisdictions in both the common and civil law worlds. As Malsch and de Boer show in chapter 19, investigative interviewing is already influential in continental Europe. The influence of western approaches to criminal process is growing in East Asia, notably China, Japan, Taiwan and South Korea. Missionaries going to the east find that their policy seeds grow in unexpected ways in very different conditions and that assumptions of the inevitable progress of liberal-democratic ideas are disappointed. In China, a garbled legislative version of PACE-like criminal procedure perversely coincided with a crackdown on defense lawyers who dared to represent dissidents.⁸¹ Meanwhile, in Japan, sophisticated proponents of western approach face familiar problem of opposition from those adhering to a distinctive, traditional approach.⁸²

It would be naïve to think that these changes will come easily anywhere. Entrenched social, economic and market interests will continue to seek to protect what have become

⁷⁹ Robert Kolker, Nothing but the Truth, The Marshall Project (May 24, 2016),

<https://www.themarshallproject.org/2016/05/24/nothing-but-the-truth#.D7cInOPFy>.

⁸⁰ W-Z Press Release, Wicklander-Zulawski Discontinues Reid Method Instruction After More Than 30 Years (March 6, 2017), <https://www.w-z.com/portfolio/press-release>.

⁸¹ Sida Liu & Terence C. Halliday, *Criminal Defence in China* (Cambridge Univ. Press 2016); Marvin Zalman & Yuning Wu, *The interrogation of criminal suspects in China*, in *International Developments and Practices in Investigative Interviewing and Interrogation: Volume 2: Suspects 7* (David Walsh et al. eds., Routledge 2016).

⁸² Wachi et al., *supra* note 23.

traditional interrogation methods. Cultural change in police departments will come slowly. There are already attempts to compromise, combining investigative interviewing and the Reid Technique.⁸³

IX. **Conclusion: revisiting the myths**

This chapter opened with a summary of myths about police interrogation. The research literature indicates that reality is very different. In the world of everyday criminal process, most interrogations are mundane rather than tense, and suspects cooperate or, less often, deny allegations, whatever police do. Few suspects shift from denial to confession. In the past, many police have not interviewed well, but officers can be trained to be more efficient if they set aside coercive, persuasive tactics. Even though suspects are confined on police territory, everyday interviews are often more socially balanced than is usually assumed. Questioning serves a number of purposes which cannot be reduced to a search for truth. Body language is not a reliable guide to detection of deception. While young suspects and those suffering from a disability are particularly vulnerable, inaccurate confessions are also made by suspects of all kinds. Far from harming police efficiency, good legal regulation increases it, maintaining confession and conviction rates and reducing wrongful convictions. Such regulation should include audio-visual recording as just one of a combination of managerial and legal controls over investigation and detention.

Finally, there are reasons for unfashionable optimism about the future of interrogation law and practice. Some collaboration between police and academics in this field has been exemplary. If police officers are shown how to improve their practices (rather than simply told what not to do) their response is often positive. They are most likely to

⁸³ Slobogin, *supra* note 55.

respond in this way if they are convinced that changing their practices will not only serve the interests of legality, but will also make them more efficient. Or, to put it more bluntly, if they understand that traditional modes of questioning suspects have led not just to the wrong people being convicted, but also to the really guilty being left free to carry out other crimes.

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