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LEGISLATING CONFESSION LAW IN GREAT BRITAIN: A STATUTORY APPROACH TO POLICE INTERROGATIONS

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The police interrogation process has been a subject of controversy in both Great Britain and the United States. Within each country, a sharp division of opinion exists as to the proper limits of police authority in questioning criminal suspects. In the main, however, the dispute has not been a contest between the extreme positions that police should either be barred from conducting interrogations entirely or have their questioning tactics freed of all control. Rather, the debate has focused on how to regulate the police interrogation process and thereby balance the public interest in crime control against the individual interest in freedom from state coercive authority.

Much of the interrogation controversy in the United States has centered on the decision of the Supreme Court in *Miranda v. Arizona*.[1] In ruling that police custodial interrogations must be preceded by a warning to the suspect detailing his constitutional rights,[2] and that the state has the burden of proving an effective waiver of those rights,[3] the Court touched a sensitive nerve in the American criminal justice system. The available evidence does not support the charge that *Miranda* significantly reduced confession rates,[4] but critics

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1. 384 U.S. 436 (1966).

2. The Court stated that the suspect "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.* at 479.

3. In *Miranda*, the Court indicated that the government had a "heavy burden" in proving an effective waiver. *Id.* at 475. More recently, however, it has ruled that the government need only prove waiver by a preponderance of the evidence, rather than the more demanding clear-and-convincing or beyond-a-reasonable-doubt standards. Colorado v. Connelly, 479 U.S. 157 (1986).

4. Researchers in New Haven, Connecticut, observed that "[n]o support was found for the claim that warnings reduce the amount of 'talking.' " Project, *Interrogations*

have still objected to the decision.[5] Indeed, an entirely new round of resistance emerged as *Miranda* reached its twentieth anniversary.[6]

In its American context, the controversy surrounding the police interrogation process has been concerned only partly with the process itself. To an equal if not larger extent, the debate has focused on the legitimacy of exercising federal constitutional authority to control local police practices. To critics, the *Miranda* Court improperly imposed a set of prophylactic rules on the police interrogation process, even where no constitutional violation existed, and in so doing exceeded its judicial authority.[7] As a consequence, these critics contend, the Court should now reconsider its approach and return American confession law to the pre-*Miranda* voluntariness standard as the test for determining the admissibility of confessions.[8] Supporters of *Miranda*, on the

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in New Haven: The Impact of Miranda, 76 YALE L.J. 1519, 1563 (1967) (authored by Michael Wald, Richard Ayres, David W. Hess, Mark Schantz, and Charles H. Whitebread, II); *see generally* Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement* Miranda, 66 MICH. L. REV. 1347 (1968); Seeburger & Wettick, Miranda *in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1 (1967).

5. Law review criticisms that appeared after *Miranda* include: Ervin, Miranda v. Arizona: *A Decision Based on Excessive and Visionary Solicitude for the Accused*, 5 AM. CRIM. L.Q. 125 (1966); Broderick, Book Review, 53 CORNELL L. REV. 737 (1968). Indeed, the early reaction to *Miranda* produced hearings in Congress and legislation designed to reverse the decision. *See Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. (1967); Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 701(a), 82 Stat. 197, 201-11 (codified as amended at 18 U.S.C. § 3501 (1988)); *see generally* M. BERGER, TAKING THE FIFTH: THE SUPREME COURT AND THE PRIVILEGE AGAINST SELF-INCRIMINATION 130-33 (1980).

6. A United States Department of Justice Report has recommended seeking reversal of *Miranda*. *See* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE SERIES, REPORT NO. 1, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRETRIAL INTERROGATION, *reprinted in* 22 U. MICH. J.L. REF. 437 (1989) [hereinafter REPORT NO. 1, PRETRIAL INTERROGATION]. Other recent criticisms include: Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417 (1985); Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering* Miranda," 54 U. CHI. L. REV. 938 (1987). Defenses of *Miranda* appear in Saltzburg, Miranda v. Arizona *Revisited: Constitutional Law or Judicial Fiat*, 26 WASHBURN L.J. 1 (1986); Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435 (1987); White, *Defending* Miranda: *A Reply to Professor Caplan*, 39 VAND. L. REV. 1 (1986).

7. *See, e.g.*, Grano, Miranda's *Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174 (1988); Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U.L. REV. 100 (1985); REPORT NO. 1, PRETRIAL INTERROGATION, *supra* note 6, at 491-96.

8. *See* Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859 (1979). The Office of Legal Policy Report recommended developing confession

other hand, find no constitutional impropriety in the decision and approve of mandated warnings and waivers in the custodial interrogation process.[9]

The constitutional law focus of the American confession law debate has diverted attention from the substantive police interrogation issues that society should address. Instead of considering what police may or may not do to question criminal suspects, courts have had to evaluate what the judicial system can and cannot do to supervise practices in police stationhouses.[10] The effort to determine the limits of judicial authority to regulate the police has obscured the real interrogation issue: what is the proper scope of police authority to question suspects in their custody?

A constitutional law focus also deters legislative attempts to control the police interrogation process. Although the *Miranda* decision invited efforts to develop alternative solutions to the problems the Court found in police-questioning practices,[11] in most respects the decision appeared to deny that any process other than *Miranda* warnings and waivers could satisfy constitutional standards. By repeating and elaborating the specific warnings that must be given, as well as detailing the characteristics of a valid waiver, the decision offered little indication that the Court would be satisfied with anything other than the *Miranda* procedure.[12] It should be

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guidelines concurrent renewing a legal challenge to *Miranda*. *See* REPORT NO. 1, PRETRIAL INTERROGATION, *supra* note 6, at 551-53.

9. *See* Saltzburg, *supra* note 6, at 3; Schulhofer, *supra* note 6, at 460-61 ("*Miranda* reaffirms our constitutional commitment to limited government . . . ."); White, *supra* note 6.

10. The problem is best illustrated by the Court's decision in Moran v. Burbine, 475 U.S. 412 (1986), upholding the admission of a confession despite police failure to inform the suspect that his attorney was attempting to contact him. The basis of the ruling was the Court's conclusion that "[e]vents occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right." *Id.* at 422. The Court added that it did not "believe that the level of the police's culpability in failing to inform respondent of the telephone call has any bearing on the validity of the waivers." *Id.* at 423. Constitutional restraints, as seen by the *Burbine* majority, mandated an abstract analysis of the concept of waiver rather than a review of the propriety and impact of misleading a suspect.

11. The *Miranda* Court observed that its system of warnings and waiver were required "unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it." 384 U.S. 436, 444 (1966). The Court repeated this qualification later in the opinion as well. *Id.* at 479. The Court also "encourage[d] Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws." *Id.* at 467.

12. The *Miranda* Court's extended treatment of the warning and waiver procedure

no surprise, therefore, that legislatures have generally left the issue of police interrogation control untouched in the years since *Miranda* was decided, with the only major exception being the congressional attempt to reverse the ruling in 1968.[13]

Nevertheless, in light of the longstanding tradition of legislative involvement in criminal law,[14] the legislative branch, particularly at the state level,[15] had no adequate reason to relinquish all responsibility for supervising police interrogation practices. Legislatures have the legal authority to define police procedures as long as constitutional rights are not infringed[16] and have used that authority to deal with specialized law enforcement problems.[17] The legislatures could just as easily direct police investigative practices of a

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covers 12 pages of the opinion after the holding of the case. *Id.* at 467-79. The Court then further supported its conclusion by referring to F.B.I. practice as well as to procedures employed in England, Scotland, India, and Ceylon (now Sri Lanka). *Id.* at 483-89. The Office of Legal Policy Report observed that in light of "the hedged terms of the invitation to adopt alternative systems, the absence of any discussion of acceptable alternatives, and the discrepancies between the Court's expressed openness to alternatives and specific argumentation in the decision, it is not surprising that no state acted on this invitation." REPORT NO. 1, PRETRIAL INTERROGATION, *supra* note 6, at 510.

13. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 701(a), 82 Stat. 197, 201-11 (codified as amended at 18 U.S.C. § 3501 (1988)). Apparently only two state legislatures took steps in this direction. Arizona adopted a similar statute, Act of Mar. 18, 1969, ch. 23, 1969 Ariz. Sess. Laws 37 (codified as amended at ARIZ. REV. STAT. ANN. § 13-3988 (1989)), while Indiana enacted but subsequently repealed comparable legislation, Act of Mar. 14, 1969, ch. 312, 1969 Ind. Acts 1293 (codified at IND. CODE ANN. §§ 35-5-5-1 to -5 (Burns 1979)) (repealed 1981).

14. Professor LaFave has observed that although the first steps in the creation of crimes were taken by courts in formulating common-law offenses, as legislatures came to sit regularly they assumed a more significant role in this process "until today the law of crimes is mostly statutory law." W. LAFAVE & A. SCOTT, CRIMINAL LAW 37 (2d ed. 1986).

15. Over 95% of all felony prosecutions and over 99% of all felony and misdemeanor prosecutions are at the state level. Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE–CASES, QUESTIONS & COMMENTS 2 (7th ed. 1990).

16. *See, e.g.*, New York v. Burger, 482 U.S. 691 (1987) (upholding a statute permitting warrantless inspections of automobile junkyards); Kolender v. Lawson, 461 U.S. 352 (1983) (holding unconstitutionally vague a statute that made it a criminal offense for an individual who had been lawfully stopped to fail to provide credible and reliable identification to the police).

