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A Comparative Examination of Police Interrogation of Criminal Suspects in Australia, Canada, England and Wales, New Zealand, and the United States

Authors

Carol A. Brook, Bruno Fiannaca, David Harvey, Paul Marcus, Renee Pomerance, and Paul Roberts

A COMPARATIVE EXAMINATION OF POLICE INTERROGATION OF CRIMINAL SUSPECTS IN AUSTRALIA, CANADA, ENGLAND AND WALES, NEW ZEALAND, AND THE UNITED STATES

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Many thanks to research assistant Margaret Shadid, UIC John Marshall Law School Class of 2020, for her excellent assistance on this Article.

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Judge Harvey graduated with an LLB from Auckland University in 1969, an MJur from University of Waikato in 1994, and a PhD from Auckland University in 2012. His doctoral dissertation was on the influence of a new technology (the printing press) on law and legal culture in England in the Early Modern period. Judge Harvey has an interest in the immediate and wider impact of technology on the law and legal culture and continues researching in this field.

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Renee Pomerance,^{****} and Paul Roberts^{*****†}

ABSTRACT

The interrogation process is central to the investigation and resolution of criminal matters throughout the world. It is fundamental to a comprehensive understanding of comparative criminal procedure to study and appreciate the different approaches to the interrogation process in different nations. This Article developed through a series of conversations between six international criminal justice professionals—practicing attorneys, scholars, and judges—regarding the interrogation practices and

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† Editor’s Note: Due to the comparative nature of this Article and in consultation with the authors, several of the sources have been cited using elements of the style of the original jurisdiction rather than in strict adherence to Bluebook citation style.

rules in their respective countries. Providing a comparative look at this important area, this Article examines the applicable practices and procedures in the common law nations of Australia, Canada, England and Wales, New Zealand, and the United States.

I. THE INTERROGATION PROCESS

A. Must warnings be given when law enforcement officers interrogate? Under what circumstances? What is the substance of those warnings?

AUSTRALIA, HON. JUSTICE FIANNACA:

Australia consists of nine jurisdictions in a federal constitutional system, being the Commonwealth of Australia, six states, and two territories that have been granted a limited right of self-government by the federal government.¹ Commonwealth law applies in all states and territories alongside the laws made by the legislatures of those jurisdictions, and federal law enforcement agencies operate within each of the states and territories separately from, but at times in conjunction with, the state and territory police forces and other investigative agencies.² In each jurisdiction, the criminal law, including the law of criminal procedure and the law of evidence as it affects criminal proceedings, is largely set out in legislation enacted by the government of that jurisdiction, augmented by the common law.

In general terms, law enforcement officers in all Australian jurisdictions are obliged by legislation to afford arrested suspects (i.e., persons they reasonably suspect to have been involved in the commission of an offence) a number of rights before they question them in respect of the matter under investigation.³ One such right is a caution to the effect, generally, that the suspect is not obliged to answer questions, and that anything they say or do during the course of an interview may be used in

¹ In order of the most populous to the least, the states and territories are: New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania, Australian Capital Territory, and Northern Territory. There are other territories, including external territories, but they do not have separate legislatures and statutory frameworks.

² *The Australian Legal System*, AUSTL. NAT'L UNIV., <https://libguides.anu.edu.au/c.php?g=634887&p=4547083> [<https://perma.cc/ET28-8TZX>] (last visited May 6, 2021).

³ See, e.g., *Crimes Act 1914* (Cth) ss 3, 3V–3ZQ (Austl.); *Evidence Act 1995* (Cth) s 139 (Austl.); *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 114–131 (Austl.); *Evidence Act 1995* (NSW) s 139 (Austl.); *Crimes Act 1958* (Vic) ss 464A–464J (Austl.); *Police Powers and Responsibilities Act 2000* (Qld) ss 391, 396–441 (Austl.); *Criminal Investigation Act 2006* (WA) ss 136–143 (Austl.); *Summary Offences Act 1953* (SA) s 79A (Austl.); *Bail Act 1985* (SA) s 13 (Austl.); *Evidence Act 2011* (ACT) s 139 (Austl.); *Crimes Act 2000* (ACT) s 222 (Austl.); *Evidence Act 2001* (Tas) s 139 (Austl.); *Criminal Law (Detention and Interrogation) Act 1995* (Tas) ss 4–6, 9 (Austl.); *Police Administration Act 1978* (NT) ss 127, 135, 140 (Austl.). The New South Wales, ACT, and Tasmanian provisions mirror the Commonwealth provisions. I note also that, despite the title of the South Australian statute, it contains the law concerning the arrest and interviewing of suspects for indictable offences (which are generally tried before juries).

evidence in a court of law.⁴ Across the jurisdictions there are different formulations of the caution, but flexibility is allowed in respect of the wording to ensure that a suspect understands the substance of the caution. The caution may be given on more than one occasion in an officer's dealings with a suspect, which will usually culminate in a videorecorded interview. Further, in two jurisdictions the content of the caution is not set out in the statute and must be discerned from other sources.⁵

Before the enactment of statutory provisions stipulating the rights of suspects and the obligations of law enforcement officers in respect of questioning (or interrogation) of suspects, there was no requirement at common law for a law enforcement officer to caution a suspect in respect of his or her right to remain silent and the use that could be made of anything said by the suspect.⁶ The common law principles governing the admissibility or discretionary exclusion of confessions (or, more broadly, admissions relevant to the commission of the offence)⁷ made by accused persons did not create such an obligation, but, over time, they provided the context for the potential consequences of a failure to caution. The principles, which continue to apply, consist of two "definite"⁸ rules that predicate the admissibility of evidence of a confession upon the confession being "voluntary," and three discretionary bases for the exclusion of such evidence even if it is found to have been voluntary.⁹ The discretionary bases were summarised by Gleeson CJ in *Tofilau v The Queen*:

The first is a case where it would be unfair to the accused to admit the statement. The relevant form of unfairness is related to the law's protection of the rights and privileges of the accused person. The second is a case where considerations of public policy, such as considerations that might be enlivened by improper police

⁴ *Crimes Act 1914* (Cth) s 23F; *Evidence Act 1995* (Cth) s 139; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 122; *Evidence Act 1995* (NSW) s 139; *Crimes Act 1958* (Vic) s 464A(3); *Police Powers and Responsibilities Act 2000* (Qld) s 431(1); *Criminal Investigation Act 2006* (WA) s 138; *Summary Offences Act 1953* (SA) s 79A(3); *Evidence Act 2011* (ACT) s 139; *Evidence Act 2001* (Tas) s 139; *Police Administration Act 1978* (NT) s 140.

⁵ *Police Powers and Responsibilities Act 2000* (Qld) s 431(1) (referring to an obligation to caution the person "in the way required under the responsibilities code"); *Criminal Investigation Act 2006* (WA) s 138 (referring simply to an arrested suspect's entitlement "to be cautioned before being interviewed as a suspect"). For the content of the caution in Western Australia, see *infra* text accompanying note 20.

⁶ *Carr v Western Australia* (2007) 232 CLR 138, 141 (Austl.).

⁷ Henceforth I will use "confession" to encompass also relevant admissions that are not explicitly a confession of the offence.

⁸ *Tofilau v The Queen* (2007) 231 CLR 396, 408 (Austl.). Although the meaning of "definite" in this context is debatable (as appears from the judgments in *Tofilau*), it would appear to denote that the rules do not involve the exercise of a discretion; rather, a finding that a confession was not voluntary will necessarily result in exclusion of the confession from the evidence at trial.

⁹ 231 CLR at 401–02, 408, 411, 416, 418–19, 422–23, 468–70.

conduct, make it unacceptable to admit the statement. The third concerns the general power of a trial court to reject evidence on the ground that its prejudicial effect (that is to say, the danger of its misuse, not its inculpatory force) outweighs its probative value.¹⁰

I will refer to the common law principles in more detail below in the context of what would be an improper interrogation.

In England, in the absence of a common law requirement for a caution to be given, the judges of the King's Bench Division promulgated the Judges' Rules for the guidance of police officers in relation to obtaining evidence, especially confessional evidence, and those rules included a requirement that "[a]s soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence," the officer was required to caution the suspect that they were not obliged to say anything unless they wished to do so, but what they said would be put into writing and given in evidence.¹¹ Aspects of the Judges' Rules, including the requirement for a caution, were adopted in Australia in practices and standing orders implemented by the various commissioners of police, and continue to apply in updated forms.¹² However, the Judges' Rules have never been law in Australia, although they have been recognised as useful guides to the propriety of police conduct for the purpose of considering the exercise of the discretion to exclude confessional statements.¹³ Commissioners' circulars and standing orders have been regarded in the same way,¹⁴ although some orders may fall into the category of subsidiary legislation, breach of which will mean the police conduct was unlawful and would engage the public policy head of discretionary exclusion.¹⁵

The rights of arrested suspects and the obligations of police officers in respect of them are now largely governed by legislation.¹⁶ There are differences between the jurisdictions, although there are also common threads. A detailed comparison is beyond the scope of this contribution. As I am a judge in Western Australia, I will focus generally on the legislation in this State.

In general terms, the statutory provisions identify the rights of an arrested suspect and impose obligations on investigating officers to enable the suspect to exercise those

¹⁰ *Id.* at 402; see also *R v Swaffield* (1998) 192 CLR 159, 189 (Austl.); *Cleland v The Queen* (1982) 151 CLR 1, 5, 9 (Austl.).

¹¹ *Harling v Hall* (1997) 94 A Crim R 437, 439 (Austl.) (quoting *Practice Note (Judges' Rules)* [1964] 1 WLR 152 (Eng.)).

¹² For the situation in Western Australia, see *Norton v The Queen* [2001] WASCA 207 (19 July 2001) 46–49 (Austl.).

¹³ *R v Lee* (1950) 82 CLR 133, 142–43 (Austl.); *Van der Meer v The Queen* (1988) 82 ALR 10, 15–16 (Mason CJ) (Austl.); *Harling*, 94 A Crim R at 439–40.

¹⁴ *R v Collins* (1979) 4 NTR 1, 28 (Gallop J) (Austl.); *Norton*, [2001] WASCA 207 at 60, 64.

¹⁵ *Norton*, [2001] WASCA 207 at 64.

¹⁶ In relation to the need for a caution when interviewing suspects, see for example *Crimes Act 1914* (Cth) s 23F (Austl.); *Evidence Act 1995* (Cth) s 139 (Austl.).

rights. The obligations take two forms: the provision of information and the facilitation of the suspect's rights.

In Western Australia, the obligation to caution the suspect arises by way of the need to afford the suspect his or her right to be cautioned before being interviewed.¹⁷ What it means to be "cautioned" is not defined in the statute.¹⁸ In that regard, the provisions of the Criminal Investigations Act (CIA) differ from similar provisions in other jurisdictions, most of which stipulate the terms of the caution.¹⁹

In Western Australia, the statute has been construed on the basis that it was enacted in the knowledge of the long-established practice of a caution being given to arrested suspects in this State in accordance with the Commissioner's Orders and Procedures Manual (COP's Manual), which currently provides relevantly:

When a police officer administers a caution the words used should be similar to:

'You are not obliged to say anything unless you wish to do so, but whatever you do say will be recorded and may later be given in evidence.'

The exact words used may vary. In the case of children or others who may have difficulty comprehending the caution it may be necessary to break it down. What is critical is that a police officer conveys it to the suspect and is satisfied that they understand:

- They are free to speak or be silent or that they do not have to answer questions (addresses voluntariness)
- Whatever they say will be recorded (addresses fairness)
- What they say may be communicated to a court in evidence (addresses fairness).²⁰

In practice, particularly during videorecorded interviews, the caution will be elaborated upon by reference to the presence of the cameras and microphones and the fact that the interview will be recorded on video, and by the use of words similar to the caution in the Commonwealth *Crimes Act*, which refers to what the suspect may do, as well as what they may say.²¹ Further, although it is not mandated by the CIA or the COP's Manual, it is almost invariably the practice that the interviewer will ask the suspect to repeat the caution back in their own words to indicate their understanding. As evidence that it is ingrained in training, that approach is taken

¹⁷ *Criminal Investigation Act 2006* (WA) ss 137(3), 138(2) (Austl.).

¹⁸ *See id.* s 138(2).

¹⁹ *See sources cited supra* note 4.

²⁰ W. AUSTL. POLICE FORCE, POLICE MANUAL, at s QS-01.02.3 (2020); *see Wright v Western Australia* [2010] WASCA 14 (29 January 2010) 3–4 (Austl.).

²¹ The need for a video recording arises by virtue of *Criminal Investigation Act 2006* (WA) s 118, which I will discuss later.

irrespective of the suspect's level of sophistication or legal knowledge. If breaks are taken during the course of an interview, the suspect will be reminded of the caution upon recommencement. There will sometimes also be reminders of the caution when the suspect is asked to do something specific during the interview, such as making a drawing or signing a photograph shown to him or her.

In Western Australia, the obligations to which I have referred, including the giving of a caution, are not confined to police officers, but apply also to a "public officer," as defined in the CIA, and to "any person who holds an office with powers to arrest people."²² The statutes in other jurisdictions refer to "police officer," "investigating official," and "investigating member" (of the police).²³ In all jurisdictions except Queensland, the provisions relate to persons who are in custody, having been arrested. In order to have arrested the suspect, the investigating officer must have reasonably suspected that the person had committed, was committing, or was about to commit an offence.²⁴ A reasonable suspicion is a state of mind, based on known facts, that is more than speculation but less than belief that the suspect is probably guilty of the offence.²⁵ The Queensland legislation refers to a "relevant person" being a person who "is in the company of a police officer for the purpose of being questioned as a suspect about his or her involvement in the commission of an indictable offence."²⁶ The *Crimes Act* refers to a person who is under arrest and "a protected suspect,"²⁷ being a person who has not been arrested, but

is in the company of an investigating official for the purpose of being questioned about a Commonwealth offence . . . [and in respect of whom] the official believes that there is sufficient evidence to establish that the person has committed the offence . . . [or] the official would not allow the person to leave if the person wished to do so . . . [or] the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so²⁸

It will be apparent that the statutory provisions in the Commonwealth jurisdiction (which are mirrored in New South Wales and Tasmania) and in Queensland are

²² *Id.* s 138(1) ("Public officer" is defined in section 3 to mean "a person, other than a police officer, appointed under a written law to an office that is prescribed under section 9(1)" of the CIA.).

²³ *See, e.g., Crimes Act 1958* (Vic) ss 464(3), 464C(1) (Austl.); *Crimes Act 2000* (ACT) s 212(a) (Austl.); *Police Administration Act 1978* (NT) s 140 (Austl.).

²⁴ *See, e.g., Criminal Investigation Act 2006* (WA) s 128.

²⁵ *See Lai v The Queen* [2003] NTCCA 12 (14 November 2003) 9 (Austl.).

²⁶ *Police Powers and Responsibilities Act 2000* (Qld) s 415(1) (Austl.).

²⁷ *Crimes Act 1914* (Cth) s 23B(1), 23B(2) (Austl.).

²⁸ *Id.* s 23B(2).

engaged even if the person who is in the company of the police is not under arrest. What is the situation in Western Australia if the police interview a person who they have not arrested, but suspect of having committed the offence? Such a situation may arise where a person attends the station voluntarily at the request of the police, or where the suspect is already in custody as a sentenced prisoner. In the first instance, it would be expected—if the police had a reasonable suspicion—that the person would be arrested for the purposes of the interview so that he could be afforded his rights under sections 137 and 138 of the *Criminal Investigation Act*.²⁹ If that did not occur, the common law principles would apply, as they would in the case of the sentenced prisoner. A failure to inform the suspect of the offence for which he or she was being investigated, or to caution the suspect, would be relevant factors in determining whether any confession should be excluded in the exercise of discretion if objection were taken.³⁰

Finally, it should be noted that there are a number of statutory powers conferred on investigating agencies by which persons who are believed to have relevant information may be compelled to provide that information. Examples can be found in proceeds of crime legislation and the powers conferred on anti-corruption agencies. They also include powers enabling police investigators to compel a suspect to unlock a password protected electronic device (or provide information for that purpose). There are checks and balances in such laws for the proper exercise of those powers. In the case of compulsory examinations, there will ordinarily be a prohibition on the use of evidence so obtained in criminal proceedings (other than for perjury) against the person who has given the evidence.³¹ Section 23F(3) of the *Crimes Act* specifically excludes the requirement for a caution “so far as another law of the Commonwealth requires the person to answer questions put by, or do things required by, the investigating official.”³² On the other hand, it will be a requirement of procedural fairness that persons who are compelled to answer questions or provide information by other means under statutory provisions must be warned of the consequences of failing to do so, which may include prosecution for contempt.

CANADA, HON. JUSTICE POMERANCE:

The admissibility of statements is governed by two distinct, yet related, sources of Canadian law: the common law confessions rule and the constitutional rules set by section 10 of the *Canadian Charter of Rights and Freedoms*.³³

²⁹ See *Criminal Investigation Act 2006* (WA) ss 137, 138.

³⁰ As to whether the person ought to be regarded as a suspect, see *Western Australia v Gibson* [2014] WASC 240 (4 July 2014) 16–17 (Austl.).

³¹ See, e.g., *Corruption and Crime Commission Act 2003* (WA) s 145(1) (Austl.).

³² See *Crimes Act 1914* (Cth) s 23F(3).

³³ See Canadian Charter of Rights and Freedoms, s 10, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.).

Dealing first with the common law, the “confessions rule” applies to any statement made by an individual to a person in authority.³⁴ The prosecution must prove, beyond a reasonable doubt, that such a statement was voluntary as a precondition to admission.³⁵ A *voir dire* into voluntariness must be held at trial unless the accused has provided a clear, express, and unequivocal waiver.³⁶

Voluntariness may be vitiated by threats, inducements, promises, oppressive conditions, police trickery, or other circumstances that unfairly deny the suspect the right to choose whether to speak to state authorities.³⁷ It is not enough to show that there was a promise or threat or other wrongdoing. There must be a link between the impugned state conduct and the statement. It must be established that the suspect chose to speak *because of* the promise or threat or inducement and that his or her will was overborne.³⁸ Voluntariness will also be vitiated if the suspect demonstrates that he or she did not have an “operating mind” at the time of the statement,³⁹ though the threshold for an operating mind is very low.

Police in Canada abide by the “Judges’ Rules” originally developed in England,⁴⁰ which require that a primary and, in some cases, a secondary caution be given to a suspect. The primary caution reads:

[I wish to give you the following warning:] You need not say anything. You have nothing to hope from any promise or favour, nothing to fear from any threat, whether or not you say anything. Anything you do say may be used as evidence . . . Do you understand?⁴¹

The secondary caution is given where the suspect has already made a statement:

I wish to give you the following warning: You must clearly understand that anything said to you previously should not influence you or make you feel compelled to say anything at this time. Whatever you felt influenced or compelled to say earlier

³⁴ R v. Hodgson, [1998] 2 S.C.R. 449, 460–62 (Can.).

³⁵ *Id.* at 460.

³⁶ *Id.* at 454.

³⁷ R. v. Oickle, 2000 SCC 38 para. 68, [2000] 2 S.C.R. 3, 42 (Can.).

³⁸ *See id.* paras. 15, 33; R. v. Spencer, 2007 SCC 11 para. 13, [2007] 1 S.C.R. 500, 508 (Can.).

³⁹ *Hodgson*, [1998] 2 S.C.R. at 462.

⁴⁰ *See, e.g.*, Clarkson v. The Queen, [1986] 1 S.C.R. 383, 399 (Can.).

⁴¹ R. v. Latimer, [1997] 1 S.C.R. 217, 225 (Can.); *see* SIMON VERDUN-JONES & ADAMIRA TIJERINO, A REVIEW OF *BRYDGES* DUTY COUNSEL SERVICES IN CANADA 33, https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr03_la4-rr03_aj4/rr03_la4.pdf [<https://perma.cc/Z3A4-L3LS>] (last visited May 6, 2021).

you are now not obliged to repeat nor are you obliged to say anything further but whatever you do say may be given in evidence. Do you understand . . . ?⁴²

These warnings are usually given after the *Charter* caution, which I will turn to next.

Sections 10(a) and (b) of the *Charter* provide as follows:

10. Everyone has the right on arrest or detention
 (a) to be informed promptly of the reasons therefor;
 (b) to retain and instruct counsel without delay and to be informed of that right.⁴³

Unlike the confessions rule which applies to any statement given to a person in authority, section 10 applies only if a person is arrested or detained for constitutional purposes.⁴⁴ Detention may be physical or psychological in nature. Physical detention is relatively easy to identify. Psychological detention can be more amorphous. It arises either where 1) failure to comply with a police demand or direction gives rise to liability, or 2) a reasonable person would conclude by reason of the state's conduct that he or she had no choice but to comply with a direction or demand.⁴⁵ It is sometimes difficult to pinpoint the precise moment at which a detention commences. Once it does, the rights under section 10 of the *Charter* are immediately engaged.

Section 10(a) imposes a duty on police to advise the detainee of the reasons for the detention.⁴⁶ Section 10(b) defines the right to counsel and imposes two sets of obligations on police: 1) informational obligations, and 2) implementational obligations.⁴⁷ The informational obligations require police to advise the detainee of the right to retain and instruct counsel without delay, and the availability of free legal advice from a duty counsel at a 1-800 number.⁴⁸ This information must be given

⁴² R. v. Black, [1989] 2 S.C.R. 138, 144 (Can.); see VERDUN-JONES & TIJERINO, *supra* note 41, at 33.

⁴³ See Canadian Charter of Rights and Freedoms, s 10, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

⁴⁴ Compare R. v. Hodgson, [1998] 2 S.C.R. 449, 462 (Can.) (stating that the confessions rule protects statements given during "the arrest, detention, examination or prosecution of the accused" (quoting R. v. A.B. (1986), 26 C.C.C. (3d) 7, 26 (Can.))), with Canadian Charter of Rights and Freedoms, s 10, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.) (stating that the right to be informed and retain counsel without delay is available only for arrestees and detainees).

⁴⁵ R. v. Grant, 2009 SCC 32 para. 30, [2009] 3 S.C.R. 353, 378–79 (Can.).

⁴⁶ See Canadian Charter of Rights and Freedoms, s 10, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

⁴⁷ R. v. Prosper, [1994] 3 S.C.R. 236, 239 (Can.).

⁴⁸ See *id.* at 241, 279.

“immediately.”⁴⁹ The implementational obligations require that police provide a reasonable opportunity for the detainee to exercise the right to counsel (such as the provision of a phone, in private) and that the police refrain from eliciting evidence until the reasonable opportunity has been provided.

Sometimes police will be constitutionally obliged to provide another caution, known as the “*Prosper* warning.”⁵⁰ If a person asks to speak to counsel and then changes their mind, police must tell the person that they still have a right to contact a lawyer and that, during this time, the police cannot take any statements until they had had a reasonable opportunity to contact a lawyer.⁵¹ In effect, the police must advise the person of what they are giving up.

The following would be a typical section 10(b) caution given by police upon detention:

I am arresting you for [name of offence(s)].
 You have the right to retain and instruct counsel without delay.
 You also have the right to free and immediate legal advice from
 duty counsel by making free telephone calls to [toll-free phone
 number(s)] during business hours and [toll-free phone num-
 ber(s)] during non-business hours.
 Do you understand?
 Do you wish to call a lawyer now?

ENGLAND AND WALES, PROFESSOR ROBERTS:

Criminal law within the UK is jurisdictionally differentiated and normatively complex. The criminal law addressed in my contribution is the law and practice of England and Wales, comprising a single, unified legal jurisdiction. Scotland and Northern Ireland have their own, entirely separate criminal justice systems, and Scottish law, in particular, diverges from English law in many significant ways.⁵² English criminal procedure law, broadly encompassing the doctrinal aspects of police interrogation of criminal suspects, continues to be informed by common law thinking. The structure of criminal proceedings in England and Wales is fundamentally adversarial. There is no consolidated criminal code in either substantive criminal law or criminal procedure. Traditional common law precedents remain a primary source of procedural law, but nowadays they increasingly play a subordinate role as authoritative

⁴⁹ See *id.* at 241.

⁵⁰ See *id.* at 278.

⁵¹ See *id.*

⁵² Cf. *Cadder v. HM Advocate* [2010] UKSC 43, [4], [22]–[24]; Pamela R. Ferguson, *Repercussions of the Cadder Case: The ECHR’s Fair Trial Provisions and Scottish Criminal Procedure*, 2011 CRIM. L. REV. 743, 744, 746; Dimitrios Giannouloupoulos, *North of the Border and Across the Channel: Custodial Legal Assistance Reforms in Scotland and France*, 2013 CRIM. L. REV. 369, 369–70, 382–84.

interpretations of statutory provisions. Moreover, legislation and caselaw are supplemented by a diverse variety of secondary legislation, codes of practice, court rules, official guidance, and sundry other informal sources (collectively, “hard-working soft law”) with enormous practical significance out of all proportion to their lowly jurisprudential status.⁵³

Criminal procedure law, and more particularly the topic of police interrogation, exemplifies the normative complexity of English law. The most important piece of legislation for present purposes is the Police and Criminal Evidence Act 1984, generally referred to as “PACE.”⁵⁴ PACE represented a watershed in English law regulating police powers, including powers of arrest, search, seizure, detention, and custodial interrogation. A distinctive feature of the PACE framework is that most of the detailed rules which police follow on a day-to-day basis, and which sometimes become the subject of legal argument in court, are not contained in the primary legislation, but in a series of Codes of Practice. The PACE Codes have been continuously refined and expanded since the 1980s. Policing in England and Wales is still organised on a local basis, with forty-three separate county police forces, but is increasingly centrally directed by policy priorities set by the National Police Chief’s Council⁵⁵ and the Home Office. A prescribed model of interviewing suspects and witnesses is taught to police recruits and implemented nationwide.

The PACE 1984 statutory framework and codes of practice are replete with mandatory warnings. Suspects are constantly to be warned of their rights to remain silent and to receive legal advice. Such warnings are issued, for example, on arrest,⁵⁶

⁵³ Periodically revised Police and Criminal Evidence Act 1984 (PACE) Codes of Practice, designated A–H, are issued by the Home Secretary pursuant to sections 66 and 60A of PACE 1984. See *Police and Criminal Evidence Act 1984 (PACE) Codes of Practice*, GOV.UK (June 18, 2020), <http://www.gov.uk/guidance/police-and-criminal-evidence-act-1984-pace-codes-of-practice#current-versions-of-the-codes> [<https://perma.cc/UES3-CGZY>]; Police and Criminal Evidence Act 1984, c. 60, ss. 60A, 66 (Eng.). Two other influential sources of ‘hard-working soft law’ norms pertinent to the present discussion are: 1) The Criminal Procedure Rules (Crim PR) 2020, in force and updated annually since 2005, Criminal Procedure Rules 2020, SI 2020/759 (Eng.); and 2) the Judicial College’s *Crown Court Compendium* (2020), which is a practically orientated “bench book” for trial judges, THE CROWN COURT COMPENDIUM (Picton et al. eds., 2020), <https://www.judiciary.uk/wp-content/uploads/2020/12/Crown-Court-Compendium-Part-I-December-2020-amended-01.02.21.pdf> [<https://perma.cc/DGG6-YBA8>].

⁵⁴ See Police and Criminal Evidence Act 1984, c. 60.

⁵⁵ See *What We Do and Why*, NAT’L POLICE CHIEFS’ COUNCIL, <http://www.npcc.police.uk/About/AboutNPCC.aspx> [<https://perma.cc/NRE6-BCZQ>] (last visited Mar. 19, 2021).

⁵⁶ See *Police and Criminal Evidence Act 1984 (PACE) Code G Revised Code of Practice for the Statutory Power of Arrest by Police Officers*, HOME OFF., 3.5 (2012), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/903814/pace-code-g-2012.pdf [<https://perma.cc/8ULG-A454>]; *Police and Criminal Evidence Act 1984 (PACE) Code C Revised Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers*, HOME OFF., 10.4 (2019) [hereinafter PACE Code

on being detained at the police station,⁵⁷ whenever an interview is commenced or recommenced after a break,⁵⁸ and whenever suspects are formally charged with an offence.⁵⁹ The general form of the caution is specified by paragraph 10.5 of PACE Code C: “You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in Court. Anything you do say may be given in evidence.”⁶⁰

Common law readers will immediately notice that the current police caution in England and Wales does not conform with our traditional understanding of criminal suspects’ right of silence. This deviation reflects important legislative changes introduced by the Criminal Justice and Public Order Act 1994.⁶¹ Trial judges’ duty to direct jurors on the permissibility of drawing adverse inferences from the accused’s pretrial silence is subject to detailed legislative preconditions, further embroidered in caselaw. Where the enumerated preconditions do not pertain, a different, simpler caution is to be given, as specified by Annex C to PACE Code C: “You do not have to say anything, but anything you do say may be given in evidence.”⁶²

NEW ZEALAND, HON. JUDGE HARVEY:

Section 23 of the New Zealand Bill of Rights Act 1990 (NZBORA) provides that “[e]veryone who is arrested or who is detained under any enactment” has the right to be informed of:

1. the reason for their detention;
2. their “right to consult and instruct a lawyer without delay”; and
3. their right to refrain from making any statement.⁶³

Section 23 only applies to those “arrested or . . . detained under any enactment.”⁶⁴ An arrest or detention under any enactment occurs when “(a) the arrestor, by words or conduct, makes it clear to the person being arrested that he or she is no longer free to go where he or she pleases; and (b) the person being arrested knows that he or she is no longer free to leave.”⁶⁵

C], https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/903473/pace-code-c-2019.pdf [https://perma.cc/VC6J-2V2Z].

⁵⁷ See PACE Code C, *supra* note 56, 3.1.

⁵⁸ *Id.* at 10.1.

⁵⁹ *Id.* at 16.2.

⁶⁰ *Id.* at 10.5.

⁶¹ See Criminal Justice and Public Order Act 1994, c. 33, s. 34 (Eng.).

⁶² PACE Code C, *supra* note 56, Annex C para. 2.

⁶³ New Zealand Bill of Rights Act 1990, s 23 (N.Z.).

⁶⁴ *Id.*

⁶⁵ *Arahanga v. R* [2012] NZCA 480, [2013] 1 NZLR 189 at [53] (N.Z.). Notably, “arrested” in section 23(1) is not limited to lawful or formal arrests. See *R v. Kirifi* [1992] 2 NZLR 8 (CA)

An arrest is

of a mixed objective and subjective nature, [the question] is whether the suspect has “a reasonably held belief, induced by police conduct, that he or she is not free to leave.” A common-sense question to ask is whether there was some form of substantial interference with . . . personal liberty in the light of the nature, purpose, extent and duration of the constraint. Something more is required than a “temporary check, hindrance or intrusion on the citizen’s liberty.”⁶⁶

The “police conduct” inducing the requisite belief must be something beyond the general environment of the interview.⁶⁷ Conduct sufficient to induce a belief in detention may include “words indicating that a witness is obliged to co-operate, generally intimidating behaviour by the police, or words indicating that the person to be interviewed is suspected of a serious crime.”⁶⁸

In addition to the above NZBORA provisions, the Practice Note on Police Questioning issued by former Chief Justice Sian Elias on 16 July 2007 is also of relevance.⁶⁹ Clause 2 provides:

Whenever a member of the police has sufficient evidence to charge a person with an offence or whenever a member of the police seeks to question a person in custody, the person must be cautioned before being invited to make a statement or answer questions. The caution to be given is:

- (a) that the person has the right to refrain from making any statement and to remain silent
- (b) that the person has the right to consult and instruct a lawyer without delay and in private before deciding whether to answer questions and that such right may be exercised without charge under the Police Detention Legal Assistance Scheme.
- (c) that anything said by the person will be recorded and may be given in evidence.⁷⁰

at 11 (N.Z.). If the arrest is unlawful, for example, if it is in the absence of the requisite “reasonable grounds” or “good cause,” it will still be an arrest for the purposes of section 23. *See id.*

⁶⁶ *Yoganathan v. R* [2017] NZCA 225 at [20] (N.Z.) (citations omitted).

