

CRIMINAL LAW BULLETIN

Volume 55, Number 5

DANCING AROUND *MIRANDA*: THE EFFECTS OF LEGAL REFORM ON HOMICIDE DETECTIVES
IN THE USA AND THE UK

Fiona Brookman, Sophie Pike, and Edward R. Maguire

TIME WILL TELL: REFLECTIONS ON THE SUPREME COURT'S ENDURING DISPUTES OVER THE
DEATH PENALTY, AND A POSSIBLE RESOLUTION

Robert A. Flatow

THE ENTRAPMENT DEFENSE IN TERRORISM CASES: PUTTING THE 'PRE' BACK IN
PREDISPOSITION

Joseph J. Pantella, IV

EVIDENCE COMMENTARY
SOLUTION TO CONFRONTATION CLAUSE "TESTIMONIAL" v. "NONTTESTIMONIAL" DILEMMA:
A *ROBERTS* AND *CRAWFORD* COMBINED APPROACH

Michael H. Graham

CORRECTIONAL LAW COMMENTARY
THE PRISON CASE LAW OF THE U.S. COURTS OF APPEALS, 2018

James E. Robertson

FROM THE LEGAL LITERATURE

Jason Walker

© 2019 Thomson Reuters

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

Dancing Around *Miranda*: The Effects of Legal Reform on Homicide Detectives in the USA and the UK

Fiona Brookman, Sophie Pike, & Edward R. Maguire*

ABSTRACT

Drawing upon qualitative data gathered during fieldwork at homicide units in the USA and UK, this paper explores how detectives in both settings have responded to legal reforms intended to protect suspects' rights. Our analyses reveal that homicide detectives in the USA routinely engage in procedures intended to circumvent these rights, typically to enhance the likelihood of eliciting a confession. We explore, in particular, the tactics adopted by detectives in the USA to circumvent suspects' *Miranda* rights immediately prior to and during the interrogation of homicide suspects. We discuss how and why detectives in the USA and UK, two nations with "adversarial" legal systems, appear to have responded differently to legal reforms designed to enhance suspects' rights during interviews and interrogations (*Miranda* in 1966 and the Police and Criminal Evidence Act of 1984).

I. INTRODUCTION

In both the UK¹ and the USA, suspects are afforded certain rights when questioned by police. These rights have developed over time in both countries and are currently rooted in two sources of authority, one legislative and the other judicial. In England and Wales, the Police and Criminal Evidence Act (PACE) was introduced in 1984 in an effort to balance the rights of suspects with the powers of the

*Fiona Brookman is a professor of criminology at the University of South Wales. She earned her Ph.D. in criminology from Cardiff University. Her research focuses on homicide, violence, and major crime investigation.

Sophie Pike is a lecturer in criminology at Bath Spa University in England. She earned her Ph.D. in criminology from the University of South Wales. She specializes in the study of homicide and criminal investigation.

Edward R. Maguire is a professor in the School of Criminology and Criminal Justice at Arizona State University. He earned his Ph.D. in criminal justice from the University at Albany, SUNY. His research focuses primarily on policing and violence.

¹There are three criminal justice jurisdictions in the United Kingdom: England and Wales, Scotland, and Northern Ireland. This paper uses data only from the first and largest of these jurisdictions—England and Wales. However, for ease of reading, we refer to the UK throughout this paper unless it is essential to distinguish regions.

police. The legislation was enacted following widespread concerns about police practices when suspects were in custody, including during interviews. Of note, numerous cases during the 1970s and 1980s placed attention squarely on the “investigative and specifically the interview process as a major contributor to miscarriages of justice in the UK.”² In the USA, the *Miranda v. Arizona* ruling of 1966 followed similar concerns about police interrogation practices. In particular, it was hoped that the *Miranda* warnings would reduce the risk of coercion.³ In a similar vein to PACE, *Miranda* affords suspects certain rights on arrest and during police interrogation. Despite their similar objectives, it appears that these respective legal mechanisms have been reacted to in rather distinct ways by homicide detectives in the UK and USA.

Drawing upon qualitative data gathered during fieldwork at homicide units in the UK and USA, we illustrate how British and U.S. detectives have responded in different ways to the emergence of PACE and *Miranda*. We suggest that some of these differences are cultural (e.g. different emphases on the value of confessional evidence and the “skill” of outsmarting suspects) whilst others relate to the different practices that have emerged—most notably in the UK—around professionalizing homicide investigations. We then move on to explore in detail the ways in which homicide detectives in the USA circumvent *Miranda* and we compare these practices to those adopted by British homicide detectives during suspect interviews. Practices surrounding the detention and interrogation of homicide suspects are important to understand for a number of reasons. In many countries homicide investigations are considered to represent the “gold standard” of criminal investigations. Police departments often invest substantial portions of their resources to the investigation of these grave crimes. Therefore, we might reasonably expect these kinds of investigations to adhere most closely to legal and procedural rules or guidance and to avoid flaws and errors.

The ramifications of flawed homicide investigations are significant for many reasons, including the possibility of committing two serious errors of justice: imposing a potential life or death sentence on an innocent person, or failing to capture a guilty person and therefore potentially endangering the public.⁴ For these and other reasons, the public has high expectations that the police will carry out homicide

²Sam Poyser & Becky Milne, *Miscarriages of Justice: A Call for Continued Research Focussing on Reforming the Investigative Process*, 13 BRITISH J. FORENSIC PRAC. 61, 63 (2011).

³Linda M. Keller, *Alternatives to Miranda: Preventing Coerced Confessions via the Convention Against Torture*, 10 CHAP. L. REV. 745 (2007).

⁴Peter Stelfox, *The Evolution of Homicide Investigation in the UK*, 10 J. HOMICIDE & MAJOR INCIDENT INVESTIGATION 92 (2015); BRIAN FORST, ERRORS OF JUSTICE: NATURE, SOURCES AND REMEDIES (2004).

investigations competently, professionally, and quickly. In Part II, we review the literature on the emergence of *Miranda* and PACE and the extent to which these legal reforms have afforded suspects enhanced rights. We also review the small body of research that has specifically explored how detectives in the USA bypass *Miranda*, how and why police “bend” rules, and how courts in the United States have seemingly diluted *Miranda* since its inception. In Part III, we describe the methodology we used in our analyses. In Part IV, we present the findings from our interviews and observations in the UK and the USA. Finally, in Part V we offer some concluding thoughts on homicide investigation, custodial interrogation, and differences in the effects of legal reforms in the UK and the USA.

II. LITERATURE REVIEW

A. *Miranda v. Arizona*

Efforts to professionalize police interrogation practices in the USA began in the 1930s in a bid to reduce or eradicate the use of coercive or “third degree” methods of interrogation.⁵ This continued in the 1960s when interrogation manuals were published and a psychological approach began to underpin interrogations,⁶ the most well-known being Reid and Inbau’s *Criminal Interrogation and Confessions*.⁷ However, it was the 1966 ruling in *Miranda v. Arizona* that prompted fundamental changes in the way police interrogated suspects.⁸ The decision was actually based on four cases in which confessions were obtained in breach of the suspects’ constitutional rights, but it was Ernesto Miranda’s confession that was used to justify the ruling.⁹ Based on the U.S. Supreme Court’s landmark decision in this case,

⁵“Third degree” methods “ranged from psychological coercion to outright torture.” Brooks Holland, *Miranda v. Arizona: 50 Years of Regulating Police Interrogation*, 16 *INSIGHTS ON LAW & SOCIETY* 4, 6 (2015). The publication of the Wickersham Commission Report “Lawlessness in Law Enforcement” in the 1930s prompted reform. See UNITED STATES NAT. COMM. ON LAW OBSERVANCE & ENFORCEMENT, No. 11, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931); see also RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* 63 (2008).

⁶Saul M. Kassin, Sara C. Appleby, & Jennifer Torkildson Perillo, *Interviewing suspects: Practice, Science, and Future Directions*, 15 *LEGAL & CRIMINOLOGICAL PSYCHOL.* 39 (2010).

⁷FRED E. INBAU & JOHN E. REID, *CRIMINAL INTERROGATION AND CONFESSIONS* (1962). The latest edition of the book, written with additional co-authors, was published in 2013. See FRED E. INBAU, JOHN E. REID, JOSEPH J. BUCKLEY, & BRIAN C. JAYNE, *CRIMINAL INTERROGATION AND CONFESSIONS* (5th ed., Jones & Bartlett 2013).

⁸*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966); see also Roscoe C. Howard & Lisa A. Rich, *A History of Miranda and Why It Remains Vital Today*, 40 *VAL. U. L. REV.* 685 (2006).

⁹*Miranda*, 384 U.S. at 436; see also Howard & Rich, *supra* note 8, at 690.

Miranda v. Arizona became the “most famous case in the history of United States criminal procedure.”¹⁰

Ernesto Miranda was arrested in Arizona for the kidnap and rape of a woman.¹¹ He was identified by the victim and subsequently interrogated by police.¹² During the interrogation, Miranda confessed and was later convicted.¹³ Miranda appealed his conviction on the basis that he had not been informed of his right to speak to a lawyer or told that a lawyer may be present during the interrogation, nor had he been informed of his Fifth Amendment right against self-incrimination.¹⁴ In 1966, the U.S. Supreme Court ruled in his favor.¹⁵ Miranda’s conviction was overturned and the Supreme Court established what became known as the *Miranda* “rights” or “warnings.”¹⁶

The *Miranda* warnings, which must be relayed to a suspect before any custodial interrogation, are as follows:

- A. You have the right to remain silent.
- B. If you choose to give up this right, anything that you say can be used against you in a court of law.
- C. You have the right to consult with an attorney, and to have the attorney present during interrogation.
- D. If you cannot afford an attorney, one will be appointed to represent you.¹⁷

The Supreme Court did not stipulate the precise language that should be used when issuing the *Miranda* warning, indicating only the content that must be addressed.¹⁸ When suspects “waive” their rights, detectives must be able to demonstrate that they did so knowingly, voluntarily, and intelligently before the interrogation may begin.

¹⁰Tammy R. Pettinato, *The Custody Catch-22: Post-Interrogation Release as a Factor in Determining Miranda Custody*, 65 ARK. L. REV. 799, 801 (2012).

¹¹*Miranda*, 384 U.S. at 518.

¹²*Miranda*, 384 U.S. at 491; Howard & Rich, *supra* note 8, at 691.

¹³*Miranda*, 384 U.S. at 491; Howard & Rich, *supra* note 8, at 691.

¹⁴*Miranda*, 384 U.S. at 491; Howard & Rich, *supra* note 8, at 691.

¹⁵*Miranda*, 384 U.S. at 492–93; Bryan Taylor, *You Have the Right to Be Confused. Understanding Miranda After 50 Years*, 36 PACE L. REV. 160 (2015).

¹⁶*Miranda*, 384 U.S. at 471–73. Miranda was later retried for the crime. See Paul G. Ulrich, *Miranda v. Arizona: History, Memories, and Perspectives*, 7 PHOENIX L. REV. 203, 251–54. During this second trial, his common-law wife testified that he had confessed to her and, based on her incriminating testimony, Miranda was found guilty of the rape a second time. Ulrich, *supra* note 16, at 254.

¹⁷*Miranda*, 384 U.S. at 471–73.

¹⁸Richard Rogers, Chelsea E. Fiduccia, Eric Y. Drogin, Jennifer A. Steadham, & John W. Clark, *General Knowledge and Misknowledge of Miranda Rights: Are Effective Miranda Advisements Still Necessary?*, 19 PSYCHOL. PUB. POL’Y & L. 432, 433 (2013).

As criminologist and confessions expert Richard Leo explains: “if detectives fail either to properly warn suspects of their *Miranda* rights or to elicit a proper waiver, any statements the suspect makes should, in theory, be excluded from evidence at trial.”¹⁹ The introduction of the *Miranda* rights was intended to protect suspects from coercive interrogation practices and prevent against false confessions.