17. For example, blood-alcohol tests for those suspected of driving while intoxicated have been required by statute, and the Supreme Court has allowed states to revoke the licenses of those who refuse to comply and to use the refusal as evidence against the driver. South Dakota v. Neville, 459 U.S. 553 (1983). Legislative efforts to define conditions that would authorize police to conduct strip searches also illustrate this authority. *See, e.g.*, MO. REV. STAT. §§ 544.193-.197 (1986).

more generalized character. As a consequence, police interrogation practices would be subjected to a more thorough and systematic overview than can be expected from judicial decision making. The recent experience of Great Britain, moreover, indicates that legislatures can formulate an effective statutory response to the issues raised by police interrogation practices.

Great Britain's effort to legislate confession law, in contrast to the American pattern, has been characterized by a complete focus on the process of police interrogation. The British have not been forced to divert attention to issues of judicial authority to regulate police practices because Great Britain's system of parliamentary supremacy does not entail the same kind of constitutional review practiced by American courts.[18] Without this restraint, the British confronted directly what goes on during police questioning and enacted legislation recasting the system from the ground up. To a significant extent, the passage of the Police and Criminal Evidence Act[19] (PACE) and the issuance by the Home Office[20] of the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers[21] (the "Interrogation Code") reflect this activity.

Viewed in its entirety, the combination of the legislative framework of PACE and the regulatory structure of the

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18. Although British courts lack authority to declare an act of Parliament unconstitutional, Great Britain is a signatory to the European Convention on Human Rights, and some review of domestic British law is available through the European Court of Human Rights. *See* Mahoney, *Suing the State: A Comparison of Remedies Provided for Individual Rights Violations in Great Britain and the United States,* 56 UMKC L. REV. 435, 449-53 (1988); *see also* Lester, *Fundamental Rights: The United Kingdom Isolated?,* 1984 PUB. L. 46.

19. Police and Criminal Evidence Act (PACE), 1984, ch. 60. The Act followed an extensive study of British pretrial criminal procedure by a Royal Commission. *See* ROYAL COMM'N ON CRIMINAL PROCEDURE, REPORT, 1981, CMND. NO. 8092 [hereinafter ROYAL COMM'N REPORT]. The events leading to the passage of PACE are described in Reiner, *The Politics of the Act,* 1985 PUB. L. 394.

20. The Home Office is the British equivalent of the U.S. Department of Justice, as the Foreign Office is the counterpart of the State Department.

21. Home Office, Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (1985) [hereinafter Interrogation Code]. The Interrogation Code was authorized by PACE, 1984, ch. 60, § 66, and became effective on January 1, 1986. Contemporaneous with the Interrogation Code, the Home Office issued the following: Code of Practice for the Exercise by Police Officers of Statutory Powers of Stop and Search (1985); Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises (1985); and the Code of Practice for the Identification of Persons by Police Officers (1985). More recently, the Home Office issued the Code of Practice on Tape Recording (1988) [hereinafter Tape Recording Code].

Interrogation Code establishes a comprehensive system to supervise and control the police interrogation process. The system addresses confession admissibility by establishing a mandatory exclusionary rule, applicable to statements obtained by oppression or other tactics presenting reliability risks,[22] and by granting discretionary judicial authority to exclude confessions in circumstances that jeopardize the fairness of the proceedings or would have authorized exclusion under the common law.[23] PACE and the accompanying Interrogation Code also examine closely the entire interrogation process and develop detailed standards to supervise the police in their questioning of criminal suspects. The system represents a fresh approach to the interrogation debate, one that not only establishes confession admissibility standards but also directs attention to the tactics and environment in which police interrogation takes place.

Great Britain's criminal justice system has now experienced several years of supervision by PACE and the Interrogation Code. During this period, the courts have had an opportunity to clarify portions of PACE, and the Home Office has been able to assess the reactions of criminal justice agencies, as well as other interested organizations and individuals, to the implementation of PACE and the Interrogation Code. This provides an ideal opportunity to review Great Britain's effort to legislate confession law. The British strategy represents a challenging alternative to the traditional constitutional approach used in the United States to control the process of obtaining incriminating statements from an accused. Although the legal and governmental structures of the two countries are different, Great Britain's legislative response to the police interrogation controversy may nevertheless offer

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22. PACE, 1984, ch. 60, § 76. The mandatory exclusionary rule applies to confessions obtained by oppression or as a result of something said or done that was likely, under the circumstances, to render any subsequent confession unreliable. *See generally infra* notes 65-100 and accompanying text.

23. PACE, 1984, ch. 60, §§ 78, 82(3). The fairness-based discretion under § 78 applies to all forms of evidence whose admission "would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it." *Id.* § 78. It is not clear whether this is similar to the common-law discretion to exclude evidence retained by § 82(3) of the Act. *See generally* Birch, *The Pace Hots Up: Confessions and Confusions Under the 1984 Act*, 1989 CRIM. L. REV. 95, 97-99. Assuming § 78 to be independent of common-law discretion, a likely conclusion given that it is contained in a separate provision of PACE, the demarcation of what would constitute unfairness *to the proceedings* remains uncertain. *See* Smith, *The New Rules of Evidence*, in THE POLICE: POWERS, PROCEDURES AND PROPRIETIES 251, 264-65 (1986).

constructive ideas applicable to the American interrogation debate. At the very least, the issues that the British have addressed in both legislation and regulations, and the specific solutions they have identified, merit American policy makers' close attention.

Part I provides an overview of the development of British confession law, including the changes under PACE. Part II examines PACE's impact on related subjects, such as detention conditions, access to legal advice, and waiver of the right of access to a solicitor. Finally, Part III suggests that the British experience in developing a statutory framework to regulate these issues can serve as a model for undertaking such reforms in the United States.

I. BRITISH STANDARDS FOR ADMITTING CONFESSIONS

Any system that controls the police interrogation process must incorporate standards to determine whether the suspect's statements can be admitted in court. Confessions often serve as a powerful tool in the law enforcement system, with the potential for increasing the likelihood of a conviction at trial or inducing the defendant to plead guilty.[24] The police interest in obtaining confessions, however, must be balanced against other important concerns in the criminal justice system, such as the individual's right to be free from coercive tactics and society's interest in basing criminal convictions on reliable evidence. PACE is directed toward

24. The extent of the relationship between confessions and convictions, either by guilty plea or at trial, is disputed. Police and prosecution supporters frequently assert a strong connection between the two, *see* P. DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 48 (1960), but researchers have challenged this position, *see* P. SOFTLEY, POLICE INTERROGATION: AN OBSERVATIONAL STUDY IN FOUR POLICE STATIONS 85-88, 94 (Royal Comm'n on Criminal Procedure Research Study No. 4, 1980). The point of dispute is frequently whether the confession is important to the prosecution case or merely cumulative of other evidence. If it is only cumulative, the confession would be less likely to have a cause-and-effect relationship to the conviction of the defendant. Some of the available research is surveyed in: P. MORRIS, POLICE INTERROGATION: REVIEW OF LITERATURE (Royal Comm'n on Criminal Procedure Research Study No. 3, 1980); Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 HASTINGS L.J. 1, 111-15 (1986).

achieving that balance, but also reflects the common-law evolution of confession law standards.

By the eighteenth century, British law had settled on the voluntariness test as the standard governing the admission of confessions. Lord Mansfield had observed in *The King v. Rudd*[25] that when confessions had been obtained by threats or promises, "the consequence as frequently has been, that such examinations and confessions have not been made use of against them on their trial."[26] Subsequently, in *The King v. Warickshall*,[27] the court converted the dicta in *Rudd* into a rule:

> Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not entitled to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.[28]

Significantly, the *Warickshall* opinion not only established the voluntariness rule as the standard for admitting confessions but also explained its rationale. The court insisted that the prosecutor show the voluntariness of the confession before admitting it as evidence because of the need to ensure the reliability of the evidence. Voluntary confessions were connected to feelings of guilt, and these were presumed to produce sufficiently trustworthy evidence. On the other hand, the court believed that confessions "forced" from the accused by offers of advantage or fear should be presumed unreliable and therefore excluded.[29]

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25. 168 Eng. Rep. 160 (K.B. 1775).
26. *Id.* at 161.
27. 168 Eng. Rep. 234 (K.B. 1783).
28. *Id.* at 234-35 (footnote omitted).
29. *Id.* The common-law reliability principle is discussed in ROYAL COMM'N ON CRIMINAL PROCEDURE, THE INVESTIGATION AND PROSECUTION OF CRIMINAL OFFENSES IN ENGLAND AND WALES: THE LAW AND PROCEDURE, 1981, CMND. NO. 8092-1, at 29 [hereinafter ROYAL COMM'N STUDY]; P. MIRFIELD, CONFESSIONS 61-65 (1985).

Following *Rudd* and *Warickshall*, British courts found that applying the reliability-based voluntariness test could be a difficult task. The courts had no clear indicia available for separating voluntary from involuntary confessions. In some circumstances, a particular inducement might produce an involuntary and untrue confession, but the result could be different with other defendants in other settings. The voluntariness standard appeared to lack both precision and predictability. It is therefore not surprising that court rulings on voluntariness during this period are difficult to reconcile.[30]

Over time, however, courts became less concerned with the general concepts of voluntariness and reliability in their confession rulings. Instead, they began to substitute a more mechanical analysis in which the inquiry focused on whether the confession followed any threat or promise.[31] Under this approach, confessions were held involuntary and inadmissible based solely on the existence of a threat or promise, but without any real inquiry into whether the suspect exercised freedom of choice and without any considered judgment about the reliability of the statement.[32] Obviously, in replacing the voluntariness inquiry with an admissibility test based exclusively on the existence of a threat or promise behind the confession, the court limited and simplified its task. By changing to a test based on a simple factual determination, the courts also avoided speculating about the impact of police tactics on suspects of widely varied abilities.