⁶⁷ *R v. McCallum* [2007] NZHC 2065 at [15] (N.Z.).

⁶⁸ *Id.* at [16].

⁶⁹ *See generally* Sian Elias, PRACTICE NOTE—POLICE QUESTIONING (§ 30(6) OF THE EVIDENCE ACT 2006) (2007), <https://www.courtsofnz.govt.nz/assets/going-to-court/practice-directions/practice-notes/high-court/pnpoliceq.pdf> [<https://perma.cc/72FS-CQSH>].

⁷⁰ *Id.* at 1–2.

In terms of the specific content of the required cautions in informing a person of their rights, the court's primary concern has been "the substance and intelligibility of the advice, not any specific form of words."⁷¹

UNITED STATES, MS. BROOK:

The law of criminal procedure in the United States is entirely based on the U.S. Constitution as interpreted by the U.S. Supreme Court. Not surprisingly, given the broad language of the Constitution, there are few clear answers to any of these questions. What is clear, however, is that law enforcement officers in the U.S. have long considered confessions to be the "gold standard" proof of guilt.⁷² Likewise, the U.S. Supreme Court has long recognized the significance of confessions at trial. And television's most ubiquitous interrogator, *Law & Order* Detective "Bobby" Goren,⁷³ reinforces this view every time he whispers: "With the right questions, you can find out anything."⁷⁴

Although the Fourteenth Amendment was ratified and made part of the U.S. Constitution in 1868, it took almost seventy years for the Court to decide that the amendment's Due Process Clause⁷⁵ prohibited the admission of coerced confessions in state courts. The case was *Brown v. Mississippi*, and the horrific facts in the case left the Court little choice.⁷⁶ The undisputed facts in *Brown* revealed that all three of the defendants were Black men who had been brutally tortured prior to confessing.⁷⁷

In *Brown*, finding that the actions of the police were "revolting to the sense of justice,"⁷⁸ the Court created a new area of constitutional law to deal with the problem of involuntary confessions. It held that the Fourteenth Amendment's Due Process Clause limited the amount and type of pressure state and local law enforcement could use to persuade suspects to confess and gave federal judges the power to enforce those limits.⁷⁹

One observer noted that:

⁷¹ *Gallichan v. Police* [2009] NZCA 79 at [27] (N.Z.).

⁷² *See, e.g.,* *People v. Powell*, 53 Misc. 3d 171, 177 (N.Y. Sup. Ct. 2014).

⁷³ *See* Chris Addeo, *ION Television Becomes Only Network to Have All Three "Law and Order" Series, the Most-Watched Franchise in History of TV*, GLOBE NEWSWIRE (Sept. 22, 2015, 11:11 AM), <https://www.globenewswire.com/news-release/2015/09/22/770098/10150169/en/ion-television-becomes-only-network-to-have-all-three-law-order-series-the-most-watched-franchise-in-history-of-tv.html> [<https://perma.cc/5KW2-8EY8>].

⁷⁴ *Law & Order: Criminal Intent* (NBC television broadcast).

⁷⁵ U.S. CONST. amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law.").

⁷⁶ 297 U.S. 278, 281 (1936).

⁷⁷ *Id.*

⁷⁸ *Id.* at 286.

⁷⁹ *Id.* The torture of the three defendants included hanging them from tree limbs, tying them to the trees, whipping them, rehanging them, driving them to a distant county, and then whipping them until they confessed. *Id.* at 281–82.

[A]lthough the *Brown* Court did not openly address the role that race played in the case, “the opinion’s repeated references to the race of the murder victim, the race of the defendants, and the race of their attackers do more than merely demonstrate a general awareness of the institutionalized racism existing in that time and place.”⁸⁰

Unfortunately, issues of race continue to permeate the law of criminal procedure in the United States, as will become apparent in my answers below.

In the thirty years following *Brown*, the Supreme Court reviewed almost three dozen cases in which it grappled with the problem of coerced confessions, applying a totality of the circumstances test to the individual facts of each case. Many, like *Brown*, involved extreme physical torture of Black men in the South.⁸¹ Others included psychological coercion such as prolonged interrogations and threats of mob violence.⁸² In 1966, having made so little progress in the elimination of official coercion, the Court changed direction in the landmark opinion of *Miranda v. Arizona*.⁸³

In *Miranda*, instead of relying on the Fourteenth Amendment, the Court looked to the Fifth Amendment’s privilege against self-incrimination⁸⁴ and held that the prosecution must show that “procedural safeguards effective to secure the privilege” were in place prior to interrogation.⁸⁵ For the first time, law enforcement officers

⁸⁰ Tracey Maclin, *A Comprehensive Analysis of the History of Interrogation Law, with Some Shots Directed at Miranda v. Arizona*, 95 B.U. L. REV. 1387, 1391–92 (2015) (quoting Morgan Cloud, *Torture and Truth*, 74 TEX. L. REV. 1211, 1214 (1996)) (reviewing GEORGE C. THOMAS III & RICHARD A. LEO, *CONFESSIONS OF GUILT: FROM TORTURE TO MIRANDA AND BEYOND* (2012)); see also Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 48, 52 (2000).

⁸¹ Between 1936 and 1962 the Court reviewed thirty-one cases involving confessions obtained by physical or psychological coercion, nine of which were cited in note six of the *Miranda* opinion. Of the twenty-two reversed convictions, fourteen defendants were Black, six were white and two were of unknown race. Wilfred J. Ritz, *Twenty-Five Years of State Criminal Confession Cases in the U.S. Supreme Court*, 19 WASH. & LEE L. REV. 35, 35–36 (1962).

⁸² See, e.g., *Ashcraft v. Tennessee*, 322 U.S. 143, 144–45 (1943) (holding that thirty-six hours of relay teams engaging in continuous questioning resulting in confessions was inherently coercive); *Chambers v. Florida*, 309 U.S. 227, 229–35 (1940) (holding that a group of young Black men in fear of mob violence taken by sheriff’s officers to a different county, held incommunicado and questioned incessantly by a group of white officers and other unknown white men over a five-day period until they confessed, violated due process).

⁸³ 384 U.S. 436 (1966). The *Miranda* Court explained its lengthy opinion was required “because of the nature of the problem and because of its recurrent significance in numerous cases.” *Id.* at 491.

⁸⁴ See U.S. CONST. amend. V (“[N]or shall [any person] be compelled in any criminal case to be a witness against himself.”).

⁸⁵ *Miranda*, 384 U.S. at 444, 478–79.

would be required to warn persons taken into custody of their Fifth Amendment rights before interrogation could begin.⁸⁶ To be clear, however, the decision did not abrogate the Court's due process analysis, which, as we shall see, remains an important protection against the use of coerced confessions at trial.⁸⁷

So the answer to whether warnings must be given prior to interrogation in the U.S. is yes.

When the warnings must be given is more complicated. The *Miranda* Court held that warnings must be given whenever a person is subject to custodial interrogation, defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."⁸⁸ Today, courts—and law enforcement—continue to struggle with the meaning of custody.⁸⁹

In *Oregon v. Mathiason*,⁹⁰ where the questioning occurred inside a police station, the Court began to answer those questions. But rather than focusing on the location of the questioning, the Court looked to the circumstances surrounding the questioning: "[T]he requirement of warnings [is not] to be imposed simply because the questioning takes place in the station house *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'"⁹¹

The inquiry is a two-part test: "[F]irst, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave."⁹²

Under this test, even questioning an inmate inside a prison is not necessarily custodial. In *Howes v. Fields*, the Court looked both to whether the prisoner's freedom of movement had been curtailed and to "whether the relevant environment

⁸⁶ Two years after the Court's *Miranda* decision, an unhappy Congress passed 18 U.S.C. § 3501, making the admissibility of a confession solely dependent on whether the confession was voluntarily made, regardless of *Miranda*. The statute was basically ignored until the issue came before the Court in *Dickerson v. United States*, 530 U.S. 428 (2000), when the Court made clear that *Miranda* was a constitutional decision that could not be overruled by statute. *Id.* at 431–32.

⁸⁷ For a comprehensive review of how courts decide the question of voluntariness, see generally Paul Marcus, *It's Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601 (2006).

⁸⁸ *Miranda*, 384 U.S. at 444. Rather than rewrite the text of the Court's opinions, I have left as is the Court's use of the words "he," "his," and "him" to refer to both men and women.

⁸⁹ See Paul Marcus, *The Miranda Custody Requirement and Juveniles*, 85 TENN. L. REV. 251, 252, 274–97 (2018).

⁹⁰ 429 U.S. 492 (1977).

⁹¹ *Id.* at 495. In *Stansbury v. California*, the Court explained that the test "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." 511 U.S. 318, 323 (1994).

⁹² *Thompson v. Keohane*, 516 U.S. 99, 112 (1995) (footnote omitted).

presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.”⁹³ In *Howes*, neither was present.⁹⁴

Given all this, can interrogation inside one’s home ever be custodial? The answer is a solid maybe. In the leading case of *Orozco v. Texas*,⁹⁵ four officers entered the defendant’s bedroom at 4 a.m. and began questioning him.⁹⁶ At trial, one officer testified that the defendant was not free to leave and was under arrest at the time of the questioning.⁹⁷ Rejecting the State’s argument that interrogation in such familiar surroundings did not amount to custody, the Court found that the interrogation “deprived [Orozco] of his freedom of action in [a] significant way,” citing *Miranda*.⁹⁸

Orozco did not leave behind a smooth wake. Four decades later, one court held that where officers used a battering ram to enter a suspect’s home and the suspect came home during the search, the suspect was *not* in custody because he was told he was not under arrest.⁹⁹ That same year, the Seventh Circuit found that a suspect who was handcuffed in his bedroom while more than a dozen officers searched his home *was* in custody, even though he also was told he was not under arrest.¹⁰⁰

What about interrogation during a traffic stop? The law here is clearer. In *Berkemer v. McCarty*, the Court held that interrogation during a routine traffic stop is not custodial and therefore no warnings are required unless the treatment of the suspect turns into an actual custody situation.¹⁰¹

Age? That’s easy to answer, harder to apply. In *J.D.B. v. North Carolina*, the Court found that if the officers knew or should have known the child’s age when arrested, “its inclusion [as one factor] in the custody analysis is consistent with the objective nature of that test.”¹⁰² Nonetheless, the courts continue to differ on the significance of the child’s age, often depending on how close the child is to adulthood.¹⁰³

Even where custody exists, however, the Court has carved out three exceptions to *Miranda*, exceptions that some, including several Supreme Court Justices, warn go too far toward eviscerating the protections of *Miranda*.¹⁰⁴ The first gives the prosecution the right to impeach defendants with their own unwarned statements if those

⁹³ 565 U.S. 499, 509 (2012).

⁹⁴ *Id.* at 517.

⁹⁵ 394 U.S. 324 (1969).

⁹⁶ *Id.* at 325.

⁹⁷ *Id.* at 327.

⁹⁸ *Id.* (emphasis omitted).

⁹⁹ *United States v. Williams*, 760 F.3d 811, 813 (8th Cir. 2014).

¹⁰⁰ *United States v. Borostowski*, 775 F.3d 851, 855 (7th Cir. 2014); *see also* *United States v. Melo*, 954 F.3d 334, 340 (1st Cir. 2020) (listing factors such as the number of officers present, whether weapons were drawn, the amount of physical restraint used and the type and length of the interrogation).

¹⁰¹ 468 U.S. 420, 429 (1984).

¹⁰² 564 U.S. 261, 277 (2011).

¹⁰³ *See* Marcus, *supra* note 89, at 283–87.

¹⁰⁴ *See, e.g.*, Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 666–67 (1996).

statements contradict their trial testimony. “The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense”¹⁰⁵

Next came the public safety exception, resulting from the compelling circumstances in *New York v. Quarles*.¹⁰⁶ In *Quarles*, after a woman reported she had been raped by a man with a gun wearing distinctive clothing who had just entered a nearby supermarket, the police found the man in the supermarket, handcuffed him, and asked for the location of the gun.¹⁰⁷ The Court held that his response, “over there,” was admissible despite the lack of *Miranda* warnings because “the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment’s privilege against self-incrimination.”¹⁰⁸

The Court created the third exception in *Pennsylvania v. Muniz*, where it held that incriminating answers to routine booking questions not intended to elicit incriminating responses would be admissible in court despite the lack of *Miranda* warnings.¹⁰⁹ “[R]outine booking question[s]” would include biographical data and other questions “reasonably related” to the administrative concerns of law enforcement.¹¹⁰

Miranda requires that suspects be informed of the four basic rights well known to anyone who has ever watched or listened to a police procedural show or podcast produced in the United States.¹¹¹ Emphasizing the importance of using “clear and unequivocal” language,¹¹² the Court mandated that suspects be told:

- You have the right to remain silent
- Anything you say can and will be used against you in court
- You have the right to consult a lawyer and to have one with you during questioning
- You have the right to have a lawyer appointed for you if you cannot afford one¹¹³

¹⁰⁵ *Harris v. New York*, 401 U.S. 222, 226 (1971) (Brennan, J., dissenting).

¹⁰⁶ 467 U.S. 649, 651–53 (1984).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 652, 657. Whether the public safety exception applies in suspected terrorist cases remains an open question. Although the issue was raised in the “Boston Marathon Bomber” case where the agents interrogated the defendant Dzhokhar Tsarnaev about the bombings without giving him *Miranda* warnings, the government’s subsequent agreement not to use his statements in its case-in-chief obviated the issue. See John R. Ellement, *Tsarnaev’s Hospital Interrogation Submitted as Part of Death Penalty Appeal*, BOST. GLOBE (Oct. 22, 2018), <https://www.bostonglobe.com/metro/2018/10/22/boston-marathon-bomber-hospital-interrogation-submitted-part-death-penalty-appeal/vzWmt042BEmQa8iMKCFdcM/story.html> [https://perma.cc/7YVT-GQUL].

¹⁰⁹ 496 U.S. 582, 601 (1990).

¹¹⁰ *Id.*

¹¹¹ *Miranda v. Arizona*, 384 U.S. 436, 467–73 (1965).

¹¹² *Id.* at 467–68.

¹¹³ *Id.* at 468–73.

The warnings need not be a “talismanic incantation” of the words set out in *Miranda*.¹¹⁴ The “Court has never indicated that the ‘rigidity’ of *Miranda* extends to the precise formulation of the warnings given a criminal defendant.”¹¹⁵ Nor does *Miranda* “require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege.”¹¹⁶

It is clear that the warnings need not inform suspects that their silence cannot be used against them. “Police are supposed to say that anything a suspect says may be used against them But the police don’t have to say that silence can’t be used against them.”¹¹⁷

Finally, although the warnings require police to provide appointed counsel if requested, the police need not have a battalion of lawyers at the ready inside the stationhouse. If the suspect requests an appointed lawyer, the police are free to tell the suspects that it might not happen until they go to court.¹¹⁸ Because the majority of defendants in both state and federal court require appointed lawyers, this omission has widescale ramifications.¹¹⁹

B. We know that direct questioning is interrogation. What else would constitute interrogation? Conversations between officers? Showing suspects evidence?

AUSTRALIA, HON. JUSTICE FIANNACA:

In Australia, the term “interrogation” is not used in the statutory provisions dealing with the questioning of suspects. Those provisions refer to “questioning” and “interview” when speaking about the process (as opposed to the outcome—for instance, an “admission”).¹²⁰ In the case law, in particular older decisions, “interrogation” has been used interchangeably with “questioning” and “interview.”¹²¹

The statutory provisions and common law principles to which I have referred are concerned with whether evidence of a confession or relevant admissions should

¹¹⁴ *California v. Prysock*, 453 U.S. 355, 359 (1981).

¹¹⁵ *Id.*

¹¹⁶ *Colorado v. Spring*, 470 U.S. 564, 574 (1987).

¹¹⁷ Jan Hoffman, *Police Tactics Chipping Away at Suspects’ Rights*, N.Y. TIMES (Mar. 29, 1998), <https://www.nytimes.com/1998/03/29/nyregion/police-tactics-chipping-away-at-suspects-rights.html> [<https://perma.cc/BUA2-JBWE>] (quoting Professor Stephen Schulhofer).

¹¹⁸ *Duckworth v. Eagan*, 492 U.S. 195, 200–04 (1989). Although the Supreme Court in *County of Riverside v. McLaughlin* did hold that absent extraordinary circumstances, a person arrested without a warrant must be brought before a judicial officer within forty-eight hours of arrest, suspects need not be told that either. 500 U.S. 44, 56–59 (1991).

¹¹⁹ See *OJP Fact Sheet: Indigent Defense*, OFF. JUST. PROGRAMS (2011), https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/factsheets/ojpfactsheet_indigentdefense.html [<https://perma.cc/NBY4-63JN>].

¹²⁰ See, e.g., *Criminal Investigations Act 2006* (WA) ss 117–18 (Austl.) (requiring an “admission” to be on an audio-visual recording for it to be admissible in a trial for a serious offence).

¹²¹ See, e.g., *R v Ireland* (1970) 126 CLR 321, 332 (Austl.).

be received into evidence. Strictly speaking, the method need not be determinative, except to the extent that statutory provisions envisage an interview process and stipulate the obligations on investigating officers in respect of that process. However, it is the case that anything that takes place during the course of an interview is to be regarded as part of the interview or interrogation. If a conversation takes place between police officers in the presence of an accused during an interview, it is part of the circumstances to be taken into account in assessing the admissibility of any admissions made by the accused. However, if the conversation is hearsay in nature (as opposed, for instance, to a discussion about what materials to show the accused) and it does not elicit relevant information from the accused, the conversation would be excised from an otherwise admissible interview. The basis here is that the conversation is irrelevant and inadmissible, in the same way as opinions expressed by the interviewing officers would ordinarily be deleted. Similarly, if information is provided to the accused, the fact that it is not direct questioning will not prevent it from being part of the interview or interrogation.¹²²

The showing of evidence to an accused is a routine aspect of questioning, whether in the interview room, at the scene of the alleged offence, or during the course of a search of the accused's home or business premises, during which the accused may identify or explain items. All such interactions may properly be regarded as interviews and, in the case of serious charges, will be recorded on video, unless there is a reasonable excuse for the interview not being recorded.¹²³

To the extent that the question is concerned with when a caution is required, in Western Australia, the obligation to give the caution as soon as practicable after the arrest will ordinarily mean that the accused will be cautioned very shortly, if not immediately, after the arrest. If an accused were to make an admission as a result of hearing a conversation between the investigating officers after his arrest, but before a formal interview, it would likely be after he has been cautioned and informed of his other rights. The admissibility of the admission would not depend on whether it was part of an interrogation, but whether it was voluntary.¹²⁴ If exclusion were sought in the exercise of the court's discretion, all of the surrounding circumstances would be taken into account to determine the questions of fairness and public policy.

It is perhaps worth noting that things said or done by an undercover officer during a covert operation, such as the controlled purchase of drugs, the infiltration of a criminal gang, or the online detection of persons seeking to engage in sexual activity with children, do not constitute interrogations for the purposes under discussion. Nor are pretext calls made by complainants, or conversations conducted with the accused by associates at the request of the police, provided they do not

¹²² See, e.g., *id.* at 331–32.

¹²³ The statutory provisions will be discussed in answer to a later question, see *infra* note 327 and accompanying text.

¹²⁴ *R v Swaffield* (1998) 192 CLR 159, 189 (Austl.); *Tofilau v The Queen* (2007) 231 CLR 396, 398–402 (Austl.).

become the “functional equivalent of an interrogation” by an agent of the police, and they do not cut across a clearly expressed exercise of the right to silence.¹²⁵ If a confession is elicited by an undercover police officer in circumstances which the court finds to be akin to an interrogation and in unfair derogation of the suspect’s right to exercise a free choice to speak or to be silent, the evidence may be excluded in the exercise of discretion.¹²⁶

CANADA, HON. JUSTICE POMERANCE:

“Interrogation” is not a term of art in Canada. It is used interchangeably with “questioning” and “interviewing,” though interrogation tends to connote more aggressive police inquiry.¹²⁷

Police use various techniques to elicit evidence from suspects, some more aggressive than others. The “Reid Technique” is still used by many Canadian police agencies.¹²⁸ It is predicated on the goal of manipulating and breaking down the suspect’s will. While there has been some judicial criticism of this technique, the courts have given some latitude to police to use manipulation to coax a suspect into speaking. This is subject to circumstances that would amount to oppression, threats, or other factors that might vitiate voluntariness.¹²⁹

Admissibility of statements does not depend exclusively on what is said by the police and the suspect. Virtually anything that happens in the interview room is open for consideration, be it showing of evidence, or conversation between officers in the suspect’s presence. Anything that might have influenced the suspect’s decision to speak is properly considered when assessing voluntariness and, in some instances, constitutional compliance.

¹²⁵ *Swaffield*, 192 CLR at 178, 184–85 (Brennan J); *id.* at 203 (Toohey, Gaudron & Gummow JJ); *id.* at 220–25 (Kirby J). See generally *R v Anderson* [2008] QDC 137 (7 March 2008) (Austl.) for a first instance decision in the District Court of Queensland in which a complainant in a sexual offence case, who conducted a pretext call with the accused, was found to be the agent of the police and to have engaged in a functional interrogation. The evidence was excluded. *Id.* at 11.

¹²⁶ *Swaffield*, 192 CLR at 197.

¹²⁷ *E.g.*, *R. v. M.J.S.*, 2000 ABPC 44, paras. 18–19 (Can.).

¹²⁸ *See id.* para. 19.

¹²⁹ As described in *R. v. M.J.S.*, *id.* para. 19:

The Reid technique involves a skilful development of “themes” and suggestions put to the suspect in a rapid fire and high intensity manner where the interrogator stays in complete control of the situation. On the rare occasions when there is an opportunity for the accused to respond any disagreement is immediately ignored or overridden and, in particular, any denial is countered with a shift to another theme, or a cutoff remark such as “we are beyond that point—we know you did it” this technique is used over 40 times. Many of the “themes” place blame away from the accused, or minimize any intentional wrong doing.

ENGLAND AND WALES, PROFESSOR ROBERTS:

PACE Code C defines an “interview” (terminology generally preferred to the more aggressive-sounding “interrogation”) as “the questioning of a person regarding their involvement or suspected involvement in a criminal offence or offences.”¹³⁰ This definition complements section 37 of PACE 1984, which authorizes a custody officer to detain a person who is under arrest where there are “reasonable grounds for believing that the person’s detention without being charged is necessary to secure or preserve evidence relating to an offence for which the person is under arrest *or to obtain such evidence by questioning the person.*”¹³¹

Nothing else formally qualifies in English law as an “interview” with a suspect. Police questioning that is not “regarding” a particular individual’s “involvement or suspected involvement in a criminal offence or offences” is not an interview,¹³² so police officers are free to make general inquiries of members of the public, and even to query apparently suspicious behaviour if that is not directly offence-related. Citizens are not legally obliged to answer speculative police questions, though an uncooperative or uncivil response may in itself be treated as suspicious and affording grounds for lawful arrest.

NEW ZEALAND, HON. JUDGE HARVEY:

The word “interrogation” seems to envisage direct, focused, and insistent questioning; however, more subtle means may be equally—or more—effective in obtaining admissions from a suspect and therefore ought to be considered interrogation.¹³³ Guidance in this regard can be taken from caselaw in the context of undercover operations, discussed more fully below. In such cases, the Courts have adopted an “active elicitation” test which, whilst articulations are varied, focuses largely on the question of whether the police caused the accused to make admissions.¹³⁴ If so, the interaction engaged in is considered the “functional equivalent” of an interrogation.¹³⁵

UNITED STATES, MS. BROOK:

In *Rhode Island v. Innis*,¹³⁶ the Court made clear that interrogation not only includes express questioning but also “its functional equivalent.”¹³⁷ “[F]unctional equivalent” was defined as “any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions

¹³⁰ PACE Code C, *supra* note 56, 11.1A.

¹³¹ Police and Criminal Evidence Act 1984, c. 60, s. 37(3) (Eng.) (emphasis added).

¹³² PACE Code C, *supra* note 56, 11.1A.

¹³³ *R v Harrison* [2014] NZHC 2246 at [31] (N.Z.).

¹³⁴ *R v Kumar* [2015] NZSC 124 at [4]–[5] (N.Z.).

¹³⁵ *Id.* at [43].

¹³⁶ 446 U.S. 291 (1980).

¹³⁷ *Id.* at 301.

of the suspect, rather than the intent of the police.”¹³⁸ Nonetheless, the Court noted that “[a]ny knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining” what the police reasonably should have known.¹³⁹

With that understanding, the Court determined that the conversation between the officers in *Innis* did not constitute interrogation. After the police arrested Innis and gave him his *Miranda* rights, Innis requested counsel. The police put Innis in the back of a patrol car and began driving to the police station. During the drive, the officers discussed the fact that there was a school for handicapped children nearby and that it would be a terrible thing if one of them found a loaded weapon and maybe ended up hurting or even killing themselves.¹⁴⁰ At that point, Innis told the officers to turn the car around so he could show them where he hid the gun.¹⁴¹

Finding the conversation between the officers was not an interrogation, the Court said:

There is nothing in the record to suggest that the officers were aware that the respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children. Nor is there anything in the record to suggest that the police knew that the respondent was unusually disoriented or upset¹⁴²

Between 1990 and 1993, one police interrogation expert sat in on 122 felony interrogations and viewed another 60 taped interrogations.¹⁴³ One of his many observations was: “In approximately 90% of the interrogations . . . , the detective confronted the suspect with evidence (whether true or false) of his guilt and then

¹³⁸ *Id.* (footnotes omitted). This point is especially important in cases involving vulnerable suspects, discussed *infra* text accompanying notes 505–06.

¹³⁹ *Id.* at 302 n.8.

¹⁴⁰ *Id.* at 294–95.

¹⁴¹ *Id.* at 295.

¹⁴² *Id.* at 302–03. The Court came to a different conclusion in the earlier case of *Brewer v. Williams*, 430 U.S. 387 (1977), also known as the “Christian Burial Speech” case, where the defendant was accused of murdering a nine-year-old girl. *Id.* at 390–91. Like *Innis*, that case also involved officers driving a defendant to a police station after giving him *Miranda* warnings. *Id.* at 391. Unlike *Innis*, however, the case was decided under the Sixth Amendment right to counsel. *Id.* at 401. Also, where the officers had no knowledge of Innis’s specific characteristics or susceptibilities, the officers in *Williams* knew that Williams was a former mental patient and was deeply religious. *Id.* at 412. So, when they told him the blizzard-like weather conditions might soon make it impossible for them to find the body of the little girl, preventing her parents from giving her a Christian burial, the Court held the speech was tantamount to interrogation. *Id.*

¹⁴³ Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 268 (1996).

suggested that the suspect's self-interest would be advanced if he confessed."¹⁴⁴ Both tactics are intended to elicit confessions and therefore would appear to require the giving of *Miranda* warnings.¹⁴⁵ Both can be permissible, although showing a suspect false evidence may, in rare circumstances, result in exclusion of the confession. For most courts, however, the decision does not turn on whether the deception involved a false document or a verbal lie, but on whether the action in question was likely to induce a false confession.¹⁴⁶

C. Can police lie to suspects to elicit an incriminating statement?

AUSTRALIA, HON. JUSTICE FIANNACA:

The question is best answered by saying that the use of deception by police to elicit an incriminating statement will not necessarily result in the statement being inadmissible or being excluded by the court in the exercise of discretion.¹⁴⁷

In the Australian jurisdictions that have adopted the Uniform Evidence Act,¹⁴⁸ if a police officer makes a false statement in the course of questioning a suspect, in circumstances in which he or she knows, or ought reasonably to have known, that the statement is false and that making the false statement is likely to cause the person who is being questioned to make an admission, any admission or derivative evidence obtained as a result will have been obtained improperly, and will not be admitted unless the court determines in the exercise of discretion that "the desirability of admitting the evidence outweighs the undesirability of admitting evidence."¹⁴⁹ In the other jurisdictions, the issue of the admissibility of such evidence is determined according to common law principles. Even in the jurisdictions with the Uniform Evidence Act, the common law will apply when admissions are obtained in circumstances other than by formal questioning.

In some older cases, it had been held that false representations would negate voluntariness, and in the High Court decision of *Cleland v The Queen*, Judge Murphy suggested "[i]t may be a question of classification whether a confession induced by false representations or other trickery is voluntary."¹⁵⁰ However, in *Tofilau*, the High Court held that deception alone would not render the elicited admission involuntary,

¹⁴⁴ *Id.* at 279.

¹⁴⁵ "[P]olice are trained to interrogate only those suspects whose culpability they 'establish' on the basis of their initial investigation." Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 6 (2010).

¹⁴⁶ Marcus, *supra* note 87, at 614–15.

¹⁴⁷ *R v Swaffield* (1998) 192 CLR 159, 220 (Austl.); *Tofilau v The Queen* (2007) 231 CLR 396, 408–09 (Austl.).

¹⁴⁸ The Commonwealth, NSW, Victoria, the ACT, and Tasmania.

¹⁴⁹ *See Evidence Act 1995* (Cth) s 138 (Austl.).

¹⁵⁰ (1982) 151 CLR 1, 13 (Austl.) (referring to *Reg. v Johnston* (1864) 15 ICLR 60 (U.K.); *Attorney-General (NSW) v Martin* (1909) 9 CLR 713 (Austl.)).

although, as Chief Justice Gleeson noted: “Since possible forms of deception are bounded only by human imagination, and human gullibility, it would be dangerous to assert that no form of deception could deprive conduct of its voluntary character.”¹⁵¹ Nevertheless, his Honour went on to say, “Most deception used in the hope of eliciting admissions . . . is calculated to induce a person to *choose* to reveal information that otherwise would be concealed.”¹⁵² Choice is at the core of voluntariness.

As a general proposition, the common law in Australia, following English authority, is that “[s]ubterfuge, ruses and tricks may be lawfully employed by police, acting in the public interest” and evidence obtained in the course of, or through, such activities will not necessarily be excluded.¹⁵³ It has often been said that the investigation of crime is “not a game governed by a sportsman’s code of fair play.”¹⁵⁴

In *Tofilau*, four of the judges distinguished the common law position from a repealed section of the *Crimes Act 1900* (NSW), namely section 410(1), which, for most of the twentieth century, had provided, in part, that “no confession, admission or statement shall be received in evidence against an accused person if it has been induced . . . by any untrue representation made to him,” which was a reference to a deliberately false statement.¹⁵⁵ Chief Justice Gleeson noted that the repealed provision was “unusual, and went beyond the common law.”¹⁵⁶ As the plurality wrote, that had been recognised to be the case in *Basto v The Queen* where the High Court said that section 410(1)(a) made a “statutory extension of the common law doctrine . . . to untrue representations.”¹⁵⁷

Although the general position is that deception alone will not result in the exclusion of confessional evidence, the particular circumstances of a case in which deception is used by the police may result in discretionary exclusion of the evidence. The authorities in this area are cases involving confessions or relevant admissions obtained by the use of deception in circumstances other than formal interviews. It would be unusual for law enforcement officers to lie to an accused during the course of an interview in order to elicit an admission, especially in an age in which interviews are almost invariably recorded on video. While the community (from which a jury will be empaneled) may be accepting, or prepared to tolerate, the use of deception

¹⁵¹ *Tofilau*, 231 CLR at 409.