B. *Miranda* Warnings and Police Interrogation

Although only a small number of experts have examined how the *Miranda* warnings are delivered,²⁰ some research conducted in the United States has explored how police try to bypass and minimize its importance to suspects during interviews. For example, Leo’s extensive research includes direct observations of more than 100 police interrogations and considers a number of issues, including the various tactics that the police use to persuade suspects to waive their *Miranda* Rights in order to proceed with an interrogation.²¹ Leo and White identified three particular ways in which the warnings are delivered.²²

Firstly, the *Miranda* warnings are merely read out, before suspects are asked if they understand them and if they choose to waive them; in doing so, investigators act “merely as conveyors of legal information, delivering the warnings in a way that appears non-partisan.”²³ Secondly, and most commonly, they are delivered in such a way as to diminish their importance, beginning with “rapport-building small talk” as the police aim to portray themselves as a friend before broaching the subject of rights.²⁴ The warnings are then depicted as an “unimportant bureaucratic ritual,” which police fully expect the suspect to waive so that the interrogation can proceed.²⁵ Leo adds that in these circumstances, the detectives become less animated as they convey the warnings and will also try and blend them into

¹⁹Leo, *supra* note 5, at 123.

²⁰Yale Kamisar, *The Miranda Case Fifty Years Later*, 97 B.U. L. REV. 1293 (2017).

²¹Leo, *supra* note 5, *passim*.

²²Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators’ Strategies for Dealing with the Obstacles Posed by Miranda*, 84 MINN. L. REV. 397 (1999). Leo and White’s findings are based on earlier data collected by Leo and Ofshe. See Richard A. Leo & Richard J. Ofshe, *The Decision to Falsely Confess: Rational Choice and Irrational Action*, 74 DENVER U. L. REV. 979 (1997). They accumulated over 125 transcripts of disputed interrogations and other case materials between 1987 and 1997 from various jurisdictions, which included major felony and murder cases.

²³Leo & White, *supra* note 22, at 432.

²⁴Leo & White, *supra* note 22, at 433.

²⁵Leo & White, *supra* note 22, at 433.

the conversation.²⁶ Perhaps the clearest indication of the extent to which the importance of the warnings is downplayed is the reference that the police often make to television or films through which the suspect may have heard of *Miranda*.²⁷ Indeed, the presence of the *Miranda* warnings in popular culture is seen to normalize this formality.²⁸ However, research has shown that the general public's understanding of *Miranda* is, in reality, minimal at best.²⁹

The third method of delivery involves the detective advising the suspect that waiving the *Miranda* rights will be beneficial, although these benefits are often "implicit rather than explicit."³⁰ Nevertheless, the authors cite a case in which a homicide suspect was told that if he gave his side of the story, he would be viewed more favorably and receive a lighter sentence.³¹ Finally, if the police are unsuccessful in their efforts to obtain a waiver, it is not necessarily the end of their efforts to circumvent *Miranda*. When suspects invoke their rights, the police might give them some time to think about it in the hope that they will reconsider. Police might also try to persuade them to change their mind, or continue to question a suspect in violation of *Miranda*.³² Alternatively, investigators may fully disregard the requirements of *Miranda* and ask suspects to sign the waiver without reading them their rights, indicating that the suspect has no choice but to sign the waiver form.³³ Leo concludes that all of these tactics persist and that *Miranda* has become merely a "manageable annoyance" for investigators.³⁴

Similar findings were identified by Feld³⁵ in a study which he described as only the second "naturalistic empirical study of police

²⁶Leo, *supra* note 5, at 127–28; *see also* Leo & White, *supra* note 22, at 433–44.

²⁷Leo & White *supra* note 22, at 433–35.

²⁸Anthony J. Domanico, Michael D. Cicchini, & Lawrence T. White, *Overcoming Miranda: A Content Analysis of the Miranda Portion of Police Interrogations*, 49 IDAHO L. REV. 1 (2012); Richard Rogers, Allyson J. Sharf, John W. Clark, Eric Y. Drogin, Darby B. Winningham & Margot M. Williams, *One American Perspective on the Rights of Accused: An Initial Survey of Miranda Rights in a Broader Context*, 34 BEHAV. SCI. & L. 477 (2016).

²⁹Tonja Jacobi, *Miranda 2.0*, 50 U.C. DAVIS L. REV. 1 (2016); Laura Smalarz, Kyle C. Scherr, & Saul M. Kassin, *Corrigendum: Miranda at 50: A Psychological Analysis*, 26 CURRENT DIRECTIONS IN PSYCHOL. SCI. 455 (2017).

³⁰Smalarz et al., *supra* note 29, at 440.

³¹Smalarz, et al., *supra* note 29, at 433.

³²Smalarz, et al., *supra* note 29, at 433.

³³Leo, *supra* note 5, at 123–24.

³⁴Leo, *supra* note 5, at 124.

³⁵Barry C. Feld, *Real Interrogation: What Actually Happens When Cops Question Kids*, 47 LAW & SOC'Y REV. 1 (2013).

interrogation in the United States in the past three decades,” the first being the research carried out by Leo.³⁶ Focusing on juveniles charged with a felony, Feld looked at 307 cases in which suspects had invoked or waived their *Miranda* rights, examining case files and conducting interviews with professionals including police, prosecutors and defense lawyers. Feld found that the importance of the warnings was downplayed and that suspects were told that it was their only opportunity to recount their story.³⁷ Before the warnings were given, suspects were asked generic questions, which helped the police to build rapport with the suspect and therefore lead them towards waiving their rights.³⁸ Weisselberg noted that the courts appear to have sanctioned conversations that might take place before a waiver is obtained, though this only appears to be the case if the police do not ask incriminating questions.³⁹

Domanico and colleagues examined twenty-nine electronically recorded custodial interrogations taken from a pool of felony murder or Class A, B and C felony cases in Milwaukee and found that the police minimized the importance of *Miranda* in 45% of the interrogations.⁴⁰ They also found that the *Miranda* warnings were often portrayed as something to “get out of the way.”⁴¹ In addition, they found that the police would speak more quickly when relaying the warnings and that suspects needed the reading ability of a fifteen- to sixteen-year-old to understand the waiver.⁴² Furthermore, 93% of the suspects waived their rights,⁴³ a finding supported by Leo who also acknowledged the success of the police in obtaining waivers.⁴⁴ Finally, Blackwood and colleagues evaluated the *Miranda* waiver decisions of eighty pre-trial defendants from two jails in Oklahoma; they found that almost half of the defendants failed to

³⁶Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996) [hereinafter Leo, *Inside the Interrogation Room*]; Richard A. Leo, *Miranda's Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC'Y REV. 259 (1996) [hereinafter, “Leo, *Miranda's Revenge*”].

³⁷Feld, *supra* note 35, at 10–11.

³⁸Feld, *supra* note 35, at 10.

³⁹Charles D. Weisselberg, *Mourning Miranda*, 96 CAL. L. REV. 1519 (2008).

⁴⁰Domanico et al., *supra* note 28, at 15–16.

⁴¹Domanico et al., *supra* note 28, at 15–16.

⁴²Domanico et al., *supra* note 28, at 14–15.

⁴³Domanico et al., *supra* note 28, at 13–14.

⁴⁴Leo, *supra* note 5, at 123–32.

consider the long-term consequences of waiving their *Miranda* rights.⁴⁵

The small amount of research on *Miranda* waivers that has been conducted in the USA indicates that police are adept at circumventing *Miranda* to their advantage. Specifically, mounting evidence suggests that police are successful in securing waivers and inducing suspects to talk. The interesting question that follows is why the police might engage in such practices. In order to address this issue, we turn to the broader literature on rule breaking by police.

C. Rule Breaking by Police

Rule breaking by police has been explored by a number of scholars. Innes introduced the concept of “compliance drift” as a means to understand the initial genesis of rule breaking during criminal investigations.⁴⁶ “Compliance drift” occurs when individuals who are working on protracted cases and under considerable pressure, begin to deviate from standard working practices.⁴⁷ Innes states that there are several causes of compliance drift, but that all essentially result from detectives’ perceived need to “maintain the investigative system’s efficacy when it is under strain.”⁴⁸ Consequently, detectives bypass procedure and regulation to reduce strain and such actions eventually become part of accepted practice, not least because they are seen to have been successful at reducing strain and resolving problems in the past.⁴⁹

Ericson describes two ways in which the police deal with rules: the “ways and means act” and “the end justifies the means.”⁵⁰ In the former, rules are considered an obstacle to effective criminal investigation and so they are “ignored, sidestepped or subject to interpretive leaps.”⁵¹ “The end justifies the means” refers to the view that efficient criminal investigation is in the public’s interest and “trumps due process.”⁵²

Loyens undertook ethnographic research with two police teams in

⁴⁵Hayley L. Blackwood, Richard Rogers, Jennifer A. Steadham, & Chelsea E. Fiduccia, *Investigating Miranda Waiver Decisions: An Examination of the Rational Consequences*, INT’L J. LAW & PSYCHIATRY 11, 42–43 (2015).

⁴⁶MARTIN INNES, INVESTIGATING MURDER. DETECTIVE WORK AND THE POLICE RESPONSE TO CRIMINAL HOMICIDE 242, 259–63, 265, 275 (2003).

⁴⁷INNES, *supra* note 46, at 242, 259–63, 265, 275.

⁴⁸INNES, *supra* note 46, at 259.

⁴⁹INNES, *supra* note 46, at 259–63.

⁵⁰Richard V. Ericson, *Rules in Policing: Five Perspectives*, 11 THEORETICAL CRIMINOLOGY 367, 370 (2007).

⁵¹Ericson, *supra* note 50, at 370.

⁵²Ericson, *supra* note 50, at 370.

Belgium.⁵³ She found that many detectives were inclined to bend the rules, that rule breaking was not limited to a few “bad apples” and that rule bending generally occurred in situations where rule abidance could “jeopardize values like effectiveness or efficiency.”⁵⁴

Forst proposed a sophisticated way of identifying and managing errors of justice that draws on the framework commonly used to manage errors in statistical inference.⁵⁵ He argued that such a framework should be used for managing errors that arise within the criminal justice system, particularly since these errors result in such profound costs to society.⁵⁶ In statistical inference, a Type I error is a false positive and a Type II error is a false negative.⁵⁷ Similarly, Forst describes two types of errors of justice: errors of due process⁵⁸ and errors of impunity.⁵⁹ Errors of due process, like Type I errors, are false positives; they involve subjecting innocent people to the weight of the legal process, whether through harassment, detention, or sanctioning.⁶⁰ They can arise from a range of causes, from honest mistakes at one end of the scale, to corruption at the other.⁶¹ Errors of impunity, like Type II errors, are false negatives; they involve the failure to sanction those responsible for an offence.⁶² Errors of impunity can be the consequence of skillful offenders avoiding detection or poor policing.⁶³ Forst considers the costs that both types of errors of justice impose upon society, notably that they “shake the foundations of public confidence in institutions broadly regarded not long ago as trustworthy, if not sacred, built on sworn oaths to uphold the law.”⁶⁴

Of particular relevance to our paper is Forst’s view that law enforcement is “the engine of errors of justice.”⁶⁵ For Forst, the likelihood of errors of justice increases as the pressure to solve crime

⁵³Kim Loyens, *Rule Bending by Morally Disengaged Detectives: An Ethnographic Study*, 15 POLICE PRAC. & RES., AN INT’L J. 62 (2014).

⁵⁴Loyens, *supra* note 53, at 72.

⁵⁵BRIAN FORST, *ERRORS OF JUSTICE: NATURE, SOURCES AND REMEDIES* (2004).

⁵⁶FORST, *supra* note 55, *passim*.

⁵⁷FORST, *supra* note 55, at 34–36.

⁵⁸FORST, *supra* note 55, at 10–21.

⁵⁹FORST, *supra* note 55, at 22–30.

⁶⁰FORST, *supra* note 55, at 10–21.

⁶¹FORST, *supra* note 55, at 10–21.

⁶²FORST, *supra* note 55, at 22–30.

⁶³FORST, *supra* note 55, at 22–30.

⁶⁴FORST, *supra* note 55, at 2.