Nevertheless, simplifying the judicial task produced an arbitrary standard divorced from the rationale that had led to the voluntariness test. Voluntariness at least had been based on a theory that confessions stemming from sufficient inducements or threats could not be trusted. The evolution to a new standard produced many rulings in which the courts found

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30. *Compare* Rex v. Kingston, 172 Eng. Rep. 752 (Assizes 1830) (ruling defendant's confession involuntary when solicited by surgeon's statement that " 'you are under suspicion of this, and had better tell all you know ' ") *and* Rex v. Partridge, 173 Eng. Rep. 243 (Crown Court 1836) (ruling defendant's confession involuntary when solicited by prosecutor's statement that " 'I should be obliged to you if you would tell us what you know about it; if you will not, we of course can do nothing; I shall be glad if you will ' ") *with* Rex v. Gilham, 168 Eng. Rep. 1235 (K.B. 1829) (ruling defendant's confession admissible when solicited by spiritual admonitions to tell the truth).

31. *See, e.g.*, The King v. Thompson, 168 Eng. Rep. 248, 249 & n.(a) (Old Bailey 1783).

32. *See* Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, 1975 WASH. U.L.Q. 275, 279-80.

that confessions were involuntary because of threats or promises that were unconnected to any reasonable view of voluntariness or reliability.[33] The finding that the confession followed a threat or promise was in itself sufficient to require exclusion of the confession, even though the underlying rationale for exclusion was unclear.

Basing the decision to exclude the suspect's statement on the existence of threats and promises allowed the courts to begin establishing standards of police conduct in questioning suspects, a goal separate and distinct from simply insuring the voluntariness and reliability of the confession. These standards were necessary, at least in part, because common law courts of this period were skeptical of the scope of police authority to engage in pretrial questioning.[34] Some judges denied that any such authority existed;[35] those who acknowledged its legality were nevertheless cautious to ensure that a

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33. *See, e.g.,* Regina v. Croydon, 7 L.T.R.O.S. 410 (Assizes 1846); Rex v. Enoch, 172 Eng. Rep. 1089 (Assizes 1833). Voluntariness would seem to require that the threat or inducement be evaluated against the characteristics of the defendant in order to determine whether it overcame his free will. The failure of the courts to undertake such an analysis suggests that the actual voluntariness of the confession was not of paramount importance. Furthermore, by requiring that the threat or inducement come from a person in authority, the courts appear to have been unconcerned with the voluntariness or reliability of statements made to other sources. *See generally* Mirfield, *Confessions—The "Person in Authority" Requirement*, 1981 CRIM. L. REV. 92.

34. Justices of the peace had been conducting pretrial examinations of criminal suspects but developed the practice of preceding their questioning with a caution that the suspect did not have to respond. The role of the justices of the peace, however, became increasingly judicialized, and their questioning ceased to be an interrogation of the accused. At the same time, newly instituted police forces assumed the investigatory role that the justices of the peace had performed. Having given up the role of interrogator, the justices of the peace were uncertain whether police could be allowed to perform that function. *See* P. MIRFIELD, *supra* note 29, at 58-59; G. WILLIAMS, THE PROOF OF GUILT 44-45 (1963). The uncertain status of police authority to question led Mr. Justice Hawkins to write that " '[p]erhaps the best maxim for a constable to bear in mind with respect to an accused person is, "Keep your eyes and your ears open, and your mouth shut." ' " HOME OFFICE, THE LAW AND PROCEDURES RELATING TO THE QUESTIONING OF PERSONS IN THE INVESTIGATION OF CRIME (EVIDENCE TO THE ROYAL COMMISSION ON CRIMINAL PROCEDURE, MEMORANDUM NO. V para. 5 (1978).

35. Justice Cave observed:

> The law does not allow the judge or the jury to put questions in open court to prisoners; and it would be monstrous if the law permitted a police officer to go, without anyone being present to see how the matter was conducted, and put a prisoner through an examination, and then produce the effects of that examination against him . . . . It is no business of a policeman to put questions . . . .

Regina v. Male, 17 Cox C.C. 689, 690 (Assizes 1893); *see also* Rex v. Knight, 11 T.L.R. 310, 310 (Assizes 1905).

crime had been committed[36] or that the interrogation had not constituted unlawful cross-examination of the accused.[37] Rigid rules against threats or promises were entirely consistent with a legal system that was uncomfortable with any pretrial police questioning at all.

As a result of these developments, by the early part of the twentieth century the voluntariness standard had become firmly grounded in English common law, but with a focus that deemphasized the issue of reliability in favor of an apparent objective of regulating police tactics. Thus, in a 1914 decision, Lord Sumner observed:

> It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.[38]

In so describing the rule, Lord Sumner avoided any direct expression of a reliability rationale. Indeed, in requiring that the statement stem from fear or hope created by a person in authority,[39] Lord Sumner's ruling stressed misconduct by officials as the basis for excluding the suspect's statement.

Nevertheless, one has difficulty rationalizing common-law decisions applying the voluntariness standard.[40] Some judges may have retained the view that there was something

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36. *See* Rex v. Crowe, 81 J.P. 288 (Central Criminal Court 1917); Regina v. Berriman, 6 Cox C.C. 388 (Assizes 1854).

37. Rex v. Gardner, 11 Crim. App. 265, 267 (1915) (mentioning the rule against cross-examination by police officers).

38. Ibrahim v. The King, 1914 App. Cas. 599, 609 (P.C.). Lord Sumner's definition of voluntariness became part of the Judges' Rules. *See* HOME OFFICE, JUDGES' RULES AND ADMINISTRATIVE DIRECTIONS TO THE POLICE, CIRCULAR NO. 89/1978, *reprinted in* ROYAL COMM'N STUDY, *supra* note 29, app. 12, at 154 [hereinafter JUDGES' RULES]. The Judges' Rules were originally promulgated in 1906 by the judges of the King's Bench in response to an inquiry from the Chief Constable of Birmingham. They were designed to provide guidance to police in questioning criminal suspects and were revised several times until they took their final form in the 1978 version cited above. *See generally* Berger, *Rethinking Self-Incrimination in Great Britain*, 61 DEN. L.J. 507, 519-20 (1984).

39. *See* Regina v. Moore, 16 J.P. 744 (Cr. Cas. Res. 1852); Rex v. Upchurch, 168 Eng. Rep. 1346 (Cr. Cas. Res. 1836); *see generally* P. MIRFIELD, *supra* note 29.

40. *See* ROYAL COMM'N REPORT, *supra* note 19, para. 4.70; *see also* Berger, *supra* note 38, at 512-13; Dix, *supra* note 32, at 279-82; Van Kessel, *supra* note 24, at 16-17.

intrinsically wrong with police interrogation and therefore rejected confessions accompanied by even the slightest inducement.[41] Others apparently accepted the inevitability of police questioning of suspects and tolerated more substantial pressures in the custodial interrogation process.[42]

By the time the House of Lords decided *Director of Public Prosecutions v. Ping Lin*[43] in 1975, the mood had clearly changed from one favoring strict control of police interrogations to an attitude more accepting of aggressive police questioning techniques. Ping Lin, who had been arrested and charged with drug possession, sought to gain favorable treatment by offering to identify his supplier. The police officer refused to offer any guarantee, but did inform Ping Lin that he thought the judge would remember this assistance at the time of sentencing. Although the police conduct could easily be criticized as having held out a hope of advantage in return for a confession, the House of Lords ruled that the voluntariness test had not been violated.[44]

At the same time that British courts were relaxing the voluntariness standard, they were also establishing an alternative test for excluding confessions. In *Callis v. Gunn*,[45] Lord Parker observed that confessions obtained through oppression were inadmissible in court. Oppression was variously defined as "something which tends to sap, and has sapped, that free will which must exist before a confession is voluntary"[46] and as " 'questioning which by its nature, duration, or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the subject that his will crumbles and he speaks when otherwise he would have stayed silent.' "[47] As developed by the courts, the test evaluated the impact of

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41. *See supra* notes 34-35.

42. *See, e.g.*, Regina v. Sleeman, 169 Eng. Rep. 714 (Crim. App. 1853); Regina v. Baldry, 169 Eng. Rep. 568 (Assizes 1852).

43. [1975] 3 All E.R. 175 (H.L.) (requiring, as a condition to admissibility, that the prosecutor show that a confession was made voluntarily and not in consequence of an inducement or threat by a person in authority).

44. *Id.* at 180 (Lord Morris of Borth-y-Gest).

45. [1964] 1 Q.B. 495, 501 (1963).