¹⁵² *Id.* (emphasis added).

¹⁵³ *R v Swaffield* (1998) 192 CLR 159, 220 (Austl.) (Kirby J); *id.* at 198 (Toohey, Gaudron & Gummow JJ).

¹⁵⁴ *Id.* at 185 (Brennan CJ); *Bunning v Cross* (1978) 19 ALR 641, 659 (Austl.) (Stephen & Aickin JJ); *Tofilau*, 231 CLR at 442 (Kirby J).

¹⁵⁵ *Tofilau*, 231 CLR at 408 (Gleeson CJ); *id.* at 509 (Callinan, Heydon & Crennan JJ); *see also R v Connors* [1990] 20 NSWLR 438, 438 (Austl.) (as to the meaning of “untrue representation”).

¹⁵⁶ *Tofilau*, 231 CLR at 408.

¹⁵⁷ *Basto v The Queen* (1954) 91 CLR 628, 640 (Austl.) (Dixon CJ, Webb, Fullagar, Kitto & Taylor JJ).

in covert activities so that the police can solve serious crimes and bring to justice dangerous criminals, the use of lies in a formal setting is less likely to be met with approval. To put it bluntly, it is not a good look, particularly if the same officers will be required to give oral testimony. It is also fraught if the accused does not make any admission, and the lies are subsequently used by the defence to attack the credibility of the police evidence more broadly. What is not unusual, is the framing of questions in a way that may imply to the suspect the existence of certain facts that may be speculative at the time of the interview, for instance: “Is there any reason why your DNA would be on the knife?” If ultimately there is no evidence of DNA on the knife that matches the accused’s profile, such a question and the answer ought to be excluded (by editing) on the basis that it would be unfair to the accused at trial.

More particularly, if the police were to lie to a suspect about his or her rights, that would be a contravention of the officers’ statutory obligations to inform an accused of his or her rights and to afford those rights to the accused. As I will explain later, where such a contravention is established, the evidence is inadmissible, unless the court decides otherwise, having regard to a number of factors. However, the lines become blurred when the police obtain authority to make a covert recording, even as they remain in their role as police officers.

In *Em v The Queen*, the accused challenged the trial judge’s decision not to exclude covertly recorded admissions pursuant to the fairness discretion.¹⁵⁸ It was submitted that unfairness arose as a consequence of the police exploiting the accused’s belief that the conversation was not being recorded and consequently could not be used in evidence. A majority of the High Court rejected the submission, essentially on the basis that a mistaken assumption that a confession was not being recorded could not, without more, be unfair.¹⁵⁹ Significantly, Chief Justice Gleeson and Justice Heydon said: “To reach the opposite conclusion would be for the judiciary, by exercise of its capacity to reach a judgment characterising conduct as ‘unfair’ under § 90, to create an automatic and universal rule of exclusion in place of a provision calling for case-by-case judgment.”¹⁶⁰

CANADA, HON. JUSTICE POMERANCE:

Yes, but there are limits.

Canadian courts have recognized that, in order for police to effectively combat crime, they must be able to match the ingenuity of those whom they are investigating. Therefore, some degree of deceit is permissible. Police may tell a suspect that his DNA was found at the scene, or that an accomplice “spilled the beans,” even if these things are not true. This strategy is not, however, without limits. In some cases, the effect of the lie may, together with other circumstances, amount to oppression.

¹⁵⁸ (2007) 232 CLR 67, 71 (Austl.).

¹⁵⁹ *Id.* at 92 (Gleeson CJ & Heydon J); *id.* at 105, 106–07.

¹⁶⁰ *Id.* at 92.

That is, it may cause the suspect to believe that nothing he says will establish his innocence and he might as well speak. In other instances, the lie might be such as to shock the conscience of the community. Police in Canada can resort to tricks, but not dirty tricks.

In *Rothman v. The Queen*, then-Justice Lamer said:

It must also be borne in mind that the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queens-bury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the rule be hampered in their work. What should be repressed vigorously is conduct on their part that shocks the community. That a police officer pretend to be a lock-up chaplain and hear a suspect's confession is conduct that shocks the community; so is pretending to be the duty legal-aid lawyer eliciting in that way incriminating statements from suspects or accused; injecting Pentothal into a diabetic suspect pretending it is his daily shot of insulin and using his statement in evidence would also shock the community; but generally speaking, pretending to be a hard drug addict to break a drug ring would not shock the community; nor would, as in this case, pretending to be a truck driver to secure the conviction of a trafficker; in fact, what would shock the community would be preventing the police from resorting to such a trick.¹⁶¹

Dirty tricks would also include those that have the effect of undermining the suspect's right to silence. The placement of an undercover operative in a cell with a suspect is not per se objectionable. However, the undercover operative is not permitted to actively elicit evidence from the suspect. This would constitute a dirty trick in that it would undermine the suspect's right to silence in circumstances in which he cannot walk away. This principle, established in the case of *R. v. Hebert*, only applies to suspects who are detained.¹⁶²

Undercover operations aimed at suspects out of custody are not subject to the same limitations, given that the suspect *can* walk away. On the other hand, some operations, such as the "Mr. Big" scenario raise a host of other problems. I will address Mr. Big in a later portion of this Article.

¹⁶¹ [1981] 1 S.C.R. 640, 697 (Can.). In *R. v. Rowe* (2006), 209 O.A.C. 50, paras. 44–46, 49–50 (Can. Ont. C.A.), a police officer pretending to be a religious figure was held not to be a dirty trick.

¹⁶² [1990] 2 S.C.R. 151, 181 (Can.).

ENGLAND AND WALES, PROFESSOR ROBERTS:

During police interviews, deception, if employed at all, will generally take the form of selective disclosure and misleading by suggestion or omission rather than downright lies. PACE Code C mandates that, prior to interview, suspects “must be given sufficient information to enable them to understand the nature of any . . . offence [about which they will be questioned], and why they are suspected of committing it,” but it is added that “this does not require the disclosure of details at a time which might prejudice the criminal investigation.”¹⁶³ Moreover, “[t]he decision about what needs to be disclosed for the purpose of this requirement . . . rests with the investigating officer who has sufficient knowledge of the case to make that decision.”¹⁶⁴ One recent small-scale empirical study found that police interviewers routinely withhold information prior to interview, exaggerate the weight of ostensibly incriminating information in their possession, and employ selective disclosure to test suspects’ veracity and potentially catch them out in lies or contradictions.¹⁶⁵

Police interviewing practice in England and Wales has undergone significant professionalization since the PACE reforms of the 1980s and chastening experiences of (historical and contemporary) miscarriages of justice emerging in the 1990s. The national College of Policing characterizes interviews with suspects, victims, and witnesses as a highly skilled activity which is “a crucial element of the process of investigation” and “central to the success of an investigation.”¹⁶⁶ Detectives are now taught a national “PEACE” investigative interviewing protocol¹⁶⁷ designed to elicit the maximum amount of reliable information, which is often best achieved, it is now appreciated, simply by stating the grounds for arrest and inviting suspects to respond to open-ended, neutral questions. As interviews develop, police questioning can legitimately become more probing and persistent—suspects may lie, after all—so long as it remains “careful and consistent but not unfair or oppressive.”¹⁶⁸ The old

¹⁶³ PACE Code C, *supra* note 56, 11.1A. What amounts to “sufficient information” is context-specific,

but it should normally include, as a minimum, a description of the facts relating to the suspected offence that are known to the officer, including the time and place in question. This aims to avoid suspects being confused or unclear about what they are supposed to have done and to help an innocent suspect to clear the matter up more quickly.

Id. Note 11ZA.

¹⁶⁴ *Id.*

¹⁶⁵ See generally Divya Sukumar, Jacqueline S. Hodgson & Kimberley A. Wade, *Behind Closed Doors: Live Observations of Current Police Station Disclosure Practices and Lawyer-Client Consultations*, 2016 CRIM. L. REV. 900.

¹⁶⁶ *Investigation—Investigative Interviewing*, COLL. POLICING, <http://www.app.college.police.uk/app-content/investigations/investigative-interviewing/#peace-framework> [https://perma.cc/B6TX-LSV4] (last visited May 6, 2021).

¹⁶⁷ The “PEACE” mnemonic stands for **P**lanning and preparation; **E**ngage and explain; **A**ccount clarification and challenge; **C**losure; **E**valuation.

¹⁶⁸ *Id.* “Oppression” and “unfairness” are grounds for excluding confessions at trial under

prescientific approach of wheedling, cajoling, and coercing suspects into a confession, as the overriding objective of a successful interrogation (seemingly irrespective of reliability or authenticity),¹⁶⁹ has been jettisoned, at any rate. Police interviews in England and Wales have routinely been recorded since the late 1980s, and alongside other PACE safeguards—notably including more effective access to custodial legal advice—have exposed policing interview practice to wider judicial and public scrutiny. For any officers still tempted towards the dark arts, investigative impropriety is a lot harder to conceal, and to get away with, than it used to be.

Incriminating statements (or other conduct) may be ruled inadmissible at trial if they fall foul of either the dedicated rules regulating confession evidence, now primarily contained in PACE 1984 section 76, or a more general exclusionary jurisdiction conferred on trial judges by PACE 1984 section 78 to exclude seriously “unfair” prosecution evidence.¹⁷⁰ The most significant limitation on police deception during custodial interrogation is that officers must not deliberately mislead the suspect’s lawyer (in England and Wales, this will generally be a solicitor or somebody employed by a firm of solicitors to provide custodial legal advice—formerly “law clerks,” and nowadays compendiously described as “police station advisers”).

Paragraph 3.1 of PACE Code C requires the custody officer¹⁷¹ to notify detainees on their arrival at the police station of their rights: to have someone informed of their detention, to consult privately with a solicitor, and to be provided with copies of the PACE Codes of Practice for consultation. The suspect must also be given written notification of these key rights.¹⁷² If the suspect does not know any solicitor, he must be advised of the availability of duty solicitors whose services are provided free of charge.¹⁷³ Subject to limited exceptions, a suspect who asks for legal advice may not be interviewed until he has received it, either in person or by telephone. Moreover, suspects are entitled to be accompanied by their legal adviser during the police interview itself,¹⁷⁴ a highly significant procedural protection in an adversarial system of justice.

It is not possible to state with confidence whether a particular instance of police deception will result in the exclusion of a suspect’s admissions during interview in any given case. Everything turns on the facts. It is safe to say, however, that if police

PACE 1984. College of Policing guidance points out, however, that “[c]onducting an investigative interview is not the same as proving an argument in court. This means that interviewers are not bound by the same rules of evidence that lawyers must abide by.”

¹⁶⁹ For a detailed illustration, see David Dixon, *Integrity, Interrogation and Criminal Injustice*, in *THE INTEGRITY OF CRIMINAL PROCESS* 75 (Hunter, Roberts, Young & Dixon eds., 2016).

¹⁷⁰ Police and Criminal Evidence Act 1984, c. 60, ss. 76, 78 (Eng.).

¹⁷¹ An independent officer unconnected with the current investigation: see *infra* notes 350–51 and accompanying text.

¹⁷² PACE Code C, *supra* note 56, 3.2.

¹⁷³ *Id.* at 6.1, Notes 6B & 6J.

¹⁷⁴ *Id.* at 6.8. The solicitor can be required to leave only if “their conduct is such that the interviewer is unable properly to put questions to the suspect.” *Id.* at 6.9; see also *id.* at 6.10–6.11, Notes 6D & 6E.

interviewers deliberately tell lies to legally represented suspects during custodial interrogations, they are running a serious risk that a trial court in England and Wales will regard such conduct as undermining the substantive value of suspects' rights and will consequently rule any resulting statements inadmissible. In one significant judgment, the Court of Appeal stated:

It is obvious from the undisputed evidence that the police practised a deceit not only upon the appellant, which is bad enough, but also upon the solicitor whose duty it was to advise him. In effect, they hoodwinked both solicitor and client. That was a most reprehensible thing to do. . . . This is not the place to discipline the police. That has been made clear here on a number of previous occasions. We are concerned with the application of the proper law. . . . [T]he only question to be answered by this court is whether, having regard to the way the police behaved, the judge exercised that discretion correctly. In our judgment he did not. He omitted a vital factor from his consideration, namely, the deceit practised upon the appellant's solicitor.¹⁷⁵

NEW ZEALAND, HON. JUDGE HARVEY:

There are no specific rules prohibiting the police from lying to a suspect in order to elicit an incriminating statement.¹⁷⁶ A common form of deception on the part of the police in this context is through the adoption of undercover investigative methods which are discussed more fully below. At this point, it is noteworthy that evidence obtained from undercover operations has been ruled admissible by New Zealand courts.¹⁷⁷ This indicates that the lies integral in such methods are not of themselves considered to be improper or unfair.

UNITED STATES, MS. BROOK:

Police can lie to suspects. But the methods police may use extend far beyond lies. In a 2015 survey of 340 highly experienced law enforcement interrogators, 84.7% were trained in "using deceit."¹⁷⁸

¹⁷⁵ *R v. Mason* [1988] 1 WLR 139 (CA) 144 (Eng.).

¹⁷⁶ *But see* Elias, *supra* note 69, at 2 (noting Clause 4 of the Practice Note clarifies earlier law by imposing a positive obligation on the police to fairly explain the substance of statements or the nature of the evidence against a suspect when these matters are the subject of questions posed by the police). Evidence of the defendant's statement was excluded in one recent case because the police had misled the defendant about the strength of the other evidence in their possession which identified him as the offender. *See R v. Hennessey* [2009] NZCA 363 at [37] (N.Z.).

¹⁷⁷ *See R v. Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [308] (N.Z.).

¹⁷⁸ Hayley M.D. Cleary & Todd C. Warner, *Police Training in Interviewing and Interrogation Methods: A Comparison of Techniques Used with Adult and Juvenile Suspects*, 40 LAW & HUM. BEHAV. 270, 275 (2016).

The Court in *Miranda* described with apparent distaste many of the deceptive interrogation techniques contained in *Criminal Interrogation and Confessions*, Fred E. Inbau & John E. Reid's leading book on interrogations, published in 1962. The techniques, collectively known as "the Reid Technique," included prolonged interrogations in private rooms, "Mutt and Jeff" friendly-unfriendly routines, lying about lineup results, and minimization and maximization techniques which include giving suspects excuses for what they were accused of doing or maximizing certainty of guilt to give suspects a feeling of hopelessness. These same techniques continue to be taught by the Reid organization¹⁷⁹ and remain the most common interrogation techniques used by U.S. law enforcement today.¹⁸⁰

Despite its distaste for the techniques, the Court did not limit their use. Instead, it imposed the warnings requirement to ensure confessions were voluntary and did not violate a suspect's Fifth Amendment right against self-incrimination. In *Illinois v. Perkins*, the Court explained:

Miranda forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner. . . . Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*'s concerns.¹⁸¹

Since *Miranda*, the Court has consistently avoided creating limits on the use of deception. In *Frazier v. Cupp*, for example, the defendant's confession was admitted even though the police falsely told him that another man he had been seen with had confessed and implicated him.¹⁸² In a number of cases involving deception which were decided on other issues, the Court simply ruled without commenting on the deceptive techniques.¹⁸³

The Court's silence has given the lower courts what one commentator called "carte blanche" to engage in deceptive practices, practices which the availability of DNA testing has revealed often result in false confessions.¹⁸⁴ A recent study by the Innocence Project shows that of 365 persons exonerated by DNA between 1989 and

¹⁷⁹ See *Miranda v. Arizona*, 384 U.S. 436, 449 n.9 (1966) (discussing the extensive use of the techniques described by the Reid organization). See generally FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, *CRIMINAL INTERROGATION AND CONFESSIONS* (4th ed. 2004).

¹⁸⁰ Cleary & Warner, *supra* note 178, at 271.

¹⁸¹ 496 U.S. 292, 297 (1990) (citations omitted).

¹⁸² See generally 394 U.S. 731 (1969).

¹⁸³ See, e.g., *Oregon v. Mathiason*, 429 U.S. 492, 493–96 (1977) (per curiam) (finding for *Miranda* purposes, the fact that police falsely told defendant they found his fingerprints at the scene was irrelevant).

¹⁸⁴ Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 781 (1997).

2020, 29% involved false confessions and 49% of the false confessors were age twenty-one or younger.¹⁸⁵ Notably, 60% of the 365 exonerees were Black.¹⁸⁶ Despite these statistics, courts continue to uphold interrogations involving deceit.¹⁸⁷

Not long ago, however, these statistics found their way into the dissent in a murder case dramatized by the popular Netflix series, *Making a Murderer*. The dissent pointed out: “Our long-held idea that innocent people do not confess to crimes has been upended by advances in DNA profiling. We know now that in approximately 25% of homicide cases in which convicted persons have later been unequivocally exonerated by DNA evidence, the suspect falsely confessed to committing the crime.”¹⁸⁸

Just last year, some of the tactics taught by the Reid organization were prominently featured and disparaged in *When They See Us*, another popular Netflix documentary seen by over 2.3 million households worldwide within the first two weeks of its release.¹⁸⁹ The documentary dramatized the well-publicized 1989 case (then–New York City Mayor Edward Koch called it “the crime of the century”) of five Black youths who were wrongly charged and convicted of the rape and murder of a white woman while jogging in New York City’s Central Park. In the program’s last episode, a prosecutor harshly criticizes a detective for using the Reid Technique to coerce a confession from a suspect and sneers that the technique has been “universally rejected.”¹⁹⁰

D. What would be an improper/illegal interrogation in your jurisdiction?

AUSTRALIA, HON. JUSTICE FIANNACA:

The propriety or legality of an interrogation goes to the admissibility or discretionary exclusion of the confession or relevant admissions obtained. In that context,

¹⁸⁵ *DNA Exonerations in the United States*, INNOCENCE PROJECT, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> [<https://perma.cc/4KZX-R6DC>] (last visited May 6, 2021).

¹⁸⁶ *Id.*

¹⁸⁷ Slobogin, *supra* note 184, at 780–81; *see also* Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 451 (1996) (“With no absolute prohibition of police lying during interrogation, courts today are free to condone such lying.”).

¹⁸⁸ *Dassey v. Dittmann*, 877 F.3d 297, 333 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 2677 (2018) (Wood, C.J., dissenting).

¹⁸⁹ Rick Porter, *Ava DuVernay’s ‘When They See Us’ Seen by 23 Million, Netflix Says*, HOLLYWOODREP. (June 26, 2019, 8:37 AM), <https://www.hollywoodreporter.com/live-feed/ava-duvernays-they-see-us-seen-by-23-million-netflix-says-1221069> [<https://perma.cc/K47U-YBQZ>].

¹⁹⁰ Tal Dickstein & Kamilah Moore, *Reid v. Netflix*, LOEB & LOEB LLP, <https://www.loeb.com/en/insights/publications/2020/04/reid-v-netflix> [<https://perma.cc/9WD4-NVK6>] (Mar. 24, 2020). To this point, in 2017, Wicklander-Zulawski & Associates, an industry leader in interviewing and interrogation techniques, announced it would stop training detectives in the Reid training method and, ironically, would only use the technique to teach police about the risks of false confessions. Eli Hager, *The Seismic Change in Police Interrogations*, MARSHALL PROJECT (Mar. 7, 2017, 10:00 PM), <https://www.themarshallproject.org/2017/03/07/the-seismic-change-in-police-interrogations> [<https://perma.cc/ACF4-Z6W9>].

an interrogation will be improper or illegal if it involves conduct that (a) contravenes legislative requirements that must be met by officers dealing with arrested suspects; (b) involves inducements by persons in authority or the overbearing of the suspect's will, such as to render any confession involuntary (the two "definite rules" I referred to earlier);¹⁹¹ or (c) would justify exclusion of any confession or admission in the exercise of discretion, because it would be unfair to allow the prosecution to use the confession against the accused or because of public policy considerations.

A confession is presumed to have been made voluntarily, unless an issue is raised by the accused as to its admissibility or the circumstances give rise to a doubt about its voluntariness.¹⁹² In such a case, the confession will be excluded unless the prosecution establishes to the satisfaction of the presiding judicial officer, on the balance of probabilities, that the confession was made voluntarily.¹⁹³ A confession will not be voluntary if it was obtained (a) as a result of the accused's will being overborne, for instance as a result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure ("basal voluntariness"), or (b) in consequence of a threat or promise made or held out by a person in authority (an inducement). In short, an accused must have spoken from a free choice to answer questions. The original rationale for these rules was concern about the unreliability of statements made under coercion. Some of the forms of conduct contemplated may be "illegal" as well as improper, if they constitute offences (for instance, an unlawful assault or threat). The courts have been reluctant to make specific rules for particular factual circumstances, preferring to rely on the broad articulation of the rules, to which I have referred, and leaving it for judgment on a case-by-case basis as to whether the confession is voluntary. However, comparison with other cases may be instructive in predicting how a court may rule. Improper conduct affecting "basal voluntariness" will include the use of physical force as well as non-physical intimidation or duress. It may involve deprivations (for instance of sustenance or sleep). On the other hand, persistence in questioning, even after an indication by the accused that she does not wish to answer questions, does not necessarily amount to "undue insistence or pressure."¹⁹⁴

As for threats and promises, it is a matter of assessment in the circumstances of the particular case whether the threat or promise was of such a kind as to induce the

¹⁹¹ See *Tofilau v The Queen* (2007) 231 CLR 396, 410–22 (Austl.) (discussing the development of the common law regulating the exclusion of evidence of out-of-court confessions); *MacPherson v The Queen* (1981) 147 CLR 512, 519–20 (Austl.); *McDermott v The King* (1948) 76 CLR 501, 511 (Austl.); *Cornelius v The King* (1936) 55 CLR 235, 245 (Austl.).

¹⁹² *R v Williams* (1992) 8 WAR 265, 271 (Austl.); *Hough v Ah Sam* (1912) 15 CLR 452, 457 (Austl.).

¹⁹³ *Williams*, 8 WAR at 271–72; *MacPherson*, 147 CLR at 519; *Wendo v The Queen* (1963) 109 CLR 559, 572–73 (Austl.).

¹⁹⁴ See *Western Australia v Smith* [2010] WASC 279 (1 October 2010) 3, 6–7 (Austl.); *Slater v Western Australia* [2009] WASC 144 (8 May 2009) 8 (Austl.); *Malgil v Western Australia* [2008] WASC 290 (10 December 2008) 14 (Austl.).

confession. Promising a suspect that he will be released on bail if he admits his part in the offence is an obvious inducement.

The overbearing conduct or inducement must have had an operative effect on the accused's choice to answer questions, but the burden is on the prosecution to establish on the balance of probabilities that either the conduct, threat, or promise did not occur or that it did not have an operative effect.

In the jurisdictions that have adopted the Uniform Evidence Act, the law has been modified by statute.¹⁹⁵ In each of those jurisdictions, section 84 (which is not confined to criminal proceedings) provides that, if the party against whom the evidence is to be adduced raises an issue about its admissibility, evidence of an admission by that party is not admissible unless the court is satisfied that the making of the admission was not influenced by:

- (a) violent, oppressive, inhuman, or degrading conduct, whether towards the person who made the admission or towards another person; or
- (b) a threat of conduct of that kind.

Section 85(2), which applies only to criminal proceedings, provides that “[e]vidence of the admission [by a defendant] is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.”¹⁹⁶ Factors that are relevant to be taken into account include (i) the nature of the questions and the manner in which they were put and (ii) the nature of any threat, promise or other inducement made to the person questioned.

Factors that are relevant to discretionary exclusion may include whether the accused was able to understand and communicate in English, was placed under pressure, had adequate breaks and sustenance, and was not pressed to continue whilst fatigued.¹⁹⁷ Another factor may be whether police have persisted with questioning after a suspect has indicated a wish not to answer further questions. Other circumstances that have led to exclusion of confessional evidence in the exercise of discretion have included where detention was unlawful; because officers failed to bring the accused before a magistrate or bail justice;¹⁹⁸ a failure to caution the accused and tell him of his right to communicate with a friend, relative, or lawyer;¹⁹⁹ and an unlawful arrest of the accused and holding him incommunicado for the purpose of questioning.²⁰⁰

¹⁹⁵ *Evidence Act 1995* (Cth) ss 84–86 (Austl.); *Evidence Act 1995* (NSW) ss 84–86 (Austl.); *Evidence Act 2008* (Vic) ss 84–86 (Austl.); *Evidence Act 2011* (ACT) ss 84–86 (Austl.); *Evidence Act 2001* (Tas) ss 84–86 (Austl.).

¹⁹⁶ *Evidence Act 1995* (Cth) s 85 (Austl.).

¹⁹⁷ For an example of how this is considered, see *Western Australia v Gibson* [2014] WASC 240 (4 July 2014) 21–22 (Austl.).

¹⁹⁸ See, e.g., *Cleland v The Queen* (1982) 151 CLR 1, 5 (Austl.).

¹⁹⁹ See generally *Pollard v The Queen* (1992) 176 CLR 177 (Austl.).

²⁰⁰ E.g., *Foster v The Queen* (1993) 113 ALR 1, 7 (Austl.).

CANADA, HON. JUSTICE POMERANCE:

Improper questioning would include the following:

- Any questioning that follows a breach of section 10 of the *Charter*;
- Any questioning that results in an involuntary statement; and
- Questioning that results in a violation of the right to silence in section 7 of the *Charter*.

ENGLAND AND WALES, PROFESSOR ROBERTS:

Remarkably, the legality of police detention for questioning was not settled at common law until as recently as the early 1980s.²⁰¹ In reality, by mid-century at the latest, police officers in England and Wales were routinely detaining suspects for questioning on the euphemistic pretext that suspects were “helping the police with their inquiries.” These blurred lines left suspects exposed in a legal no-man’s-land, without any proper juridical framework to regulate their detention or to safeguard their procedural rights. It was a system of studied non-regulation ripe for abuse. PACE 1984 was enacted with the express purpose of regularizing police detention and subjecting it to the rule of law. Section 37 authorizes detention where a “custody officer has reasonable grounds for believing that [the suspect’s] detention without being charged is necessary . . . to obtain . . . evidence by questioning [him].”²⁰²

PACE also mandated that custodial interrogation would henceforth be strictly delimited and supervised. Section 37 implies that investigative²⁰³ questioning in relation to any particular offence should cease as soon as there is sufficient evidence to support a formal criminal charge, though it is permissible to ask further questions “to clear up an ambiguity in a previous answer or statement” or to put new information to the suspect where “in the interests of justice . . . the detainee . . . [should] have an opportunity to comment”²⁰⁴ Questioning may continue in relation to other

²⁰¹ See *Holgate-Mohammed v. Duke* [1984] 1 AC 437 (HL) 445–46.

²⁰² Police and Criminal Evidence Act 1984, c.60, s. 37(2) (Eng.). This enactment confirmed a decisive shift in English law’s conception of the legitimate purposes of custodial interrogation. As one commentary observed: “[PACE] embodied the philosophy of encouraging the use of detention as an instrument for the obtaining of evidence by questioning. Thus, the very reason why 98 per cent of defendants who are charged are arrested is in order that they can be interrogated.” DAVID WOLCHOVER & ANTHONY HEATON-ARMSTRONG, *WOLCHOVER AND HEATON-ARMSTRONG ON CONFESSION EVIDENCE* 137 (1996).

²⁰³ So-called “safety interviews” intended “to prevent or minimise harm or loss to some other person, or the public” are permitted. PACE Code C, *supra* note 56, 16.5.

An interview process which, so far as possible, enables the police to protect the public is a necessary imperative. These interviews are variously described as “safety interviews”, or “urgent” or “emergency interviews”.

The suspect is interviewed for information which may help the police to protect life and prevent serious damage to property to be obtained.

R v. Ibrahim [2008] EWCA Crim 880, [2009] 1 WLR 578, [33].

²⁰⁴ PACE Code C, *supra* note 56, 16.5.

alleged or suspected offences, but the police are prohibited from using custodial interrogation to build up an affirmative prosecution case beyond the charging threshold, except on application to a Crown Court judge in relation to terrorist offences.²⁰⁵

The limits of proper police interrogation are circumscribed, negatively, by exclusionary remedies for *improper* interrogation. A confession obtained by improper means may be excluded under either or both sections 76 and 78 of PACE 1984.²⁰⁶ Deployment of “significant silences” at trial is preconditioned on compliance with detailed rules regulating the conditions and conduct of questioning, inside and outside the police station. Failure to follow these rules will not generally render the interrogation unlawful or improper, but it may preclude evidential reliance on significant silences at trial.

NEW ZEALAND, HON. JUDGE HARVEY:

Under section 30 of the Evidence Act 2006, “evidence is improperly obtained if it is obtained” as follows:

- (a) in consequence of a breach of any enactment or rule of law by a person to whom section 3 of the New Zealand Bill of Rights Act 1990 applies; or
- (b) in consequence of a statement made by a defendant that is or would be inadmissible if it were offered in evidence by the prosecution; or
- (c) unfairly.²⁰⁷

The Supreme Court said, “[T]here must almost always be a causative link between the unfairness and the impugned evidence.”²⁰⁸

Section 30 applies to police officers and those in law enforcement roles.²⁰⁹ Section 30(5)(c) unfairness is “intensely fact-specific, and potentially open-ended.”²¹⁰ “[C]ategories of unfairness are not . . . closed and must adapt to changing social conditions, the need to enforce proper standards of official behavior and the circumstances

²⁰⁵ Counter-Terrorism Act 2008, c. 28, s. 22 (UK); *Police and Criminal Evidence Act 1984 (PACE) Code H Revised Code of Practice in Connection with: The Detention, Treatment and Questioning by Police Officers of Persons in Police Detention Under Section 41 of, and Schedule 8 to, the Terrorism Act 2000—The Treatment and Questioning by Police Officers of Detained Persons in Respect of Whom an Authorization to Question After Charge Has Been Given Under Section 22 of the Counter-Terrorism Act 2008*, HOME OFF., 15 (2019) [hereinafter PACE Code H].

²⁰⁶ Police and Criminal Evidence Act 1984, c. 60, ss. 76(2), 78(1) (Eng.).

²⁰⁷ Evidence Act 2006, s 30 (N.Z.).

²⁰⁸ *R v. Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [48] (N.Z.).

²⁰⁹ Evidence Act 2006, s 30(5)(a).

²¹⁰ *R v. Roper* [2012] NZHC 1855 at [27] (N.Z.).

of the particular case at issue.”²¹¹ The issue of unfairly obtained evidence often intersects with police questioning and the way in which police obtain a statement from a suspect. When deciding whether a statement was obtained unfairly, section 30(6) specifically requires judges to take into account the guidelines set out in the Practice Note.²¹² These guidelines emphasize that a person must be advised that she is entitled to seek a lawyer’s advice and is not compelled to answer questions.

UNITED STATES, MS. BROOK:

Only two types of interrogations categorically qualify. Looking first to the issue of *Miranda* warnings, a complete failure to give the warnings would be improper, but not illegal. “Failure to administer *Miranda* warnings creates a presumption of compulsion,” requiring that “unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment . . . be excluded from evidence.”²¹³ But even here, there are exceptions, as discussed above.