⁶⁵FORST, *supra* note 55, at 109.

grows and police find ways to successfully resolve cases.⁶⁶ In particular, Forst argues that the “case for managing errors of justice is most strikingly made for the crime of homicide.”⁶⁷ He suggests that opportunities for of justice in homicide investigation are plentiful and can arise at any point in the process, from the very beginning when the police must determine whether or not a homicide has occurred, to identifying a suspect, to determining the appropriate charges (e.g. establishing whether the charge ought to be first or second degree murder or manslaughter).⁶⁸

Forst goes on to argue that whilst it is possible to identify where failings lie when guilty offenders are not brought to justice (i.e. errors of due process), errors of impunity are less well understood due to the lack of “any systematic attempt by the police to document known errors in detaining and arresting suspects.”⁶⁹ Forst proffers that the most significant source of errors of justice is the use of incentives, which place the police under pressure to resolve high-profile cases and can lead to the “use of untrustworthy snitches, overlooking (and occasionally suppressing) exonerating evidence, inducements to false confessions, and shopping for laboratory technicians who are more inclined to find incriminating evidence against the suspect.”⁷⁰

In 2015, fifty-eight homicide defendants were exonerated in the United States; five of whom had been sentenced to death.⁷¹ Of the fifty-eight exonerees, twenty-two (38%) falsely confessed and forty-four (76%) were wrongly convicted because of official misconduct, including by the police.⁷² Forst argues that changes to policies that contribute excessively to errors of justice will help avoid their occurrence in the future, suggesting that improvements could be made to witness identification procedures and accountability in criminal investigations.⁷³

The ways in which detectives have circumnavigated *Miranda* is one part of a larger story of how suspects’ rights have been diminished. We turn now to a consideration of some key court rulings that appear to have diluted the potency of *Miranda* since its inception. Arguably, such rulings have sent a message to police that

⁶⁶FORST, *supra* note 55, at 66–111.

⁶⁷FORST, *supra* note 55, at 184.

⁶⁸FORST, *supra* note 55, at 184–211.

⁶⁹FORST, *supra* note 55, at 19.

⁷⁰FORST, *supra* note 55, at 199.

⁷¹Nat’l Registry of Exonerations, *Exonerations in 2015* (Feb. 3, 2016), at 4, http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2015.pdf [hereinafter “2015 Exonerations”].

⁷²2015 Exonerations, *supra* note 71, at 7.

⁷³FORST, *supra* note 55, at 211.

it is permissible to “push back” against legal reforms governing criminal investigation practices.

D. Diluting *Miranda*

According to Romano, since its beginning, “*Miranda* has sustained subtle setbacks and restrictions to provide police with more leeway in seeking confessions and avoiding the suppression of evidence.”⁷⁴ A series of rulings in response to particular criminal cases have, arguably, begun to dilute the protective powers of *Miranda*.

To illustrate, Van Chester Thompkins was arrested on suspicion of murder following a shooting in Michigan.⁷⁵ Although police read him his rights, Thompkins refused to sign them and during interrogation he remained silent for almost three hours.⁷⁶ Police asked Thompkins if he had prayed to God to forgive him for the shooting to which he responded “yes.” Although he would not write his confession, his response to that question formed the basis of his eventual conviction.⁷⁷ The U.S. Supreme Court ultimately rejected Thompkins’ argument that his having remained silent constituted an invocation of his Fifth Amendment rights under *Miranda*.⁷⁸ Relying on the Court’s prior decision in *Davis v. United States*, which held that suspects must invoke their rights clearly and unambiguously,⁷⁹ the majority concluded that Thompkins’ silence failed to constitute such a clear and unambiguous invocation.⁸⁰

There is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously. A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that avoids difficulties of proof and provides guidance to officers on how to proceed in the face of ambiguity. If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused’s unclear intent and face the consequence of suppression if they guess wrong . . .

Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his right to cut off

⁷⁴Illan M. Romano, *Is Miranda on the Verge of Extinction? The Supreme Court Loosens Miranda’s Grip in Favor of Law Enforcement*, 35 *NOVA L. REV.* 525, 527 (2011).

⁷⁵*Berghuis v. Thompkins*, 560 U.S. 370, 374, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010).

⁷⁶*Thompkins*, 560 U.S. at 375.

⁷⁷*Thompkins*, 560 U.S. at 376–78; see also Romano, *supra* note 74, at 527.

⁷⁸*Thompkins*, 560 U.S. at 380–82; Romano, *supra* note 74, at 527.

⁷⁹*Davis v. U.S.*, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994).

⁸⁰*Thompkins*, 560 U.S. at 381–82; see also Michael O’Neil, *The Unjust Application of Miranda: Berghuis v. Thompkins and Its Inequitable Effects on Minority Populations*, 31 *B.C. THIRD WORLD L.J.* 85 (2011).

questioning . . . Here he did neither, so he did not invoke his right to remain silent.⁸¹

Although *Miranda* requires police to show that suspects have waived their rights knowingly, voluntarily and intelligently,⁸² both the dissenting justices and subsequent commentators argued that the Court's ruling in *Berghuis v. Thompkins* places responsibility on suspects to know how to invoke their rights.⁸³

A number of researchers have noted that the ruling in *Berghuis v. Thompkins* will have negative impacts for certain kinds of suspects. For example O'Neil argues that the ruling will prove especially damaging to individuals from minority populations as these individuals are more likely to use indirect language and be less assertive, making it challenging for them to clearly and unambiguously invoke their rights.⁸⁴

Salseda and colleagues explored the connection between the deficits present in those suffering ASD [autism spectrum disorders] and a potential lack of comprehension of *Miranda* among these individuals.⁸⁵ They suggested that ASD sufferers are more likely to waive their rights because of impairments in social cognition, adding that variations in how *Miranda* warnings are delivered compounds these difficulties.⁸⁶ Other researchers have noted that one need not suffer from any kind of impairment to fall foul of safeguarding measures once suspected of a crime. For example, Dearborn notes that the majority of suspects do not understand their *Miranda* rights and are not therefore in a position to waive them without the advice

⁸¹ *Thompkins*, 560 U.S. at 381–82 (internal quotations and citations omitted).

⁸² Leo, *supra* note 5, at 123.

⁸³ *Thompkins*, 560 U.S. at 391, 407–12 (Sotomayor, J., dissenting); Romano, *supra* note 74, at 546. Justice Sotomayor's dissent in *Thompkins* argued that the majority decision meant “a suspect who wishes to guard his right to remain silent against . . . a finding of ‘waiver’ must, counterintuitively, speak—and must do so with sufficient precision to satisfy a clear-statement rule that construes ambiguity in favor of the police.” *Thompkins*, 560 U.S. at 391. She went on to say, “What in the world must an individual do to exercise his constitutional right to remain silent beyond actually, in fact, remaining silent?” 560 U.S. at 409. Her critique of the majority's logic led some commentators to conclude that the words used in *Miranda* warnings are fatally outdated since “telling a suspect that he has the right to remain silent is no longer accurate.” Michael D. Cicchini, *The New Miranda Warning*, 65 S. METHODIST U.L. REV. 911, 918 (2012).

⁸⁴ O'Neil, *supra* note 80, at 100–01.

⁸⁵ Lindsay M. Salseda, Dennis R. Dixon, Tracy Fass, Deborah S. Miora, & Robert A. Leark, *An Evaluation of “Miranda” Rights and Interrogation in Autism Spectrum Disorders*, 5 RES. IN AUTISM & SPECTRUM DISORDERS 79 (2011).

⁸⁶ Salseda et al., *supra* note 85, at 82–84; *see also* Domanico et al., *supra* note 28; Richard Rogers, Kimberly S. Harrison, Daniel W. Shuman, Kenneth W. Sewell, & Lisa L. Hazlewood, *An Analysis of Miranda Warnings and Waivers: Comprehension and Coverage*, 31 L. & HUM. BEHAV. 177 (2007).

of a lawyer.⁸⁷ This lack of understanding is heightened when the suspect is “simultaneously faced with a barrage of psychological trickery and manipulation.”⁸⁸ Smalarz and colleagues state that, “once under suspicion, and targeted for interrogation, even well-adjusted, intelligent adults are at risk despite *Miranda*.”⁸⁹

A second case illustrative of the dilution of *Miranda* is *Florida v. Powell* in 2010.⁹⁰ Powell was arrested for the illegal possession of a handgun and subsequently read his *Miranda* rights.⁹¹ However, he appealed his subsequent conviction on the basis that the *Miranda* warning he was given did not clearly inform him of his right to have an attorney present during interrogation by the police.⁹² The Florida Supreme Court agreed with Powell, finding that the warning intimated only that he had the right to speak to a lawyer before being questioned.⁹³ However, the U.S. Supreme Court held that the warnings he had received were sufficient because they “reasonably conveyed” his rights under *Miranda*.⁹⁴ Romano argues that this signaled a substantial move away from the original *Miranda* ruling, as it was the first time that a court approved a warning that saw a key aspect, the right to have an attorney present during interrogation, essentially entirely disregarded.⁹⁵

Some research suggests that police will employ tactics to avoid ever having to inform suspects of their rights, an approach that some commentators say has been supported by court rulings subsequent to *Miranda*. The *Miranda* ruling provides that the warnings only need to be administered to an individual prior to a custodial interrogation.⁹⁶ However, Leo found that the police would question suspects in a non-custodial setting in order to circumvent this legal

⁸⁷Christopher D. Dearborn, *You Have the Right to an Attorney, but Not Right Now: Combating Miranda’s Failure by Advancing the Point of Attachment Under Article XII of the Massachusetts Declaration of Rights*, 44 SUFFOLK U.L. REV. 359 (2011).

⁸⁸Dearborn, *supra* note 87, at 373.

⁸⁹Smalarz et al., *supra* note 29, at 458.

⁹⁰*Florida v. Powell*, 559 U.S. 50, 130 S. Ct. 1195, 175 L. Ed. 2d 1009 (2010).

⁹¹*Powell*, 559 U.S. at 53–54.

⁹²*Powell*, 559 U.S. at 54.

⁹³*State v. Powell*, 998 So. 2d 531, 532 (Fla. 2008).

⁹⁴*Powell*, 559 U.S. at 62.

⁹⁵Romano, *supra* note 74, at 532.

⁹⁶*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).

necessity.⁹⁷ Further, Maoz notes that in post-*Miranda* rulings, the Court has “made room for tactics to flourish by allowing officers to easily manipulate the distinction between custodial and non-custodial interrogations.”⁹⁸

The evidence presented here suggests that *Miranda* has not fully protected individuals from “inherently coercive” police interrogations and that suspects remain vulnerable to these practices.⁹⁹ Given the numbers of suspects in the USA who have confessed to crimes for which they have later been exonerated, the consequences of coercive practices are clearly significant.¹⁰⁰

Concerns around police interrogations are not restricted to investigations in the USA. Suspects’ rights in the UK have faced similar criticism, leading to the introduction of the landmark Police and Criminal Evidence Act 1984 (PACE) and other measures such as the development of the PEACE model of interviewing.¹⁰¹ Unlike in the USA, these measures appear to have resolved earlier disquiet around suspects’ rights and interviewing practices.

E. The Police and Criminal Evidence Act (PACE) of 1984

PACE aimed to balance the rights of the suspect with the powers of the police. It “defined police powers, laid down investigative procedures and defined suspects and others’ rights.”¹⁰² The legislation moved to address the lack of guidance for police work and the subsequent “variation in practice and many gaps in the legal definitions of what was, and was not, permissible.”¹⁰³ Furthermore, PACE increased police accountability by ensuring that decisions are recorded at the time they are made, making failure to adhere to the Act a disciplinary offence, and introducing complaints procedures.¹⁰⁴

PACE is supplemented by eight “Codes of Practice” lettered A to

⁹⁷Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME, L., & SOC. CHANGE: AN INT’L J. 35, 43 (1992).

⁹⁸Aurora Maoz, *Empty Promises: Miranda Warnings in Noncustodial Settings*, 110 MICH. L. REV. 1309, 1322 (2012).

⁹⁹Smalarz, et al., *supra* note 29, at 455.

¹⁰⁰James M. Doyle, *Learning from Error in American Criminal Justice*, 100 J. CRIM. L. & CRIMINOLOGY 109 (2010); Jacobi, *supra* note 29, at 9–23.

¹⁰¹PEACE is an acronym that stands for: Planning and preparation; Engage and explain; Account, clarify and challenge; Closure; and Evaluation. See TONY COOK & ANDY TATTERSALL, BLACKSTONE’S SENIOR INVESTIGATING OFFICERS’ HANDBOOK (2d ed. 2010).