46. Note to Martin Priestly, 51 Crim. App. 1, 1, *clarifying* Regina v. Priestly, 50 Crim. App. 183 (1966).

47. ROYAL COMM'N STUDY, *supra* note 29, at 28 (describing the oppression standard stated by Lord MacDermott in an address to the Bentham Club in 1968). The MacDermott and *Priestly* definitions of oppression were adopted in Regina v. Prager, 56 Crim. App. 151, 161 (1971).

official interrogation techniques on the individual; admissibility decisions would reflect the court's view of the fortitude of the particular suspect.[48] Overall, the courts accepted substantial police pressure and reserved the oppression standard for more extreme situations.[49]

Thus, English confession law, which originated in the reliability-based voluntariness test but had evolved into a rigid prohibition against so-called threats and promises, once again began to inquire into the relationship between the activities of the police and the reaction of the suspect. Relying on Lord Parker's oppression standard, courts, under the guise of evaluating allegations of oppression, renewed their search for free-will decisions to answer police questions.[50] Indeed, the courts increasingly emphasized the oppression test to the extent that it arguably began to displace rather than merely supplement the traditional voluntariness requirement.[51] As part of this evolution, court rulings no longer seemed concerned with the need for abstract, rigid restraints on police behavior.[52] Once again, courts analyzed interrogation tactics in the context of the applicable circumstances, with admissibility related to the characteristics of the defendant.[53] English confession law was coming full circle and reemphasizing the ultimate voluntariness and reliability of the defendant's statement in determining admissibility.

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48. *See Note to Martin Priestley*, 51 Crim. App. at 1 ("What may be oppressive as regards a child, an invalid or an old man or somebody inexperienced in the ways of this world may turn out not to be oppressive when one finds that the accused person is of a tough character and an experienced man of the world."). The *Priestly* standard was approved in *Prager*, 56 Crim. App. at 161; *see also* ROYAL COMM'N REPORT, *supra* note 19, para. 4.72; P. MIRFIELD, *supra* note 29, at 103-06; Van Kessel, *supra* note 24, at 17.

49. *Compare* Regina v. Gowan, 1982 CRIM. L. REV. 821 (C.A.) (finding no oppression in interrogation despite seven days of incommunicado interrogation and denial of access to a solicitor) *and* Regina v. Steel, 73 Crim. App. 173, 187 (1981) (finding no oppression in a total of eight hours of interrogation during 50 hours of custody) *and Prager*, 56 Crim. App. 151 (finding no oppression in periods of interrogation lasting three hours and six hours in one day) *with* Regina v. Hudson, 72 Crim. App. 163 (1980) (finding oppression in 25 hours of questioning over more than a four-day period of a 59-year-old suspect whose arrest and detention reflected a number of likely illegalities).

50. *See* Regina v. Mackintosh, 76 Crim. App. 177 (1982); Regina v. Dodd, 74 Crim. App. 50 (1981).

51. *See* cases cited *supra* note 49; *see also* Van Kessel, *supra* note 24, at 17-19.

52. *See* cases cited *supra* note 49.

53. P. MIRFIELD, *supra* note 29, at 103-06.

Against this background, the Royal Commission on Criminal Procedure issued its Report in 1981.[54] The Commission comprehensively examined police investigative practices and sought to balance state and individual interests in its recommendations for reform.[55] Based on its assessment of both the prevailing law on police interrogation and the competing policy objectives, it concluded that common law standards needed major change.[56] The Commission recommended curtailing the use of the exclusionary rule as a method of regulating the police interrogation process.[57] Under the Commission's plan, courts could exclude confessions if they were obtained by violence, threats of violence, torture, or inhuman or degrading treatment.[58] Other statements, however, even if involuntary under traditional standards, would be fully admissible.[59]

The Commission concluded that relying on internal police codes of practice would ensure the reliability of a suspect's statements better than attempting to control the admission of the statements at trial.[60] The Commission recommended that a regulatory code be developed that would address police interrogation procedures directly.[61] The Commission did not, however, wish to have violations of the code requirements result in effective immunity from prosecution for the suspect. Instead, any statements so obtained would be admissible but subject to defense and judicial comment emphasizing to the

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54. ROYAL COMM'N REPORT, *supra* note 19.

55. *Id.* paras. 1.11-.23. The Commission's work extended to police practices in the areas of arrest, entries and searches, surveillance, detention, and interrogations. It also addressed issues in the prosecution process, but these were not incorporated in PACE. *See generally* Berger, *supra* note 38, at 515-16.

56. The Commission observed that "[b]oth the notion of voluntariness and the application of the rule seem to us to cause much difficulty to the police and to the courts." ROYAL COMM'N REPORT, *supra* note 19, para. 4.70. It also found "more serious difficulty" with "the imprecision of the concept of 'oppression' as the judges see it." *Id.* para. 4.71.

57. *Id.* para. 4.133.

58. The Commission observed that "in order to mark the seriousness of any breach of the rule prohibiting violence, threats of violence, torture or inhuman or degrading treatment and society's abhorrence of such conduct, non-compliance with this prohibition should lead to the automatic exclusion of evidence so obtained." *Id.* para. 4.132.

59. *Id.* para. 5.18

60. *Id.* para. 4.109. The Commission observed that "[f]or the actual conduct of questioning we need to replace the vagueness of the Judges' Rules with a set of instructions, which provide strengthened safeguards to the suspect and clear and workable guidelines for the police." *Id.*

61. *Id.* para. 5.18.

jury "the dangers involved in acting upon a statement whose reliability can be affected by breach of the code."[62]

Although the British law of confessions may have been moving toward (or back to) a reliability objective, the Royal Commission proposals marked a major departure from longstanding practice. The Commission's limited exclusionary rule meant that all confessions would reach the trier of fact, except those obtained under conditions unacceptable to a civilized society. Reliability instructions might be required, but these would only guide the evaluation of the weight to be given to the confession. Even the limited category of confessions that the Commission proposed to exclude seemed puzzling. Rather than call for excluding confessions resulting from violence, threats, and comparable tactics because of the possible impact on reliability, the Commission justified its exclusionary requirement on the ground that these tactics were abhorrent.[63] This stance more directly and substantially embraced a police disciplinary rationale than previously found in British interrogation law, even though the Commission identified its major interrogation policy objective as evidence reliability.[64]

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62. *Id.* para. 4.133.

63. *Id.* para 4.132 (stating that prohibiting violence and other similar unacceptable tactics was a concern distinct from ensuring reliable answers to custodial questioning).

64. The reluctance of the courts to use the exclusionary rule as a remedy to deal with police misconduct was reflected in the remarks by Lord Diplock in a House of Lords opinion:

> It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. If it was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with.

Regina v. Sang, 1980 App. Cas. 402, 436 (1979). Nevertheless, the common law had recognized some judicial discretion to exclude confessions obtained in violation of the Judges' Rules and as a result of police improprieties. *See* ROYAL COMM'N REPORT, *supra* note 19, para. 4.123; D. WOLCHOVER, THE EXCLUSION OF IMPROPERLY OBTAINED EVIDENCE 132-36, 173-206 (1986). By the time of the passage of PACE in 1984, however, the courts rarely exercised the discretion to exclude confessions when the Judges' Rules had been violated, leading one commentator to maintain that the discretion no longer existed. S. MITCHELL, P. RICHARDSON & D. THOMAS, ARCHBOLD [ON] PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES § 15-90 (43d ed. 1988). Nevertheless, the courts did acknowledge that a suspect cannot be compelled to provide evidence against himself. *Id.*; *see also* P. MIRFIELD, *supra* note 29, at 65-69. The Royal Commission, however, adopted the reliability principle as the basis of its proposals. *See* ROYAL COMM'N REPORT, *supra* note 19, paras. 4.132-.133.

Ultimately, the Government recommended that Parliament reject the Royal Commission's limited exclusionary rule because the rule would provide inadequate protection against unreliable confessions.[65] Instead, the Government proposed changes, embodied in section 76 of PACE, that offered two alternative grounds that could lead to the mandatory exclusion of the defendant's confession. First, no confession obtained by oppression, defined as including "torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture)," would be admissible against the defendant.[66] Second, courts would have to exclude any confession obtained "in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by [the accused person] in consequence thereof."[67] Unless the prosecution disproved these conditions beyond a reasonable doubt, exclusion was required even if the confession were true.[68]

Judicial decisions since the passage of PACE indicate that the mandatory exclusionary rules of section 76 are unlikely to require courts to reject vast numbers of confessions.[69] The oppression prong of the rule—encompassing torture, inhuman or degrading treatment, and the use or threat of violence—involves extreme conduct that, if proved, would seem to call for exclusion without much dispute. Some uncertainty might arise out of the inhuman and degrading treatment category, but because this parallels language contained in the European Convention on Human Rights,[70]

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65. M. ZANDER, THE POLICE AND CRIMINAL EVIDENCE ACT 1984, at 112 (1985).

66. PACE, 1984, ch.60, §§ 76(2)(a), 76(8).

67. *Id.* § 76(2)(b).

68. *Id.* § 76(2).

69. Despite cases excluding confessions under the authority of § 76 of PACE, such as Regina v. Delaney, 88 Crim. App. 338 (1988), and Regina v. Phillips, 86 Crim. App. 18 (1987), the Court of Appeal statement in Regina v. Fulling, [1987] 2 W.L.R. 923 (C.A.), equating oppression to " 'detestable wickedness,' " indicates the limited applicability of this exclusionary principle. *Id.* at 929 (quoting the Oxford English Dictionary). The reliability prong of PACE has also led to the exclusion of confession evidence, but the cases are often extreme, as reflected in the extended questioning of the suspect in Regina v. Trussler, 1988 CRIM. L. REV. 446, followed by his late-night confession in the absence of his solicitor. Additionally, Regina v. Goldenberg, 88 Crim. App. 285 (1988), limits the reliability principle to cases in which the risk of unreliability originates in conduct external to the accused.

70. European Convention for the Protection of Human Rights and Fundamental

at least a available framework is available for analyzing the provision.