When the question is one of voluntariness, where the police use acts of physical violence or threats of violence during interrogation, the interrogation would be both improper and illegal.

Physical violence or threat of it by the custodian of a prisoner during detention serves no lawful purpose, invalidates confessions that otherwise would be convincing, and is universally condemned by the law. When present, there is no need to weigh or measure its effects on the will of the individual victim. . . . [J]udges long ago found it necessary to guard against miscarriages of justice by treating any confession made concurrently with torture or threat of brutality as too untrustworthy to be received as evidence of guilt.²¹⁴

These decisions did not eliminate police violence. A number of surveys conducted between 2002 and 2008 show that, compared to white individuals, Hispanic individuals were up to twice as likely and Black individuals up to three times as likely “to experience physical force or its threat during their most recent contact with the police.”²¹⁵ And after decades of litigation, we now know that between 1972

²¹¹ *R v. Wichman* [2015] NZSC 198 at [503] (N.Z.).

²¹² Evidence Act 2006, s 30(6).

²¹³ *Oregon v. Elstad*, 470 U.S. 298, 307 (1985).

²¹⁴ *Stein v. New York*, 346 U.S. 156, 182 (1953).

²¹⁵ Nazgol Ghandnoosh, *Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System*, SENTENCING PROJECT (2015), <https://www.sentencingproject.org/publications/black-lives-matter-eliminating-racial-inequity-in-the-criminal-justice-system/> [<https://perma.cc/DH85-87BZ>]. See generally U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., NJC 242937, SPECIAL REPORT: POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011 (Oct. 2016).

and 1991, Chicago law enforcement used abhorrent torture methods to elicit confessions from at least 120 mostly Black individuals.²¹⁶

Techniques short of physical force intended to exhaust suspects physically and mentally may also amount to coercion, but the results in those cases are impossible to categorize because they are so fact specific. In *Davis v. North Carolina*, for example, the Court condemned tactics such as lengthy interrogation sessions (in that case consisting of sixteen days of incommunicado questioning).²¹⁷ Other cases reject tactics such as prolonged detention combined with repeated questioning.²¹⁸

One technique that seems especially offensive to the courts is lying about the legal process itself. *Lynumn v. Illinois*, is illustrative.²¹⁹ There the officers told the suspect that if she did not confess, her government benefits would be withdrawn and her children would be taken from her. The Court concluded: “We think it clear that a confession made under such circumstances must be deemed not voluntary, but coerced.”²²⁰ Nonetheless, casebooks are filled with decisions following *Lynumn* upholding confessions made after promises of lenient treatment, as in *Fare v. Michael C.*, where the young suspect was told “a cooperative attitude would be to [his] benefit.”²²¹

Although tactics not involving either physical or mental exhaustion, taken alone, are generally insufficient to show involuntariness, courts must also weigh those tactics and the location of the interrogation against the vulnerabilities of the suspect.²²² In the *Dassey* case mentioned earlier, the court listed a number of relevant factors, including “the suspect’s age, intelligence, and education, as well as his familiarity with the criminal justice system,” and noted: “The interaction between the suspect’s vulnerabilities and the police tactics may signal coercion even in the absence of physical coercion or threats.”²²³ *Spano v. New York* is a good example of such an interaction. There, a prolonged interrogation combined with the defendant’s personal characteristics and the false claims by a fellow officer who was defendant’s childhood friend that he needed the defendant to confess or his job and family would suffer terrible consequences, violated due process.²²⁴

²¹⁶ The court in *United States v. Burge* described the torture this way: “Former Chicago Police Commander Jon Burge presided over an interrogation regime where suspects were suffocated with plastic bags, electrocuted until they lost consciousness, held down against radiators, and had loaded guns pointed at their heads during rounds of Russian roulette.” 711 F.3d 803, 806 (7th Cir. 2013).

²¹⁷ 384 U.S. 737, 752 (1966).

²¹⁸ See, e.g., *Spano v. New York*, 360 U.S. 315, 322–23 (1959).

²¹⁹ 372 U.S. 528, 534 (1963).

²²⁰ *Id.*

²²¹ 442 U.S. 707, 727 (1979).

²²² See *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

²²³ *Dassey v. Dittman*, 877 F.3d 297, 304 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 2677 (2018).

²²⁴ *Spano v. New York*, 360 U.S. 315, 322–23 (1959).

No technique can be improper without police coercion. In *Colorado v. Connelly*, the Court emphasized the need for a link between the suspect's state of mind and the actions of the police. Lacking that link, even where a suspect was experiencing "command hallucinations," the resulting confession was found to be admissible because there was no causal connection between the police conduct and the confession.²²⁵

II. REMEDIES

A. If police conduct an improper interrogation, will the resulting confession be excluded at trial?

AUSTRALIA, HON. JUSTICE FIANNACA:

In the jurisdictions where there has been no modification of the common law, if the impropriety results in a confession that is not voluntary, the confession will be excluded at trial. In those jurisdictions, if the confession is ruled to have been voluntary, it may still be excluded in the exercise of discretion, on the bases I outlined above. The potential for the confession to be unreliable when improper methods have been used is important, but not the only relevant factor in considering discretionary exclusion. It has been observed that "it is not always possible to treat voluntariness, reliability, unfairness to the accused and public policy considerations as discrete issues."²²⁶ The differentiation is important, however, in that involuntariness will result in strict exclusion, whereas discretionary bases require the accused to satisfy the court on the balance of probabilities that the evidence ought to be excluded.

The unfairness discretion is concerned with whether admitting the evidence would be unfair to the accused at trial, rather than whether the police engaged in unfair treatment of the accused when the confession was obtained.²²⁷

The third basis for discretionary exclusion, namely that the probative value of the evidence is outweighed by its prejudicial effect (that is, the potential to lead the jury into improper reasoning about the accused's guilt), depends, in the case of a confession, on the likelihood that it is not reliable, as that is the only factor that could reduce its probative value to a level where the potential for prejudice becomes relevant. In most cases, an impropriety that is not sufficient to render a confession legally inadmissible will be unlikely to render a confession unreliable to the extent that the third head of discretion would be engaged.

²²⁵ 479 U.S. 157, 161–62, 164 (1986).

²²⁶ *R v Swaffield* (1998) 192 CLR 159, 197 (Austl.) (in which Toohey, Gaudron, and Gummow JJ said that it may be expected that "improprieties calculated to cause the making of an untrue admission . . . will often impact on the exercise of a free choice to speak if that notion is given its full effect. However, it will not necessarily be so in every case.").

²²⁷ *Van der Meer v The Queen* (1988) 82 ALR 10, 26 (Austl.).

All of the Australian jurisdictions have legislation the effect of which is to exclude evidence, including confessional evidence, where there has been noncompliance by relevant authorities with a requirement of the legislation, unless the court decides otherwise, having regard to various factors which lead to satisfaction that it is in the interests of justice to admit the evidence.²²⁸ There are usually separate provisions, with which I will deal in a later section, that require admissions to be video recorded and deal with the admissibility of admissions that do not comply with that requirement.

CANADA, HON. JUSTICE POMERANCE:

It is not uncommon for a statement to be challenged both on common law and constitutional grounds. While the issues are related, and the evidence often identical, the doctrines engage different burdens and standards of proof.

At common law, the prosecution bears the onus of proving a statement to be voluntary beyond a reasonable doubt—one of the few situations in which the criminal standard of proof is applied to a single piece of evidence. If a statement is found to be involuntary, it is automatically excluded.

Where the defence alleges a *Charter* violation, the accused bears the persuasive onus on a civil standard of proof. The accused must: 1) establish the *Charter* violation on a balance of probabilities; and 2) must establish that the admission of the evidence would bring the administration of justice into disrepute.

The *Charter* does not guarantee a remedy for every rights violation. Admission of evidence obtained in violation of the *Charter* is governed by section 24 of the *Charter* which provides:

- (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
- (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.²²⁹

²²⁸ By way of example, see section 154(2) of the *Criminal Investigation Act 2006* (CIA) in Western Australia which lays out in some detail rules as to the admission of such evidence. *Criminal Investigation Act 2006* (WA) s 154(2) (Austl.). The Act further provides that “[t]he court may nevertheless decide to admit the evidence if it is satisfied that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence,” having regard to a number of specified factors and “any other matter the court thinks fit.” *Id.* s 155(2)–(3)(f).

²²⁹ Canadian Charter of Rights and Freedoms, s 24 (1)–(2), Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

These words have generated decades of litigation and have been given differing interpretations over the years. The current iteration of the section 24(2) test was set by the Supreme Court of Canada in 2009 in *R. v. Grant*.²³⁰ In brief, the Court must consider the seriousness of the state infringing conduct; the impact of the breach on the suspect's rights; and the societal interest in the prosecution of crime. Statements obtained following a violation of the right to counsel are, as a general rule, excluded due to the seriousness of the breach and the fact that the accused was conscripted to manufacture evidence against himself. This raises serious concerns about self-incrimination and the fairness of the trial. Courts will not speculate on what advice a suspect would have received absent the breach. There are some cases in which a statement made after a section 10(b) breach was admitted. This may occur where the suspect had an "irresistible desire to confess,"²³¹ but such cases are very rare.

ENGLAND AND WALES, PROFESSOR ROBERTS:

The traditional common law rationale for excluding "involuntary" confessions was pithily summarized by Lord Griffiths: "[T]he rejection of an improperly obtained confession is not dependent only upon possible unreliability but also upon the principle that a man cannot be compelled to incriminate himself and upon the importance that attaches in a civilised society to proper behaviour by the police towards those in their custody."²³²

The old common law admissibility standard was superseded and replaced by section 76 of PACE 1984. Subsection 76(1) provides that: "In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section."²³³

The principal grounds of exclusion are then adumbrated by subsection 76(2):

If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained—

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

²³⁰ 2009 SCC 32 para. 71, [2009] 2 S.C.R. 353, 393–94 (Can.).

²³¹ See *R. v. Harper*, [1994] 3 S.C.R. 343, 346 (Can.).

²³² *Lam Chi-ming v. R* [1991] 2 AC 212 (PC) 220.

²³³ Police and Criminal Evidence Act 1984, c. 60, s. 76(1) (Eng.).

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.²³⁴

It is a measure of how seriously Parliament takes the responsibility of monitoring the quality of confession evidence that the onus is placed squarely on the prosecution to disprove “beyond reasonable doubt” any objection to the admissibility of a confession under either paragraph (a) or (b) of subsection (2).²³⁵

The Court of Appeal’s early decision in *Fulling*²³⁶ remains one of the leading judicial pronouncements on the meaning of “oppression” under section 76(2)(a) of PACE. According to Lord Lane CJ, section 76(2)(a)’s concept of oppression bears its ordinary dictionary meaning:

The *Oxford English Dictionary* as its third definition of the word runs as follows: “Exercise of authority or power in a burdensome, harsh, or wrongful manner; unjust or cruel treatment of subjects, inferiors, etc., [or] the imposition of unreasonable or unjust burdens.” One of the quotations given under that paragraph runs as follows: “There is not a word in our language which expresses more detestable wickedness than oppression.”²³⁷

Subsequent authorities have interpreted section 76(2)(a) more expansively. In *Paris, Abdullahi and Miller*²³⁸ (the “Cardiff Three”), the suspect Miller was interrogated over some thirteen hours, during which time he denied the murder no less than 300 times, before he finally confessed. Lord Taylor CJ seemed genuinely shocked by the audiotaped record of the interview, exclaiming that “[s]hort of physical violence, it is hard to conceive of a more hostile and intimidating approach by officers to a suspect.”²³⁹ At the other end of the spectrum, an officer’s isolated shouting, swearing, or fleeting loss of temper would not amount to oppression,²⁴⁰ nor does every police impropriety automatically trigger exclusion.²⁴¹ The maturity, mental stability,

²³⁴ *Id.* s. 76(2). Section 76(8) provides that: “[O]ppression’ includes torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture).”

²³⁵ *Id.* s. 76(2).

²³⁶ *R v. Fulling* [1987] QB 426 (CA) (Eng.).

²³⁷ *Id.* at 432.

²³⁸ *R v. Paris, Abdullahi & Miller* (1993) 97 Cr. App. R. 99 (CA) 102 (Eng.).

²³⁹ *Id.* at 103.

²⁴⁰ *R v. Emmerson* (1991) 92 Cr. App. R. 284 (CA) 284–85 (Eng.); *R v. Heaton* [1993] Crim. L. Rev. 593 (CA) 595 (Eng.); *see also* *Hussein v. Defence Secretary* [2013] EWHC (Admin) 95, [38] (shouting at military captives not inhuman, and unlikely to be considered “oppressive”).

²⁴¹ *R v. Parker* [1995] Crim. L. Rev. 233 (CA) 234 (specifically applying the more general principle established in cases such as *R v. Keenan* [1990] 2 QB 54 (CA) 69 (Eng.)).

and physical health of the suspect,²⁴² as well as the conduct of the interviewing officers themselves, must all be taken into account in arriving at an intensively fact-sensitive assessment.

The second limb of section 76(2) targets, not the unreliability of any particular confession, but *circumstances liable to produce unreliable admissions* (even if the confession in the instant case is or might well be true).²⁴³ The test is one of—as it were—hypothetical unreliability:

[T]he test is not whether the actual confession was untruthful or inaccurate. It is whether whatever was said or done was, in the circumstances existing as at the time of the confession, *likely* to have rendered such a confession unreliable, whether or not it may be seen subsequently (with hindsight and in the light of all the material available at trial) that it did or did not actually do so.²⁴⁴

Section 76(2)(b) is predicated on the assumption that a categorical rule of exclusion will promote the reliability of confession evidence *in general*, in preference to a discretionary approach relying on case-specific judicial determinations and *ad hoc* exceptions. The reliability of particular admissions is not treated as a criterion of admissibility in its own right. Contextual applications of subsection (2)(b) must focus on the *interaction* between particular suspects and the nature and conditions of the police interview or other occasion on which an admission was made. “The question is always fact specific, and in particular, defendant specific The focus must be concentrated on the reliability of the confession made by the individual defendant, given the circumstances as they existed when the confession was made.”²⁴⁵ In contrast to the “oppression” ground of exclusion, however, the operation of the unreliability limb does not presuppose any impropriety on the part of the police.²⁴⁶ Some disturbed or dissociated suspects²⁴⁷ may be prone to making false admissions in the absence of any untoward pressure or encouragement to incriminate themselves.²⁴⁸

²⁴² See, e.g., *R v. Seelig* [1992] 1 WLR 148 (CA) 155 (Eng.); *R v. Smith (Wallace Duncan)* (1994) 99 Cr. App. R. 233 (CA) 238 (Eng.).

²⁴³ See *Re Proulx* [2001] 1 All ER 57 (DC) (Eng.).

²⁴⁴ *Id.* at 77.

²⁴⁵ *R v. Wahab* [2002] EWCA Crim 1570 [40], [2003] 1 Cr. App. R. 15, 241 (Eng.).

²⁴⁶ *Beeres v. CPS* [2014] EWHC (Admin) 283, [10], [2014] 2 Cr. App. R. 8 101, 107 (“The absence of culpability on the part of the police is not determinative since a confession may prove to be unreliable notwithstanding.”).

²⁴⁷ See, e.g., *R v. Ward (Judith)* [1993] 1 WLR 619 (CA) 674 (Eng.); *R v. Brady* [2004] EWCA Crim 2230, [1], [17] (Eng.) (described by Laws LJ as an “extraordinary” and “troublesome” case in which the accused’s conviction of robbery, to which she confessed and pleaded guilty, was only quashed when two independent eyewitnesses came forward to say that she had been misidentified as the robber).

²⁴⁸ “[S]ometimes all is not what it seems. The question . . . is one of objective evaluation.” *R v. Wilding* [2010] EWCA Crim 2799, [21] (Gross LJ) (Eng.); see also *R v. Roberts* [2011]

NEW ZEALAND, HON. JUDGE HARVEY:

New Zealand courts have long claimed jurisdiction to exclude improperly obtained evidence.²⁴⁹ Initially, exclusion was on the basis of trial fairness. Following the enactment of the NZBORA, the courts began excluding evidence obtained in breach of the rights enshrined therein and shifted towards a presumption in favour of exclusion. However, the Court of Appeal replaced this approach with a balancing test focusing on whether exclusion of the improperly obtained evidence was a proportionate remedy to the impropriety giving rise to the evidence.²⁵⁰ This approach has largely been codified in section 30 of the Evidence Act which requires a balancing exercise in light of a non-exhaustive list of factors in section 30(3):

- (a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it:
- (b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith:
- (c) the nature and quality of the improperly obtained evidence:
- (d) the seriousness of the offence with which the defendant is charged:
- (e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used:
- (f) whether there are alternative remedies to exclusion of the evidence that can adequately provide redress to the defendant:
- (g) whether the impropriety was necessary to avoid apprehended physical danger to the Police or others:
- (h) whether there was any urgency in obtaining the improperly obtained evidence.²⁵¹

The New Zealand approach neither mandates the exclusion of evidence nor creates a presumption in its favour. It simply maintains the balancing test where exclusion will only be ordered where it is deemed a proportionate response to the impropriety having regard to the need for an effective and credible justice system.²⁵²

EWCA Crim 2974, [17] (Goldring LJ) (Eng.) (referring to “the objective likelihood of reliability in the circumstances at the time the confession was made”).

²⁴⁹ See generally Simon France, *Exclusion of Improperly Obtained Evidence*, 11 N.Z. UNIVS. L. REV. 334 (1985).

²⁵⁰ See generally *R v. Shaheed* [2002] 2 NZLR 377 (N.Z.).

²⁵¹ Evidence Act 2006, s 30(3) (N.Z.).

²⁵² The Law Commission in the Second Review of the Evidence Act noted that the general policy of section 30 should be examined given common concerns that the section is skewed too heavily in favor of admission rather than exclusion. N.Z. Law Comm'n, *The Second Review of the Evidence Act 2006* [2019] NZLCR 142: *Te Arotake Tuarua I te Evidence Act 2006*,

In addition to section 30, the reliability rule and the oppression rule in sections 28 and 29 of the Evidence Act 2006 provide further means of control over the admissibility of statements obtained through questionable investigative methods.²⁵³ Unlike section 30 which leaves an overarching discretion with the judge as whether or not evidence ought to be excluded, sections 28 and 29 are both rules of automatic exclusion: once the conditions in either of those sections are made out, the evidence simply must be excluded.²⁵⁴

The reliability rule in section 28 focuses on the circumstances in which the statement offered by the prosecution was made. If the defendant or the judge makes reliability a live issue on the basis of an evidential foundation, the statement must be excluded unless the prosecution proves on the balance of probabilities that the circumstances in which the statement was made were not likely to have adversely affected its reliability.²⁵⁵

Section 29 operates to exclude statements that are influenced by oppression.²⁵⁶ If the defendant or the judge makes oppression a live issue, then the prosecution must satisfy the judge beyond reasonable doubt that the statement was not influenced by oppression.²⁵⁷

NZLII, s 7.5, <http://www.nzlii.org/nz/other/lawreform/NZLCR/2019/142.html> [<https://perma.cc/B4MQ-87Z5>] (Mar. 13, 2019).

²⁵³ Evidence Act 2006, ss 28–29.

²⁵⁴ *Id.*

²⁵⁵ When making the reliability assessment, the judge must have regard to the non-exhaustive list of matters in section 28(4) including the defendant’s physical, mental or psychological condition at the time the statement was made; any mental, intellectual or physical disability to which the defendant is subject; the nature of any questions and manner and circumstances in which they were put to the defendant; and the nature of any threat, promise or representation made to the defendant or any other person. *Id.* s 28(4). Section 28(3) provides a limited exception and that is when a statement is offered only as evidence of the physical, mental or psychological condition of the defendant or as evidence of the fact the statement was made, as opposed to for the proof of its content. *Id.* s 28(3).

In one recent case, the defendant argued that her statement should be inadmissible under section 28 due to a combination of extreme tiredness and the effects of cannabis and alcohol. *R v. Butler* [2019] NZHC 446 at [33] (N.Z.). The court accepted that the issue of reliability was a live issue, but held that the defendant’s tiredness and any enduring effects of alcohol or cannabis at the time of her police interviews were not likely to have adversely affected the reliability of her statement. *Id.* The court noted the absence of any case law or social science research to assist with her decision and considered a “common sense” approach to be most appropriate. *Id.* at [21].

²⁵⁶ Evidence Act 2006, s 29.

²⁵⁷ Section 29(5) provides an exhaustive definition of oppression as “oppressive, violent, inhuman, or degrading conduct towards, or treatment of, the defendant or another person; or . . . a threat of conduct or treatment of that kind.” *Id.* In *R v. Hanford*, Priestley J stated that the words in section 29(5) “denote conduct of a very brutal, physically violent, or highly callous type.” HC Auckland CRI 2007-057-1922, 24 July 2008 at [64] (N.Z.).

Sections 28–30 will often overlap and intersect. In one prominent decision, the Supreme Court reviewed the reform process leading to sections 28–30 of the Act:

In our view, the legislative scheme reveals a three tier approach to confessional statements:

(a) At the most serious level are statements obtained under the influence of oppression. . . .

(b) The second tier concerns reliability. . . . The change in the standard of proof [of ss 28(2); 29(2)] is indicative of reliability issues being regarded as less serious than oppressive conduct. . . .

(c) If neither s 28 nor s 29 apply, the statement falls for consideration under the more general provisions of s 30. . . . If the statement is found to have been improperly obtained (for s 30 purposes) there is no onus on the Crown to demonstrate that the circumstances require admission of the statement. Rather, the circumstances in which the confessional statement was obtained becomes one of the number of balancing factors set out in s 30(3) to be taken into account in determining whether the statement should be admitted.²⁵⁸

UNITED STATES, MS. BROOK:

If police conduct an improper interrogation, it is difficult to determine if the resulting confession will be excluded at trial. It depends on the circumstances. Due process, however, prohibits coerced confessions from being used in any way in a criminal trial.²⁵⁹

As a general rule, that is also true for voluntary confessions given in violation of *Miranda*, as the Court made clear in *Oregon v. Elstad*, discussed above.²⁶⁰ However, as we have seen, there are exceptions to this rule.

B. Will tangible evidence be excluded if the statement is not allowed?

AUSTRALIA, HON. JUSTICE FIANNACA:

The answer is “not necessarily.” There is no strict rule of exclusion of “the fruit of the poisoned tree” in the common law applied in Australia.

The public policy basis for discretionary exclusion was first expounded in Australia in *Bunning v Cross*, a case concerning the administering of a breathalyser test in contravention of the relevant statutory requirements.²⁶¹ It was held that the

²⁵⁸ *R v Hawea* [2009] NZCA 127 at [31] (N.Z.) (citations omitted).

²⁵⁹ See *Mincey v. Arizona*, 437 U.S. 385, 398 (1978).

²⁶⁰ 470 U.S. 298, 307 (1985).

²⁶¹ (1978) 141 CLR 54, 80–81 (Austl.). The court referred to the decision in *R v Ireland*, (1970) 126 CLR 321, 335 (Austl.) which, in part, did involve a confession.

court had a discretion at common law to exclude tangible evidence obtained by illegal or improper process, which includes a failure to comply with statutory obligations, although in the circumstances of that case the High Court held that the evidence ought to have been admitted. I am not aware of any decision in Australia in which “tangible evidence” has been excluded on the basis that the accused’s statement that identified the existence or location of the object was excluded. However, it is within the principles concerning discretionary exclusion (both in respect of fairness and public policy) for an exhibit found in such circumstances to be excluded at trial if the interests of justice favoured such a course. That decision would be reached after taking into account the competing factors, in particular the desirability of bringing wrongdoers to justice on the one hand and the damage to the integrity of the administration of justice and law enforcement on the other.²⁶²

Provisions such as section 154(2) of the CIA (referred to above) render inadmissible any evidence derived from the exercise of a power where there has been a contravention of a relevant requirement of the Act.²⁶³ On the face of it, the provision could apply to exclude (presumptively) tangible evidence of which the police became aware only as a result of the accused’s admissions which have been excluded from evidence. Such tangible evidence could be said to have been derived from the exercise of the power to detain the suspect for the purposes of interviewing or investigation.²⁶⁴

CANADA, HON. JUSTICE POMERANCE:

This raises the question of derivative evidence.

For many years, the key question was whether the tangible evidence would have been discovered but for the breach. For example, in *R. v. Black*, the accused was a suspect in a homicide.²⁶⁵ While being questioned in her home, she produced the knife that had been used to kill the victim from her kitchen drawer. While the police violated the suspect’s right to counsel, and her statements were excluded, the Supreme Court of Canada ruled that the knife was admissible at trial. There was no doubt that the police would have conducted a search of the accused’s apartment with or without her assistance and that such a search would have uncovered the knife. Because the evidence was discoverable even without the statement, it was ruled admissible at the trial.

By way of contrast, in *R. v. Burlingham*, the murder weapon was excluded at trial.²⁶⁶ Police engaged in highly improper and unconstitutional questioning techniques of Mr. Burlingham before asking him to identify where the weapon was. He

²⁶² See generally *Ireland*, 126 CLR 321; *R v Swaffield* (1998) 192 CLR 159 (Austl.). In *Ireland*, Barwick CJ said: “Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price.” *Ireland*, 126 CLR at 335.

²⁶³ *Criminal Investigations Act 2006* (WA) s 154(2) (Austl.).

²⁶⁴ See *id.* s 139(2)(b)–(c).

²⁶⁵ See generally [1989] 2 S.C.R. 138 (Can.).

²⁶⁶ See generally [1995] 2 S.C.R. 206 (Can.).

eventually showed police where he had left the gun months earlier, under what had since become the frozen Kootenay River. Armed with that information, police divers located the gun for presentation at trial. In excluding the statements and the gun, the Court noted that the gun would never have been found were it not for the unconstitutional conduct by the police officers.

With the evolution of the section 24(2) test under *R. v. Grant*,²⁶⁷ discoverability is no longer dispositive when dealing with derivative evidence. It is one of many factors to be considered:

The weighing process and balancing of these concerns is one for the trial judge in each case. Provided the judge has considered the correct factors, considerable deference should be accorded to his or her decision. As a general rule, however, it can be ventured that where reliable evidence is discovered as a result of a good faith infringement that did not greatly undermine the accused's protected interests, the trial judge may conclude that it should be admitted under s. 24(2). On the other hand, deliberate and egregious police conduct that severely impacted the accused's protected interests may result in exclusion, notwithstanding that the evidence may be reliable.

The s. 24(2) judge must remain sensitive to the concern that a more flexible rule may encourage police to improperly obtain statements that they know will be inadmissible, in order to find derivative evidence which they believe may be admissible. The judge should refuse to admit evidence where there is reason to believe the police deliberately abused their power to obtain a statement which might lead them to such evidence. Where derivative evidence is obtained by way of a deliberate or flagrant *Charter* breach, its admission would bring the administration of justice into further disrepute and the evidence should be excluded.²⁶⁸

ENGLAND AND WALES, PROFESSOR ROBERTS:

English law has never embraced a general “fruit of the poisoned tree” doctrine mandating exclusion of evidence obtained through a tainted confession or any other kind of illegality or impropriety. The traditional common law rule, stretching back at least to the mid-eighteenth century, is that the admissibility of evidence at trial is wholly unaffected by the circumstances in which it was obtained.²⁶⁹ By the same token,

²⁶⁷ 2009 SCC 32, [2009] 2 S.C.R. 353 (Can.).

²⁶⁸ *Id.* paras. 127–28.

²⁶⁹ Classic early authorities include *R v. Warickshall* (1783) 168 Eng. Rep. 234; 1 Leach 263; *R v. Griffin* (1809) 168 Eng. Rep. 732; *Russ & Ry* 151; *R v. Gould* (1840) 173 Eng. Rep. 870;

English criminal jurisprudence insists on procedural fairness; and it is recognised that certain uses of evidence, including reliance at trial on evidence which has been obtained through illegality, impropriety or rights violations, could be fundamentally unfair.²⁷⁰ The common law exclusionary “discretion” was subsequently reinforced, and more or less superseded, by section 78 of PACE 1984, which provides:

In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.²⁷¹

Section 78 has spawned a vast interpretational jurisprudence elucidating the circumstances in which it can be said that evidence “would have *such an adverse effect* on the fairness of the proceedings that the court ought not to admit it.”²⁷² The precise rationale(s) for exclusion remain controversial.²⁷³ What is clear is that trial judges enjoy significant latitude in applying section 78 to the (unique) factual circumstances of individual cases and trials, so that decided cases may have limited precedential value. Bad faith is an aggravating factor but not a prerequisite to exclusion, especially where investigative conduct may have undermined the reliability of resulting evidence.²⁷⁴ Violations of certain fundamental rights, notably suspects’ access to custodial legal advice, point strongly in favour of exclusion, but even here there are no guaranteed outcomes. The upshot, for present purposes, is that “[t]he ‘fruits of the poisoned tree’ are not inadmissible in a criminal trial in this country”;²⁷⁵ but they *may* trigger section 78 exclusion on the facts.

9 Car. & P 364; R v. Leatham (1861) 121 Eng. Rep. 589; 8 Cox CC 498; and R v. Berriman (1854) 6 Cox CC 388.

²⁷⁰ See R v. Christie [1914] AC 545 (HL); R v. Sang [1980] AC 402 (HL).

²⁷¹ Police and Criminal Evidence Act 1984, c. 60, s. 78(1) (Eng.).

²⁷² *Id.*

²⁷³ See PAUL ROBERTS & ADRIAN ZUCKERMAN, CRIMINAL EVIDENCE 176–78 (2d ed. 2010); PETER MIRFIELD, SILENCE, CONFESSIONS AND IMPROPERLY OBTAINED EVIDENCE (1997); DIMITRIOS GIANNOULOPOULOS, IMPROPERLY OBTAINED EVIDENCE IN ANGLO-AMERICAN AND CONTINENTAL LAW (2019).

²⁷⁴ Cf. ROBERTS & ZUCKERMAN, *supra* note 273, at 211–12 (discussing R v. Stagg, 1994 WL 17112471 (Sept. 14, 1994)); Sir Harry Ognall, *Any Judge Would Do the Same. The Case Against Colin Stagg Was Based on a Single Rotten Plank*, SUNDAY TIMES (Dec. 19, 2008), <https://www.thetimes.co.uk/article/any-judge-would-do-the-same-the-case-against-colin-stagg-was-based-on-a-single-rotten-plank-jxg7krs79j2> [<https://perma.cc/26AJ-QAZM>].

²⁷⁵ Mustafa v. United States [2008] EWHC (Admin) 1357, [48] (Eng.); see also HM Advocate v. P [2011] UKSC 44, [2011] 1 WLR 2497.

Reiterating the common law position, subsection 76(4)(a) of PACE 1984 now provides that “[t]he fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence . . . of any facts discovered as a result of the confession.”²⁷⁶ Subsection 76(5) adds the crucial proviso that reference must not be made to any part of an excluded confession when adducing evidence resulting from it.²⁷⁷ This means that the evidence in question must be relevant in its own right, without referring to the accused as the source of the information leading to it.