¹⁰²PETER STELFOX, CRIMINAL INVESTIGATION: AN INTRODUCTION TO PRINCIPLES AND PRACTICE 34 (2009).

¹⁰³STELFOX, *supra* note 102, at 68.

¹⁰⁴Tim Newburn & Robert Reiner, *Policing and the Police*, in THE OXFORD HANDBOOK OF CRIMINOLOGY 910 (4th ed. Mike Maguire, Rodney Morgan, & Robert Reiner eds., 2007).

H, each focusing on a particular aspect of criminal investigation process.¹⁰⁵ Code C focuses on the detention, treatment and questioning of suspects, as historically “police cells and interview rooms were secretive, dark corners of criminal process that were in practice almost impervious to external scrutiny.”¹⁰⁶ PACE also saw the introduction of a custody officer responsible for ensuring that the police adhere to the Codes of Practice.¹⁰⁷ Additionally, under PACE all police interviews now require audio, and in some cases visual, recording as outlined in codes E and F, to resolve allegations of “verballing,” whereby false or incriminating statements were erroneously attributed to suspects.¹⁰⁸

PACE radically altered the ways in which suspect interviews in England and Wales were conducted, however, it has not been exempt from criticism. Research has shown that fewer than half of those held by police receive legal advice and the independence of the custody officer role has been questioned.¹⁰⁹ Mylonaki and Burton have argued that PACE is dependent upon the police regulating themselves and that, despite new time limits for detention in custody, there is evidence to suggest that requests for extensions are rarely denied.¹¹⁰ Critics suggest that the process does not always balance the rights of suspects with the powers of the police in the manner that was intended.¹¹¹ Finally, PACE has been subject to numerous amendments, indicative of ongoing concerns.

Nevertheless, the evidence tends to signify a general acceptance of PACE by police in the UK. In their research exploring what constitutes “success” in homicide investigations in England and Wales, Brookman and Innes identified the importance of “procedural success” to the detectives that they interviewed and observed.¹¹² They found that conducting a proper investigation that complied with

¹⁰⁵Northern Ireland Dep’t of Just., *PACE Codes of Practice*, <https://www.justice-ni.gov.uk/articles/pace-codes-practice> (last visited July 27, 2019).

¹⁰⁶Paul Roberts, *Law and Criminal Investigation*, in *HANDBOOK OF CRIMINAL INVESTIGATION* 113 (Tim Newburn et al. eds, 2007).

¹⁰⁷Home Office, *Police and Criminal Evidence Act 1984 (PACE). Code C Revised. Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers* (Feb. 2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/592547/pace-code-c-2017.pdf.

¹⁰⁸Roberts, *supra* note 79, at 92.

¹⁰⁹Roberts, *supra* note 79, at 92.

¹¹⁰Emmanouela Mylonaki & Tim Burton, *A Critique of the Deficiencies in the Regulation of Contemporary Police Powers of Detention and Questioning in England and Wales*, 83 *POLICE J.* 61 (2010).

¹¹¹ANDREW SANDERS & RICHARD YOUNG, *CRIMINAL JUSTICE* (3d ed., 2007).

¹¹²Fiona Brookman & Martin Innes, *The Problem of Success: What is a “Good” Homicide Investigation?*, 23 *POLICING & SOC’Y: AN INT’L J. RES. & POL’Y* 292, 300 (2013).

official guidance was a key objective and that “the “gold standard” of homicide investigations was as much, if not more, about maintaining the integrity of the investigation than it was about identifying offenders.”¹¹³ Moreover, known breaches of PACE have been widely condemned. To illustrate, during the search for a missing young woman, Sian O’Callaghan, in 2011, the Senior Investigating Officer (SIO), Steve Fulcher, sanctioned an “urgent interview” of the suspect, Christopher Halliwell, that was conducted by the arresting officers.¹¹⁴ However, when Halliwell did not speak, Fulcher took the decision to continue the “urgent interview” himself.¹¹⁵ Fulcher questioned Halliwell who then led police to Sian O’Callaghan’s body, as well as that of Becky Godden-Edwards, whom he had murdered eight years earlier.¹¹⁶ Later, Halliwell’s lawyers argued that the detective’s actions were “an assault on the integrity of the legal system” as Halliwell was neither cautioned nor given access to a solicitor.¹¹⁷ Agreeing, the judge ruled that the evidence pertaining to Halliwell’s confessions was inadmissible.¹¹⁸ Although the police had sufficient additional evidence in the case of Sian O’Callaghan’s murder, this was not so for Becky Godden-Edwards. As a result, Christopher Halliwell was charged with only one murder.¹¹⁹ In short, whilst some commentators have raised concerns regarding the efficacy of PACE, this case clearly illustrates that the legislation has been firmly upheld when breached.¹²⁰

Whilst PACE broadly legislates for the detention and questioning of suspects, the introduction of the PEACE model of interviewing in the 1990s served to further professionalize the interview process.¹²¹ In part, this expansion of professionalization emerged in response to

¹¹³Brookman & Innes, *supra* note 112, at 300.

¹¹⁴Joshua Rozenburg, *Ignoring PACE Was Not “Brave,”* LAW SOC’Y GAZETTE, Oct. 24, 2012, <https://www.lawgazette.co.uk/analysis/ignoring-pace-was-not-brave/67944.article>.

¹¹⁵Rozenburg, *supra* note 114.

¹¹⁶Paul Peachey, *Inside Story: How a Resourceful Detective Got Chris Halliwell to Confess- But Fell Foul of the Law*, INDEPENDENT, Oct. 20, 2012, <http://www.independent.co.uk/news/uk/crime/inside-story-how-a-resourceful-detective-got-chris-halliwell-to-confess—but-fell-foul-of-the-law-8218762.html>; Rozenburg, *supra* note 114.

¹¹⁷Peachey, *supra* note 116.

¹¹⁸Peachey, *supra* note 116.

¹¹⁹Martin Evans, *Sian O’Callaghan Killer Escapes Justice for Second Murder After Police Blunder*, THE TELEGRAPH, Oct. 19, 2012, <http://www.telegraph.co.uk/news/uknews/crime/9619952/Sian-OCallaghan-killer-escapes-justice-for-second-murder-after-police-blunder.html>. In 2016, however, Christopher Halliwell was convicted of Becky Gooden-Edwards’ murder after the discovery of new evidence led to a new trial.

¹²⁰Mylonaki & Burton, *supra* note 110, at 72–76.

¹²¹See COOK & TATTERSALL, *supra* note 101, at 310.

evidence that PACE had not resolved all of the problems it was intended to fix, and, in fact, PACE prompted renewed interest by researchers into police interviewing practices.¹²² For example, Moston and colleagues found that many police considered securing a confession to be the main aim of a suspect interview.¹²³ Similarly, Dixon describes how the oppressive interviewing of “The Cardiff Three”¹²⁴ suspects exemplified the need for a new approach to interviewing.¹²⁵ The PEACE framework of interviewing aimed to address the shortcoming with suspect interviews that persisted despite PACE.¹²⁶ Symbolic of this change, came a shift in terminology¹²⁷ from interrogation to investigative interviewing and the adoption of fresh psychological principles of interviewing.¹²⁸ PEACE provides a “chronology of events for the interview process” and stands for: Planning and preparation; Engage and explain; Account, clarify and challenge; Closure; and Evaluation.¹²⁹ A five-tier model of interviewing was also introduced, with tier-three designed to ensure that those involved in the investigation of serious offences have the necessary skills to conduct interviews.¹³⁰

PEACE has not escaped criticism. Clarke and colleagues found, for example, that officers were less skilled at exploring suspect’s ac-

¹²²Andy Griffiths & Becky Milne, *Will it All End in Tiers? Police Interviews with Suspects in Britain*, in *INVESTIGATIVE INTERVIEWING* 167–89 (Thomas Williamson. ed., 2006).

¹²³Stephen Moston, Geoffrey M. Stephenson, & Thomas M. Williamson, *The Effects of Case Characteristics on Suspect Behaviour During Police Questioning*, 32 *BRITISH J. CRIMINOLOGY* 23 (1992).

¹²⁴“The Cardiff Three” were wrongly convicted for the murder of Lynette White in South Wales in 1988. Significant concerns were raised about the conduct of the investigation. See Richard Horwell, *Mouner Investigation Report*, GOV.UK (Jul. 18, 2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/629725/mouner_report_web_accessible_july_2017.pdf.

¹²⁵David Dixon, *Questioning Suspects: A Comparative Perspective*, 26 *J. CONTEMPORARY CRIM. JUST.* 426 (2010).

¹²⁶See, e.g., College of Policing, *Investigation: Investigative Interviewing* (Mar. 18, 2019), <https://www.app.college.police.uk/app-content/investigations/investigative-interviewing/>.

¹²⁷Fiona Brookman & Amanda Wakefield, *Criminal Investigation*, in *THE SAGE DICTIONARY OF POLICING* 65 (Amanda Wakefield & Jenny Fleming. eds., 2009); Gisli H. Gudjonsson, *Investigative interviewing*, in *HANDBOOK OF CRIMINAL INVESTIGATION* 466 (T. Newburn et al. eds., 2007).

¹²⁸Gisli H. Gudjonsson & John Pearse, *Suspect Interviews and False Confessions*, 20 *CURRENT DIRECTIONS IN PSYCHOL. SCI.* 33 (2011).

¹²⁹COOK & TATTERSALL, *supra* note 101, at 310.

¹³⁰Griffiths & Milne, *supra* note 122, at 168.

counts than they were at covering legal and procedural matters.¹³¹ Conversely, Leahy-Harland and Bull explain that studies of police interviewing post-PACE and post-PEACE have found “little evidence of such manipulative and coercive ‘Reid-like’ tactics.”¹³² In addition, the benefits of adopting the PEACE model of interviewing in other countries, such as Canada, have been discussed.¹³³

Although both *Miranda* and PACE were borne out of a desire to address police interrogation practices, clear differences are emerging. In particular, PACE is seemingly more comprehensive, with its Codes of Practice documenting suspects’ rights, and police powers, in detail. Indeed, one of the rights that suspects in custody have is to view the Codes of Practice.¹³⁴ This kind of transparency, combined with the introduction of the PEACE model of interviewing, tends to suggest a professionalization of suspect interviewing in the UK.

F. Overview

The foregone review illustrates that the police interrogation of suspects has been surrounded by much disquiet in both the USA and the UK for several decades. Both jurisdictions responded to the problems associated with police interrogations with the introduction of key changes in legal procedure—*Miranda v. Arizona* in 1966 and PACE in 1984, respectively—in an effort to improve suspects’ rights during interviews.

The limited evidence from the UK suggests that PACE and other related measures have been largely accepted and adopted by police. In contrast, since its inception, *Miranda* has been shrouded in controversy and as Smalarz and colleagues put it, “well-intentioned as it was, *Miranda* has not served the protective functions that the U.S. Supreme Court intended.”¹³⁵ One of the reasons for this, according to Jacobi, is that the Court did not “anticipate the effect of its solution [*Miranda*] upon other parties to the interaction: the police”

¹³¹Colin Clarke, Becky Milne, & Ray Bull, *Interviewing Suspects of Crime: The Impact of PEACE Training, Supervision and the Presence of a Legal Advisor*, 8 J. INVESTIGATIVE PSYCHOL. & OFFENDER PROFILING 149 (2011).

¹³²Samantha Leahy-Harland & Ray Bull, *Police Strategies and Suspect Responses in Real-Life Serious Crime Interview*, 32 J. POLICE & CRIM. PSYCHOL. 138, 142 (2017).

¹³³Brent Snook, Joseph Eastwood, Michael Stinson, John Tedeschini, John C. House, *Reforming Investigative Interviewing in Canada*, 52 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 215 (2010).

¹³⁴Home Office, *supra* note 107, at 12–19.

¹³⁵Smalarz, et al., *supra* note 29, at 455.

who have developed numerous techniques to dissuade suspects from invoking their *Miranda* rights.¹³⁶ As Leo explains:

The entire process of interrogation is structured to advance the penal interests of the state and secure a conviction. Yet, unlike courtroom lawyers, police interrogators do not represent themselves as the suspect's adversary. Instead, in what must be one of the deepest ironies of American criminal justice, they portray themselves as the suspect's advocate[.]¹³⁷

In this paper we present data gathered from homicide units in the USA and the UK in order to explore how and why homicide detectives in these countries have responded differently to similarly intentioned legal reforms instituted to enhance suspects' rights during police interrogations. Before considering the findings, we describe the methodology used in this study.