The concept of oppression under PACE, however, is potentially more comprehensive than the extreme conduct illustrated in the legislation. PACE's definition of oppression includes torture and similar brutality, but only as illustrations. The Court of Appeal had to decide what other conduct constituted oppression in *Regina v. Fulling*.[71] In *Fulling*, the defendant challenged the admissibility of her confession claiming that she had been the victim of oppressive conduct by the police. Following her initial refusal to answer police questions, the defendant confessed after being told that her lover had been having an affair with a woman held in the next cell. The defendant maintained that this caused her distress and led her to confess in order to be released from custody.[72] The Court of Appeal, however, rejected the oppression claim, ruling that the appropriate standard for interpreting the word oppression was the term's dictionary definition as the " '[e]xercise of authority or power in a burdensome, harsh, or wrongful manner; unjust or cruel treatment of subjects, inferiors, etc.; the imposition of unreasonable or unjust burdens.' "[73] The court indicated that it intended to make this an extreme standard by repeating the dictionary quote that " '[t]here is not a word in our language which expresses more detestable wickedness than *oppression*.' "[74] The court further observed that oppressive conduct would normally entail an act of impropriety by the police, adding some confusion to its ruling by suggesting that the oppression-based exclusionary rule was to some extent related to the goal of controlling police conduct and was not limited to ensuring the reliability of the suspect's statement.[75]

Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221. On the provisions of the Convention and its enforcement procedures, see Andrews, *The European Jurisprudence of Human Rights*, 43 MD. L. REV. 463 (1984). A discussion of relevant cases from the European Commission on Human Rights and European Court on Human Rights appears in P. MIRFIELD, *supra* note 29, at 108-10.

71. [1987] 2 W.L.R. 923 (C.A.). The Court of Appeal observed that because PACE was codifying legislation, the language used by Parliament, rather than the common-law authorities, would control its interpretation . *Id.* at 928 (citing Bank of England v. Vagliano Bros., 1891 App. Cas. 107, 144).

72. *Id.* at 925-26.

73. *Id.* at 928 (quoting the Oxford English Dictionary).

74. *Id.* at 929 (quoting the Oxford English Dictionary).

75. The reference to impropriety also suggests that the PACE exclusionary rule is in some respects concerned with police misconduct, even though the major thrust

In contrast, section 76's exclusion of a statement obtained "in consequence of anything said or done which was likely, in the circumstances existing at the time, to render [it] unreliable,"[76] requires no act of police impropriety. No violation of specific provisions of PACE or the Interrogation Code is needed for the court to exclude a confession on this basis.[77] Whatever the status of the pre-Act voluntariness test in moving toward an increasing emphasis on reliability, PACE explicitly adopted the goal of ensuring the accuracy of confession evidence.[78] But what kinds of conduct are likely to render a confession unreliable and therefore require suppression? The Court of Appeal in *Regina v. Goldenberg*[79] began to answer this question.

The defendant in *Goldenberg* maintained that his confessions stemmed from a desire to secure bail because of his heroin addiction. He claimed that the circumstances were such that he might be expected to say anything to be released to feed his addiction. The trial judge, however, refused to exclude his confession, and this decision was affirmed on appeal.[80] The Court of Appeal noted that the relevant language of the statute called for exclusion of the suspect's statement if, " 'in consequence of anything said or done,' "[81] the statement was likely to be unreliable. Although the defendant argued that this language meant that the trial judge should be "concerned with the objective reliability of the confession and not merely with the conduct of any police officer or other person to whom the confession was made,"[82] the Court of Appeal concluded that the conduct it could consider was limited to "something external to the person

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of the provision appears directed toward a reliability objective. *See generally* Birch, *supra* note 23, at 100-02. An alternative explanation is that exclusion for oppression is required because of the principle that no one can be forced to be his own accuser. *See* J. ARCHBOLD, *supra* note 64, § 15-82.

76. PACE, 1984, ch. 60, § 76(2)(b).

77. P. MIRFIELD, *supra* note 29, at 111; Clegg, *Recent Developments in Criminal Evidence*, 84 L. SOC'Y GAZETTE 2920 (1987). On the other hand, it might be helpful to establish police misconduct in pressing a claim of unreliability. This is particularly true if the impropriety violates Code provisions that are geared to ensuring the reliability of confessions. Birch, *supra* note 23, at 100.

78. This is the result of the reliability language contained in PACE, 1984, ch. 60, § 76(2)(b). *See generally* M. ZANDER, *supra* note 65, at 111-12.

79. 88 Crim. App. 285 (1988).

80. *Id.* at 288-90.

81. *Id.* at 289 (quoting PACE, 1984, ch. 60, § 76(2)(b)).

82. *Id.* at 290.

making the confession."[83] The internal hopes of the accused, therefore, could not lead to the kind of unreliability that would warrant excluding the confession under section 76 of the Act.

More substantial psychological weaknesses, however, can increase the impact of police tactics on the suspect and create a risk of unreliability sufficient to lead to exclusion. The Court of Appeal addressed this issue in *Regina v. Delaney*.[84] In this case, an educational psychologist testified that the defendant had an I.Q. of eighty and that his personality "was such that when being interviewed as a suspect he would be subject to quick emotional arousal which might lead him to wish to rid himself of the interview by bringing it to an end as rapidly as possible."[85] The authorities had held out the hope of psychiatric help for the defendant, who had been taken into custody for the indecent assault of a three-year old girl. The defendant finally confessed following these inducements, but only after maintaining his innocence for over one and one-half hours.[86] The Court of Appeal concluded that the trial judge did not consider the impact of the long-term expectation of treatment on the reliability of the defendant's statement and ruled that the confession should not have been admitted.[87]

Another form of inducement that may generate a finding of unreliability is the offer to "take other offenses into account" (consolidate them into the current case without bringing separate charges, thereby avoiding a longer possible sentence) if the defendant confesses. In *Regina v. Phillips*,[88] the defendant, who was being questioned about credit card offenses, the police had stated to the accused:

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83. *Id.*

84. 88 Crim. App. 338 (1988).

85. *Id.* at 339-40.

86. *Id.*

87. *Id.* at 343. The court also emphasized that the police had violated the Interrogation Code by failing to make a contemporaneous note of the conversation with the defendant, thereby depriving the court of information as to exactly what transpired. *Id.* at 341-42. Interestingly, however, the Court of Appeal upheld the trial judge's conclusion that the surrounding circumstances were not sufficient to lead the suspect to believe that he would be released on bail, a factor that traditionally had been the basis for decisions to exclude confessions. *Id.* at 342. *See, e.g.*, Regina v. Zaveckas, 54 Crim. App. 202 (1969). Whether police practices have conformed to the requirement that they avoid linking release from custody to the suspect's willingness to respond to questions has been seriously questioned. *See* Van Kessel, *supra* note 24, at 19 n.76.

88. 86 Crim. App. 18 (1987).

> "We have already told you, if need be we will contact all the shops where the card was used. If we have to do this lengthy job we will have to charge you with every single offence. If you tell us and co-operate the majority of the offences can be taken into consideration when you appear at court."[89]

Although most defendants may confess because they hope to gain favorable treatment,[90] the authorities' explicit inducement caused the court to exclude the *Phillips* confession.[91]

Even without explicit inducements, police conduct can render a confession unreliable. In *Director of Public Prosecutions v. Blake*,[92] a juvenile who was estranged from her parents was arrested in connection with a fire at the hostel where she lived. Consistent with the requirements of the Interrogation Code, the authorities asked the juvenile how to locate her father so that he could be present at the interview.[93] She initially refused to tell them and sought a social worker, but social-worker policy was to decline to attend such interviews unless it was impossible to contact any other suitable person.[94] The police eventually secured the presence of the juvenile's father.[95] Given the earlier steadfast resistance of the child to the presence of her father, and out of concern that an estranged parent would not be able to fulfill the goal of ensuring a fair interview of the child, the court

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89. *Id.* at 21 (quoting the police).

90. Earlier cases held that either assurances or inducements would render any confession so obtained inadmissible, unless they clearly did not operate on the mind of the accused. *See* Regina v. Northam, 52 Crim. App. 97 (1967); Regina v. Richards, 51 Crim. App. 266 (1967). Self-generated expectations and situations in which the offers made were not relied upon, however, would not necessarily lead to exclusion. In such cases the judge is to decide the issue on the basis of all the relevant circumstances. In support of this principle, the *Phillips* court cited Regina v. Rennie, 74 Crim. App. 207 (1981), and Director of Pub. Prosecutions v. Ping Lin, 1976 App. Cas. 574 (1975). *See Phillips*, 86 Crim. App. at 22.

91. *See Phillips*, 86 Crim. App. at 23. Where such an inducement is made, the prosecution has the burden of proving admissibility beyond a reasonable doubt. PACE, 1984, ch. 60, § 76(2).

92. 89 Crim. App. 179 (Q.B. Div'l Ct. 1988).

93. *Id.* at 183. The Interrogation Code, *supra* note 21, paras. 1.5, 13.1, generally requires that an appropriate adult be present before the authorities question a juvenile under 17 years of age. A parent is specifically listed as an appropriate adult for purposes of the Code. *Id.* para. 1.7. On the provisions of PACE and the Interrogation Code that cover persons at risk, including juveniles, see *infra* notes 235-50 and accompanying text.

94. *Blake*, 89 Crim. App. at 183.