Both at common law and by virtue of the European Convention on Human Rights, testimonial evidence obtained by torture is absolutely inadmissible in any judicial proceeding,²⁷⁸ including criminal trials, in England and Wales. Physical torture during interrogation is forbidden not by virtue of special provisions of criminal procedure but by ordinary criminal law and international human rights standards.²⁷⁹

NEW ZEALAND, HON. JUDGE HARVEY:

Section 30(5)(b) of the Evidence Act 2006 covers the circumstances in which a suspect makes a statement to the police and that statement refers to other incriminating real evidence.²⁸⁰ The subsection provides that if the originating statement is inadmissible, the real evidence also comes within the definition of improperly obtained evidence.²⁸¹ The real evidence is not necessarily excluded though; its admissibility will be determined by reference to the section 30(2)(b) balancing exercise discussed above.

UNITED STATES, MS. BROOK:

On the question of whether tangible evidence will be excluded, again, the answer is not certain. For involuntary coerced confessions, the answer is yes.²⁸²

For unwarned but voluntary confessions, the answer is no. The Supreme Court has not applied the fruit of the poisonous tree doctrine to Fifth Amendment violations as strictly as it has applied the doctrine in the Fourth Amendment search and seizure context, finding less need for deterrence and giving more deference to the police.

²⁷⁶ Section 76(4)(b) likewise preserves admissibility “where the confession is relevant as showing that the accused speaks, writes or expresses himself in a particular way, of so much of the confession as is necessary to show that he does so.” Police and Criminal Evidence Act 1984, s. 76(4)(b).

²⁷⁷ *Id.* s. 76(5).

²⁷⁸ *See A v. Home Secretary (No 2)* [2005] UKHL 71, [2006] 2 AC 221 (HL); Paul Roberts, *Normative Evolution in Evidentiary Exclusion: Coercion, Deception and the Right to a Fair Trial*, in *CRIMINAL EVIDENCE AND HUMAN RIGHTS* 163 (Paul Roberts & Jill Hunter eds., 2012).

²⁷⁹ Torture is an international crime and its prohibition is a jus cogens norm of customary international law. *See* ROBERT CRYER, DARRYL ROBINSON & SERGEY VASILIEV, *AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE* 294–95 (4th ed. 2019).

²⁸⁰ *See* Evidence Act 2006, s 30(5)(b) (N.Z.).

²⁸¹ *Id.*

²⁸² *New Jersey v. Portash*, 440 U.S. 450, 459 (1979).

For those reasons, where unwarned statements led to the identity of a key witness, the Court ruled that the witness's testimony was admissible at the defendant's trial, even though the defendant's confession was not. In reaching its conclusion, the Court weighed the need to provide effective sanctions for violations of a constitutional right against making available relevant evidence to the trier of fact and "society's interest in the effective prosecution of criminals."²⁸³

Moving from testimony to tangible evidence, in *United States v. Patane*, the Justices refused to suppress the gun the defendant told the police about even though the police stopped giving him his *Miranda* warnings halfway through the interrogation.²⁸⁴ Here too, the Court considered the effect exclusion would have on deterrence and determined that it would not further that goal.

The Court took a different tack in *Oregon v. Elstad*, where the issue was whether a failure to initially administer warnings before obtaining a confession made it impossible to legally obtain a subsequent confession after administering proper warnings because "the 'cat [was] out of the bag.'"²⁸⁵ The Court said no, focusing on whether the second confession was knowingly and voluntarily made rather than on society's interest in the prosecution of criminals or on the goal of deterring bad police conduct.²⁸⁶

It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.²⁸⁷

The Court does find coercion, however, in so-called "two stage" cases where the police initially deliberately omit *Miranda* warnings to obtain a confession, then give the warnings, ask the suspect to waive them and to confess again. The Court distinguished its holding in *Elstad* by looking at factors including the good faith of the officers, "the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first."²⁸⁸

²⁸³ *Michigan v. Tucker*, 417 U.S. 433, 450 (1974) (quoting *Jenkins v. Delaware*, 395 U.S. 213, 221 (1969)).

²⁸⁴ 542 U.S. 630, 644 (2004) (plurality opinion).

²⁸⁵ 470 U.S. 298, 303–04 (1985) (quoting *United States v. Bayer*, 331 U.S. 532 (1947)).

²⁸⁶ *Id.* at 309.

²⁸⁷ *Id.*

²⁸⁸ *Missouri v. Seibert*, 542 U.S. 600, 615 (2004).

III. MORE ON THE PROCESS

A. What must suspects do or say to indicate a desire for silence or for a lawyer?

AUSTRALIA, HON. JUSTICE FIANNACA:

There is no prescribed set of words or manner in which the suspect must indicate his or her right to silence. The suspect may literally remain silent, although it is a common practice for interviewing officers to ask the suspect to signify their desire not to answer any question by saying so, saying “no comment” or advising the officer that he or she does not wish to continue with the interview. However, the approach taken may affect whether the suspect is taken to have expressly indicated a desire to exercise the right to silence in respect of the matter under investigation, if covert means are used subsequently to obtain a confession. If there is a clear indication of the suspect’s choice not to speak to police about the matter, the covert elicitation of the confession would be an improper circumvention of the appellant’s right to remain silent.²⁸⁹

On the other hand, where a suspect indicated her desire to discontinue the interview, but then chose to answer questions when the police continued with the interview, and there was no suggestion of her will having been overborne, it was held that the circumstances did not warrant the exclusion of the evidence in the exercise of discretion.²⁹⁰

It is appropriate to note that, if an accused answers some questions and says “no comment” in respect of others, a jury will ordinarily be directed that they are not to draw any adverse inference against the accused from the fact he has exercised the right not to answer some questions.

As for requesting a lawyer, the obligation on the police to afford an arrested suspect the right to speak with a lawyer will ordinarily entail the interviewing officer asking the suspect whether he wishes to speak with a lawyer. It is necessary for the suspect to indicate positively that he wishes to do so. It is not for the police to make the decision for the suspect if he equivocates. The situation is different in Western Australia, however, in respect of Aboriginal persons and Torres Strait Islanders. In those cases the police must (a) notify the Aboriginal Legal Service Western Australia (ALSWA) by telephone before interviewing the suspect, (b) allow the lawyer to speak with the suspect, and (c) speak with the lawyer to ascertain if there are any concerns before interviewing the suspect.²⁹¹

CANADA, HON. JUSTICE POMERANCE:

Once a detainee asserts that she would like to speak to a lawyer, she need not take further steps to request an opportunity to do so. It is incumbent upon the police

²⁸⁹ See *R v Swaffield* (1998) 192 CLR 159, 184–85 (Austl.) (Brennan, CJ); *id.* at 203 (Toohey, Gaudron & Gummow, JJ); *id.* at 225 (Kirby, J).

²⁹⁰ See *Western Australia v Smith* [2010] WASC 279 (1 October 2010) 8–9 (Austl.).

²⁹¹ See *Police Force Regulations 1979* (WA) reg 703 (Austl.).

to facilitate the right in a timely fashion. If a detainee is ambiguous about whether she wishes to speak to a lawyer, police are under an obligation to clarify the detainee's position, and perhaps, reiterate the right to ensure that the detainee has a full understanding. An ambiguous response will not qualify as a waiver of the right to counsel as a waiver must be express and unambiguous.

That said, the detainee does have a duty to act with diligence. For example, if the detainee's lawyer of choice is not available and will not be for several hours, diligence may require the detainee to obtain legal advice from duty counsel instead. If a detainee is not diligent in the exercise of her right to counsel, this will suspend the obligation on police to refrain from eliciting evidence.

As for the right to silence, suspects may assert the right to silence at any time. The case law is full of examples of suspects who have failed to heed the advice of their lawyer to say nothing. Those who do follow the advice may assert the right to silence in response to police questioning. While the suspect can assert the right to silence, this does not have the effect of halting or suspending police questioning. The Supreme Court of Canada has held that "[t]he state is not obliged to protect the suspect against making a statement; indeed it is open to the state to use legitimate means of persuasion to encourage the suspect to do so."²⁹² In *R. v. Singh*, the court confirmed that: "What the common law recognizes is the individual's right to *remain* silent. This does not mean, however, that a person has the right *not to be spoken to* by state authorities."²⁹³ The question in any given case is whether the persistent questioning denied the accused the ability to make a meaningful choice about whether to speak.

In *Singh*, the police continued questioning the accused, despite eighteen assertions that he did not wish to say anything.²⁹⁴ While the Supreme Court of Canada found no violation in that case, it left open the possibility that such conduct could amount to an infringement. I believe that *Singh*, properly construed, is a case about appellate deference. The Supreme Court of Canada reversed the court of appeal for not showing proper deference to the trial judge's finding that there was no violation. Ultimately, these decisions are fact specific and involve the weighing of several factors:

It must again be emphasized that such situations are highly fact-specific and trial judges must take into account all the relevant factors in determining whether or not the Crown has established that the accused's confession is voluntary. In some circumstances, the evidence will support a finding that continued questioning by the police in the face of the accused's repeated assertions of the right to silence denied the accused a meaningful choice whether to speak or to remain silent. The number of times the accused asserts

²⁹² *R. v. Herbert*, [1990] 2 S.C.R. 151, 176–77 (Can.).

²⁹³ 2007 SCC 48, para. 28, [2007] 3 S.C.R. 405, 421 (Can.).

²⁹⁴ *Id.* para. 13.

his or her right to silence is part of the assessment of all of the circumstances, but is not in itself determinative. The ultimate question is whether the accused exercised free will by choosing to make a statement.²⁹⁵

ENGLAND AND WALES, PROFESSOR ROBERTS:

Access to custodial legal advice is regarded as part of the fundamental (human) right to a fair trial in states, including the UK, which are parties to the European Convention on Human Rights; and for suspects in pre-charge police detention in England and Wales, this is guaranteed by section 58 of the Police and Criminal Evidence Act (PACE) 1984. In *R v. Samuel*, the Court of Appeal described the section 58 right to (free) custodial legal advice as “one of the most important and fundamental rights of a citizen,”²⁹⁶ a sentiment which the Strasbourg European Court of Human Rights strongly endorses.²⁹⁷ Detained suspects in England and Wales must be informed of this right by the police without prompting; they do not actively need to request it. Paragraph 6.4 of PACE Code C states, unequivocally, that “[n]o police officer should, at any time, do or say anything with the intention of dissuading any person who is entitled to legal advice in accordance with this Code, whether or not they have been arrested and are detained, from obtaining legal advice.”²⁹⁸ Paragraph 6.6 of Code C adds that “[a] detainee who wants legal advice may not be interviewed or continue to be interviewed until they have received such advice.”²⁹⁹ It then proceeds to enumerate a long list of provisos and exceptions.

Having a statutory right to custodial legal advice does not entail that all suspects interviewed in police stations actually *receive* custodial legal advice during their interrogation; not even those who actively assert their right necessarily receive it before being interviewed. Numerous empirical studies have shown that suspects decline legal advice for a variety of personal reasons and contextual factors, but one recurrent influence is the various “ploys” devised by police officers to persuade suspects to be interviewed before the duty solicitor arrives, or to forego legal advice altogether.³⁰⁰ PACE Code C has been serially amended in an effort to wean detectives off these subversive practices, but in reality the scope for subtle “ploy[s]” of one kind or another cannot be eliminated,³⁰¹ even if investigating officers stick

²⁹⁵ *Id.* para. 53 (citation omission).

²⁹⁶ *R v. Samuel* [1988] QB 615 at 630 (Eng.), *endorsed by* *R v. James* [2008] EWCA Crim 1869, [35] (Eng.).

²⁹⁷ *See Salduz v. Turkey* (2009) 49 EHRR 19 (GC).

²⁹⁸ PACE Code C, *supra* note 56, 6.4.

²⁹⁹ *Id.* at 6.6.

³⁰⁰ *See generally* Pascoe Pleasence, Vicky Kemp & Nigel J. Balmer, *The Justice Lottery? Police Station Advice 25 Years on from PACE*, 2011 CRIM. L. REV. 3; Layla Skinns, *The Right to Legal Advice in the Police Station: Past, Present and Future*, 2011 CRIM. L. REV. 1.

³⁰¹ For empirical demonstrations, see Vicky Kemp, “No Time for a Solicitor”: *Implications for Delays on the Take-up of Legal Advice*, 2013 CRIM. L. REV. 3, 184.

fastidiously to the letter of Code C. For example, officers are expressly forbidden from volunteering to suspects that waiting for a solicitor may lengthen their time in custody, but are permitted—indeed, they are bound—to communicate this reality *in response to a direct question*.³⁰²

A suspect's right to access legal advice may be waived without the benefit of professional legal advice on the question of waiver itself.³⁰³ The UK Supreme Court has confirmed that, "[w]here the accused, having been informed of his rights, states that he does not want to exercise them, his express waiver of those rights will normally be held to be effective" provided that the accused "understands what the right is and that it is being waived and that the waiver is made freely and voluntarily."³⁰⁴ There are also circumstances in which access to legal advice can legitimately be delayed, including the conduct of "safety interviews" to avert anticipated peril (e.g., to thwart an imminently feared terrorist attack). If the accused's remarks during such interviews are later adduced at trial, the jury may implicitly learn what the accused did *not* say as well as what he did say during police interrogation.

It remains the case that suspects detained in police stations in England and Wales are not obliged to say anything when interviewed by the police. Conversely, there is no indication, either in PACE itself or in the accompanying Codes of Practice, that the accused's prerogative to refuse to answer questions implies that the police cannot continue to press suspects for answers. To the contrary, the current version of Code C states that although a suspect "may choose not to answer questions . . . police do not require the suspect's consent or agreement to interview them."³⁰⁵ Clearly, the "right to remain silent" in the police station is not to be confused with an immunity from being questioned under PACE.

NEW ZEALAND, HON. JUDGE HARVEY:

There is no specific rule or regulation in respect of what is required in order to indicate a desire for silence or for a lawyer, or conversely, to waive the right to silence or to speak with a lawyer. However, a valid waiver of the right to consult with a lawyer cannot normally be implied from silence. Very recently in *Ballantyne v. R*, the Court of Appeal held that a court may infer from silence that a suspect made an informed

³⁰² PACE Code C, *supra* note 56, Note 6ZA. Nicely encapsulating the dilemma in *R v. Saunders* [2012] EWCA Crim 1380, [21] (Eng.), Moses LJ opined:

[W]e do not agree that there is any necessity to keep quiet about any delay a decision to wait for a solicitor may cause. There may be cases where to say that it will take time, and the way in which it is said, might amount to a suggestion not to wait. But it can hardly be fair for a police officer to refuse to say how long it may take to wait, and merely to confine a detainee without any warning of how long that might be.

³⁰³ *McGowan v. B* [2011] UKSC 54, [54]–[55].

³⁰⁴ *Id.* at [46] (Lord Hope).

³⁰⁵ PACE Code C, *supra* note 56, 12.5.

choice not to exercise a right in a particular case.³⁰⁶ A waiver by silence was held to have occurred in *Ballantyne* because the defendant had been fully informed of and understood his right to speak to a lawyer.³⁰⁷ The court emphasized that although a decision not to exercise the right to speak to a lawyer should not be lightly inferred, that does not mean it may never be inferred. Whilst it would constitute best practice, there is no requirement for a police officer to expressly enquire whether a suspect wishes to exercise the right to consult with a lawyer.

The key Supreme Court decision is *R v. Perry*.³⁰⁸ There the defendant had not unequivocally claimed the right to remain silent by telling the police that he had spoken to his lawyer by telephone and the lawyer had told him not to make a statement.³⁰⁹ The defendant's rights were explained to him, but he elected to start an interview. During the interview he said, "I'm not going to say anymore until I speak with a lawyer."³¹⁰ The officer stopped the interview and provided access to a lawyer. The defendant then told the detective his lawyer had advised him not to make a statement. During a break, the officer suggested to the defendant that his choice not to continue his statement might not be his best course. The Supreme Court found that the defendant had not unequivocally asserted a wish to remain silent and was undecided about whether or not to say anything further.³¹¹

UNITED STATES, MS. BROOK:

According to *Miranda*:

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is

³⁰⁶ See [2017] NZCA 363 at [34] (N.Z.). See generally *Police v. Kohler* [1993] 3 NZLR 129 (N.Z.).

³⁰⁷ *Ballantyne*, [2017] NZCA 363 at [34].

³⁰⁸ See [2016] NZSC 102 at [36]–[37] (N.Z.).

³⁰⁹ *Id.*

³¹⁰ *Id.* at [13].

³¹¹ Given the conclusion in *Perry*, the majority held that the case was not the appropriate context in which to resolve the divergence in the Court of Appeal on a related issue of whether the police must stop questioning after an assertion of a desire to exercise the right to silence or to a lawyer. *Id.* at [159]. Following a series of cases in which the Court came close to recognizing such a requirement, it rejected such a "bright line" rule in *R v. Ormsby* CA 493/04, 8 April 2005 (N.Z.). In *Ormsby* the Court held that, despite clause 2 of the Practice Note, where a suspect has expressed a desire to remain silent, the police may continue to ask further questions in the hope that the suspect will waive their right to silence, provided the questioning is not "overbearing or unfair." *Id.* This would ultimately involve a finding of fact as to whether or not continuation of the questioning involved an "inappropriate undermining" of the suspect's rights under NZBORA. See *id.*

present. . . . If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.³¹²

Despite the clarity of this language, a suspect still has to speak up. Silence during a three-hour interrogation does not constitute a request for silence. To invoke the right, a suspect must say he or she wants to remain silent or does not want to talk.³¹³

Similarly, a statement like, “Maybe I should talk to a lawyer,” does not constitute a request for a lawyer.³¹⁴ Although a suspect need not “speak with the discrimination of an Oxford don,”³¹⁵ a request for counsel “requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.”³¹⁶ “[T]he *likelihood* that a suspect would wish counsel to be present is not the test”³¹⁷

Once suspects have invoked their right to counsel, further questioning must cease unless they knowingly and intelligently waive their right. The question then becomes, how to determine whether a waiver is knowing and intelligent? Again, courts look to the totality of the circumstances:

A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.³¹⁸

In *Fare v. Michael C.*, the analysis included the “juvenile’s age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him . . . and the consequences of waiving those rights.”³¹⁹ Although the Court there described the government’s burden as “heavy,”³²⁰ the Court later lowered the standard to “preponderance of the evidence.”³²¹

The government met that standard in one important case where the defendant originally said he did not want to answer any more questions and all questioning stopped. Two hours later, when different detectives gave new warnings at a different

³¹² *Miranda v. Arizona*, 384 U.S. 436, 473–74 (1966).

³¹³ *See generally, e.g., Berghuis v. Thompkins*, 560 U.S. 370 (2010).

³¹⁴ *Davis v. United States*, 512 U.S. 452, 462 (1994).

³¹⁵ *Id.* at 476 (Souter, J., concurring in the judgment).

³¹⁶ *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991).

³¹⁷ *Id.*

³¹⁸ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

³¹⁹ 442 U.S. 707, 725 (1979).

³²⁰ *Id.* at 724.

³²¹ *Colorado v. Connelly*, 479 U.S. 157, 168 (1986).

location and questioned the defendant about a different crime, the Court found no *Miranda* violation.³²² The differences made all the difference.

Waiver may also be inferred. In *North Carolina v. Butler*, the defendant was read his rights, said he understood them, but refused to sign the waiver form.³²³ The agents explained he did not need to sign the form and then asked to talk with him.³²⁴ The Court found the defendant's subsequent inculpatory statements were voluntary and that he had properly waived his *Miranda* rights.³²⁵

B. When [if ever] are statements, ruled admissible, edited before presentation to a jury?

AUSTRALIA, HON. JUSTICE FIANNACA:

By virtue of statutory requirement (which will be discussed later), statements made by an accused person will almost invariably be recorded by electronic audio-visual means (video recording). However, whether the statement is a video recording or written, admissible statements are routinely edited before presentation to a jury (and also in judge alone trials) to remove inadmissible or otherwise irrelevant matter, particularly if it could be prejudicial to the accused. Such material should not be admitted before a jury, and therefore should be excised.³²⁶

Generally, in cases of charges for serious offences, there are statutory provisions to the effect that, subject to exceptions, evidence of a confession or admission by an accused is not admissible unless it is a video (or audio-visual) recording. The editing of such recordings to remove inadmissible or irrelevant material will ordinarily be done by agreement between the prosecution and defence, either at the instigation of the prosecution or upon request (with suggested edits) by the defence. The court may give directions (with or without conditions) as to the editing of an electronically recorded interview.³²⁷ That may occur as a result of a decision upon a dispute between the parties as to what edits should be made or because of matters the court has identified as inadmissible at a hearing before trial.

Edits will often be obvious, with a “jump” in the video and audio and a break in the flow of the questioning or an answer, so juries are directed that editing is a routine matter to remove irrelevant material and that they are not to draw any adverse conclusion against the accused (or, it may be added, the prosecution) as a result. If the editing results in distortion of the interview or unfairness to the accused, it may be excluded by the court in the exercise of discretion.³²⁸

³²² *Michigan v. Mosley*, 423 U.S. 96, 104–05, 107 (1975).

³²³ 441 U.S. 369, 371, 373, 375–76 (1979).

³²⁴ *Id.* at 371.

³²⁵ *Id.* at 375–76.

³²⁶ *Kilby v The Queen* (1973) 129 CLR 460, 473 (Austl.).

³²⁷ *See, e.g., Criminal Investigation Act 2006* (WA) s 122 (Austl.).

³²⁸ The issue was raised in *R v Lacey*, which involved a written record of interview, although in that case, the interview was held to have been properly admitted. (1982) 29 SASR 525, 538 (Austl.) (en banc).

Examples of material that would be edited out include references by the accused to previous convictions for offending and/or periods of imprisonment, questions and answers concerning matters that are not the subject of the charges faced by the accused at trial, opinions or expressions of disbelief expressed by the interviewing officers, lengthy recitations by the interviewing officers of the evidence of other witnesses that are not adopted by the accused, “no comment” answers, and gratuitous or scandalous comments made by an accused about a victim or a witness that are not relevant to his or her defence. There is a tendency to delete “no comment” answers on the basis that they are not probative and may engender prejudice against the accused, notwithstanding any direction from the judge that the jury must not draw any adverse inference from an accused’s exercise of the right to silence. There is no doubt that an interview that consists only of “no comment” answers is not admissible, as it contains no relevant evidence. However, when an accused exercises his right to silence by answering in that way to some of the questions, but gives relevant answers to other questions, it is not strictly necessary for the “no comment” answers to be excised, provided an appropriate direction is given to the jury. It will be a matter of judgment, having regard to the particular circumstances of the case, whether particular edits are necessary.

CANADA, HON. JUSTICE POMERANCE:

Statements are often edited, particularly when certain questioning techniques are used. Police will sometimes engage in “forensic soliloquys” during interviews, offering their theories in the hopes that the suspect might take the bait. The theories of the officer should not be heard by the trier of fact unless they are adopted by the suspect.

Similarly, where the accused has asserted his desire to remain silent, this too is usually edited out of the statement, the concern being that a jury might think the accused had something to hide. An individual should never be penalized for asserting or exercising constitutional rights. If editing is not possible (for example, because content is necessary to provide context for another utterance), then the jury must be instructed that they are not to draw any adverse inference from the accused’s invocation of the right to silence during questioning by police.³²⁹

ENGLAND AND WALES, PROFESSOR ROBERTS:

Editing of witness statements prior to their production in a trial is a routine, and largely uncontroversial, feature of criminal litigation in England and Wales. The accused’s pretrial statements, including confessions and informal admissions, are in principle no different to the pretrial statements of any other declarant or witness in this regard. Inadmissible material would be edited out as a matter of course.³³⁰

³²⁹ See generally *R. v. Noble*, [1997] 1 S.C.R. 874 (Can.).

³³⁰ Thus, tape recordings should not be given to juries after their retirement (as other exhibits can be), because “[i]t may very well be that there are matters which are left on the tape inadvertently which the jury should not hear.” *R v. Riaz* (1992) 94 Cr. App. R. 339 at 344 (Eng.).

In the context of this comparative discussion, two important features of English criminal procedure need to be appreciated to contextualise what might otherwise be taken for complacency on the question of statement editing. First, all custodial police interviews in England and Wales are routinely audio-recorded and some are videorecorded, too. There is therefore virtually always a permanent record of exactly what was said, how it was said, and in response to which questions or allegations. In the absence of such a record, it is very likely that the accused's statements would be inadmissible at trial in any event, unless there was a compelling explanation for the prosecution's failure to produce it.³³¹ Tape recordings of police interviews are sometimes played to the jury at trial, typically in edited form. Such interviews may run to many hours of recordings, and it would impractical, as well as unnecessary, to force the jury to sit through the entire unedited performance. Prosecution and defence counsel would generally be able to agree which edited portions need to be heard, but the trial court may rule, following adversarial argument, where the matter is disputed.³³²

Second, pretrial disclosure by the prosecution is extensive in England and Wales, at least in serious cases tried on indictment, and would certainly include copies of the unedited tape recordings of interviews with the suspect, plus a written summary of the interview transcripts. This is in addition to defence solicitors themselves being present in many interviews, observing and taking their own notes, which is all the more likely in relation to serious allegations. England and Wales is served by a national Crown Prosecution Service, which is responsible for implementing statutory obligations for full and timely pretrial disclosure.³³³ All witness statements, scientific reports and copies or records of any other material comprising the prosecution's case-in-chief at trial must be served on the defence in advance.³³⁴

NEW ZEALAND, HON. JUDGE HARVEY:

Section 91 of the Evidence Act allows a party to “use an admissible part of [a] statement” in a civil or criminal proceeding where another portion of the statement has been “determined by the Judge to be inadmissible.”³³⁵ The party who wishes to

³³¹ “[W]here there have been substantial breaches of the ‘verballing’ provisions, this court has not been slow to hold that the trial judge was wrong to admit the interview evidence.” *R v. Keenan* [1990] AC 54 (CA) 66 (Eng.); *see also* *R v. Walsh* (1990) 91 Cr. App. R. 161 at 162–64 (Eng.); *R v. Absolam* (1989) 88 Cr. App. R. 332 at 336 (Eng.).

³³² Consolidated Criminal Practice Direction [2015] EWCA Crim 1567 (amended April 2019) CPD V Evidence 16C.

³³³ Criminal Procedure and Investigations Act 1996, c. 25, s. 3 (Eng.); *see* NAT'L POLICE CHIEFS' COUNCIL, THE NATIONAL DISCLOSURE STANDARDS (May 25, 2018), https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/National-Disclosure-Standards-2018.pdf [<https://perma.cc/J2QY-L38F>].

³³⁴ Pursuant to the framework established by Part I of the Criminal Procedure and Investigations Act 1996 (as amended). *See* Max Hill, *Disclosure—a Response from the CPS*, 2019 CRIM. L. REV. 611; Ian Dennis, *Prosecution Disclosure: Are the Problems Insoluble?*, 2018 CRIM. L. REV. 829.

³³⁵ Evidence Act 2006, s 91 (N.Z.).

use the admissible part must edit the statement by excluding the inadmissible part. However, such editing is only permissible at the direction of the Judge who must be of the opinion that the inadmissible parts can be excluded without obscuring or confusing the meaning of the admissible part of the statement. Commentary to the Act suggests that whether the Judge will be of that opinion will depend on factors including the nature of the statement, the purpose for which the statement will be used and whether the trial will take place before a jury.³³⁶

UNITED STATES, MS. BROOK:

Admissible statements may be edited for both constitutional and evidentiary reasons. The Confrontation Clause of the Sixth Amendment requires redaction of any portion of a defendant's statement that implicates a co-defendant because the defendant has the right not testify and cannot be cross-examined by the co-defendant.³³⁷

Turning to the rules of evidence, in cases where the defendant's incriminating statement contains prejudicial language not relevant to the charges which may seriously prejudice the jury against her, such as racial slurs or references to gang membership, the defense may request that the language be redacted.³³⁸ In other situations, where a defendant's statement contains an admission of prior bad acts, upon defense motion, the court may order redaction if it finds the prior bad acts are not admissible for a proper purpose such as to prove motive or intent.³³⁹

C. Are there limits—timing, location—on interrogation of suspects?

AUSTRALIA, HON. JUSTICE FIANNACA:

There are no formal limits in relation to interrogations. There are statutory limits in all jurisdictions in relation to the period or periods for which an arrested person may be detained for the purpose of interviewing the person and/or investigating the person's involvement in the alleged offence.³⁴⁰

Under the Commonwealth legislation, the period of detention allowed for non-terrorism offences is determined by the duration of the "investigation period." The arrested person must be released once the investigation period is over, which is two hours for children under the age of eighteen years and Aboriginal or Torres Strait

³³⁶ FIONNGHUALA CUNCANNON, NINA KHOURI, ELISABETH McDONALD, JACK OLIVER-HOOD, SCOTT OPTICAN, WARREN PYKE & NICK WHITTINGTON, MAHONEY ON EVIDENCE: ACT AND ANALYSIS 626 (Elisabeth McDonald & Scott Optican eds., 4th ed. 2018).

³³⁷ *Bruton v. United States*, 391 U.S. 123, 136–37 (1968).

³³⁸ *See, e.g.*, FED. R. EVID. 403.

³³⁹ *See, e.g., id.* at 404(b).

³⁴⁰ *See Crimes Act 1914* (Cth) s 23C (Austl.); *see also Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 114–116 (Austl.); *Crimes Act 1958* (Vic), s 464A (Austl.); *Police Powers and Responsibilities Act 2000* (Qld) s 403 (Austl.); *Criminal Investigation Act 2006* (WA) ss 140–141 (Austl.); *Summary Offences Act 1953* (SA) s 78 (Austl.); *Criminal Law (Detention and Interrogation) Act 1995* (Tas) s 4 (Austl.); *Police Administration Act 1978* (NT) ss 137–138A (Austl.).

Islanders or four hours for any other case, unless the period is extended by authorisation of a magistrates or judge.³⁴¹

In Western Australia, the CIA provides³⁴² that the detention of an arrested suspect must not exceed six hours from the arrest of the suspect, unless a further period is authorised under one or more provisions that deal separately with simple (or summary) offences and indictable offences, after which the person must be charged or released. On occasions, detention is authorised for lengthy periods to enable an interview to be conducted, for instance where there is a large volume of evidence to discuss, or where travel is required to a relevant scene, and so on.

If the arrested suspect is detained in contravention of the provisions of the CIA, and therefore unlawfully, any interview during the period of unlawful detention would be inadmissible by virtue of section 154 of the CIA unless the court decides otherwise under section 155.³⁴³ Even if there is no contravention of the CIA, the duration of an interview may have a bearing on whether the interview was oppressive or unfair to the accused, if the evidence is challenged. That will require an assessment of all the surrounding circumstances.

As for location, again there are no formal requirements except as are dictated by the location where a person is to be detained and the availability of video recording equipment, given the need for admissions to be recorded in that manner.³⁴⁴

CANADA, HON. JUSTICE POMERANCE:

No, though the timing and location may render the interaction to be a detention, thereby triggering a requirement of compliance with section 10 of the *Charter*.

ENGLAND AND WALES, PROFESSOR ROBERTS:

Police interviews and the duration and conditions of detention are regulated in minute detail by PACE Code of Practice C, the “DTQ Code.”³⁴⁵ An overriding generic constraint on all police powers of detention and questioning is that they must at all times be exercised “fairly, responsibly, with respect for the people to whom they apply and without unlawful discrimination.”³⁴⁶ After arrest, suspects may be detained without charge on the authorization of a senior police officer for up to thirty-six hours,³⁴⁷ but this period can be extended on application to a magistrate for a maximum of ninety-six hours,³⁴⁸ that is, four days in the police cells without

³⁴¹ *Crimes Act 1914* (Cth) ss 23C, 23DA.