III. METHODS

This paper is based on qualitative data gathered at intervals over a period of eight years in eleven different police areas, seven in the UK and four in the USA.¹³⁸ This involved a total of 129 interviews with homicide investigators (58 in the USA and 71 in the UK), as well as more than 700 hours of ethnographic shadowing and observation.¹³⁹ The latter included shadowing four specific homicide investigations in Britain for a period of 120 hours and five homicide investigations in the USA for a total of 190 hours. Extensive field notes were produced from these observations, including records of numerous informal conversations with detectives and senior officers.

In addition, we viewed over twelve hours of video-recorded interrogations/interviews from the USA and UK. The detectives interviewed had a broad range of experience within homicide units, from those who had only recently joined a homicide team and had investigated a handful of murders, to those with more than twenty years of service and many hundreds of investigations completed. Five of the investigators in the USA were "managers" (holding the rank of Lieutenant, Captain, or Major) who oversaw the work of detectives. Sixteen of those in the UK were retired senior detectives who had held both investigative and management roles. Eleven of

¹³⁶Jacobi, *supra* note 29, at 13.

¹³⁷Leo, *supra* note 5, at 11.

¹³⁸The majority of the data drawn upon for this paper were collected by the first author as part of an ethnographic research project exploring homicide investigation in the UK and the USA (i.e. 101 of the interviews and all of the fieldwork in the UK). The paper also draws upon interviews conducted by the second author as part of her PhD research that examined the changing nature of homicide investigation in England and Wales. As part of this research, fourteen former detectives and thirteen currently-serving detectives were interviewed.

¹³⁹Interviews were conducted with detectives in all four agencies in the USA, but in two of them, no sustained observations or shadowing were undertaken.

the investigators interviewed were women (eight in the UK and three in the USA). Data from the UK were collected between January 2008 and July 2016. Data from the USA were collected between April 2012 and August 2013 with two follow-up interviews conducted with a long-serving homicide detective in 2018.

The selection of police organizations and interviewees was based on convenience, rather than random sampling. Nevertheless, the agencies studied in both countries varied sufficiently to allow for a modest level of generalization. In the UK, fieldwork was conducted in police force areas in England and Wales with different population compositions and a range of homicide rates and detection rates. In the USA, it was carried out in four police agencies on the east coast which all had homicide rates above the national average, and which had all at times experienced problems particularly with gang-related murders and challenges in securing witness co-operation during investigations. Interviews were conducted with detectives in all four agencies, but in two of them no sustained observations or shadowing were undertaken.

Interviews were conducted in private (usually in empty rooms in the criminal investigation or homicide departments). One hundred and fourteen of the 128 interviews were digitally recorded; for the remainder, detailed hand-written notes were typed up as soon as possible afterwards. Interviews lasted an average of seventy minutes, were transcribed verbatim, and were analyzed thematically and comparatively using the qualitative software package NVivo, Version Eleven. Nodes and sub-nodes were created incrementally as each transcript was read and re-read in depth. For example, detectives' broad responses to questions about interviews or interrogations became a first level node, within which several sub-nodes were created, each covering their comments about particular issues such as the legal framework for interviewing (e.g. *Miranda* and *PACE*), the role/value of confessional evidence, false confessions, detective interviewing skills and so forth. In addition, four homicide investigations were shadowed for a total period of 120 hours in the UK and five homicide investigations were shadowed for a total of 190 hours in the USA. Extensive field notes were produced from these observations, including records of numerous informal conversations with detectives and senior officers.

All identifying information related to the officers who took part in the research and the research sites have been excluded in order to protect the anonymity of the research participants.

IV. FINDINGS

We begin this section by illustrating some of the different ways that homicide detectives in the UK and USA have “received” and responded to legal reforms governing the interrogation of homicide suspects. We then consider various tactics used by detectives in

homicide units in the USA to persuade suspects to waive their *Miranda* rights before moving on to consider the implications of these findings for justice.

A. The Introduction of PACE and *Miranda*: Necessary Safeguard or Unnecessary Obstacle?

The introduction of PACE followed a series of miscarriages of justice that came to light in the 1970s and 1980s and a subsequent Royal Commission on Criminal Procedure that identified numerous concerns in respect of questioning techniques, malpractice and the overall behavior of the police.¹⁴⁰ There was, in short, a growing sense at this time that the police needed to be controlled. Despite some initial skepticism, British detectives appear to have accepted that the introduction of PACE was a necessary step towards governing the police and protecting suspects, as the following quotations illustrate:

Policing couldn't face a next generation of being criticized in terms of how investigations were run. They have got to be transparent and they have got to be auditable and they have got to be thorough. (Homicide Detective, UK)

I think it was a change for the good, I really do. It brought safeguards for both sides. (Homicide Detective, UK)

Detectives in the UK described PACE as leading to the increased accountability of detectives and felt that this was necessary, given the history of problematic confessional evidence pre-PACE:

There are allegations in the past of people being threatened and beaten up and you know tortured technically to make confessions, I mean that wouldn't happen in today's practices because of the way PACE has come in and the control over interviews and again the accountability there, so I see that as a good thing, I see PACE as a good thing. (Homicide Detective, UK)

PACE was also regarded by many detectives as having professionalized homicide investigations:

I think, any investigation became more professional when the Police and Criminal Evidence Act was introduced. I think there's no doubt it's made everybody more professional in the way they investigated any offence. (Homicide Detective, UK)

PACE appears to have become firmly embedded in police culture and the idea of subverting the spirit and intent of the legislation is generally not accepted by detectives or other criminal justice system actors. In 2011, an SIO investigating the disappearance of a young woman questioned the suspect in violation of PACE (the suspect wasn't cautioned or given the opportunity to have a solicitor

¹⁴⁰Poyser & Milne, *supra* note 2, at 63–65.

present).¹⁴¹ Despite the fact that the suspect took the detective to the woman's body during the "interview," as well as to the location of a second victim, the evidence pertaining to the suspect's confession was deemed inadmissible.¹⁴² Detectives interviewed during our research generally supported the legal outcome in this case, as one detective explained:

You can't go back. The law has been put into tablets of stone for a reason and you can't get a time machine and go back. So, I'm sorry, you can't support what he did. (Homicide Detective, UK)

In short, homicide detectives in the UK stated that they accepted the introduction of PACE and viewed it as having had a positive influence on investigations and investigators. By contrast, homicide detectives in the United States interviewed as part of our research seem to have reacted rather differently to the introduction of *Miranda*. Of note, we did not observe the widespread acceptance of procedural reform among the United States detectives that we observed among detectives in the UK. Rather than being viewed as a means by which both detectives and suspects could be safeguarded, *Miranda* was described as a constraint. As one U.S. homicide detective put it, "The odds are really stacked against us."

In particular, *Miranda* was viewed as a barrier to an important part of the detective's role—speaking to people freely:

I have the right to talk to anybody I want to. I could stop you on a street corner and talk to you, not necessarily stop you for that means . . . I could see you walking down the street and say, "Can I talk to you for a minute?" "Hey, where were you last night?" "Last night, did you happen to be over there at the store down the street?" "Were you there?" "I know a murder took place down there and stuff," and I'm sitting there asking you questions about a murder. I have to Mirandize you before that? No way. We do it all the time. Sometimes these people don't have fixed addresses, we're going to see them walking down the street, there he is now. Hey, excuse me, you got a second? Yeah, what do you want, yeah well hang on before I talk to you let me tell you have the right to remain silent, anything that you . . . come on . . . no I want to get . . . I want to start talking to you right now. (Homicide Detective, USA)

Detectives in the USA placed considerable importance on their ability to speak to suspects and most detectives explained that their ultimate goal during an interrogation was to obtain the suspect's confession. Those interviewed for this research suggested that *Miranda* has made this more challenging:

¹⁴¹INDEP. POLICE COMPLAINTS COMM'N, INVESTIGATION ARISING FROM OPERATION MAYAN INTO THE CONDUCT OF DETECTIVE SUPERINTENDENT STEPHEN FULCHER: INDEPENDENT INVESTIGATION FINAL REPORT [IPCC References 2012/008077, 2012/020178, 2012/015950] (July 2013), https://webarchive.nationalarchives.gov.uk/20131003222921/http://www.ipcc.gov.uk/sites/default/files/Documents/investigation_commissioner_reports/investigation_report_Fulcher_090913.pdf [hereinafter "IPPC"].

¹⁴²IPPC, *supra* note 141, at 14.

It's tough, but ultimately you always want a confession. But at the same time, the way the laws are with the *Miranda* rights, most people aren't going to give you a statement anyway. Or when you do get heated with them—let's say you do come in and start talking to me, once I start getting you possibly on the verge of where you know I've got you caught in a bunch of lies and you're like, you know what, I want a lawyer. Let's end it right here. I'm not going to say anything else. So then you can't go any further. You can't get a statement. You can't get a confession because they want to ask for an attorney. So it kind of limits you. (Homicide Detective, USA)

When asked what they would change about homicide investigations, some detectives cited the *Miranda* ruling, due to the “barriers” imposed:

The *Miranda* laws, that every suspect or a person—anybody that we deem as associated with a case has to give us some kind of a statement, some form of a statement . . . in reference to a homicide case, that anybody involved, that the police want to interview, has to give us some kind of a statement, verbal statement, written statement, something. They can't just say, “I want a lawyer and I don't want to talk to you.” (Homicide Detective, USA)¹⁴³

Another important distinction that emerged during our research, was the status that U.S. and British detectives afforded to confessional evidence, to which we now turn.

B. The Status of the Confession

Detectives in the United States whom we interviewed and observed placed great importance upon inducing suspects to talk. This was, in part at least, because confessional evidence was viewed as particularly compelling and impactful when compared to other kinds of evidence that detectives might secure:

Confessional evidence still outshines any other evidence. A confession is more important than almost a fingerprint or DNA. (Homicide Detective, USA)

I mean it's their account, it's their admission . . . What more do you want than someone to say and tell you they did it. (Homicide Detective, USA)

The homicide detectives that we spoke to in the UK explained that obtaining a confession had historically been the goal of an interview:

¹⁴³Notably, this response reveals how ill-informed detectives can be about the law of interrogations. As a leading criminal procedure text in the United States explained:

No particular words are required to invoke the Fifth Amendment right to remain silent. A suspect, therefore, does not need to use formal language like “I invoke my right to remain silent.” Colloquialisms such as “I don't not want to talk to you” would be sufficient. For example, in *Tice v. Johnson*, 647 F.3d 87 (4th Cir. 2011), the court found that a suspect's statement that he “decided not to say any more” was sufficient to invoke his Fifth Amendment rights.

JOHN FERDICO, HENRY F. FRADELLA, AND CHRISTOPHER D. TOTTEN, *CRIMINAL PROCEDURE FOR THE CRIMINAL JUSTICE PROFESSIONAL* 538 (12th ed. 2015).