95. *Id.*

concluded that the spirit of the Interrogation Code had been violated.[96] As a result, the court found that the interrogation had breached the reliability prong of PACE and excluded the confession.[97]

Finally, the ruling of a Crown Court judge illustrates that extended questioning of an impaired suspect may breach the reliability requirement. In *Regina v. Trussler*,[98] the police arrested the suspect, but a doctor found him to be unfit for questioning because of symptoms related to his drug addiction. This occurred early in the morning, but by late afternoon he was fit for questioning and agreed to participate without his solicitor. Two interviewing sessions followed, with the defendant becoming extremely agitated at the close of the final one. Thereafter, the suspect conversed by phone with his solicitor. Later, at the request of a co-accused, the defendant and the co-accused conversed with each other. The defendant then agreed to another interview without his solicitor, and ultimately confessed by three o'clock in the morning, some eighteen hours after his original arrest.[99] The trial judge excluded the confession as unreliable, emphasizing the extended questioning without rest in breach of the Interrogation Code and the police efforts to avoid interrogation restrictions by engaging in a "general chat" with the accused before securing a final confession.[100]

II. THE CODES OF PRACTICE

If British interrogation reforms had ended with the decision to reformulate an exclusionary rule to replace the voluntariness test, the result would have remained a system that supervised the distant process of police questioning by depending entirely on evidentiary standards. Moreover, the new tests for admitting confession evidence under PACE, by focusing on oppression and reliability problems, appeared likely to reduce the level of control from that previously provided by the voluntariness standard. Nor could it be

96. *Id.* at 186.
97. *Id.*
98. 1988 CRIM. L. REV. 446 (Crown Court).
99. *Id.* at 446-48.
100. *Id.* at 448.

certain that the additional discretionary authority to exclude confessions, based on common-law principles and fairness, would add much to the degree of supervision. At best, the reforms would have meant little real change, and at worst they would have resulted in a lessening of efforts to control the police interrogation process.

PACE, however, did not end with the development of alternatives to the voluntariness test. Instead, the legislation directed the Secretary of State to issue codes of practice covering a variety of police procedures, including interrogation.[101] Generally, Parliament provided that violating any code provision would not automatically subject police to civil or criminal liability,[102] or mandate exclusion of evidence obtained as a result of the violation.[103] Instead, consistent with the character of the codes of practice as a broad structure regulating internal police practices, Parliament relied primarily on internal police disciplinary procedures to enforce the codes. In fact, the relevant PACE provisions appear to be mandatory: "A police officer *shall* be liable to disciplinary proceedings for a failure to comply with any provision of such a code . . . ."[104] Moreover, the police complaints procedure was entirely revamped as part of the legislation's overall structure.[105]

Nevertheless, the courts may go beyond the limits of the internal police disciplinary system if important code provisions are breached. One potential argument is that under the particular circumstances of the interrogation, the confession would have to be excluded under section 76 of PACE because

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101. PACE, 1984, ch. 60, §§ 66-67. In addition to interrogation, codes were to be prepared for searches, detention, identification, and property seizures. More recently, a code covering the tape recording of police interrogations was issued. *See supra* note 21. Codes issued under PACE must be presented to Parliament and cannot become effective unless approved by a resolution of each House. PACE, 1984, ch. 60, §§ 67(3)-(5).

102. PACE, 1984, ch. 60, § 67(10).

103. *Id.* § 67(11) (providing only that the code "be taken into account" in the decision to admit evidence).

104. *Id.* § 67(8) (emphasis added).

105. *Id.* §§ 83-105. Professor Michael Zander has observed, "Although I do not anticipate there will be many occasions when a breach is visited with a disciplinary charge, the fact that it is technically a breach of police disciplinary rules will give officers some cause to think carefully about the codes." Zander, *The Act in the Station*, in THE POLICE: POWERS, PROCEDURES AND PROPRIETIES, *supra* note 23, at 123, 124. Others have complained about the lack of more effective remedies. *See* Sanders, *Rights, Remedies, and the Police and Criminal Evidence Act*, 1988 CRIM. L. REV. 802.

the code breach was either oppressive or conducive to producing an unreliable confession. Additionally, in two general circumstances, judges could use their discretionary authority to exclude statements that resulted from violations of code provisions. First, PACE provides for exclusion when, "having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."[106] Second, Parliament specifically retained in PACE the existing common-law discretion to control the admission of evidence.[107] Thus, even though code breaches might not warrant applying the mandatory exclusionary rule, judicial discretion could be invoked to reject confession evidence so obtained.

In drafting the codes, the Home Office assembled the provisions into three separate categories. The regulations appear first and constitute the core of the codes. Annexes are appended to the codes, and have equivalent status. They serve mainly to assemble in one area collections of sections relating to the same general subject. The codes also contain provisions labelled "Notes for Guidance." Many are important substantive provisions, but because they are not actual code sections, violating them would not automatically constitute a police disciplinary offense.[108] Although the Home Office issued a consultative document seeking comments on the PACE codes and recently prepared revised codes that have been circulated for review before their submission to Parliament,[109] they retained both the basic structure and most of the substance of the original format.

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106. PACE, 1984, ch. 60, § 78(1).

107. *Id.* § 82(3). The scope of common-law authority to exclude evidence is unclear, although it would include the judgment that the prejudicial impact of the evidence outweighs its probative value. Birch, *supra* note 23, at 97. The House of Lords expressed resistance to the idea that exclusion could be based on the need to discipline police officers. *See* Regina v. Sang, 1980 App. Cas. 402 (1979). But "[i]t was well settled that, in relation to both the Judges' Rules proper and the principles in the preamble to them, breach triggered the discretion to exclude evidence." P. MIRFIELD, *supra* note 29 at 137 (footnotes omitted).

108. *See* M. ZANDER, *supra* note 65, at 95-96. Whether the distinction between note provisions and code requirements will remain clear to police, however, is not certain. *Id.*

109. Home Office, Police and Criminal Evidence Act 1984: Revised Draft Codes of Practice (Aug. 14, 1989). A revision of the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers [hereinafter Revised Interrogation Code] was included in the draft codes circulated for review and comment.

A. Detention

In a strict sense, the power to detain criminal suspects raises issues that are distinct from the police interrogation debate.[110] Detention can, after all, occur without interrogation, and police may seek to question suspects who are not within their custody. Nevertheless, detention is a powerful tool in the interrogation process. It ensures control over the suspect's freedom of movement and may well add to the psychological advantage of the interrogator. PACE and the Interrogation Code, therefore, appropriately consider the power to detain, especially for purposes of interrogation, as well as the conditions and duration of detention.[111]

Detaining suspects to secure their appearance in court or to complete administrative booking procedures presents interrogation issues, albeit in an indirect manner. In such cases, the detention would have to be justified for custodial reasons, and the question that arises is whether interrogation can take place during otherwise legitimate confinement.[112] A distinct concern, however, is whether detention for the

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110. In the United States, the Supreme Court has addressed the issue of what constitutes interrogation for purposes of applying the *Miranda* safeguards. In Rhode Island v. Innis, 446 U.S. 291 (1980), the Court held that warnings were required whenever the suspect was in custody and was subjected to either express questioning or its functional equivalent, defined to include "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301 (footnotes omitted). Although neither PACE nor the Interrogation Code address this issue, a new guidance note recommends this definition of an interview:

> An interview is a series of questions put to a suspect about an offence with a view to obtaining either his explanation of the facts or an admission on which a prosecution for the offence may be founded. Questioning a person whom an officer has no grounds to suspect of an offence, simply to obtain information or in the ordinary course of the officer's duties, does not constitute an interview for the purpose of this code.

Revised Interrogation Code, *supra* note 109, notes for guidance, para. 11A.

111. These issues are dealt with in detail, both in the legislation, PACE, 1984, ch. 60, §§ 34-52, and in the regulations, Interrogation Code, *supra* note 21, paras. 8.1-.12 (regulating conditions of detention); paras. 9.1-.9 (regulating treatment of detained persons); paras. 16.1-.5 (regulating reviews and extensions of detention).

112. In the United States, McNabb v. United States, 318 U.S. 332 (1943), analyzed the problem under the federal requirement that arrestees be taken before a magistrate without unnecessary delay. Questioning during lawful confinement was held permissible, but statements obtained after unnecessary delay in presenting the accused before a magistrate were excluded. *Id.* at 341-45. *See also* M. BERGER, *supra* note 5, at 112-19.

specific purpose of interrogation is permissible. American courts have resisted recognizing police authority to detain where the exclusive objective is to interrogate the accused,[113] but British law has moved toward accepting this principle both in court decisions and in the legislative and regulatory structure of PACE.

The House of Lords decision in *Holgate-Mohammed v. Duke*[114] approved detention for interrogation. The plaintiff had won a judgment of £1,000 for false imprisonment, which consisted of her arrest and a six-hour detention. She had been taken into custody in connection with a jewelry store burglary, but the police realized that their case rested upon a potentially weak and insufficient identification. The investigating officer proceeded to take the suspect into custody because "he held the honest opinion that the police inquiries were more likely to be fruitful in clearing up the case if Mrs. Holgate-Mohammed were compelled to go to the police station to be questioned there."[115] The police sought to use the " *'greater stress and pressure'* "[116] of stationhouse interrogation, although the questioning was performed without any impropriety. The House of Lords concluded that the police could lawfully arrest and detain a suspect to interrogate her under conditions more favorable to the police.[117]

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113. The Supreme Court has observed that the police should not "arrest, as it were, at large and . . . use an interrogating process at police headquarters in order to determine whom they should charge." Mallory v. United States, 354 U.S. 449, 456 (1957).

114. 1984 App. Cas. 437.