³⁴² *Criminal Investigation Act 2006* (WA) s 140(3).

³⁴³ *Id.* ss 154–155.

³⁴⁴ *Id.* s 118.

³⁴⁵ See PACE Code C, *supra* note 56.

³⁴⁶ *Id.* at 1.0.

³⁴⁷ Police and Criminal Investigations Act 1984, c. 60, ss. 41(1), 42(1) (Eng.).

³⁴⁸ *Id.* at 43–44. The overall time limit is set by section 44(3). In the year ending in March 2019, the police applied for 429 warrants of further detention, of which 420 (98%) were

charge.³⁴⁹ Vulnerable, confused, or intimidated suspects have been known to make false confessions within shorter periods of custodial detention. The duration and conditions of detention are subject to periodic reviews by the appointed custody officer—a police officer of at least the rank of sergeant who is not otherwise involved in the relevant criminal investigation³⁵⁰—who is tasked with monitoring the treatment of detainees and ensuring their welfare.³⁵¹ Paragraph 1.1 of PACE Code C states unambiguously that “[a]ll persons in custody must be dealt with expeditiously, and released as soon as the need for detention no longer applies.”³⁵²

To facilitate judicial supervision of the treatment of suspects in custody, PACE made detailed provision for keeping a written record of the progress of a suspect’s detention. The police are obliged to state their reasons for continuing to detain a suspect³⁵³ and must record and justify their decision-making in the course of the investigation, particularly in relation to evidentially significant matters like responding to a suspect’s request for legal advice,³⁵⁴ conducting an interrogation,³⁵⁵ or holding a particular type of identification procedure.³⁵⁶ Suspects must be reminded of their legal rights, including their right to remain silent, at every significant stage during their detention, such as at the beginning or resumption of formal interviews.³⁵⁷ Each time the caution is administered a record of it must be made in the custody record together with a note of the suspect’s replies, if any.³⁵⁸ As a general rule, “in any

granted. HOME OFFICE, POLICE POWERS AND PROCEDURES, ENGLAND AND WALES, YEAR ENDING 31 MARCH 2019, HOSB 15/19, at 37 (2019).

³⁴⁹ Those held on terrorism charges can be detained for substantially longer periods. *See, e.g.*, Terrorism Act 2000, c. 11, s. 41, sch. 8 (UK).

³⁵⁰ Police and Criminal Evidence Act 1984, s. 36.

³⁵¹ *Id.* s. 39(1); PACE Code C, *supra* note 56, 1.1A & Part 2.

³⁵² PACE Code C, *supra* note 56, 1.1.

³⁵³ Police and Criminal Evidence Act 1984, ss. 34, 37(4), 38(3), 42(5)(b); PACE Code C, *supra* note 56, 15.

³⁵⁴ PACE Code C, *supra* note 56, 6.5, 6.6, 6.15–6.17 & Annex B paras. 4, 6–7. Additionally, Note 6E provides that: “An officer who takes the decision to exclude a solicitor [from an interview] must be in a position to satisfy the court the decision was properly made. In order to do this they may need to witness what is happening.”

³⁵⁵ *Id.* at 12.9.

³⁵⁶ *Police and Criminal Evidence Act 1984 (PACE) Code D Revised Code of Practice for the Identification of Persons by Police Officers*, HOME OFF., 2.11, 3.25–3.27 (2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/903812/pace-code-d-2017.pdf [<https://perma.cc/P6ZG-Q38C>].

³⁵⁷ PACE Code C, *supra* note 56, Part 10.

³⁵⁸ *Id.* at 12.13 & Annex D. By PACE Code C, at 11.7:

(a) An accurate record must be made of each interview, whether or not the interview takes place at a police station. . . .

. . . .

(c) Any written record must be made and completed during the interview,

period of 24 hours a detainee must be allowed a continuous period of at least 8 hours for rest, free from questioning, travel or any interruption in connection with the investigation concerned” and this rest period “should normally be at night or other appropriate time which takes account of when the detainee last slept or rested.”³⁵⁹

NEW ZEALAND, HON. JUDGE HARVEY:

There are no set rules or regulations in respect of the length and conditions of detention permitted in police interrogation. Rather, these matters are considered on a case-by-case basis when the admissibility of the consequent statement is challenged under the Evidence Act discussed above. In the absence of specific regulation of these matters, exclusion on this basis serves as an important deterrent for police against ill treatment of suspects during interrogation. In one case, the court accordingly stated:

[A]ny civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions.³⁶⁰

UNITED STATES, MS. BROOK:

After reviewing more than 10,000 voluntariness cases, Professor Marcus wrote: “[I]t is striking how little guidance lawyers, judges, and law enforcement officers have in terms of the allowable time for police questioning.”³⁶¹ This is because the

unless this would not be practicable or would interfere with the conduct of the interview, and must constitute either a verbatim record of what has been said or, failing this, an account of the interview which adequately and accurately summarises it.

³⁵⁹ *Id.* at 12.2.

³⁶⁰ *Wong Kam-Ming v. R* [1980] AC 247 (PC) 261, [1979] 1 All ER 939, 946. A practical example of judicial consideration of sections 28–29 in this context can be found in a case where, despite the six-hour length of an interview conducted at a police station, the judge was:

[S]atisfied . . . that there was no oppressive conduct on the part of [the interviewing detective] that could justify a finding that he overbore Mr Roigard’s will in any relevant respect, notwithstanding some signs of fatigue presented in the latter part of the interview. I am also satisfied on a balance of probabilities that the statements were not made in circumstances that cast doubt on their reliability. For completeness, I do not regard Detective White as having improperly obtained the statements in a manner that would put admissibility of what was said into issue.

R v. Roigard [2015] NZHC 727 at [24] (N.Z.) (citing Evidence Act 2006, s 29 (N.Z.)).

³⁶¹ Marcus, *supra* note 87, at 626.

limits on police questioning are found in the cases governing coercive confessions, which we know are fact-specific and not susceptible to bright line rules.

There are procedural rules, however, that govern how long a person may be detained before being brought before a judge. As noted earlier, persons arrested without a warrant must be brought before a judge for a probable cause determination within forty-eight hours of their arrest, absent extraordinary circumstances. In federal court, rule 5 of the Federal Rules of Criminal Procedure requires that an arrestee be brought before a judge “without unnecessary delay.”³⁶² Most states have similar rules.³⁶³

D. How do the rules apply, if at all, to undercover operations?

AUSTRALIA, HON. JUSTICE FIANNACA:

In brief, the statutory provisions concerning arrested suspects do not apply to undercover operations, as the circumstances of such operations will not involve the suspect being in custody or the undercover officers being within the framework of provisions such as section 138 of the CIA.³⁶⁴ The applicability of the common law rules and principles to undercover operations has been considered on a number of occasions. I have already dealt with the issue of deception as it affects the admissibility of confessions. It will be apparent from that discussion that confessions obtained in the course of undercover operations can be excluded in the exercise of discretion if the court were to find that the circumstances were such as to make it unfair to use the confession against the accused at trial, or public policy considerations weighed in favour of exclusion. That was confirmed by the High Court in *Tofilau* in the context of considering the admissibility of confessions obtained utilising the “Crime Boss” scenario undercover operation.³⁶⁵ However, in that case the primary challenge to the confessional evidence was voluntariness.

The “Crime Boss” (or “Mr Big”) scenario is discussed in the contributions from other jurisdictions. In *Tofilau*, the scenario was succinctly described by Gummow and Hayne JJ in the context of the issue to be determined as follows:

Undercover police, posing as criminals, tell a murder suspect that, to join their gang and profit from their activities, he must tell their boss the truth about his involvement in the murder. They tell him that, if he does that, the boss can and will make any problems “go away”. The undercover police play out various scenarios designed

³⁶² FED. R. CRIM. P. 5.

³⁶³ See, e.g., 725 ILL. COMP. STAT. 5 (1963); N.D.R. CRIM. P. 5; TEX. CODE CRIM. P. Art. 15.17 (2019); W. VA. MAGIS. CTS. CRIM. P.R. 5.

³⁶⁴ See *Tofilau v The Queen* (2007) 231 CLR 396, 506 (Callinan, Heydon & Crennan JJ) (Austl.) (citing sections 464A and 464C of the *Crimes Act 1958* (Vic)).

³⁶⁵ *Id.* at 471.

to show the suspect how successful and powerful they are as criminals. Any initial protestations of innocence by the suspect are met with insistence upon the need to tell the truth because charging and conviction are inevitable if the gang's help is rejected. Is the suspect's subsequent confession to those who play the roles of boss and gang members a voluntary confession?³⁶⁶

The majority of the court held that the confessions of the various appellants had been properly admitted.³⁶⁷ Their Honours decided that the "inducement" limb of the voluntariness rule of exclusion had no application to the scenario, because it is concerned with inducements held out by persons in authority, and the purported criminals, including the "boss" could not be regarded as, and were not perceived by the accused to be persons in authority.³⁶⁸ Although the undercover officers represented themselves to have the capacity to influence corrupt officials, that did not invoke the State's coercive power, as there were no reasonable grounds for the accused in each case to perceive them to have the lawful authority of the State to investigate the offence of which the accused was thought to be guilty.

However, all of the judges accepted there was scope for the rule concerning "basal voluntariness" to apply in the case of an undercover operation, as the issue in that regard is whether the accused's will was overborne so that the admission was not voluntary. Justices Callinan, Heydon, and Crennan noted that the police officers were at times importunate and insistent that each appellant confess his guilt and that, by their questioning, they applied pressure.³⁶⁹ "The question whether each appellant confessed involuntarily thus turn[ed] on whether the importunacy was so persistent, and whether the insistence and the pressure were so sustained or undue, as to overbear his will. That depends on the particular circumstances [in each case]."³⁷⁰ A majority of the court held that the courts below were correct to conclude that the confessions were voluntary.³⁷¹

CANADA, HON. JUSTICE POMERANCE:

In the landmark case of *R. v. Hebert*, the Supreme Court of Canada ruled that placing an undercover operative in a suspect's cell violates the right to silence under section 7 of the Charter if the operative sets out to actively elicit evidence from the

³⁶⁶ *Id.* at 410 (Gummow & Hayne JJ).

³⁶⁷ However, a cautionary note was sounded by Justices Callinan, Heydon and Crennan about "undiscriminating reception of evidence gathered by police officers operating covertly." *Id.* at 529–30.

³⁶⁸ *Id.* at 404–07 (Gleeson CJ); *id.* at 411, 414–15, 416, 429 (Gummow & Hayne JJ); *id.* at 470, 498–99 (Callinan, Heydon & Crennan JJ); *id.* at 433–34 (Kirby J dissenting).

³⁶⁹ *Id.* at 517 (Callinan, Heydan & Crennan JJ).

³⁷⁰ *Id.*

³⁷¹ *Id.* at 411 (Gummow & Hayne JJ).

suspect.³⁷² Placement of an undercover cellmate is acceptable, if that individual passively receives information from the accused.

What about undercover operations that take place outside of the custodial context? For many years, there were no protections afforded a suspect in this scenario. The confessions rule only applied if the accused knew that he was speaking to a person in authority. The whole point of an undercover operation is to conceal that fact.³⁷³ The rights under section 10(b) of the *Charter* and the section 7 right to silence are only triggered once there is a detention. Suspects are not detained during undercover operations. These doctrinal limitations made it difficult for the courts to remediate unfairness flowing from certain evidence gathering methods.

One of the more notorious methods was the “Mr. Big” operation, whereby undercover officers would befriend the suspect, invite him to join a criminal organization, tantalize him with promises of wealth and other benefits and gradually infiltrate his life. While there are variations on the theme, a Mr. Big operation would eventually have the suspect meet with the kingpin of the criminal organization. That individual would elicit a confession using one of various strategies. He might insist on knowing about anything in the suspect’s background that could come back to haunt him; he might ask the suspect to prove his capacity and willingness to commit criminal acts; or he might tell the suspect that if he had a crime in the past, the organization could fix it, because they had police officers on the inside. Faced with these inducements, suspects may make highly incriminating statements.

Mr. Big poses many difficulties. For one thing, it is not clear that the statements produced by this method are reliable. It is conceivable that a suspect intent on joining the group might say something untrue in order to guarantee membership. The technique is, in some cases, so invasive and oppressive as to be abusive. Vulnerable and/or isolated suspects, who are financially underprivileged, may be wooed with offers of friendship, untold wealth, and other temptations. Finally, if the suspect seeks to challenge the statement at trial, he must disclose that he wanted to join a criminal organization, a fact that is, itself, highly prejudicial in front of a jury.

The landmark decision of the Supreme Court of Canada in *R. v. Hart* addressed these problems head-on.³⁷⁴ The court fashioned a new common law rule to deal with the Mr. Big scenario. The court ruled that, where the state recruits an accused into a fictitious criminal organization and seeks to elicit a confession from him, any confession made by the accused to the state during the operation is presumptively inadmissible.³⁷⁵ This presumption of inadmissibility is only overcome if two prongs of the test are met. First, the Crown must establish, on a balance of probabilities, that the probative value of the confession outweighs its prejudicial effect. The question for the trial judge is whether, and to what extent, the reliability of the confession has

³⁷² [1990] 2 S.C.R. 151, 155 (Can.).

³⁷³ *R. v. Grandinetti*, 2005 SCC 5, para. 40, [2005] 1 S.C.R. 27, 40 (Can.).

³⁷⁴ 2014 SCC 52, para. 10, [2014] 2 S.C.R. 544, 559 (Can.).

³⁷⁵ *Id.* para. 13.

been called into doubt by the circumstances in which it was made. If the first prong is met, the inquiry then turns to the second prong, which explores whether the operation amounted to an abuse of process. Here the court will consider, among other things, the extent to which police have preyed on an accused's vulnerabilities, such as mental health problems, substance addictions, or youthfulness. In *Hart*, the new rule led to exclusion of the confessions made by the accused.³⁷⁶

The decision in *Hart* was an important development in Canadian law, one whose potential has yet to be fully realized. The principles in *Hart* have logical application outside of the Mr. Big context. In theory, the approach might apply to other police strategies that carry a risk of producing unreliable evidence. Similarly, the rule shines a spotlight on the scope of undercover operations and the extent to which police have infiltrated or exploited a suspect's lifestyle. The focus on reliability and abuse of process as part of the admissibility equation can, more generally, help to reduce the risks of wrongful conviction.

ENGLAND AND WALES, PROFESSOR ROBERTS:

The controlling provision in England and Wales is Police and Criminal Evidence Act (PACE) 1984, section 78, empowering trial judges to exclude evidence adduced by the prosecution in circumstances where it would be manifestly unfair to admit it. In cases of serious police illegality or impropriety sapping the integrity of criminal proceedings, infringing human rights, and undermining the rule of law, trial courts may, alternatively, stay proceedings indefinitely as an abuse of process.³⁷⁷

The PACE Code C regime for regulating custodial interviews with suspects is plainly incompatible with the pragmatic requirements of successful undercover operations, not least the imperative of keeping officers' real identities and investigative purposes secret. English law resolves this tension, in effect, through its definition of an interview. So long as undercover officers are acting "in role" for the purpose of evidence-gathering, they remain outside the PACE interview framework, and any admissions—or other incriminating conduct—by suspects will, in principle, be admissible at trial. But as soon as officers have enough information to charge particular suspects with an offence, they should generally make an arrest and "read suspects their rights" (subject to considerations of personal safety, etc.). If a court discerns that an officer has remained "in character" longer than reasonably necessary, effectively exploiting their undercover status in order to conduct a PACE-preempting covert interrogation aimed at securing additional evidence to build up a case, any resultant admissions are liable to be excluded at trial under section 78.

³⁷⁶ *Id.* paras. 89–93.

³⁷⁷ See Tony Ward & Clare Leon, *Excluding Evidence (or Staying Proceedings) to Vindicate Rights in Irish and English Law*, 35 LEGAL STUD. 571 (2015); Kingsley Hyland & Clive Walker, *Undercover Policing and Underwhelming Laws*, 2014 CRIM. L. REV. 555; David Ormerod & Andrew Roberts, *The Trouble with Teixeira: Developing a Principled Approach to Entrapment*, 6 INT'L J. EVIDENCE & PROOF 38 (2002).

The Court of Appeal's judgment in *Christou and Wright*³⁷⁸ remains a primary reference point in a voluminous jurisprudence.³⁷⁹ The police set up fake premises—'Stardust Jewellers'—in order to flush out thieves, burglars, and handlers of stolen goods suspected to be operating in the area. All transactions were captured on videotape by hidden cameras, providing conclusive evidence of customers' statements. On appeal, the defence argued that this undercover operation had deprived the accused of the privilege against self-incrimination, and had involved a catalogue of breaches of PACE Code C; the entire operation was irremediably unfair, and any evidence arising from it should consequently be excluded under section 78. The court ruled these complaints entirely misconceived.³⁸⁰ Code C was never intended to apply, and did not apply, to undercover operations such as this: "The appellants were not being questioned by police officers acting as such. Conversation was on equal terms. There could be no question of pressure or intimidation . . ." ³⁸¹ So long as the officers were doing no more than was required to sustain the fiction of their assumed roles, the operation was legitimate and could not be denounced as a cynical subversion of the PACE regime governing formal police interviews:

[T]he trick was not applied to the appellants; they voluntarily applied themselves to the trick. It is not every trick producing evidence against an accused which results in unfairness. There are, in criminal investigations, a number of situations in which the police adopt ruses or tricks in the public interest to obtain evidence.³⁸²

In other cases, by contrast, the police have gone too far in probing for further incriminating information after the point at which an arrest should have been made,³⁸³ occasionally resulting in convictions being quashed. Exclusion is all the more likely in the absence of a reliable recording of alleged admissions.³⁸⁴

NEW ZEALAND, HON. JUDGE HARVEY:

Within the context of interrogation, "undercover operations" encompasses a spectrum of investigative tactics used by police with a view to obtaining admissions. Such methods include:

³⁷⁸ See *R v. Christou & Wright* [1992] QB 979; (1992) Cr. App. R. 264 (CA) (Eng.).

³⁷⁹ See *R v. Palmer* [2014] EWCA Crim 1681, [6], [12] (Eng.) (almost identical "sting" employing a fake pawn shop in Barnet, "TJ's Trading Post," resulting in 118 prosecutions and the recovery of 2,360 stolen items "including jewellery, electrical equipment, 541 passports, 334 driving licences, and 357 bank cards").

³⁸⁰ See *R v. Christou & Wright* [1992] QB 979.

³⁸¹ *Id.* at 991.

³⁸² *Id.* at 989.

³⁸³ See *R v. Okafor* (1994) 99 Cr. App. R. 97 (CA) (Eng.); *cf.* *R v. Whiteley* [2005] EWCA Crim 699 (Eng.).

³⁸⁴ See *R v. Bryce* (1992) 95 Cr. App. R. 320 (CA) 321 (Eng.).

1. situations in which the police record a conversation between the suspect and a private person;
2. situations where a suspect is placed in overnight custody and undercover officers are deployed into the cell;
3. the Crime Scenario Undercover Technique, otherwise known as the “Mr Big” scenario.

It is to the first situation, in which police suggest the recording, that a major court decision noted that a traditional “but for” test is key.³⁸⁵ That is, would the exchange between the accused and the complainant have taken place, in the form and manner in which it did take place, but for the intervention of the state?³⁸⁶ The court there also considered the nature of the exchange between the accused and the state agent to be central.³⁸⁷ Factors such as whether the questioning was objectionable (was the conversation the functional equivalent of an interrogation?) and the nature of the relationship between the accused and the state agent (was there a relationship of trust, vulnerability on the part of the accused or an element of emotional coercion or manipulation?) will be taken into account.³⁸⁸

The second situation involves statements made to an undercover police officer by a defendant in custody.³⁸⁹ In *R v. Kumar*,³⁹⁰ the defendant had been interviewed at the police station on video record. His interview was terminated so that he could obtain legal advice. He was then arrested for murder and placed in a police cell. Unbeknown to the defendant, two undercover police officers were placed in the cell with him and instigated conversation with him. As the defendant had been arrested and was in custody, he was entitled to protection of his rights under sections 23(1) and 23(4) of the NZBORA.³⁹¹ Clearly his right to silence and right to counsel were at risk of being undermined.

In assessing whether such rights had been undermined, the Court applied the “active elicitation” test, examining both the nature of the exchange and the nature of the relationship between the suspect and the undercover officer. It was held that the undercover officers had directed their conversation in a way that “prompted, coaxed, or cajoled” him to make the statements and had taken an approach that was the “functional equivalent of interrogation.”³⁹² It was accordingly concluded that the

³⁸⁵ *R v. Barlow* (1995) 14 CRNZ 9 (CA) at 23, 61 (N.Z.).

³⁸⁶ *Id.*

³⁸⁷ *Id.* at 23, 37, 53, 63.

³⁸⁸ *Id.* at 38, 53. Importantly, it was noted that if police deliberately delay charging the suspect and orchestrate an interrogation in contravention of a suspect’s rights under the Practice Note on Police Questioning, the statement is likely to be deemed inadmissible as evidence. *Id.* at 27, 31.

³⁸⁹ Typically at the police station.

³⁹⁰ [2015] NZSC 124 (N.Z.).

³⁹¹ *Id.* at [128], [134].

³⁹² *Id.* at [62]–[67].

undercover officer had elicited the suspect's confession and thus his right to silence had been undermined, so his statements had been improperly obtained for the purposes of section 30(5)(a).³⁹³ The statements were inadmissible following the balancing process.

The third situation, the Crime Scenario Undercover Technique, is often referred to as the "Mr Big" technique. Here we see the execution of a sophisticated operation, likely spanning several months, where the target is drawn into what appears to be a criminal organisation that is in fact made up of undercover police officers. The final initiation test for admission to the organisation is a meeting with the head of the organisation, "Mr Big," where incriminating statements that will later be used as prosecution evidence are likely to be made. By the time of the interview, the suspect is aware that acceptance into the group will bring rewards such as money, lifestyle, or loyalty from other members.

The leading case on the use of this type of investigative technique is *R v. Wichman*.³⁹⁴ The defendant challenged the reliability of the confession made during the final interview pursuant to section 28 of the Evidence Act and argued that it had been improperly obtained pursuant to section 30.³⁹⁵ The majority, over a strong dissent, held that the confession was reliable and the evidence had not been improperly obtained.³⁹⁶ When determining reliability, both opinions considered the actual reliability of the confession, by reference to other evidence, to be a factor to be taken into account in the assessment.³⁹⁷

The majority of the Supreme Court admitted the defendant's statements.³⁹⁸ Its approach to the question of admissibility was informed by the view that sections 8, 28, 29 and 30 must all be interpreted in a coherent way.³⁹⁹ Section 29 excludes statements "influenced by oppression" and so addresses impropriety by undercover officers involving actual or threatened violence to obtain threats.⁴⁰⁰ Section 28 addresses the risk of unreliable confessions.⁴⁰¹ Section 30 covers other improprieties such as circumvention of the Practice Note.⁴⁰²

The Court highlighted the inadequacies of the haphazard manner in the way this area of the law currently operates as follows:

The case by case approach which this Court must take in relation to the appropriateness of particular police practices is

³⁹³ *Id.*

³⁹⁴ [2015] NZSC 198 (N.Z.).

³⁹⁵ *See id.* at [52].

³⁹⁶ *See id.* at [131], [144].

³⁹⁷ *See id.* at [84]; *see also* N.Z. Law Comm'n, *supra* note 252, s 6.19 (The Law Commission in its second review of the Evidence Act considered this approach to be correct.).

³⁹⁸ *See Wichman*, [2015] NZSC 198 at [131].

³⁹⁹ *See id.* at [69].

⁴⁰⁰ *See id.* at [24].

⁴⁰¹ *See id.* at [28].

⁴⁰² *See id.* at [30].

not well-suited to the establishment of general guidelines as to the circumstances in which a particular investigatory technique is deployed. It is of note that court sanction in the form of a warrant is required for police investigations which are far less intrusive than a Mr Big operation. Against that background there may be some sense in devising a system (perhaps involving the courts) under which criteria for the deployment of such techniques are developed and perhaps for some form of supervision (perhaps in the form of a warrant process) to ensure that such considerations are properly weighed, where a proposed operation will be intrusive and may have damaging effects as far as the suspect is concerned.⁴⁰³

UNITED STATES, MS. BROOK:

Miranda warnings are not required during undercover operations unless and until a suspect is taken into custody. Nor are they required if police ask (or send in) a cellmate to elicit incriminating information from a defendant.⁴⁰⁴ Simply put, “Conversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*.”⁴⁰⁵

Coerced confessions are a slightly different matter. Custody is no longer the touchstone. Only in the rarest of circumstances would a suspect’s incriminating statements made during an undercover operation be considered involuntary.

IV. DETERMINING THE VALIDITY OF THE INTERROGATION

A. Do different rules apply depending on the individual suspect? For instance, what about suspects who are minors, not native speakers, or intellectually disabled?

AUSTRALIA, HON. JUSTICE FIANNACA:

There are statutory provisions in all jurisdictions that afford certain suspects particular rights that are not available generally.

For instance, in respect to minors (persons under eighteen years of age), the Commonwealth’s *Crimes Act 1914* provides that an investigating official must not question the suspect (whether under arrest or not) unless an interview friend is

⁴⁰³ *Id.* at [127]; *see also* N.Z. Law Comm’n, *supra* note 252, ss 6.38–6.46 (The Law Commission, in considering whether the Practice Note as currently drafted should apply to undercover operations, concluded that that would be undesirable but left open the possibility of a new Practice Note following the completion of the consideration of the Search and Surveillance regime.).

⁴⁰⁴ *See* *Illinois v. Perkins*, 496 U.S. 292, 298 (1990).

⁴⁰⁵ *Id.* at 296.

present while the suspect is being questioned. Before the start of the questioning, the official must allow the suspect to communicate with the interview friend in circumstances in which, as far as practicable, the communication will not be overheard.⁴⁰⁶ Similar provisions apply under that Act in respect of Aboriginal persons and Torres Strait Islanders, with the additional requirement that a representative of an Aboriginal legal assistance service must also be notified and given the opportunity to communicate with the suspect before any questioning takes place.⁴⁰⁷ The *Police Force Regulations 1979* require similar notification in Western Australia.

While there is no specific statutory provision in Western Australia for an interview friend to be present when a minor is interviewed, the police must ensure that a responsible adult has been notified of the intention to question the young person,⁴⁰⁸ and the Commissioner of Police has issued instructions requiring an interview friend or independent person to be present.⁴⁰⁹ The Commissioner's instructions, which indicate that an interview with a juvenile may otherwise be found to be inadmissible because it is not voluntary or on the basis of unfairness, reflect the likely outcome of applying the common law principles if a challenge were made to such an interview.⁴¹⁰ In other words, while the same principles apply, the particular vulnerability of minors will be a relevant consideration in determining voluntariness and whether it would be unfair to receive any admissions into evidence. The same can be said of persons who are intellectually disabled, although there is no specific statutory provision relating to such persons.

In the jurisdictions that have adopted the Uniform Evidence Act, a determination must be made as to whether the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected, so as to displace the presumptive inadmissibility of the evidence.⁴¹¹ One of the factors the court must take into account is "any relevant condition or characteristic of the person who made the admission, including age, personality and education and any mental, intellectual or physical disability to which the person is or appears to be subject."⁴¹²

All jurisdictions have statutory provisions to the effect that a person who for any reason is unable to understand or communicate adequately in spoken English is not

⁴⁰⁶ See *Crimes Act 1914* (Cth) s 23K (Austl.) (An "interview friend" includes a parent or guardian or the child's lawyer, or, if such a person is not available, a relative or friend, and in the absence of anyone in those categories, then an independent person.).

⁴⁰⁷ See *id.* s 23H.

⁴⁰⁸ See *Young Offenders Act 1994* (WA) s 20 (Austl.).

⁴⁰⁹ See W. AUSTL. POLICE FORCE, *supra* note 20, s QS-01.02.5.

⁴¹⁰ See *id.*

⁴¹¹ See *Evidence Act 1995* (Cth) s 85 (Austl.); *Evidence Act 1995* (NSW) s 85 (Austl.); *Evidence Act 2008* (Vic) s 85 (Austl.); *Evidence Act 2011* (ACT) s 85 (Austl.); *Evidence Act 2001* (Tas) s 85 (Austl.).

⁴¹² See, e.g., *Evidence Act 1995* (Cth) s 85(3)(a).

to be interviewed until the services of an interpreter or other qualified person are available.⁴¹³

In the case of indigenous Australians, there are particular disadvantages and cultural characteristics that have been recognised by the courts as influencing whether a suspect has participated in an interview voluntarily or whether it is unfair to allow the tender of the interview in evidence. They are reflected in a set of guidelines promulgated in 1976 by Forster J in the Supreme Court of the Northern Territory in *R v Anunga*,⁴¹⁴ which came to be known as the Anunga Rules (in a similar vein to the Judges' Rules). For some time now, the guidelines have informed the approach taken by police officers to interviews with indigenous suspects. As Hall J said in *Gibson*, the Anunga Rules are not law in Western Australia, but they give a very good indication of what ordinarily would be regarded as a fair interrogation,⁴¹⁵ and it is no doubt for that reason that they have been adopted in the COP's Manual.⁴¹⁶ In Australia, breaches of the Anunga Rules may be relevant to an assessment of the voluntariness of confessional evidence by an Aboriginal person.

CANADA, HON. JUSTICE POMERANCE:

The *Youth Criminal Justice Act* (YCJA) sets special rules for the questioning of young persons, defined as persons under eighteen years of age.⁴¹⁷ Among other things, section 146 requires that the young person be given certain cautions and that the young person be given a reasonable opportunity to consult with counsel and a parent or adult relative.⁴¹⁸

When it comes to adults, there are no special rules, per se, for those who are vulnerable. However, the application of general rules is certainly affected by individual vulnerabilities. For example, persons impaired by intoxication, lacking English language skills, or suffering from cognitive impairments may not understand cautions given by police at the time of arrest. Where a lack of understanding is, or should be, apparent to police, police must take additional steps to facilitate comprehension.⁴¹⁹ This may involve repeating the cautions, providing further explanation, securing an interpreter, or other solutions.⁴²⁰ Individual characteristics may also impact the determination of whether statements are voluntary and whether the person's will was overborne by questioning tactics.⁴²¹

⁴¹³ See, e.g., *Criminal Investigations Act 2006* (WA) s 138(2)(d) (Austl.).

⁴¹⁴ See (1976) 11 ALR 412, 414–15 (Austl.).

⁴¹⁵ See *Webb v The Queen* (1994) 74 A Crim R 436, 438 (Austl.).

⁴¹⁶ See *Western Australia v Gibson* [2014] WASC 240 (4 July 2014) 48 (Austl.).

⁴¹⁷ See *Youth Criminal Justice Act*, S.C. 2002, c 1 (Can.).

⁴¹⁸ See *id.* s 146.