In the old days you'd always go for a confession if you could. (Homicide Detective, UK)

In contrast to the United States, however, it became apparent that this is no longer the case:

I would say that the interview of a suspect has moved away from the goal of securing a confession, which is what it always was when they oppressed and they poorly treated in order to gain a confession that was the goal of an interview years ago. (Homicide Detective, UK)

The introduction of PACE and, in particular, the advice often given by solicitors to suspects to "give no-comment" interviews, had led detectives in the UK to no longer expect a suspect to confess to a homicide:

[T]here is no expectation to get a confession and there's absolutely no reliance on a confession. Even if you get a confession we would assume it would be challenged and that we would have to have extra evidence. Most cops would not now think that a confession alone was going to be enough to win them the case. So it would be seen more as a bonus than the definitive evidence that's going to win them the case in the UK. (Homicide Detective, UK)

Other British detectives explained that the aim of the interview in the UK had shifted considerably since the introduction of PACE and PEACE from expecting a confession towards exploring and "shutting down" possible defenses that might later be offered at court by the suspect:

I think the more modern way of thinking is that we have to shut down any area of defense. (Homicide Detective, UK)

Finally, some detectives indicated that there exists a sense of "unease" with relying exclusively upon confessional evidence, given the increasing availability of other forms of evidence:

I'm uneasy about relying solely on a confession to convict somebody because bizarrely people do confess to things that they haven't done. So it's actually forced the police in the UK to invest more heavily in science and technology, which arguably provides a safer conviction. So I'm not unhappy about the fact overall that the "no comment" interview phenomenon began in 1986." (Homicide Detective, UK)

A lot of convictions in the past were based on confessions or false confessions or oppression whereas very often now the evidence now is far safer in terms of the technology that proves it. (Homicide Detective, UK)

If we look at the U.S. detection rates for murder which, it varies but where I've worked in New York they're up there with 70 or 80% so they're pretty respectable; they feel they are . . . but they're very heavily based on confession evidence. Rarely do they have lawyers involved, and one has to say, well are they safe convictions? And they obviously would say they are. Nobody wants to convict the wrong people, but we probably in the UK are now basing our convictions far more on scientific evidence which is probably more rigorous than a confession. (Homicide Detective, UK)

In contrast, the elevated status of confessional evidence amongst U.S homicide detectives appeared to be intricately entwined with their distinct status as homicide detectives. Inducing suspects to talk and, ultimately obtaining a full confession, was considered to be an intrinsic part of the detectives' role and indeed, in the USA homicide units studied, it was viewed as an important skill to be able to persuade suspects (and witnesses) to talk. And detectives generally prided themselves on having the skills to do so:

Most investigators like interrogating and interviewing people. I like catching people in lies and calling them out on it and trying to get them to admit to something that they did. It's tough but ultimately you always want a confession. (Homicide Detective, USA)

I think anybody that wants to be a good investigator, that's what they live for to get that confession, and there's nothing better than that. I've just gotten my first full confession two weeks ago, as far as a murder case and that felt good; you wanted to scream inside when he was telling you his story. (Homicide Detective, USA)

The less prominent role afforded to the confession in homicide investigations in the UK may also be explained by the fragmentation of roles within homicide investigations. Unlike in the U.S homicide units studied, where the lead homicide investigator (amongst the small team of around six detectives) often undertook suspect interrogations, in the UK, suspect interviews are undertaken by specialist interviewers, as opposed to detectives who are directly involved in the case:

I think we're probably now far more professional in the way that our interviewers are trained; we have different categories of interviewing as somebody progresses in their experience and skill in interviewing. The tier two, tier three, tier five interview advisor levels. So it's probably a much more professionalized and scientific approach to the way in which we interview now as to years ago when you just said a hundred times to somebody "you did it didn't you? You did it didn't you?" until they said they did it. (Homicide Detective, UK)

A clear distinction between the homicide detectives in the USA and UK emerged throughout the analysis of our data. Detectives in the USA prided themselves on being excellent interrogators with the ability to outwit their suspects. Conversely, in the UK, detectives rarely spoke of such skills, instead priding themselves on their professionalism and the adoption of new legislation and new models of interviewing:

I think the professionalization of it is a good thing overall and I think that the benefits of having a model far outweigh the place we were in before where what made a good interviewer had a bit of mystique around it, so I think that's a good thing. (Homicide Detective, UK)

In summary, our data suggests that homicide detectives in the USA and UK have responded differently to the introduction of similar legal reforms governing suspect interrogations. Whilst there has

been a general acceptance of PACE amongst detectives in the UK and an acknowledgement that it has helped to professionalize detective practice, U.S. detectives included in the research have seemingly not accepted *Miranda* in the same ways, viewing it as an obstacle to effective working practices. As a result of this mind-set, the U.S. detectives that we spoke to had found numerous ways to circumvent *Miranda*, to which we now turn.

C. **Outsmarting the Suspect**

In the UK, a suspect must be cautioned before being asked any questions about a suspected criminal offence.¹⁴⁴ The interview must also take place at a police station unless there are exceptional circumstances, for example, if a subsequent delay could lead to someone coming to physical harm. In addition, if a suspect chooses to have a solicitor present, their solicitor must be given sufficient information to allow them to understand the nature of the suspected offence.¹⁴⁵ In the USA the *Miranda* warnings relate specifically and only to custodial interrogation. However, detectives in the United States can and do conduct non-custodial interrogations with suspects that do not require the warnings to be given, as illustrated in the field note extract below:

Often what you have is just short of enough to charge and so you gamble to get a confession. There is also the option of non-custodial interviews; make them think that they are free to leave and that you are their friend. (Field notes, USA)

One detective gave an example of a case during which he had conducted a non-custodial interview:

I'd interviewed him at the hospital to keep it non-custodial . . . I can ask him any and everything because it's non-custodial at the hospital. (Homicide Detective, USA)¹⁴⁶

Similarly, detectives would avoid arresting suspects so that they

¹⁴⁴In England and Wales, the caution reads as follows: "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." See Home Office, *supra* note 107, at 34.

¹⁴⁵Home Office, *supra* note 107, at 36.

¹⁴⁶Again, this quote illustrates the potential confusion of U.S. detectives about the muddled state of the law of interrogations. The location of an interview is an important, but not determinative factor in determining whether an interrogation is custodial. "As a rule, interrogation in public places such as stores, restaurants, bars, streets, and sidewalks is usually considered noncustodial because people are in such locations by personal choice, are not isolated from the outside world, and rarely present a police-dominated atmosphere." FERDICO ET AL., *supra* note 143, at 527. But other indicia of custody that suggest a suspect is not free to leave—whether the suspect or the police initiated contact; the degree of restraint or force used to detain the suspect during questioning; the number of officers questioning the suspect; the duration and character of the interrogation, including the degree of psychological coercion employed; the language used; and the extent to which the

did not have to read them their rights. In this case the suspect spoke to the detective for fourteen hours without being arrested and informed of his *Miranda* rights. The suspect was not arrested for another six months:

Yeah I'll explain to you what the law says, even though some of these liberal lawyers . . . if I'm not going to arrest you, I don't have to issue *Miranda* warnings. So you have to have custody and interrogation. So we're interrogating you, but like this guy, we didn't have custody of him, "Hey do you mind coming down the police station with me?" "Yeah I'll come down and talk to you." Okay let's go. Put him in the car and get him down there. He stayed there, he wanted to go outside and smoke a cigarette, he went outside and smoked a cigarette, I said come back on in, he comes back on in. If you're in custody you don't get to just go outside and smoke cigarettes. So he's not in custody, even though I think you did it, that doesn't mean I'm going to arrest you, I may think absolutely you did this, but that doesn't mean I can arrest you, that doesn't mean I can take you into custody. (Homicide Detective, USA)

Another example of how homicide detectives attempted to outsmart suspects was observed in one police department, where the "Homicide Unit" signage had been purposely removed from the entrance to the squad offices so that when suspects were "brought in" they would not know that they were a suspect in a murder investigation, as the Lieutenant in that Unit explained:

Well that's why we took the [homicide] placard off the wall, so that when they are brought in, we can bring him on a ruse that, you know, it was a robbery, if we knew that he was out committing robberies. He had an open warrant for something else. You know we went and picked him up based upon that, instead of you know tugging on a warrant for murder. [It's] a huge advantage because it's the element of surprise. (Homicide Detective, USA)

The element of surprise was viewed as important in this context because the very sight of the word "homicide" could discourage suspects to talk:

All the other offices have signs: sexual assault unit, domestic violence unit, you know, robbery unit yes, homicide you definitely—no, that's not going to work. We learned that quick! When they see that sign they're like "I'm coming in for homicide?!" and you say hold up a second that sign cannot be there. (Homicide Detective Sergeant, USA)

The Sergeant explained that members of the warrant squad, who

suspect is confronted with evidence of guilt—may nonetheless turn questioning in a nonpublic or quasi-public location, such as a hospital, into a custodial interrogation. FERDICO ET AL., *supra* note 143, at 527 (comparing *State v. Lescard*, 128 N.H. 495, 517 A.2d 1158 (1986) (finding of custody when suspect brought in handcuffed to the hospital by police) with *State v. Pontbriand*, 178 Vt. 120, 2005 VT 20, 878 A.2d 227, 25 A.L.R.6th 763 (2005) (finding no custody for "routine questioning" of a suspect who was not confined by police, but rather was unable to leave due to a medical condition)).

are sent to arrest homicide suspects, are specifically instructed not to divulge to suspects the reason for their arrest:

When they go out and pick someone up and they're asking, "why am I arrested," they'll tell them "the investigator will tell you that when we get you down to the office." (Homicide Detective Sergeant, USA)

Detectives would often continue to keep suspects "in the dark" even when they arrived at the police station. For example, in one of the recorded interrogations that we observed, the suspect repeatedly asked why he had been brought in for questioning. He stated that he had asked the officers who brought him but was not told. The homicide detectives maintained that they were unable to tell him until he waived his *Miranda* rights. They said only that they were working on an "incident" during which the suspect's "name came up" and they had enough information to "get an arrest warrant." It is only when the suspect had waived his *Miranda* rights that he was told that he had been named as the suspect in a shooting. Moreover, it was only at the end of the interrogation, when the suspect had provided a full confession, that he was told that the charge was first degree murder.

D. "The Truth Will Set You Free"

Convincing suspects that it is in their best interest to speak to the detectives is a long-established interrogation tactic. As one detective told a homicide suspect during an interrogation: "the truth will set you free" (Extract from Interrogation of Homicide Suspect, USA). Of course, quite the reverse is true if the interviewee is indeed the killer. Nevertheless, detectives suggest to suspects that they will "feel" better if they tell their story and that it will be in some sense, cathartic. This was apparent during one interrogation we observed. The suspect claimed to be unaware of why he had been brought in for questioning or anything about the "incident" of interest to the detectives. The two detectives told the suspect that they could not give him any information about why he was there until he agreed to talk to them and waive his rights. They stressed how much they wanted to hear what he had to say and that they were keen to give him this opportunity, with one detective saying: "We would love to hear from you, you understand?" (Extract from Interrogation of Homicide Suspect, USA).

Detectives acknowledged that suspects sometimes liked to talk and detectives and played on this when adopting tactics of "encouragement," as illustrated in the following quotations:

I think a lot of them believe that they can really talk their way out of it. Or give a justifiable enough reason to explain their actions. (Homicide Detective, USA)

I can theorize it, and it's beyond my, not comprehension, but I would never do so, is most people are talkers; and they want to profess their innocence, even though they are guilty. And some people honestly

think that, even though they are in handcuffs—they might be handcuffed to a table that very moment they are speaking to you—that they want to talk their way out of it, and that you will be going home, and that you are going to release them and let them go home . . . also like a lot of these guys are talkers, and gamesmen on the road; whether they are gamesmen with their buddies, because that's all a lot of crime is, and how that begins is of one-upmanship, or you did this, when I have to something next better. (Homicide Detective, USA)

E. Knowing your Opponent

U.S. detectives indicated to us that where possible they would research the suspect prior to interrogation in order to “size up” their “opponent.” This might involve examining a suspect’s criminal history and prior experience of custody or speaking to other detectives who had interviewed the suspect in the past in order to gauge the likelihood that the suspect would waive his rights. During one interrogation recording that we observed, the homicide suspect was left alone in the interrogation room for just over one hour before the detectives entered, during which time they were conducting “research” on him.