115. *Id.* at 444. The plaintiff maintained that the constable's purpose violated the requirement of Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp., [1948] 1 K.B. 223 (C.A. 1947), that the exercise of discretionary authority, such as the decision to arrest, cannot be based upon the consideration of irrelevant matters. Under English law, it was also necessary that the arrest be based upon reasonable cause to suspect that the individual had committed an arrestable offense, Criminal Law Act, 1967, ch. 58, § 2(4), *repealed by* PACE, 1984, ch. 60, §§ 26(1), 119(2), and that the period of confinement not be unreasonable, *Holgate-Mohammed*, 1984 App. Cas. at 442-43.

116. *Holgate-Mohammed*, 1984 App. Cas. at 444 (quoting the circuit judge).

117. *Id.* at 445-46. Even before the *Holgate-Mohammed* decision, the Royal Commission observed that "the law on the permitted period for which a suspect may be kept in custody after arrest without being charged or brought before a court is uncertain in its effect, but such detention is allowed by the law and is common police practice." ROYAL COMM'N REPORT, *supra* note 19, para. 3.95. The extended detention would provide an ideal opportunity for custodial interrogation, even if that were not its official purpose. Indeed, one commentator has argued that the law before PACE would have allowed a magistrate to *remand* an uncharged suspect into police custody for the specific purpose of conducting an interrogation. D. WOLCHOVER, *supra* note

In framing the detention provisions of PACE, Parliament did not change the underlying principle that if police have grounds for arrest they may use their power to detain the suspect to further their investigation through questioning. Instead, the relevant sections of PACE and the accompanying Interrogation Code regulate the terms and conditions of detention.[118] Presumably, if they are followed, the police are unlikely to be found guilty of oppression, producing an unreliable confession, or engaging in tactics that would jeopardize the fairness of the trial process. As a result, the police would face little risk that the court would exclude the suspect's statement; PACE and the Interrogation Code thus protect the admissibility of the confession.[119]

Investigative detentions cannot be regulated without setting time limits. On this point the PACE structure grants substantial authority to police to detain for prolonged periods, and allows police to extend the duration of detention even further with magistrate approval. Generally, police can detain a suspect for twenty-four hours without charging him,[120] but this can be extended to thirty-six hours by an officer of the rank of superintendent or above,[121] and up to a maximum of ninety-six hours by a magistrate.[122] In these cases, the detention must be based upon a reasonable belief that it "is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him."[123]

To protect against the abuse of this process, Parliament created, through PACE, the position of custody officer and required that officer to ensure that police observe the requirements of the Act and the Interrogation Code.[124] At least in

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64, at 102-06.

118. *See supra* note 111.

119. In much the same way, the *Miranda* decision in the United States ensures the admissibility of confessions by creating a procedure that, if followed, makes it exceedingly difficult for the defendant to claim that his constitutional rights were violated. *See* Berger, *Compromise and Continuity:* Miranda *Waivers, Confession Admissibility, and the Retention of Interrogation Protections*, 49 U. PITT. L. REV. 1007 (1988).

120. PACE, 1984, ch. 60, § 41(1).

121. *Id.* § 42(1).

122. PACE allows the magistrate to issue a warrant of further detention for a period of up to 36 hours, and to extend the warrant for up to a total of 96 hours. *Id.* §§ 43(12), 44(3)(b).

123. *Id.* §§ 37(2), 42(1)(a), 43(4)(a).

124. Pursuant to PACE, 1984, ch. 60, § 36(1), at least one custody officer must

theory, the custody officer is independent of the investigation[125] and can therefore reach custodial judgments without bias. In particular, the custody officer determines whether it is necessary to detain the suspect to interrogate him[126] and whether there is sufficient evidence to charge the suspect with an offense.[127] The custody officer also must ensure that the treatment standards of PACE and the Interrogation Code,[128] as well as their record-keeping requirements,[129] are followed.

The Interrogation Code sets forth specific standards for police treatment of detainees. The regulations call for single cells so far as practicable, adequate heat, ventilation, and cleanliness, with sufficient bedding and access to toilet and washing facilities.[130] At least two light meals and one main meal are required during any twenty-four-hour period, and brief outdoor exercise must be offered if practicable.[131] A number of provisions also govern situations in which the detainee appears to need or requests medical attention.[132]

Additionally, the Interrogation Code explicitly regulates the conditions under which police may question detainees. For example, during any twenty-four-hour period, the detainee must have at least eight continuous hours free from interrogation or travel, normally at night.[133] Individuals under the

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be appointed for each designated police station. The designated police stations are those that have been selected for detaining arrested persons. *Id.* § 35(1). Custody officers must be of the rank of sergeant or above, although any officer may perform the duties of the position if the appointed custody officer is unavailable. In all cases, however, the individual who is acting as the custody officer cannot be involved in investigating the offense for which the individual is under detention. *Id.* § 36(5). The functions of the custody officer are spread throughout PACE, but primarily appear in § 37 (duties before charge), § 38 (duties after charge), and § 39 (responsibilities to persons detained). The duty to "ensure that all persons in police detention at that station are treated in accordance" with the Act and related codes is contained in § 39(1)(a).

125. *Id.* § 36(5). The independence of the custody officer, although set out in the legislation, can be undercut by police leadership, particularly if those with authority spread the view that the custody officer is expected to function as a rubber stamp. Zander, *supra* note 105, at 125-26.

126. PACE, 1984, ch. 60, § 37(2)-(3).

127. *Id.* § 37(7).

128. *Id.* § 39(1)(a).

129. *Id.* § 39(1)(b).

130. Interrogation Code, *supra* note 21, paras. 8.1-.4.

131. *Id.* paras. 8.6-.7.

132. *Id.* paras. 9.2-.9. Generally, these provisions create a duty to secure a police surgeon if the detainee is in need of medical assistance, whether requested or not, to ensure an opportunity to take required medication is provided, and to document the medical aspects of the individual's detention.

133. *Id.* para. 12.2. Interruption of the rest period is allowed if there are

influence of alcohol or drugs may not be questioned, except in extreme circumstances, nor may alcohol or drugs be supplied to an individual except under medical direction.[134] Interviews should take place in adequately heated and ventilated rooms, interviewees should not be required to stand, and meal breaks as well as refreshment breaks should be allowed at about two-hour intervals.[135] Finally, so-called "persons at risk," including juveniles and those who are mentally ill or mentally handicapped, may be interrogated only in the presence of an appropriate adult.[136]

B. Access to Legal Advice

Providing access to legal advice can serve as an important restraint on police interrogation tactics. Legal representation not only provides the check of an outside presence in the questioning process but also ensures that the suspect will act with full information concerning his legal rights and the consequences of exercising them.[137] Yet, before the passage

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reasonable grounds to believe there would be a risk of harm to persons or serious loss or damage to property, unnecessary delay of the individual's release from custody, or other prejudice to the outcome of the investigation. *Id.* para. 12.2(i)-(iii).

134. *Id.* para. 12.3. The regulation only specifies that liquor may not be supplied to a detainee, but because supplying drugs would be a criminal offense it too is implicitly barred. Pursuant to annex C of the Interrogation Code, which sets out the conditions for "urgent interviews," an officer of the rank of superintendent or above may authorize the interview of an individual under the influence of alcohol or drugs if delay would involve "an immediate risk of harm to persons or serious loss of or serious damage to property." *Id.* annex C, para. 1(a). The note for guidance, however, warns that such individuals are "particularly vulnerable," and because the provisions of annex C "override safeguards designed to protect them and to minimise the risk of interviews producing unreliable evidence," they should be used only in "exceptional cases of need." *Id.* annex C, notes for guidance, para. C1.

135. *Id.* paras. 12.4, 12.5, 12.7.

136. *Id.* para. 13.1. Elsewhere, the term appropriate adult is defined to include in the case of a juvenile, his parent or guardian, social worker, or failing either, another responsible adult unconnected to the police. *Id.* para. 1.7(a). For those who are mentally ill or handicapped, an appropriate adult includes a relative, guardian, or other person responsible for the individual's custody, someone unconnected with the police and experienced in dealing with mentally ill or mentally handicapped individuals, or failing either, a responsible adult unconnected with the police. *Id.* para. 1.7(b). *But see id.* annex C, para. 1(b) (listing exceptions). The only change made in the Revised Interrogation Code is to specify that the responsible adult selected pursuant to the regulations be aged 18 or over. Revised Interrogation Code, *supra* note 109, para. 1.7(a)(iii), (b)(iii). For a discussion of the treatment of persons at risk, see *infra* notes 235-50 and accompanying text.

137. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 470 (1966) (noting the

of PACE, British law and police practices were inconsistent in securing legal advice for those subject to police questioning. Although the Judges' Rules clearly incorporated a duty to allow timely access to a solicitor,[138] courts routinely ignored breaches of this requirement by the police.[139] Many of the groups submitting evidence to the Royal Commission on Criminal Procedure addressed this issue,[140] and the provisions of PACE and the Interrogation Code confronted it directly.[141]

Understanding how British law has chosen to deal with providing legal advice to criminal suspects requires some appreciation of the differences in the approach to legal representation by British and American lawyers. American legal practice has emphasized the attorney's duty to his client; in this setting, an attorney is likely to advise that a suspect not answer police questions.[142] If so, then police might assume that further questioning would be useless and redirect their efforts toward acquiring information in a manner that would not require warnings or the presence of counsel.[143] In

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"significant subsidiary functions" of counsel at interrogations).

138. The Judges' Rules stated that:

> [E]very person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so.