⁴¹⁹ See *id.*

⁴²⁰ See *id.*

⁴²¹ See *id.*

ENGLAND AND WALES, PROFESSOR ROBERTS:

PACE Code C specifies “special groups,” which it is the custody officer’s duty to identify amongst the detained population.⁴²² These include⁴²³:

- (i) “someone who does not speak or understand English or who has a hearing or speech impediment”;
- (ii) foreign nationals;
- (iii) juveniles, defined as “[a]nyone who appears to be under 18 . . . in the absence of clear evidence that they are older”;⁴²⁴ and
- (iv) any “vulnerable” detainee, defined as a person “who, because of a mental health condition or mental disorder . . . may have difficulty understanding or communicating effectively about the full implications for them of any procedures and processes . . . does not appear to understand the significance of what they are told, of questions they are asked or of their replies . . . [or] appears to be particularly prone to: becoming confused and unclear about their position; providing unreliable, misleading or incriminating information without knowing or wishing to do so; accepting or acting on suggestions from others without consciously knowing or wishing to do so; or readily agreeing to suggestions or proposals without any protest or question.”⁴²⁵

For the first category of “special group” detainees, provision is made for language or disability interpreters.⁴²⁶ Foreign nationals, in the second category, must be “informed as soon as practicable about their rights of communication with their High Commission, Embassy or Consulate” in addition to enjoying the rights afforded to all suspects held in police custody.⁴²⁷ The most detailed provisions and elaborate arrangements, however, are reserved for the third and fourth categories of special detainees, juveniles and the psychologically vulnerable. Paragraph 11.15 of Code C directs that, subject to limited exceptions, “[a] juvenile or vulnerable person must not be interviewed regarding their involvement or suspected involvement in a criminal offence or offences, or asked to provide or sign a written statement under caution or record of interview, in the absence of the appropriate adult.”⁴²⁸

⁴²² Those suspected of involvement with terrorist activities are subject to their own special regime. Counter-Terrorism Act 2008, c. 27, s. 22 (UK); *see also* PACE Code H, *supra* note 205, Part 15.

⁴²³ *See* PACE Code C, *supra* note 56, 3.12–3.15.

⁴²⁴ *Id.* at 1.5.

⁴²⁵ *Id.* at 1.13(d).

⁴²⁶ *See id.* at 3.12 & Part 13.

⁴²⁷ *See id.* at 3.12A.

⁴²⁸ *Id.* at 11.15. An “appropriate adult” is a parent, guardian or carer, local authority social worker, or “failing these, some other responsible adult aged 18 or over who is *not* a police officer” or employee, contractor, or agent of the police. *Id.* at 1.7.

As to a vulnerable suspect's confession, PACE 1984 eschews automatic exclusion, preserving the admissibility of a suspect's admissions but subjecting them to a specially crafted judicial warning. Section 77(1) provides:

Without prejudice to the general duty of the court at a trial on indictment with a jury to direct the jury on any matter on which it appears to the court appropriate to do so, where at such a trial—

- (a) the case against the accused depends wholly or substantially on a confession by him; and
- (b) the court is satisfied—
 - (i) that he is mentally handicapped; and
 - (ii) that the confession was not made in the presence of an independent person,

the court shall warn the jury that there is special need for caution before convicting the accused in reliance on the confession, and shall explain that the need arises because of the circumstances mentioned in paragraphs (a) and (b) above.⁴²⁹

There is no canonical form of words, but it would usually be wise for the judge to warn the jury quite explicitly of the “special need for caution” in any case where section 77 applies.⁴³⁰ Given the scope for excluding potentially unreliable confessions by vulnerable suspects under section 76(2)(b), the practical salience of section 77 warnings may be quite limited.⁴³¹

NEW ZEALAND, HON. JUDGE HARVEY:

The Oranga Tamariki Act 1989 contains specific controls on police questioning of children and young people.⁴³² Such measures include provision of advice and cautions that are not required to be given to adults.⁴³³ Unless the child or young person is under arrest, these include advice that the child or young person is not obliged to accompany the enforcement officer to any place for the purpose of being questioned and that if the child or young person consents to do so, he or she may withdraw that consent at any time.⁴³⁴ Additionally, young persons are given the right to consult with and make any statement in the presence of lawyer and a nominated

⁴²⁹ Police and Criminal Evidence Act 1984, c. 60, s. 77(1) (Eng.).

⁴³⁰ See *R v. Campbell* [1995] 1 Cr. App. R. 522 (CA) 522 (Eng.).

⁴³¹ See *R v. Moss* (1990) 91 Cr. App. R. 371 (CA) 377 (Eng.); *R v. Lamont* [1989] Crim. L. Rev. 813 (CA) (Eng.).

⁴³² See *R v. Z* [2008] NZCA 246 at [35] (N.Z.) (The Court of Appeal made it clear that police questioning of young persons is governed by both the Practice Note and the Oranga Tamariki Act as well as applicable NZBORA rights in sections 23 and 24.).

⁴³³ See Oranga Tamariki Act 1989, ss 215–18 (N.Z.).

⁴³⁴ See *id.* s 215(1)(d).

person.⁴³⁵ Explanations must be given in a manner and language appropriate to the suspect's age and level of understanding.⁴³⁶

The Oranga Tamariki Act provides that, subject to certain exceptions, no oral or written statement by a child or young person is admissible in evidence in a criminal proceeding unless requirements imposed by the Act have been complied with. Inadmissibility here is not subject to a balancing exercise.⁴³⁷

Arguably greater concerns are raised when a young person is not specifically asked if he or she wishes to exercise the right to speak to a lawyer or to silence than are raised as to adults. Still, while it is good practice to ask a young person directly whether they want to call a lawyer, there is no hard and fast rule requiring officers to do so.⁴³⁸

Outside of minors, separate rules or regulations do not exist depending on the suspect subject to interrogation. However, relevant statutory provisions and related case law largely allow for such characteristics to be taken into account.

In terms of the warning that must be given before enforcement officers interrogate, as noted above, "What is important is the substance and intelligibility of the advice, not any specific form of words."⁴³⁹ When the requisite advice is given and the defendant responds affirmatively to the question of whether he or she understands the position, the obvious inference is that the defendant did indeed understand.⁴⁴⁰ However, where the evidence shows the presence of factors such as intoxication, low educational level, or other circumstances which raise questions as to whether the information was effectively communicated, the prosecution bears the burden of proving effective communication on a subjective basis.⁴⁴¹

If a statement is challenged, when making the reliability assessment, the judge must have regard to matters including the defendant's physical, mental, or psychological condition at the time the statement was made; any mental, intellectual, or physical disability to which the defendant is subject; the nature of any questions and manner and circumstances in which they were put to the defendant; and the nature of any threat, promise, or representation made to the defendant or any other person. The question becomes whether the defendant's acknowledged "intellectual disability affected the reliability of his admissions" to the police.⁴⁴² The nature of the questions

⁴³⁵ See *id.* s 215(1)(f).

⁴³⁶ See *id.* s 218.

⁴³⁷ See *id.* s 221(2).

⁴³⁸ See *Tamati v. R* [2013] NZCA 535 at [35] (N.Z.) (in finding that the young person's statements were admissible, the court held there that the officers told him that he could speak to his lawyer before deciding whether to answer questions and used explanations of the defendant's rights which were straightforward and in terms that he was able to comprehend.).

⁴³⁹ *Gallichan v. Police* [2009] NZCA 79 at [27] (N.Z.).

⁴⁴⁰ See, e.g., *R v. Mallinson* [1993] 1 NZLR 528 at [532] (N.Z.).

⁴⁴¹ *Id.*

⁴⁴² *B v. R* [2014] NZCA 85 at [15] (N.Z.). After reviewing the way in which the police

and circumstances in which they are put are relevant considerations in light of the defendant's disability.

In sum, the Supreme Court has held that categories of unfairness must adapt to the "circumstances of the particular case at issue."⁴⁴³ Clearly this allows for consideration of the characteristics of the suspect being questioned.

UNITED STATES, MS. BROOK:

Officers are required to give the same *Miranda* warnings to all suspects, whether young, intellectually disabled, or non-native speaking. The Supreme Court made that clear in *Fare v. Michael C.*, where it said:

We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so. The totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.⁴⁴⁴

Research shows that effectively warning juveniles is problematic. Many *Miranda* forms contain language beyond the comprehension of juveniles.⁴⁴⁵ Similar problems hold true for intellectually disabled persons. Studies consistently show that intellectually disabled persons have "significant deficits in their understanding and appreciation of *Miranda* warnings."⁴⁴⁶ "The validity of waivers entered by persons with [intellectual disabilities] is suspect for several reasons," more likely to "respond to coercion and pressure" and less likely to understand the impact of waiving their rights compared to persons of average intelligence.⁴⁴⁷

interviewed the defendant about the alleged offending, the court there held that the defendant's admissions were reliable and admissible.

⁴⁴³ *R v. Wichman* [2015] NZSC 198 at [503] (N.Z.).

⁴⁴⁴ 442 U.S. 707, 725 (1979) (citing *North Carolina v. Butler*, 441 U.S. 369, 373 (1979)). In *Doody v. Ryan*, 649 F.3d 986 (9th Cir. 2011), the Court found the warnings provided to the seventeen-year-old defendant, "which consumed twelve pages of transcript and completely obfuscated the core precepts of *Miranda*," were improper, unclear, and confusing. *Id.* at 990. The court observed that the defendant was a juvenile "who had never heard of *Miranda*." *Id.* at 1002.

⁴⁴⁵ Kassin et al., *supra* note 145, at 8.

⁴⁴⁶ *Id.* at 20–21 (citing numerous studies).

⁴⁴⁷ Caroline Everington & Solomon M. Fulero, *Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation*, 37 MENTAL RETARDATION 212, 212 (1999).

The Supreme Court has made clear that interrogation of juveniles calls for “special care” in evaluating voluntariness.⁴⁴⁸ In *J.D.B. v. North Carolina*, the Court reiterated “that events that ‘would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.’”⁴⁴⁹ As far back as 1967, in the Court’s seminal juvenile decision, *In re Gault*, the Court recognized the special importance to juveniles of having a friend or parent with them during an interview.⁴⁵⁰

And yet, it is surprising how few juvenile interrogation cases the Supreme Court has heard over the past thirty years, especially now that it has recognized the biological differences between children and adults and when statistics show that juveniles are at risk for involuntary and false confessions during interrogation. “Numerous high-profile cases, such as the Central Park Jogger case, have demonstrated the risks of combining young age, and the attributes that are associated with it (e.g., suggestibility, heightened obedience to authority, and immature decision-making abilities), and . . . psychologically oriented interrogation tactics . . .”⁴⁵¹

Persons with intellectual disabilities are similarly at risk and overrepresented in false confession cases.⁴⁵² Indeed, when the Supreme Court banned the imposition of the death penalty on persons with intellectual disabilities, it explicitly pointed to the risk of false confessions as one reason for its prohibition.⁴⁵³

The Supreme Court has not spoken to the issue of how non-native speakers understand *Miranda* warnings and there is a paucity of case law in the lower courts. When one federal appeals court was confronted with the issue, it noted:

[A] defendant’s alienage and unfamiliarity with the American legal system should be [considered]. However, *the significance of these factors will be limited to determining whether a defendant knew and understood the warnings that were read to him.* The fact that a defendant’s alien status may have prevented him from understanding the full, tactical significance of his decision to confess will not invalidate his waiver.⁴⁵⁴

Not surprisingly, however, there is strong evidence that non-native or ESL (English as a second language) speakers have more difficulty understanding their rights than

⁴⁴⁸ See, e.g., *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (plurality opinion); *J.D.B. v. North Carolina*, 564 U.S. 261, 277 (2011).

⁴⁴⁹ 564 U.S. at 272 (quoting *Haley*, 332 U.S. at 599 (plurality opinion)).

⁴⁵⁰ 387 U.S. 1, 49 (1967).

⁴⁵¹ Kassin et al., *supra* note 145, at 19; see also *DNA Exonerations in the United States*, *supra* note 185 (thirty-one percent of false confession cases of those exonerated between 1989 and 2020 involved children under age eighteen).

⁴⁵² Kassin et al., *supra* note 145, at 21.

⁴⁵³ *Atkins v. Virginia*, 536 U.S. 304, 320 (2002).

⁴⁵⁴ *Al-Yousif v. Trani*, 779 F.3d 1173, 1182 (10th Cir. 2015) (alteration in original) (quoting *People v. Al-Yousif*, 49 P.3d 1165, 1169–70 (Colo. 2002)).

native speakers. One study found that most of the participants, all students enrolled in advanced ESL classes “failed to understand their *Miranda* rights and displayed significant disadvantages . . . in comparison to native speakers.”⁴⁵⁵

B. In reviewing interrogation practices, would courts consider both common law and constitutional principles?

AUSTRALIA, HON. JUSTICE FIANNACA:

The courts in Australia would consider relevant statutory provisions, to which I have referred earlier, and the common law. There is nothing in the Australian Constitution or the constitutions of the various states that affects the interpretation of the statutory provisions concerning the questioning of suspects or the “review” of interrogation practices by a court in any particular case or generally. In particular, there is no constitutional foundation for the “right to silence” or any of the other rights discussed earlier affecting the admissibility of a confession.⁴⁵⁶ Victoria has a Charter of Human Rights and Responsibilities and the Australian Capital Territory and Queensland have Human Rights Acts, all of which have provisions concerning a person’s right to liberty and personal security, the right to be treated humanely when deprived of liberty, and various rights in criminal proceedings.⁴⁵⁷ Each provides that a person charged with a criminal offence is entitled without discrimination “not to be compelled to testify against himself or herself or to confess” but does not deal with a person’s rights when being interviewed as a suspect.⁴⁵⁸ In any event, the human rights legislation does not add to or qualify the statutory and common law requirements to which I have referred.

CANADA, HON. JUSTICE POMERANCE:

The court will consider the issues raised by counsel which could include both common law and constitutional principles.

ENGLAND AND WALES, PROFESSOR ROBERTS:

The human rights revolution in English criminal procedure⁴⁵⁹ precipitated by the Human Rights Act 1998 has effectively constitutionalized fair trial principles in

⁴⁵⁵ Aneta Pavlenko, Elizabeth Hepford & Scott Jarvis, *An Illusion of Understanding: How Native and Non-native Speakers of English Understand (and Misunderstand) Their Miranda Rights*, 26 INT’L J. SPEECH, LANGUAGE & L. 181, 200 (2019).

⁴⁵⁶ *R v Swaffield* (1998) 192 CLR 159, 219 (Austl.).

⁴⁵⁷ See *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 21, 22, 25 (Austl.); *Human Rights Act 2004* (ACT) ss 18, 19, 22 (Austl.); *Human Rights Act 2019* (Qld) ss 29, 30, 32 (Austl.).

⁴⁵⁸ See, e.g., *Human Rights Act 2004* (ACT) s 22(2)(i).

⁴⁵⁹ Paul Roberts & Jill Hunter, *Introduction—The Human Rights Revolution in Criminal Evidence and Procedure*, in *CRIMINAL EVIDENCE AND HUMAN RIGHTS: REIMAGINING COMMON LAW PROCEDURAL TRADITIONS 2* (Paul Roberts & Jill Hunter eds., 2012).

English law, in the conventional sense of “constitutional” practised in my part of the common law world.⁴⁶⁰ There are also certain procedural and evidentiary principles expressly stated to be constitutional by courts of the highest authority.⁴⁶¹

The most pertinent illustration for present purposes is the rule established in *A v. Secretary of State for the Home Department (No 2)* stating that evidence procured by torture of any person, anywhere in the world, is categorically inadmissible in English legal proceedings.⁴⁶² “It trivialises the issue,” declared Lord Bingham, “to treat it as an argument about the law of evidence. The issue is one of constitutional principle”⁴⁶³

NEW ZEALAND, HON. JUDGE HARVEY:

As noted, in New Zealand, interrogation practices are not specifically controlled and are largely regulated through the law of evidence. Despite the lack of regulation, the rule of law means that law enforcement officers themselves are subject to the law and must follow lawful procedures when undertaking investigation to protect individual rights as far as is compatible with the public interest.

New Zealand courts have consistently recognised the important role of the judiciary in upholding the rule of law and ensuring the law is not enforced by unlawful or unjust means:

[I]f the actions of the authorities concerned are of such seriousness that the proper administration of law by the Courts in dealing with criminal offences is seriously undermined, then it has a discretion to act in order to preserve due process and, in the wider public interest, to ensure the proper conduct of those actions.⁴⁶⁴

When approaching admissibility challenges in cases of this nature there is on the one hand the important premise that the judiciary must uphold the rule of law and prevent the police abusing its powers.⁴⁶⁵ On the other hand, a significant proportion of the general public may feel uneasy about the prospect of guilty persons walking

⁴⁶⁰ *Id.* at 1.

⁴⁶¹ See Paul Roberts, *Excluding Evidence as Protecting Constitutional or Human Rights?*, in *PRINCIPLES AND VALUES IN CRIMINAL LAW AND CRIMINAL JUSTICE: ESSAYS IN HONOUR OF ANDREW ASHWORTH* 171–72 (Lucia Zedner & Julian V. Roberts eds., 2012); Paul Roberts, *Criminal Procedure, the Presumption of Innocence and Judicial Reasoning Under the Human Rights Act*, in *JUDICIAL REASONING UNDER THE UK HUMAN RIGHTS ACT* 417 (Helen Fenwick, Gavin Phillipson & Roger Masterman eds., 2007).

⁴⁶² [2006] 2 AC 221 (HL) (Eng.).

⁴⁶³ *Id.* at [51].

⁴⁶⁴ *R v. Hannah* HC Auckland T58/83, 15 February 1984 at 10 (N.Z.).

⁴⁶⁵ Finn Lowery, *Abuse of Process: The Need for Structure*, 20 AUCKLAND U. L. REV. 223, 225 (2014).

free “on a technicality,” despite the merits of the case against them.⁴⁶⁶ Whilst an effective and credible justice system should clearly ensure that guilty people are convicted, it must also give effect to the rule of law and the fundamental need to uphold broader concepts of fairness and justice.⁴⁶⁷

The Supreme Court has said that it would be “incongruous” if an obviously true confession was excluded because of the theoretical likelihood that the circumstances in which it had been made might have affected its reliability or that it would not be conducive to public confidence in the criminal justice system.⁴⁶⁸ It is unclear why this view was taken when conclusive evidence is regularly excluded under statutory provisions in the name of upholding the rule of law and the need for an effective and credible system of justice.⁴⁶⁹ Perhaps greater weight was placed on the public interest in crime detection given that the “Mr Big” technique is generally only deployed in cases of very serious offences such as murder or, as were the facts of that case, manslaughter. However, it is important that an appropriate balance is struck even in such cases. “The strength of valued constitutional principles may be best demonstrated when they are applied in favour of a person whose actions attract minimal sympathy.”⁴⁷⁰

UNITED STATES, MS. BROOK:

As noted in the beginning of this Article, this country’s criminal procedure is entirely governed by the U.S. Constitution. Although the Supreme Court occasionally refers to the common law in reaching its decisions, common law principles do not govern its result.

⁴⁶⁶ *Id.* at 224.

⁴⁶⁷ *See Hamed v. R* [2011] NZSC 101, [2012] 2 NZLR 305 at [229]–[230] (N.Z.).

It would . . . be a mistake to take the view that the need for an effective and credible system of justice is solely a counterpoint to the impropriety involved in gaining the evidence. The reference to an effective and credible system of justice involves not only an immediate focus on the instant case but also a longer-term and wider focus on the administration of justice generally.

The admission of improperly obtained evidence must always, to a greater or lesser extent, tend to undermine the rule of law. By enacting s 30 Parliament has indicated that in appropriate cases improperly obtained evidence should be admitted, but the longer-term effect of doing so on an effective and credible system of justice must always be considered, as well as what may be seen as the desirability of having the immediate trial take place on the basis of all relevant and reliable evidence, despite its provenance.

Id.

⁴⁶⁸ *R v. Wichman* [2015] NZSC 198 at [83]–[84] (majority); *id.* at [433] (Glazebrook J).

⁴⁶⁹ *See* N.Z. L. Comm’n, *supra* note 252, s 125.

⁴⁷⁰ *Waaka v. Police* CA243/85, 21 July 1987 at 3 (N.Z.).

V. RECENT TIMES

A. What important legislative developments in this field have occurred?

AUSTRALIA, HON. JUSTICE FIANNACA:

The most significant legislative developments in all jurisdictions were those that introduced (at different times): (a) the statutory frameworks for the rights of arrested suspects, the obligations of police (and other public officers) in respect of them, and the consequences of failing to comply with the statutory obligations; (b) the enactment of a number of the common law principles concerning the admissibility and discretionary exclusion of confessional evidence; and (c) the requirement for audio-visual recording of interviews, which I will discuss below. In Western Australia, the enactment of the CIA consolidated practices and procedures contained in other legislation, while also introducing new provisions for the manner in which arrested persons were to be dealt with.⁴⁷¹ A further significant recent development in Western Australia has been the introduction of regulations (referred to earlier) requiring the ALSWA to be notified when an Aboriginal person or Torres Strait Islander is detained.

CANADA, HON. JUSTICE POMERANCE:

Our law is mostly driven by judicial pronouncements—at common law and the charter.

ENGLAND AND WALES, PROFESSOR ROBERTS:

We have seen that enactment of PACE 1984 was a watershed moment in the history of custodial interrogation, and of policing powers and criminal investigations more generally, in England and Wales. The PACE Codes of Practice have subsequently undergone almost continuous expansion and refinement. Another important legislative intervention was the expanded jurisdiction to draw adverse inferences from “significant silences” introduced by the Criminal Justice and Public Order Act 1994.⁴⁷²

NEW ZEALAND, HON. JUDGE HARVEY:

This area is largely regulated by the law of evidence. Since the enactment of the Evidence Act 2006 there has been little legislative change of relevance to interrogation practices. There have been frequent calls for review.⁴⁷³

⁴⁷¹ *Criminal Investigation Act 2006* (WA) s 120(2) (Austl.).

⁴⁷² PACE Code C, *supra* note 56, 11.4; *see also* Criminal Justice and Public Order Act 1994, c. 33, ss. 34–37 (Eng.).

⁴⁷³ The matter is effectively being regulated in an inappropriate, negative, retrospective and haphazard way through the admissibility of evidence. Apart from anything else, this is only effective if there is a prosecution. Until there is a comprehensive regime of police questioning,

In the second review of the Evidence Act, the Law Commission noted that the general policy of section 30 should be examined given common concerns that the section is skewed too heavily in favour of admission rather than exclusion.⁴⁷⁴

UNITED STATES, MS. BROOK:

One of the most important legislative developments has been the requirement that police interrogations be recorded, discussed below.

A less-well-known but important legislative development was the passage of the federal Death in Custody Reporting Act of 2013, which requires any state receiving federal criminal justice funds to report “the death of any person who is detained, under arrest, or is in the process of being arrested, [or] is en route to be incarcerated” in all state, local, and juvenile facilities.⁴⁷⁵ Despite this law, the Department of Justice has not tracked in-custody deaths in the United States since 2014.⁴⁷⁶

It is too soon to tell whether the current movement for police reform will result in more protective legislation or stricter judicial requirements governing police interrogations. For many decades, commentators have urged courts and legislatures to institute a variety of reforms, including that defense counsel be present before the initiation of any interrogation,⁴⁷⁷ that the use of some or all deceptive practices during interrogations be prohibited,⁴⁷⁸ and that the length of interrogations be restricted.⁴⁷⁹

issues will continue to have to be dealt with inappropriately by courts and the Law Commission when dealing with challenges to the admissibility of evidence. N.Z. L. Comm’n, *supra* note 252, s 201.

⁴⁷⁴ *Id.* at 133. The Law Commission also flagged the possibility of a new Practice Note for undercover operations following the completion of the review of the Search and Surveillance regime. *Id.* at 118–20.

⁴⁷⁵ Death in Custody Reporting Act of 2013, Pub. L. 113-242, 128 Stat. 2860 (to be codified at 42 U.S.C. §§ 13701, 13727).

⁴⁷⁶ 42 U.S.C. § 13727 (federal record-keeping); 34 U.S.C. § 60105 (state record-keeping); see Madison Pearman, *Congressman Scott Presses AG Barr to Enforce Law to Record Deaths in Police Custody*, WAVY (June 11, 2020, 11:10 AM), <https://www.wavy.com/washington-dc/congressman-scott-presses-ag-barr-to-enforce-law-to-record-deaths-in-police-custody/> [<https://perma.cc/7653-H4LU>].

⁴⁷⁷ See, e.g., Charles J. Ogletree, Commentary, *Are Confessions Really Good for the Soul? A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1842 (1987) (urging interrogation be permitted only in the presence of counsel).

⁴⁷⁸ See, e.g., Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 794–95 (2006) (good policy to prohibit deception by law enforcement “in a criminal justice system expressly designed to elicit the truth about a crime”); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 148 (1997) (“[M]isrepresentations designed to convince the suspect that forensic evidence establishes his guilt should be prohibited.”).

⁴⁷⁹ White, *supra* note 478, at 143–44.

B. Are there any groundbreaking court decisions in the area worthy of note?

AUSTRALIA, HON. JUSTICE FIANNACA:

Tofilau, which I discussed in the context of undercover operations, was a significant development in clarifying the application of the rules concerning voluntariness to an undercover operation that in many respects resembled an interview of the accused.⁴⁸⁰

Another decision of note is *X7 v Australian Crime Commission*.⁴⁸¹ *X7* dealt with the intersection between criminal proceedings and compulsory examinations before powerful investigative bodies such as the Australian Crime Commission. The appellant was arrested and charged with three indictable offences under the *Criminal Code* (Cth). The *Australia Crime Commission Act 2002* (ACC Act) provided that an examiner appointed under that Act could summon a person to appear at an examination to give evidence.⁴⁸² It further provided that a person appearing at an examination should not refuse or fail to answer a question that he or she was required to answer by the examiner and that to do so constituted an indictable offence.

At the examination, the appellant was asked and answered questions concerning the subject matter of the offences with which he had been charged. Following an adjournment, he declined to answer further questions on those matters. He was informed by the examiner that he would be charged with failing to answer a question that he was required to answer. A direction was given under section 25A(9) that prosecutors and police officers associated with the prosecution of the offences with which the appellant had been charged were not entitled to receive a copy of the evidence given by him at the examination.⁴⁸³

A majority of the High Court held that the ACC Act did not authorise an examiner to require a person charged with a Commonwealth indictable offence to answer questions about the subject matter of the charged offence.⁴⁸⁴ The Court's view was that this was contrary to the established system of law.⁴⁸⁵ For an alteration of that kind to be made by statute, it must be made clearly by express words or necessary intendment, which they did not find to be the case in relation to the ACC Act.⁴⁸⁶ Even if the evidence was kept secret, the accused's rights at trial would be fundamentally altered.

CANADA, HON. JUSTICE POMERANCE:

I have already referred to the decision of the Supreme Court of Canada in *R. v. Hart*, one of the top groundbreaking decisions of late in Canada.⁴⁸⁷

⁴⁸⁰ See *supra* text accompanying note 365.

⁴⁸¹ (2013) 248 CLR 92 (Austl.).

⁴⁸² *Australia Crime Commission Act 2002* (Cth) s 28(1) (Austl.).

⁴⁸³ *X7*, 248 CLR at 106.

⁴⁸⁴ *Id.* at 127.

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.* at 140–41.

⁴⁸⁷ See *supra* notes 374–76 and accompanying text.

Historically, another landmark decision was that in *R. v. Brydges*.⁴⁸⁸ In that case, the Supreme Court of Canada held that all detainees must be told, as part of the information given upon arrest or detention, that there is a 1-800 number through which they can access free legal advice from duty counsel.⁴⁸⁹ After *Brydges* was decided, all provinces implemented a twenty-four-hour duty counsel system to offer this advice to persons detained or arrested. This development ensured that all persons could obtain the legal advice they needed at the time of arrest, whether or not they could afford to retain a lawyer.

A more recent trilogy of cases from the Supreme Court of Canada narrowed the scope of the section 10(b) right: *R. v. Sinclair*; *R. v. Willier*; *R. v. McCrimmon*.⁴⁹⁰ In those cases, the majority ruled that, once a detainee has been given a reasonable opportunity to exercise the right to counsel, he or she will not be given another opportunity to speak to a lawyer, unless there is a material change of circumstance.⁴⁹¹ The Court was fundamentally concerned with where the balance of power should lie in the interrogation room.⁴⁹² The majority reasoned that because suspects are an important source of evidence, they should not be empowered to obstruct questioning by asking for a lawyer at strategic moments.⁴⁹³ The Court also rejected the idea that a detainee has the right to have a lawyer present during questioning.⁴⁹⁴ While perhaps not “groundbreaking” in the traditional sense, these decisions have impacted the scope of the rights triggered by detention or arrest.

We can expect more important decisions in the area. The evidentiary power of a confession is profound. Many laypersons find it hard to believe that someone would confess to a crime that they did not commit. Yet, we know that it does happen for a variety of reasons relating to the human condition. Is there a way to counter the “common sense” notion that people do not falsely confess? It is here that expert evidence may have a role to play. Expert evidence that speaks in general terms about the phenomenon, without reference to the specific facts of the case, could provide important context for a jury presented with this issue. Canadian courts have, to date, been less than receptive to this type of evidence.⁴⁹⁵ However, given our experience with false confessions and wrongful convictions, the time may have come for a more

⁴⁸⁸ [1990] 1 S.C.R. 190 (Can.).

⁴⁸⁹ *Id.* at 203, 211.

⁴⁹⁰ *See generally* *R. v. Sinclair*, 2010 SCC 35, [2010] 2 S.C.R. 310 (Can.); *R. v. Willier*, 2010 SCC 37, [2010] 2 S.C.R. 429 (Can.); *R. v. McCrimmon*, 2010 SCC 36, [2010] 2 S.C.R. 402 (Can.).

⁴⁹¹ *Sinclair*, 2010 SCC 35, para. 2, 2 S.C.R. at 311; *Willier*, 2010 SCC 37, para. 42, 2 S.C.R. at 430; *McCrimmon*, 2010 SCC 36, para. 3, 2 S.C.R. at 403.

⁴⁹² *Sinclair*, 2010 SCC 35, para. 26, 2 S.C.R. at 313.

⁴⁹³ *Id.* paras. 195–96.

⁴⁹⁴ *Id.* para. 42.

⁴⁹⁵ *See, e.g.*, *R. v. Osmar*, 2007 ONCA 50, para. 66, [2007] 84 O.R. 3d 321 (Can. Ont. C.A.); *R. v. Bonisteel*, 2008 BCCA 344, para. 69, [2008] B.C.J. No. 1705 (Can. B.C.C.A.).

permissive approach to this evidence. To educate juries on this phenomenon is to give them the tools that they may need to reach a fair and informed verdict.

ENGLAND AND WALES, PROFESSOR ROBERTS:

Authoritative judicial interpretations and key precedent cases have been mentioned throughout the foregoing discussion. The need to ensure that English criminal procedure law is fully compatible with ECHR article 6 has generated extensive litigation, whilst particular issues—notably, objections to proactive policing methods as “entrapment” and the minutiae of judicial directions on adverse inferences from silence—spawn prodigious appellate rulings.