Learning about a suspect was also viewed as a way to help detectives to build rapport with their “opponent.” Some detectives spent time during early opening parts of the interrogation gathering information that could be used later in the interrogation to urge the suspect to confess:

Anything, an ice breaker. You want to figure out . . . he arrested in this area, the Washington Redskins, the football team. So you know, are you a Skins fan, are you a Dallas Cowboy fan? Because that's the rival team for the Washington Redskins because there's a lot of Redskin and Cowboy fans, they hate each other. The teams are rivals. You want to figure out what fan they are if it's a male or what football team he's a fan of or what his interests are, sit down . . . he got kids, how old are they, baby mama we'd call them. He got kids by this girl outside, or is he married, how many kids has he got. You can tell if those kids mean anything to him and stuff like that because you know, you want to kind of remind him later. Now you don't want another man raising your child. You don't want another man calling . . . your child calling another man daddy. (Homicide Detective, USA)

Another detective explained that the techniques he used to persuade suspects to waive their rights were varied, but involved background research and praying with them:

All different, different ones. First I'll sit in here and talk to them, to kind of get their background, where they come from, where their parents are, you know just family. And depending on if I take, I've taken different routes, as their friends, as spiritual—I pray with people, I've held their hand right here, said prayers you know. It just depends on how I feel they are, yes. (Homicide Detective, USA)

Building rapport often involved portraying a neutral or understanding stance:

This person needs to know that you're human and needs to know that you think that they're human and that you're not looking down your nose. And a lot of times in my interviews I'll say something like, I'm not here to judge you, I'm just here to find out what happened and there's more than one side to any story and this is your opportunity to tell your side of the story. (Homicide Detective, USA)

Other detectives spoke of how they would befriend suspects:

I may want to wring his neck, I may want to kill this guy who just raped this sixty-five-year-old woman, but you can't have that on your face. You have to go in there, shake his hand, be his buddy, you know, hey man, it's not your fault that she's walking around in sexy lingerie, that's her fault. You know, put it on her, anything to get this guy to say he did it, you know what I mean? So when you teach these guys how to just take your anger out when you leave the interview because you can't bring that in. (Homicide Detective, USA)

Well, my partner is pretty clever and we do good cop/bad cop as much, we do more like we're both good cops. We're sympathetic towards you, towards the position your cousin or whoever puts you in and we've got to right this wrong. We plead to their moral sides and, look, I knew you didn't want this to happen, but it did and . . . we're going to get there whether you help us or not. But it's time for you to do something right . . . And that morally changes things, but there are some that are tougher than others. (Homicide Detective, USA)

Other detectives spoke specifically about the juxtaposition between the old, coercive "third degree" methods of interrogation and new befriending techniques:

Most of our techniques now in American law enforcement are nothing to do with physical coercion, threats, anything like that; it's more about kind, treating them like human beings. Yeah, it's more about being kind to the people and treating them like they're decent folks, even though they've been treated like they are pieces of crap their whole life, even though they're feared on the street, treating them like they're your brother, you know? (Homicide Detective, USA)

Although the current approach to interrogations is an undeniable improvement on the overly forceful "third degree" methods that were once so popular, the evidence presented so far suggests that these "new" approaches do not necessarily result in suspects being afforded the rights that *Miranda* purported to provide.

F. Trivializing

A common tactic used by detectives in our research involved trivializing the *Miranda* warnings, exemplified in the following quotations from U.S. homicide detectives:

We are so used to advising suspects of their rights and its easy because you . . . for instance I don't go in the room and say "you've *murdered* this person," because that's at this level (raised hand high) so you want to bring it down some—"you hurt that person, you shot that person." That doesn't seem as intimidating. It's the same approach when you're advising someone of their rights. So I'd say, "you

watch TV right?" (Yeah everybody watch TV). You've seen when the police approach somebody and what do they normally do before they question somebody? (They read them their rights). Yes, do you know your rights? They usually give you three of them. They always give you I've got the right to remain silent, anything I say or do can be used against me in court, I've got the right to a lawyer, they know all that, off the bat, from watching TV cos it's on there all the time so we use that to get them talking, to break the ice. Then you keep on going until the Miranda rights and then you're like, so you understand all your rights? Then you do the formal waiver" (Homicide Detective, USA).

"If you know this is your guy, or even believe it, you've got to get that waiver down pretty quick. And my philosophy is the sooner you introduce it the better off you are. You do it on the basis for it's very mundane but look, I want to talk to you about this situation, I'm not saying that you had anything to do with it but there's a possibility you have some information that it might help further this situation but before I could talk to you about that I need . . . you've seen this before on TV where they have to advise you of your rights. You go through the rights and we try to maintain it as basically, just a formality, and make sure that they know and you emphasize this, and this is what I emphasize is that look, you control this conversation, you can start talking to me anytime that you want to, that you feel that this isn't going in a direction that like, you control everything, you're in charge. Just to get past that waiver. And a lot of times they'll sign off on it because they want to know what you know. They're expecting me to tell them everything about this case to see how vulnerable they are. So let's get the waiver through first, try to do it as nonchalant, as a minor, let's just make it a little down the road—not a speedboat, but just kind of do it quickly, put it out of sight, out of mind, and then just try to . . . you don't go right in to your case, that's where now you start the interview process about, tell me about yourself, let's just talk. You want that waiver to be the farthest thing from their mind. You want them to forget about the fact that at any given time they can say I want my lawyer and this has got to stop, you want to put that out of their mind. Now basically you want to start them on a path of I need to explain to you why I didn't do this. And then keep the dialogue going, taking note of every little detail. (Homicide Detective, USA)

Our observations of interrogations confirmed what the detectives reported, such as the routine use of processes of normalization and trivialization in order to encourage suspects to waive their *Miranda* rights. Time after time, suspects were told that detectives were unable to speak to them until after they "got past" the bureaucracy of the waiver form.

G. Trickery and Deceit

Although *Miranda* states that suspects have the right to remain silent and the right to an attorney during an interrogation, the U.S. homicide detectives we observed were rarely interested in ensuring that suspects were afforded this legal right. Whilst they did not usually breach the *Miranda* requirements in a clear-cut manner—as this would risk the case being lost later in the judicial process—they had

found various ingenious ways, both before and during interviews, to ensure that homicide suspects did not invoke their rights

Deflecting suspects from asking to have an attorney present during interview was a common tactic. This included refusing to permit attorneys (who had been sent by suspects' family members or friends) access to suspects unless the suspect had specifically asked to see an attorney and ignoring any subtle or less than overt requests from suspects to speak to an attorney. The latter was explained as a matter of semantics, by one young homicide detective:

It's a matter of semantics. I may *need* a lawyer or *I think I may need* a lawyer is not an invocation. *I want* a lawyer is. Even attorneys are confused about some statements and what they constitute. (Field notes, USA)

Another detectives explained to us the fine lines that detectives navigated during suspect interrogations:

"When you advise somebody of their rights, it never goes like smooth, there's always one thing here and there. There's three things that the person . . . first of all they have to understand their rights fully. Secondly you cannot threaten them in any way. And thirdly you cannot offer them anything for them to tell you. So sometimes you play with the words. I might say a word and I meant something but the attorney who is now listening to the interview—because every time we interview a suspect there has to be a recording—they can twist the words around and say, "Wow that sounds like a promise." So we fight that in court, like, "Oh, no, it's not a promise, this is what he told him and he was very specific." So you deal with things like that. Some members in the community they're very ignorant about their rights and they ask you questions. They might say something like, "Do you think I need an attorney?" And just because they say the word attorney doesn't mean that you have to stop talking to them. I usually ask them again, "It's your decision. Tell me, you want an attorney with you here present before I continue?" And if they say, "No," I just keep going with my interview. (Homicide Detective, USA)

Other more seasoned detectives suggested that they instinctively knew when suspects might be about to invoke their rights and had become adept at changing the subject:

I can usually see what's coming . . . not see it, but I know what they're going to say just from doing it for so long and I'll change the subject quick to go to something else so that I don't have to deal with that. That's my method of trying to . . . not deal with it." (Homicide Detective, USA)

According to this interviewee, only around 20% of suspects ask to speak to an attorney; the remaining 80% waive their *Miranda* rights, illustrating that detectives' tactics are often successful:

Yeah, they waive . . . I'm not saying they confess but they agree to speak with you, they don't say, "I want an attorney," and cut off immediately. Now, within that 80% there are people that will talk for an hour and then at some point it's like they think they can't outsmart you

or outtalk you, so then it's like, "Well, I'm not getting anywhere, I want an attorney." Or if they start to feel pressure with their . . . They might say something they think's going to hurt them, they'll ask for an attorney. But I would say it's probably even less than 20% actually walk in the room and say, "I want to talk to an attorney." It doesn't happen that often. (Homicide Detective, USA)

The account that we have presented thus far illustrates the many and varied ways in which U.S. homicide detectives circumvent *Miranda* to their advantage. Nevertheless, it is important to note that detectives, though often successful in these endeavors, sometimes made costly mistakes that adversely affected the prosecution of their case. To illustrate, one detective explained:

I had a case where a guy, he comes in and we had an arrest warrant for him for murder but he also had an open warrant for something else, like possession of an open alcohol container, something small. So he comes into the interrogation room, this guy speaks only Spanish so a Spanish investigator had to interview him. So when he comes in, he reads him his advice of rights. The guy is like, I want an attorney for when I go to court, or he said—at some point he said, I want an attorney. So the investigator gets up to walk out and he's like, "well you're charged with murder. I just want to let you know you're charged with murder." He's like, "well I want to talk to you." He's like, "well you asked for an attorney." He said, "no I mean, I want an attorney for court." So he talked to me, confessed to the murder, but they wouldn't bring it in. They said, he asked for an attorney. Yes . . . even though he actually—he'd meant—he just wanted an attorney for court. He wanted to talk right then . . . So it's very strict. A lot of the time you're going to lose confessions if they even mention the word lawyer a lot of times . . . to me it's kind of like it's not right because here you are, you're trying to find out the truth of what happened, you have a murder, so basically you have evidence—somebody confesses to a murder and it's true, it's a legitimate confession but a jury can't see that or it can't come into court. It makes no sense to me whatsoever. (Homicide Detective, USA)

Given the high price that detectives can pay if their use of the *Miranda* warnings is brought into question, it is perhaps surprising that detectives sail so close to the wind in whether and how they deliver the warnings. More surprisingly, our data indicate that homicide detectives in the USA often go further than playing with words and engage in deception, as illustrated in the following extract:

Yes you can lie to suspects. How it helps? Well you must use it carefully and not bluff unless it is credible. So you might say that the co-defendant said X, Y or Z in multiple suspect cases. There is case law all the way up to the Supreme Court that indicates that deception is allowed. The only thing we have to do is *Miranda*. (Homicide Detective, USA)

Moreover, detectives often spoke about the use of "calculated lies" as being an integral skill of the "good" or "successful" homicide detective:

Any detective that's any good has lied to a suspect plenty of times. But you have to be careful. You have got to be very well calculated and stuff so, but it's a good tool. (Homicide Detective, USA)

Detectives told a range of lies to suspects including suggesting that co-defendants had already implicated them in the murder or that there was physical evidence to link them to the murder:

You don't want us to go away today thinking that you are a cold blooded murderer. Now we know you were there so let's not even get into that. We have your DNA at the scene (this was not true). So, we know you were there, that's a given, but what you can do is tell us why you were there. (Field notes, USA)

The fact that U.S. detectives are permitted to deceive suspects in their pursuit of a confession is the most glaring difference that we observed between interrogations in the UK and the USA.¹⁴⁷

H. Summary

Our data have illuminated some key and stark differences in how homicide detectives in the USA and UK have responded to legal reforms that were designed to regulate the questioning of suspects. Homicide detectives in the UK viewed the introduction of PACE as a necessary step forward. In its wake, their focus has shifted away from obtaining confessions towards a structured process of interviewing that is viewed as more professional than past methods. In those parts of the USA where we undertook our research, *Miranda* was described by detectives as an obstacle to their work. In particular, it was deemed to be a barrier to speaking to people and gaining a confession—both of which were described as intrinsic parts of the detective's role. The lack of acceptance of *Miranda* amongst these homicide detectives appears to have led them to adopt numerous techniques and tactics to “dance around” *Miranda* and circumvent suspects rights. Consequently, suspects, including those who are already vulnerable, find themselves pitted against detectives who use trickery, deception, and coercion to deny them their fundamental rights. In the final section that follows, we consider the implications of these working practices for justice.

V. CONCLUSION

This study contributes to a small but meaningful body of qualita-

¹⁴⁷The UK police Code of Ethics lists honesty as one of nine policing principles along with accountability, fairness, integrity, leadership, objectivity, openness, respect and selflessness. The Code of Ethics aims to ensure the standards of policing are maintained and prevent misconduct: “The Code also has a preventative role. It requires everyone in policing to prevent unprofessional conduct by questioning behaviour which falls below expected standards. Additionally, it supports reporting or taking action against such behaviour.” See College of Policing, *Code of Ethics. A Code of Practice for the Principles and Standards of Professional Behaviour for the Policing Profession of England and Wales*, (Jul. 2014), http://www.college.police.uk/What-we-do/Ethics/Ethics-home/Documents/Code_of_Ethics.pdf.

tive research on the investigation of criminal homicide and, in particular, the custodial interrogation process. Our unique contribution is a comparison of investigative practices in two common law adversarial systems: the United Kingdom and the United States. Both nations implemented legal reforms meant to reduce the likelihood of coercive interrogation practices. In the United Kingdom, legal reform came in the form of legislation (PACE), whereas in the United States, legal reform was enacted by a U.S. Supreme Court's *Miranda* ruling. Our findings reveal that these two legal reforms have had differential impacts in the UK and the USA.

The findings from this study contribute to a broader literature on the difference between the law as written in formal legal documents (including legislation and judicial decisions) and the "law in action" as practiced by legal authorities working in the social world.¹⁴⁸ Leo refers to this difference as the "gap problem" and describes it as "the gap in our knowledge between legal ideals and empirical realities."¹⁴⁹ He notes that this gap is particularly wide in the study of police interrogation. Our goal in this study is to add to a growing collection of studies on the nature of this gap, particularly since some of the most influential scholarship on what happens during custodial interrogations is now more than twenty years old.¹⁵⁰ Furthermore, we offer a unique twist to this body of research by providing study results from the United Kingdom, another nation with a common law adversarial legal system that has implemented legal reforms associated with interview and interrogation practices. Our study of interrogation practices in the United Kingdom provides a potent source of comparison for current practices in the United States. Indeed, some of the differences between the two nations (such as the routine use of deception by U.S. detectives during interrogation) are dramatic. Numerous commentators have suggested the need for major revisions to *Miranda*, whether through judicial decision-making or legislation. The findings from our comparison between the USA and the UK offer some useful insights about what might be possible as we think about the current reality and possible future reform of *Miranda*.

The need for procedural reform in police interview and interrogation practices is controversial, with some commentators arguing that *Miranda* has tied the hands of police and made it much more difficult for them to solve cases and bring offenders to justice. For instance,

¹⁴⁸ Jean-Louis Halperin, *Law in Books and Law in Action: The Problem of Legal Change*, 64 ME. L. REV. 45 (2011); Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

¹⁴⁹ Leo, *Inside the Interrogation Room*, *supra* note 36, at 266.

¹⁵⁰ See generally Leo, *Inside the Interrogation Room*, *supra* note 36, *passim*; Leo, *Miranda's Revenge*, *supra* note 36, *passim*.

according to Cassell and Fowles “strong empirical evidence supports the conclusion that *Miranda*’s unprecedented restrictions on law enforcement has allowed numerous criminals to escape justice.”¹⁵¹ Many others use research findings similar to ours as a basis for suggesting the need for major reforms that strengthen *Miranda*’s protections of suspects’ rights. For instance, Klein argues that “the *Miranda* warnings have perverse results and ought to be retired and replaced.”¹⁵² Alschuler argues that *Miranda* is a failure on four dimensions: doctrinally, ethically, jurisprudentially, and empirically.¹⁵³ Regardless of one’s perspective on *Miranda*, two patterns appear evident from the empirical evidence on custodial interrogation practices. First, consistent with findings from the U.S. agencies we studied, “dancing around *Miranda*” appears to be routine practice in criminal investigations. Indeed, learning how to dance around *Miranda* skillfully seems to be an important rite of passage in the process of becoming a skilled detective in the USA. Second, the potential remedies available for ameliorating *Miranda* violations are largely toothless.¹⁵⁴

The U.S. Supreme Court issues decisions by which the police must abide, but the “gap problem” discussed earlier means there is often a significant gulf between the law on the books and the law in action. Police organizations and those who lead them must enact policies and practices that are consistent with binding judicial rulings. However, these policies and practices are not self-implementing and sometimes do not match the letter or spirit of the legal authority that motivated them in the first place. Zalman and Smith found that U.S. police administrators were generally supportive of *Miranda* rules and disagreed with the use of interrogation practices that deliberately flout those rules.¹⁵⁵ At the same time, three-quarters did not agree with the notion that “aggressive psychological interrogation causes false confessions.”¹⁵⁶ Moreover, the respondents noted that officers are rarely disciplined for *Miranda* violations.

Our findings beg the question—why do U.S. detectives dance

¹⁵¹Paul G. Cassell & Richard Fowles, *Still Handcuffing the Cops? A Review of Fifty Years of Empirical Evidence of Miranda’s Harmful Effects on Law Enforcement*, 97 B.U. L. REV. 685, 848 (2017).

¹⁵²Susan R. Klein, *Transparency and Truth in Custodial Interrogations and Beyond*, 97 B.U. L. REV. 993, 1004 (2017).

¹⁵³Albert W. Alschuler, *Miranda’s Fourfold Failure*, 97 B.U. L. REV. 849, 890 (2017).

¹⁵⁴Alschuler, *supra* note 153, at 890; Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109 (1998).

¹⁵⁵Marvin Zalman & Brad W. Smith, *The Attitudes of Police Executives Towards Miranda and Interrogation Policies*, 97 J. CRIM. L. & CRIMINOLOGY 873 (007).

¹⁵⁶Zalman & Smith, *supra* note 155, at 873, 918–20.

around *Miranda* so routinely, but UK detectives appear much less likely to circumvent PACE? One obvious possibility that we will consider in more detail shortly is simply that PACE is a more effective legal reform than *Miranda* for controlling the use of deceptive or coercive interrogation. But other possibilities exist. One potential explanation may simply be that there are strong cultural differences between these two nations, including differences in legal culture, police culture, and/or civic culture. With regard to police, comparative research in the USA and the UK has identified an interesting mix of differences and similarities.¹⁵⁷ For instance, a historical study of police in both nations revealed that police in London derived their authority primarily from the institution, whereas police authority in New York City derived primarily from the individual.¹⁵⁸ Exploring cultural differences between the USA and the UK is beyond the scope of this article, but such differences may constitute one explanation for the different responses to legal reforms that we have outlined.

Another potential explanation may be differences in the availability of alternative means of closing cases, including both forensic evidence and other types of evidence. To the extent that alternative forms of evidence may be more available to detectives in the UK, there may be less pressure to secure confessions. For instance, if detectives in the UK have greater (or faster) access to DNA or other types of testing than detectives in the USA, then they may be able to rely less on confessions and more on other sources of evidence in making cases. We are not aware of any comparative research evidence on the extent to which police in the UK have greater access to DNA tests than police in the USA. However, it is clear that police in the United States often face difficulty in securing DNA analyses for evidence they have collected from crime scenes.¹⁵⁹ This point is particularly salient in sexual assault cases, in which forensic evidence was not submitted for testing in thousands of cases across the nation.¹⁶⁰ The UK also has much greater CCTV coverage than in the USA, and detectives often use this evidence to identify suspects and witnesses. Testing the validity of these explanations is beyond

¹⁵⁷MICHAEL BANTON, *THE POLICEMAN IN THE COMMUNITY* (1964); DAVID H. BAYLEY, *PATTERNS OF POLICING: A COMPARATIVE INTERNATIONAL ANALYSIS* (1985); WILBUR R. MILLER, *COPS AND BOBBIES: POLICE AUTHORITY IN NEW YORK AND LONDON, 1830–1870* (1977).

¹⁵⁸Miller, *supra* note 157, at 22–23.

¹⁵⁹David A. Schroeder & Michael D. White, *Exploring the Use of DNA Evidence in Homicide Investigations: Implications for Detective Work and Case Clearance*, 12 *POLICE Q.* 319 (2009).

¹⁶⁰William H. Wells, *Some Considerations When Making Decisions About Prioritizing Sexual Assault Kits for Forensic Testing*, 15 *CRIMINOLOGY & PUB. POL'Y.* 585 (2016).

the scope of this paper, but the issues we have identified are worthy candidates for systematic empirical research.

Another potential explanation is differences between nations in the number of violent incidents. The UK has a much lower homicide rate than the USA and therefore its detectives may simply have lower caseloads.¹⁶¹ If this is true, UK detectives may be able to invest much more time and resources in solving each case. This is an important theme in the empirical literature on homicide investigations. For instance, in their study of why homicide clearance rates decreased in Trinidad and Tobago, Maguire and colleagues reported that investigators performed well when homicide rates were low, but “once the number of homicides began to increase sharply, the existing organizational structures and processes became overwhelmed.”¹⁶² The findings from our analysis are useful for comparing investigative processes in the UK and the USA, but are less useful for providing causal explanations for the differences we observed. Such explanations would require a very different research design than the one used here.

Perhaps the most obvious explanation for the patterns we have observed in this study has to do with differences in the structure and content of the legal reforms implemented in both nations. Unlike PACE, *Miranda* is a judicial decision, not legislation. Moreover, a series of post-*Miranda* decisions has weakened its provisions. Weisselberg quotes a police training video that reveals how police are being taught to exploit the gaps in *Miranda*'s protections:

When you violate *Miranda*, you're not violating the Constitution. *Miranda* is not in the Constitution. It's a court-created decision that affects the admissibility of testimonial evidence and that's all it is. So you don't violate any law. There's no law says you can't question people “outside *Miranda*.” You don't violate the Constitution. The Constitution doesn't say you have to do that. It's a court decision. So all you're violating is a court decision controlling admissibility of evidence. So you're not doing anything unlawful, you're not doing anything illegal, you're not violating anybody's civil rights, you're doing nothing improper[.]¹⁶³

Based on these types of guidance, police appear to be engaging in deliberate strategies to circumvent *Miranda*. Research shows that the majority of *Miranda* waivers “are not made knowingly, voluntarily,

¹⁶¹Fiona Brookman, Edward R. Maguire, & Mike Maguire, *What Factors Influence Whether Homicide Cases are Solved? Insights from Qualitative Research With Detectives in Great Britain and the United States*, 23 HOMICIDE STUD. 145, 160–61 (2019).

¹⁶²Edward R. Maguire, William R. King, Devon Johnson, & Charles M. Katz, *Why Homicide Clearance Rates Decrease: Evidence from the Caribbean*, 20 POLICING & Soc'y 373, 394–95 (2010).

¹⁶³Weisselberg, *supra* note 154, at 191.

and intelligently as required by *Miranda*.¹⁶⁴ Moreover, the most vulnerable suspects, especially those with cognitive impairments, are the least able to understand their rights under *Miranda* and therefore the most likely to sign a waiver that imperils them. Therefore the use of these strategies has clear implications for procedural and distributive justice.

In contrast, PACE is legislation, not a judicial decision. There is no evidence of its provisions having been successively watered down in a series of court decisions. Moreover, it is built on a more credible scientific foundation than *Miranda*. A meta-analysis on the impact of interview and interrogation methods on true and false confessions provides significant support for the model of interviewing required under PACE. The study revealed that accusatorial methods (like those used in the United States) “significantly increase the likelihood of obtaining a false confession from an innocent participant.”¹⁶⁵ In contrast, information-gathering methods (like those used in the UK under PACE) “elicit a greater proportion of true confessions, while significantly reducing the likelihood of false confessions.”¹⁶⁶ While *Miranda* is now beset by “layers of exceptions, loopholes and by-ways created by case law,”¹⁶⁷ PACE appears to be based on a much clearer and firmer foundation for regulating police behavior. *Miranda* rests on a much shakier and more ambiguous foundation, both legally and scientifically, which may be the reason why homicide detectives are so routinely dancing around *Miranda*.

¹⁶⁴Domanico et al., *supra* note 28, at 22.

¹⁶⁵Christian A. Meissner, Allison D. Redlich, Sujeeta Bhatt, & Susan Brandon, *Interview and Interrogation Methods and Their Effects on True and False Confessions*, THE CAMPBELL COLLABORATION (Jul. 2010), [https://www.campbellcollaboration.org/media/k2/attachments/Meissner Interview Interrogation Review.pdf](https://www.campbellcollaboration.org/media/k2/attachments/Meissner%20Interview%20Interrogation%20Review.pdf).

¹⁶⁶Meissner et al., *supra* note 165, at 31.

¹⁶⁷Meissner et al., *supra* note 165, at 31.