NEW ZEALAND, HON. JUDGE HARVEY:

In the absence of any statutory regime regulating interrogation, principles in the senior court authorities outlined above provide for much of the law and its development in this area. The recent Court of Appeal case of *Lyttle v. R*⁴⁹⁶ illustrates how a criminal trial is not the place to make general rulings about the legitimacy of methods of investigation and that comprehensive review would be a much more appropriate course.⁴⁹⁷

In *Lyttle*, the defendant was charged with murder following a “Mr Big” operation. The prosecution proposed to adduce the admissions the defendant had made to the undercover officers. The defence wished to call evidence attacking the value of that evidence. One proposed witness was an American professor of law and psychology who would testify as to the frequency and misleading nature of false confessions, including cases where suspects who had confessed to crimes had been exonerated by DNA evidence.⁴⁹⁸ The witness would identify matters which were accepted as leading to false confessions and then review the evidence to see whether those factors applied in the case at hand. The other proposed witness was a Canadian psychologist who would analyse the psychological factors in “Mr Big” operations and identify any relevant factors at play in that case.⁴⁹⁹

The trial judge determined that the risks of false confessions were self-evident and that the expert witnesses would not be of substantial help to the jury. On appeal to the Court of Appeal, the defence argued that the whole point of “Mr Big” operations was psychological pressure and that Mr. Lyttle had been particularly vulnerable to such pressure as he had a drinking problem, was isolated, and in financial difficulty.⁵⁰⁰ It was highlighted that some of what he had said was proven not to be true. It was argued that false confessions are more common and more convincing

⁴⁹⁶ [2019] NZCA 226 at [21]–[23] (N.Z.).

⁴⁹⁷ See N.Z. L. Comm’n, *supra* note 252, s 284.

⁴⁹⁸ *Lyttle*, [2019] NZCA 226 at [23].

⁴⁹⁹ *Id.* at [21], [24].

⁵⁰⁰ *Id.* at [35].

than is generally appreciated. The expert evidence, it was argued, was required to remedy misconceptions that the jury might hold.

The Court of Appeal was of the view that the possibility of false confession could be dealt with by judicial direction.⁵⁰¹ Otherwise, the evidence was a generalised attack on the “Mr Big” technique which had been held not to be unlawful in principle by the Supreme Court.⁵⁰² The Court of Appeal noted that the Supreme Court had stated that case by case evaluation would be required and that a confession induced by promises would be excluded.⁵⁰³

The Court of Appeal’s response shows that clearly a trial will always turn on the particular facts of the case and the information before the court will be limited to that pertaining to the issues in the particular case and, of course, by budgetary factors.⁵⁰⁴ Examination of investigative methods should be by a thorough, prospective review of the regulation of police questioning.

UNITED STATES, MS. BROOK:

Two groups of groundbreaking decisions come to mind. First, since 2005, the Supreme Court has issued four significant decisions recognizing that “children are constitutionally different” than adults, more vulnerable with brains that are still developing.⁵⁰⁵ These decisions, which have generated a number of articles and some case law, have already caused law enforcement to modify the techniques it uses when interrogating children.⁵⁰⁶

The other group of groundbreaking decisions consists of the thirteen consent decrees entered into between the Department of Justice and local governments, which have been approved by court order. These decrees contain language requiring a specified amount of additional training in proper interrogation techniques.⁵⁰⁷ For instance, the Chicago Consent Decree separately identifies unique requirements for the interrogation of juveniles, an area where commentators believe training is especially important.⁵⁰⁸

⁵⁰¹ *Id.* at [39].

⁵⁰² *Id.* at [41].

⁵⁰³ *Id.*

⁵⁰⁴ N.Z. L. Comm’n, *supra* note 252, s 285.

⁵⁰⁵ *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005) (prohibiting the death penalty for persons under eighteen); *see Miller v. Alabama*, 567 U.S. 460, 470–72 (2012) (prohibiting mandatory life without parole for persons under eighteen); *Graham v. Florida*, 560 U.S. 48, 68–69 (2010) (prohibiting life without parole for persons under eighteen not convicted of murder); *Montgomery v. Louisiana*, 136 S. Ct. 718, 733–34 (2016) (applying *Miller* retroactively).

⁵⁰⁶ *See, e.g.*, Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J.L. & PUB. POL’Y 395, 396–97 (2013); *supra* note 444 and accompanying text (discussing *Doody v. Ryan*, 649 F.3d 986 (9th Cir. 2011)).

⁵⁰⁷ *See, e.g.*, Consent Decree at 154–55, *Illinois v. City of Chicago*, No. 17-cv-6260 (N.D. Ill. Jan. 31, 2019).

⁵⁰⁸ *Id.* at 9; *see Kassin et al.*, *supra* note 145, at 31.

C. Recorded interrogations are becoming much more common. Do/should legislation or court rules require interrogations to be recorded? Should they be recorded for all offenses or only for some? What is/should the sanction be for failing to record interrogations when required?

AUSTRALIA, HON. JUSTICE FIANNACA:

In Australia, police interviews with suspects in cases involving serious offences are almost invariably recorded on video (previously on analogue tape, now on digital media). That is mandated by statutory provisions in all jurisdictions.⁵⁰⁹ In most jurisdictions, this development was the result of a number of cases in which interviews that had been typed or written, some signed by the accused and others not, were challenged on the basis that the admissions were not made or that the police had extracted the admissions by oppressive methods or inducements. In some cases, the admissions were excluded from evidence either at first instance or on appeal. In others, while the confessions were not excluded, the courts made it clear that the failure to use video recording facilities to record interviews was fraught.⁵¹⁰

In broad terms, the statutory provisions requiring video recording of interviews with suspects in Australia make the admissibility of confessions or admissions dependent upon there being a video recording of the same, subject to certain exceptions. There are differences between the jurisdictions as to whether the provisions apply to all offences or a particular category of offences. Other differences concern the stage at which the provisions apply in the interaction between the police (or other relevant public officers) and the suspect and the ability to rely on written records of interview in some jurisdictions when it is not reasonably practicable to electronically record the confession or admission, although there is a need to record a reading of the written record. A detailed comparison may be found elsewhere.⁵¹¹

The statutory provision in Western Australia, section 118 of the CIA, applies to “an admission made by a suspect to a police officer or a [Corruption and Crime Commission] officer, whether the admission is by spoken words or by acts or otherwise.”⁵¹²

⁵⁰⁹ *Crimes Act 1914* (Cth) s 23V (Austl.); *Criminal Procedure Act 1986* (NSW) s 281(2) (Austl.); *Crimes Act 1958* (Vic) s 464H (Austl.); *Police Powers and Responsibilities Act 2000* (Qld) s 436 (Austl.); *Criminal Investigations Act 2006* (WA) s 118 (Austl.); *Summary Offences Act 1953* (SA) ss 74C–74G (Austl.); *Evidence Act 2001* (Tas) s 85A (Austl.); *Police Administration Act 1978* (NT) s 142 (Austl.). Section 23V of the *Crimes Act 1914* (Cth) applies in the Australian Capital Territory in relation to certain offences against the law of that territory. See *Crimes Act 1914* (Cth) s 23A(6) (Austl.); *Crimes Act 1900* (ACT) s 187(3) (Austl.); see also *Evidence Act 2011* (ACT) s 86 (Austl.).

⁵¹⁰ See, e.g., *Kelly v The Queen* [1994] WASC 594 (27 October 1994) 19 (Austl.); *Sell v The Queen* [1995] WASC 330 (22 June 1995) 21 (Austl.). In *McKinney v The Queen* (1991) 171 CLR 468, 484 (Austl.), the High Court held that a warning would need to be given to the jury of the danger of conviction on the basis of disputed confessional statement made while the accused was in custody and not corroborated.

⁵¹¹ See DYSON HEYDON, *CROSS ON EVIDENCE* [33775] (12th ed. 2019).

⁵¹² The section distinguishes between the approach in respect of a child, being a person

The requirement for an audio-visual recording applies only if the admission is made after there were reasonable grounds to suspect the person had committed an offence.⁵¹³ However, the requirement is not confined to admissions made during a formal interview.⁵¹⁴ The provision properly places the onus on the prosecution to establish why an admission should be received if it is not video recorded—for instance, that the accused did not give consent or there is a reasonable excuse for the absence of a video recording.⁵¹⁵ The standard of proof is consistent with the standard borne by the prosecution in establishing voluntariness.⁵¹⁶ Finally, the discretionary power in section 155 to admit the evidence if the court is satisfied that “the desirability of admitting the evidence outweighs the undesirability of admitting the evidence.”⁵¹⁷

In my opinion, police interviews with suspects should be video recorded to safeguard the rights of an accused and the integrity of the criminal justice system. Of course, if the suspect does not consent to the recording being made, police should not be deterred from proceeding with an interview for the purpose of being able to pursue lines of inquiry and obtain an admission in written form. That is particularly so in the case of very serious offences. In my view, the statutory provisions in all of the Australian jurisdictions strike the right balance in enabling admissions to be received into evidence if there is a reasonable excuse why it is not contained in an audio-visual recording. Furthermore, conferring discretion on the court enables the interests of justice, informed by a long line of common law authorities, to ultimately determine whether the evidence should be admitted.

As to whether the requirement should be for all offences, that is a matter of resourcing, which affects policy decisions of the kind that have resulted in a provision like section 118 of the CIA being limited to indictable offences that cannot be dealt with summarily (in the case of an adult). Such offences are at the more serious end of the spectrum. Not all jurisdictions have such a limitation.

CANADA, HON. JUSTICE POMERANCE:

We are living in an age where virtually any member of the public can record and upload an event onto social media within moments. Many, if not most individuals carry phones that operate as video cameras.⁵¹⁸ Against this backdrop, it is difficult

who is under the age of eighteen years, and an adult, in that in the case of an adult suspect, the section applies only if the person is charged with an indictable offence that cannot be dealt with by a court of summary jurisdiction, whereas in the case of a child, it applies if the person is charged with an indictable offence, irrespective of whether it can be dealt with summarily. *Criminal Investigation Act 2006* (WA) s 118(2) (Austl.).

⁵¹³ *Id.* s 118.

⁵¹⁴ *Id.*

⁵¹⁵ *Id.*

⁵¹⁶ *Id.*

⁵¹⁷ *Id.* s 155(2).

⁵¹⁸ See S. O’Dea, *Number of Smartphone Users in Canada from 2018 to 2024 (in Millions)**,

to imagine a justification for not recording interrogations by police. There is no blanket evidentiary rule that requires all questioning to be recorded. However, the absence of a recording may lead to an adverse inference being drawn against the police.⁵¹⁹ Certainly, recording is in everyone's best interests—it is the best evidence of the encounter and tends to do away with squabbles over what was said and/or what happened in the interview room.

ENGLAND AND WALES, PROFESSOR ROBERTS:

PACE 1984 introduced routine tape-recording of all interviews with suspects, subsequently upgraded to include the possibility of videorecording where this is both feasible and would assist the investigation (including where the suspect is a juvenile or has a disability affecting their communication). Audio-recording of interviews with suspects is mandatory whenever an appropriate recording device is available and it is feasible to use it,⁵²⁰ with only minor exceptions. Today, virtually all interviews with suspects under caution at police stations in England and Wales are (at least) audio-recorded.

After PACE recording requirements were fully implemented nationwide in the late 1980s and early 1990s, the authenticity and content of formal police station interviews ceased to be contentious issues in criminal litigation.⁵²¹ Police officers originally opposed compulsory tape-recording of interviews with suspects but subsequently embraced its advantages.⁵²² Tape recordings of confessions often provide compelling evidence of guilt, either forcing the accused into a guilty plea or hastening a conviction when the jury hears the accused on tape effectively condemning himself out of his own mouth. Tape recordings also insulate police officers against false allegations of impropriety, coercion, or manufacturing evidence. The flip side is that

STATISTA (Dec. 7, 2020), <https://www.statista.com/statistics/467190/forecast-of-smartphone-users-in-canada/> [<https://perma.cc/A3KQ-3AAF>].

⁵¹⁹ See Steven Smith, Veronica Stinson & Marc Patry, *Confession Evidence in Canada: Psychological Issues and Legal Landscapes*, 18 *PSYCH., CRIME & L.* 317, 321–22, 327 (2012).

⁵²⁰ *Police and Criminal Evidence Act 1984 (PACE) Code E Revised Code of Practice on Audio Recording Interviews with Suspects*, HOME OFF., 3.1 (2018), <https://www.gov.uk/government/publications/pace-codes-e-and-f-2018> [<https://perma.cc/CV9K-Q3W8>].

⁵²¹ Nothing is foolproof. Cf. Mike McConville, *Videotaping Interrogations: Police Behaviour on and off Camera*, 1992 *CRIM. L. REV.* 532, 532–35.

⁵²² See John Baldwin, *The Police and Tape Recorders*, 1985 *CRIM. L. REV.* 695, 695–96. As Leveson LJ remarked in *Southall v. General Medical Council* [2010] EWCA Civ 407, [70] (Eng.):

The days when a police officer corroborated by one or more other police officers was inevitably believed in relation to interviews (recorded in the officer's notebook after the event) have long since passed. Prior to the Police and Criminal Evidence Act 1984, concern was expressed about the adverse impact of tape recording police interviews. In fact, taped interviews have removed all challenge and have assisted the administration of justice enormously.

any impropriety or incompetence in questioning suspects will be captured in permanent form and potentially subjected to forensic dissection later in the proceedings. Tape recordings can be deployed in evidence to support arguments for excluding confessions under PACE 1984 section 76, as obtained through oppression or in circumstances conducive to their unreliability.

NEW ZEALAND, HON. JUDGE HARVEY:

The Practice Note in New Zealand does not have statutory force and a breach of its clauses are therefore not a breach of an enactment or rule of law. Still, the Practice Note is a factor taken into account when assessing whether evidence is admissible. Clause 5 of the Practice Note provides:

Any statement made by a person in custody or in respect of whom there is sufficient evidence to charge should preferably be recorded by video recording unless that is impractical or unless the person declines to be recorded by video. Where the statement is not recorded by video, it must be recorded permanently on audio tape or in writing. The person making the statement must be given an opportunity to review the tape or written statement or to have the written statement read over, and must be given an opportunity to correct any errors or add anything further. Where the statement is recorded in writing, the person must be asked if he or she wishes to confirm the written record as correct by signing it.⁵²³

In *Chetty*, the police had failed to film the defendant's admissions, breaching rule 5 of the Practice Note.⁵²⁴ The Court discussed the importance of clause 5.

Rule 5 has several objectives. It seeks to prevent dispute about two matters—whether a suspect did in fact make admissions to the police; and, if so, the circumstances in which he or she made the admissions (for example, whether the admissions were made in response to inducements). Further, [rule] 5 has a prophylactic function, in the sense that some forms of possible police impropriety are unlikely to occur if a video or audio tape record is being kept of an interview.⁵²⁵

An example of a case in which a statement was excluded because of a failure to comply with clause 5 is *Denney v. R.*⁵²⁶ In that case the appellant was arrested and cautioned.

⁵²³ See *supra* Elias, note 69, at 2.

⁵²⁴ *R v. Chetty* [2016] NZSC 68 at [39] (N.Z.).

⁵²⁵ *Id.*

⁵²⁶ [2017] NZCA 80 at [7], [31], [35] (N.Z.).

He then denied the offense and provided an exculpatory account. The officer recorded this in his notebook. Crucially, the officer failed to give the appellant an opportunity to read and sign the notebook, thereby breaching rule 5 of the Practice Note. The Court of Appeal held that the evidence of the statement was unfairly obtained.

Given that the evidential rules in the Evidence Act 2006 and their intersection with NZBORA and the Practice Note are the only means of control over police interrogation practices, video recording serves as a crucial safeguard. There is great value of video recording, especially where there is an incidental dispute about the content of or circumstances in which evidence was obtained.⁵²⁷ As video recording can reduce the risk of error, misinterpretation, and injustice, and given that technological advancements make recording increasingly more logistically and technically feasible, there is certainly a strong argument in favour of a requirement to record all interrogations.

Currently, the remedy in cases where there has been a failure to video an interrogation is exclusion but only if that is considered a proportionate response to the impropriety.⁵²⁸ Arguably, given the special character of and risks surrounding confession evidence as opposed to collection of inherently reliable real evidence, there is a case for automatic exclusion in the event of failure to record.

UNITED STATES, MS. BROOK:

Twenty-five states and the District of Columbia currently require or recommend that law enforcement record custodial interrogations for some crimes, either by statute or judicial action.⁵²⁹ Four states require all offenses be recorded and the remainder require all or some combination of felonies be recorded.⁵³⁰ Many federal law enforcement agencies are now required to record all custodial interrogations of individuals suspected of any federal crime.⁵³¹

Is recording a good idea? The vast majority of commentators and practitioners (including me), as well as many law enforcement agencies, believe it is.⁵³² The benefits

⁵²⁷ As stated by Cooke P. in *R v. Admore* [1989] 2 NZLR 210 at 214 (N.Z.).

⁵²⁸ *R v. Hawea* [2009] NZCA 127 at [49]–[50] (N.Z.).

⁵²⁹ See Brandon L. Bang, Duane Stanton, Craig Hemmens & Mary K. Stohr, *Police Recording of Custodial Interrogations: A State-by-State Legal Inquiry*, 20 INT'L J. POLICE SCI. & MGMT. 3, 10 (2018).

⁵³⁰ See Andrew E. Taslitz, *High Expectations and Some Wounded Hopes: The Policy and Politics of a Uniform Statute on Videotaping Custodial Interrogations*, 7 NW. J.L. & SOC. POL'Y 400, 408 (2012).

⁵³¹ Press Release, Dep't of Just., *Attorney General Holder Announces Significant Policy Shift Concerning Electronic Recording of Statements* (May 22, 2014), <http://www.justice.gov/opa/pr/attorney-general-holder-announces-significant-policy-shift-concerning-electronic-recording> [<http://perma.cc/9G5Z-B3BJ>].

⁵³² See, e.g., RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 320 (2008); Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 DRAKE L. REV. 619, 645–46 (2004).

include reducing the number of false confessions; deterring the use of coercive police tactics; more accurately assessing confession evidence for the jury, counsel, and the judge; creating a permanent record for future litigation; enhancing public confidence; and improving training.⁵³³ Regarding which offenses to record, once an interrogation room is equipped to record, there seems little reason to limit the recordings to the most serious felonies, especially because there are so many benefits to recording. In addition, a requirement that all interrogations be recorded would eliminate officer discretion and make recording routine.

But what to record? In many jurisdictions, only the confession itself is taped, not the hours (or days) leading up to it.⁵³⁴ Recording the entire interrogation rather than just its conclusion is generally considered the better practice, enabling a more meaningful review.⁵³⁵

On the question of sanctions, history teaches that oversight and fear of sanctions improve compliance. The sanctions created by states that require recording include exclusion, presumption of exclusion, court determination of admissibility, jury instruction, or monetary penalty.⁵³⁶ Some states do not specify any sanction.⁵³⁷ It would seem that combining a presumption of exclusion with the admissibility determination to be made by the court would have the greatest impact, while allowing all sides to be heard.

D. Has new technology affected the way in which interrogation occurs? Should it?

AUSTRALIA, HON. JUSTICE FIANNACA:

I am in general agreement with the views expressed by my colleagues about the impact, advantages, and new possibilities of modern technology in the sphere of crime investigation, including the conduct of interviews with suspects. In particular, the various incidental and consequential ways in which new technology can have an

⁵³³ See Bang et al., *supra* note 529, at 4–5.

⁵³⁴ For instance, the North Carolina statute defines a mandated recording as one which is “[a]n uninterrupted record that begins with and includes a law enforcement officer’s advice to the person in custody of that person’s constitutional rights, ends when the interview has completely finished.” N.C. GEN. STAT. ANN. § 15A-211(c)(2) (West 2020). Similarly, under New York law, the required recording is of “the entire custodial interrogation, including the giving of any required advice of the rights of the individual being questioned, and the waiver of any rights by the individual.” N.Y. CRIM. PROC. LAW § 60.45(3)(a) (McKinney 2021). Oklahoma law also makes clear that a custodial interrogation recording is needed only once the questioning procession begins, “during the course of a custodial interrogation [including] the making and signing of the statement.” OKLA. STAT. ANN. tit. 22, § 22(B)(2) (West 2021).

⁵³⁵ Taslitz, *supra* note 530, at 404.

⁵³⁶ *Id.* at 411–15.

⁵³⁷ Bang et al., *supra* note 529, at 17. See generally Recent Administrative Policy, *Dep’t of Justice, New Department Policy Concerning Electronic Recording of Statements (2014)*, 128 HARV. L. REV. 1552 (2015).

impact on interviews, referred to by Professor Roberts, apply equally in Australia. In my opinion, all of these developments are an appropriate reflection of progress and the realities of modern society.

In the context of interviews, the ability of police to show a suspect CCTV footage or stills of an incident and to present them with forensic evidence, data from seized electronic devices, telephone records, and so on, provides them with the opportunity to impress upon the suspect the strength of the evidence against him and to obtain explanations against which any subsequent inconsistent explanations can be tested. Equally, an accused has the opportunity to better understand the case being put to him and to provide any legitimate explanation. Importantly, in a jurisdiction where interviews for serious offences are almost invariably recorded on video, it also provides a jury with the opportunity to assess not only what was said by the accused but how he conducted himself and reacted to questions and evidence presented to him. While demeanour may have its limitations in the assessment of credibility, it remains a relevant consideration in such assessments.

The videorecording of interviews has ensured that all officers must conduct interviews in a manner that is fair and without behaviour that might be regarded as oppressive. That is not to say that all officers succeed in that endeavour, but failure comes at the expense of an interview being excluded or potentially disaffecting a jury at trial.

Arguably, one of most significant effects of videorecording police interviews has been the lengthening of interviews. In some cases, that outcome is due in part to the availability of electronic evidence that is presented to an accused. However, having practised during a time of written records of interview and subsequently having experienced the advent of video records of interview, it is difficult to escape the impression that, generally, there is scant regard for economical questioning when everything that takes place is recorded in real time. That is not to say that a methodical approach which may result in a lengthy interview is not appropriate or indeed necessary in some cases, such as complex circumstantial cases, but it is my impression that the discipline engendered by the need to write or type a record of everything that was said in times past has yet to find its analogue in video interviews.

CANADA, HON. JUSTICE POMERANCE:

Technology is a game-changer. The line between science and science fiction is constantly being redrawn. We have yet to experience technology's full potential, though courts across Canada have embraced it as a tool of justice during the COVID-19 crisis.⁵³⁸ Many court proceedings have taken place remotely, by audio or videoconferencing, given the closure of physical courtrooms.⁵³⁹

⁵³⁸ See, e.g., Bernise Carolino, *Ontario to Spend \$1.3M on Justice Sector Technology; \$2.7M to Victims of Violence Amid COVID-19*, LAW TIMES (Apr. 6, 2020), <https://www.lawtimesnews.com/practice-areas/litigation/ontario-to-spend-1.3m-on-justice-sector-technology-2.7m-to-victims-of-violence-amid-covid-19/328397> [<https://perma.cc/TQA8-H25R>].

⁵³⁹ As stated by Justice Myers in giving judgment in *Arconti v. Smith*, 2020 ONSC 2782, para. 19 (Can. Ont. S.C.J.):

The technological revolution will continue to drive changes in justice and law enforcement, but it is difficult to predict how it might change interrogation practices. Will suspect interviews take place remotely, with the suspect and police in different locations? Such practices may raise other problems. It may be difficult to control whether a person in a remote location is communicating with others during the interview. There are features of the dynamic that would likely be lost in the video link. As noted above, technology allows for events to be recorded with ease. It remains to be seen whether electronic procedures will ever replace in-person, face-to-face encounters between police and suspect.

ENGLAND AND WALES, PROFESSOR ROBERTS:

Besides the introduction of tape-recording (and now sometimes videorecording) of interviews with suspects and key witnesses, new technologies impact on police interviews in various incidental and consequential ways. With the advent of digital technologies and their incorporation into patrol officers' uniforms ("bodycams") and mobile units ("dashcams"), many interactions with members of the public—including potential suspects and witnesses—in the field may be recorded during routine policework. Such material may have evidential value, and in principle it will be admissible if relevant to the proceedings. Much like digital recordings derived from open street or commercial CCTV (in which the UK is a global pioneer),⁵⁴⁰ events captured on bodycams or dashcams are "real evidence" directly admissible at trial, subject to any challenge to their authenticity or chain of custody.

Technology offers alternatives and new possibilities for conducting investigations. Surveillance technologies enable arrest and interrogation to be delayed in the hope that a suspect's covertly observed conduct will be incriminating or lead to other evidence. Proactive policing strategies have become commonplace in England and Wales. Developments in forensic science, prominently including DNA profiling, equip policing with new investigative avenues and prosecutions with powerful sources of corroboration for confessions. Although false or otherwise unreliable confessions are a well-established cause of miscarriages of justice, the worry is significantly mitigated if the confessor's DNA profile also happens to match crime scene DNA with a random match probability of one-in-a-billion.⁵⁴¹

In my view, the simplest answer to this issue is, "It's 2020." We no longer record evidence using quill and ink. In fact, we apparently do not even teach children to use cursive writing in all schools anymore. We now have the technological ability to communicate remotely effectively. Using it is far more efficient and far less costly than personal attendance. We should not be going back.

⁵⁴⁰ Andrew von Hirsch, *The Ethics of Public Television Surveillance*, in *ETHICAL AND SOCIAL PERSPECTIVES ON SITUATIONAL CRIME PREVENTION* 59, 59 (Andrew von Hirsch, David Garland & Alison Wakefield eds., 2000).

⁵⁴¹ *R v. Tsekiri* [2017] EWCA Crim 40, [3], [2017] 1 WLR 2879 (Eng.).

Technology also plays a role within the interview itself. Scientific evidence—or, more dubiously, claims that it has been or could be obtained—may be significant leverage in persuading suspects to confess, and subsequently, to plead guilty. Technology can assist interviewing officers in confronting suspects with other potentially incriminating information, or even with the mere threat of it, in order to induce a sense of hopelessness and force the suspect to “come clean.” From social media accounts to mobile phone metering data, text messages, smart card transactions, and web-browsing digital footprints, police investigators today may strategically deploy a vast array of informational resources in interviews with suspects.

NEW ZEALAND, HON. JUDGE HARVEY:

The incessant growth of social media has enabled greater and easier connection. The ability to create a profile with a false identity renders social media an attractive forum for both criminals and investigating officers. The situation of an investigator using a false identity to “friend” a Facebook user has been likened to entrapment: An officer could easily access a website and ask questions which may elicit a self-incriminating answer.⁵⁴² Given the ease, convenience, and minimal cost at which enforcement officers could undertake such undercover activity, it is likely to be increasingly invoked. This raises concerns around the potential for the rights of those questioned in this context to be undermined, particularly in light of the lack of regulation in this area.

Whilst advances in quantity and complexity of crime mean that concurrent advancements in science and technology that can help with the detection and prosecution of crime should be embraced, it is crucial that such investigative methods are appropriately regulated.

UNITED STATES, MS. BROOK:

The prevalence of new technology moots the question of whether it should affect how interrogations occur. Its impact is unavoidable. Given that fact, the goal should be to make the ways technology affects policing as transparent as possible, allowing the public and the courts to understand how it is being used and to respond intelligently.

The availability of new technologies such as tracking devices and biometric cell phone locks has given rise to a new group of cases analyzing the often hazy distinction between whether evidence is testimonial, requiring *Miranda* warnings, or nontestimonial, requiring no warnings.⁵⁴³ In finding that unlocking a cell phone using the

⁵⁴² Michelle Brown & James Mullineux, *The Authority for and Limits of Covert Investigation Methods in New Zealand*, 28 N.Z. UNIVS. L.R. 349, 363 (2018).

⁵⁴³ See, e.g., *In re Search Warrant Application for the Cellular Tel. in United States v. Barrera*, 415 F. Supp. 3d 832, 835–38 (N.D. Ill. 2019) (after noting courts are in conflict and citing cases, the court granted government’s application for a search warrant requiring defendant to submit to a biometric scan to unlock his cell phone, finding biometric scans are nontestimonial); *In re Search Warrant Application*, 279 F. Supp. 3d 800, 801 (N.D. Ill. 2017) (“[T]he Court holds

suspect's fingerprints, face, or irises was nontestimonial, one court noted: "Admittedly, the line between testimonial and non-testimonial communications under the Fifth Amendment is not crystal clear. Here, however, the compelled use of the Subject's biometric features is far more akin to the surrender of a safe's key than its combination."⁵⁴⁴

Predictive databases have been much in the news recently as well, lauded by police for aiding in crime detection and denounced by critics for inaccuracy and racial profiling.⁵⁴⁵ These programs impact interrogations by increasing the risk that innocent persons will be interrogated and by giving police the opportunity to confront all suspects with new evidence.⁵⁴⁶ In April 2020, the Los Angeles Police Department (LAPD) announced it was ending its use of a controversial program called Pred-Pol that attempted to predict where property crimes would occur in the city.⁵⁴⁷ The program had been criticized for unfairly leading to a heavier police presence in communities of color.⁵⁴⁸ The LAPD said the demise of the program was due to financial constraints.⁵⁴⁹ More such controversial programs are surely in our future.⁵⁵⁰

CONCLUSION

In each of the five national jurisdictions considered in this Article, we found that the central legal issues surrounding police interrogation are complex and extremely important for criminal justice resolutions. The nations discussed here, however, often have markedly different approaches to these issues. For instance, the emphasis

that requiring the application of the fingerprints to the sensor does not run afoul of the self-incrimination privilege because that act does not qualify as a testimonial communication."); *In re* Application for a Search Warrant, 236 F. Supp. 3d 1066, 1071 (N.D. Ill. 2017) (attempting to compel a thumb print to unlock an encrypted device violated the Fifth Amendment because the act constituted testimonial act of production); *Commonwealth v. Baust*, 89 Va. Cir. 267, 271 (2014) (granting warrant application to compel defendant to provide fingerprints to unlock cell phone but denying motion to compel provision of passcode because providing a passcode is testimonial act, whereas providing fingerprint is a non-testimonial physical characteristic).

⁵⁴⁴ *In re* Search of [Redacted] Washington, D.C., 317 F. Supp. 3d 523, 535 (D.D.C. 2018).

⁵⁴⁵ Rashida Richardson & Amba Kak, *It's Time for a Reckoning About This Foundational Piece of Police Technology*, SLATE (Sept. 11, 2020, 1:38 PM), <https://slate.com/technology/2020/09/its-time-for-a-reckoning-about-criminal-intelligence-databases.html> [<https://perma.cc/6HS7-PZT5>].

⁵⁴⁶ *Id.*

⁵⁴⁷ Leila Miller, *LAPD Will End Controversial Program that Aimed to Predict Where Crimes Would Occur*, L.A. TIMES, <https://latimes.com/california/story/2020-04-21/lapd-ends-predictive-policing-program> [<https://perma.cc/XZK7-SLLC>] (Apr. 21, 2020, 6:17 PM).

⁵⁴⁸ *Id.*

⁵⁴⁹ *Id.*

⁵⁵⁰ See, e.g., Annie Sweeney, *Fairness, Usefulness of Gang Database Questioned as Chicago Police Plan to Overhaul Controversial System*, CHI. TRIB. (Mar. 11, 2020, 5:00 AM), <https://www.chicagotribune.com/news/criminal-justice/ct-chicago-police-gang-database-analysis-2020-0311-b5kc3aiamran5chtybzd2tmcam-story.html> [<https://perma.cc/2376-MQ46>].

in England and Wales on nationwide statutory standards and guidelines is striking. Criminal justice professionals in the United States, by contrast, focus almost entirely on review under the national Constitution.

Lawmakers and judges in Canada and New Zealand have serious concerns as to the interrogation process in connection with undercover operations. While their Australian counterparts have also expressed concerns, they appear to have a preference for applying general common law principles on a case-by-case basis, rather than formulating specific rules or guidelines for particular scenarios.

With all the commentators here, there is a clear and united view that technology is changing the entire police interrogation process. Whether developed by statute, judicial rulings, or common practice, cameras and recording devices are certainly changing the way in which law enforcement personnel conduct their investigations of individual suspects.