JUDGES' RULES, *supra* note 38, app. 12, at 153.

139. Only 1 in 10 suspects requested a solicitor and police denied a third of these requests. *See* ROYAL COMM'N STUDY, *supra* note 29, at 32. On selected occasions a statement might be excluded because authorities violated the right of access to a solicitor, but in many cases such statements were admitted. *See, e.g.*, Regina v. Dodd, 74 Crim. App. 50 (1981); Regina v. Elliot, 1977 CRIM L. REV. 551 (Crown Court); Regina v. Allen, 1977 CRIM. L. REV. 163 (Crown Court 1976). According to one view, under the Judges' Rules police had "interpretational latitude for which they were rarely called to account." Sanders & Bridges, *Access to Legal Advice and Police Malpractice*, 1990 CRIM. L. REV. 494, 494.

140. *See* Berger, *supra* note 38, at 536-37 (discussing these efforts).

141. PACE, 1984, ch. 60, §§ 58-59; Interrogation Code, *supra* note 21, paras. 6.1-.12 (right to legal advice), annex B (delay in access to legal advice).

142. The Supreme Court recognized prosecution arguments that if attorneys were available to criminal suspects before interrogation they would be likely to advise silence. The Court believed, however, that the right to counsel before custodial interrogation could not be denied on this basis. Miranda v. Arizona, 384 U.S. 436, 479-81 (1966).

143. Because *Miranda* warnings apply to custodial interrogations, police may attempt to obtain information in settings that either are not custodial or are not within the concept of interrogation under applicable Supreme Court decisions. *E.g.*, Berkemer v. McCarty, 468 U.S. 420 (1984) (ruling that questioning a motorist during a routine traffic stop is not custodial interrogation); Rhode Island v. Innis, 446 U.S.

contrast, British solicitors are apparently less adversarial in performing criminal defense representation. They will often recommend that police questions be answered, particularly when they have been apprised of the evidence available against their client.[144] British police may still prefer to interrogate without allowing consultation with or the presence of a solicitor, but an enforceable right of access to a solicitor would not necessarily preclude a successful questioning session.

The structure created by PACE to accommodate the right to consult with a solicitor clarifies some of the uncertainties surrounding the right of access to legal advice under prior law, but more importantly, it gives the right a statutory basis. The legislation provides explicitly that "[a] person who is in police detention shall be entitled, if he so requests, to consult a solicitor privately at any time."[145] Police must then allow the consultation as soon as practicable, unless a delay is authorized under the provisions of the Act, but in no event may the detainee be denied access to a solicitor for more than thirty-six hours.[146]

The circumstances justifying a denial of access to legal advice are detailed in the statute. It requires that the officer authorizing the delay have reasonable grounds to believe that the exercise of the right to legal advice at that time:

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291 (1980) (ruling that a conversation between two police officers is not interrogation); Oregon v. Mathiason, 429 U.S. 492 (1977) (holding that defendant did not confess voluntarily while in custody); Beckwith v. United States, 425 U.S. 341 (1976) (holding that statements made in a noncustodial interview could be used in a later criminal prosecution even though no *Miranda* warnings were given). If the interrogation is in a custodial setting, however, a *Miranda* waiver may be obtained. A body of law has developed in response to police efforts to obtain such waivers. *See* Berger, *supra* note 119 (discussing these developments).

144. Interviews with A.T.A. Edwards, London Criminal Courts Solicitors' Ass'n (July 31, 1989); Walter Merricks, Law Society (Aug. 9, 1989). A recent report by Justice, the British Section of the International Commission of Jurists, observed that where solicitors advise their clients to remain silent, "it is usually because they have not had an opportunity to consult their clients and do not know what the case is all about. They therefore advise their clients to say nothing until they have had an opportunity to discuss the case. Once this is done, most solicitors urge their clients to tell the police what they know." JUSTICE, MISCARRIAGES OF JUSTICE para. 3.28 (1989); *see generally* LAW SOCIETY, ADVISING A SUSPECT IN THE POLICE STATION: GUIDELINES FOR SOLICITORS (2d ed. 1988). For example, in Regina v. Samuel, [1988] 1 Q.B. 615, 629 (C.A. 1987), a solicitor stated that it was not his uniform practice to advise silence in police interviews. *See also infra* notes 170-71 and accompanying text.

145. PACE, 1984, ch. 60, § 58(1).

146. *Id.* § 58(4)-(5).

> (a) will lead to interference with or harm to evidence connected with a serious arrestable offence or interference with or physical injury to other persons; or
> (b) will lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it; or
> (c) will hinder the recovery of any property obtained as a result of such an offence.[147]

More recently, as a concession to the growing problem of drugs, the Home Office has proposed adding a section to the Interrogation Code that would permit a delay in access to legal advice where there is a "drug trafficking offence and the officer has reasonable grounds for believing that the detained person has benefitted from drug trafficking, and that the recovery of the value of that person's proceeds of drug trafficking will be hindered" by the availability of legal advice.[148] Finally, in all cases in which the police deny a request for access to a solicitor, they are required to allow access once the reasons for the delay have ceased to exist.[149] Even if access to legal advice is not formally delayed, some delay between the

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147. *Id.* § 58(8). The statute also requires that a delay in access to a solicitor is permitted only when the suspect is detained for a serious arrestable offense and an officer of the rank of superintendent or above has given his approval. *Id.* § 58(6). The statutory provisions that authorize the delay in access to legal advice are also repeated in the Interrogation Code, *supra* note 21, annex B, para. 1. As they are presently constituted in the Interrogation Code, delay in allowing access to a solicitor is permitted to avoid physical *harm* to other persons, rather than the statutory standard of physical injury. *Id.* In the Revised Interrogation Code, *supra* note 109, annex B, para. 1(i), the Home Office has proposed substituting the phrase "physical injury," thereby insuring that the language of the Interrogation Code parallels that of PACE. As a practical matter, delaying access to a solicitor is a relatively rare event. One recent study revealed that superintendents delayed such access in approximately one percent of all cases. *See* D. BROWN, DETENTION AT THE POLICE STATION UNDER THE POLICE AND CRIMINAL EVIDENCE ACT 1984, HOME OFFICE RESEARCH STUDY 104, at 26 (1989).

148. Revised Interrogation Code, *supra* note 109, annex B, para. 2. The same criteria are also sufficient to permit police to impose a delay in the detainee's independent right to notify an individual known to him or likely to take an interest in his welfare of the fact of his arrest and the location of his detention. *Id.* The right of notification is contained in PACE, 1984, ch. 60, § 56(1), and replicated in the Interrogation Code, *supra* note 21, para. 5.1.

149. PACE, 1984, ch. 60, § 58(11). In investigations of terrorism, special rules apply that provide for additional reasons justifying the denial of access to legal advice and extend the maximum period of such denial to 48 hours. *See* Interrogation Code, *supra* note 21, annex B, paras. 6-7.

request for legal advice and its actual provision is unavoidable.[150] This may arise out of an inability to reach the solicitor by telephone, or, if the consultation is to be in person, by the solicitor's commuting time to the police station, assuming she is even in a position to drop everything else. Inevitably, the issue arises as to whether any questioning can take place during this interval, and the Interrogation Code adopts the position that the authorities must generally forego questioning until the suspect has received legal advice.[151]

The general obligation to defer questioning until a solicitor is available is contained the Code's injunction that "[a] person who asks for legal advice may not be interviewed or continue to be interviewed until he has received it."[152] This requirement, however, does not apply if the standards authorizing delay are satisfied,[153] or where an officer of the rank of superintendent or above has reasonable grounds to believe that:

> (i) delay will involve an immediate risk of harm to persons or serious loss of, or damage to, property; or
>
> (ii) where a solicitor, including a duty solicitor, has been contacted and has agreed to attend, awaiting his arrival would cause unreasonable delay to the processes of investigation.[154]

Additionally, if the solicitor requested by the suspect cannot be reached, has previously indicated that he does not wish to be contacted, or declines to attend, the interview may also proceed.[155] Finally, the Interrogation Code allows the suspect to authorize the interview to begin at once if the individual "has

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150. A recent Home Office Research Study, written by David Brown, indicated that the median waiting time for a solicitor was approximately one hour. *See* D. BROWN, *supra* note 147, at 28. This figure, however, included a cluster of cases with short waiting times and a minority with substantial waiting times, resulting in a mean waiting time of two hours and ten minutes. *Id.*

151. *See infra* notes 152-57 and accompanying text.

152. Interrogation Code, *supra* note 21, para. 6.3.

153. *See supra* notes 146-47 and accompanying text.

154. Interrogation Code, *supra* note 21, para. 6.3(b). The duty solicitor is available to aid suspects after referral through a telephone service. *See* LAW SOCIETY, *supra* 144, at 14-17 (describing aspects of the duty-solicitor scheme).

155. *Id.* para. 6.3(c). If a duty-solicitor scheme is in operation, the interview may proceed only if the duty solicitor is unavailable or if the suspect is advised of the scheme and declines. *Id.*

given his agreement in writing or on tape."[156] In all cases where the interview proceeds without legal advice, however, the questioning must stop as soon as the circumstances justifying the absence of a solicitor cease to exist.[157]

The Interrogation Code provisions also address two issues that arose from particular police practices before PACE that denied access to legal advice. Despite the absence of clear legal support, British police had frequently denied access to legal advice if they believed the solicitor would advise silence, or if the solicitor were sent to the police station by a third party.[158] The Interrogation Code states:

> Access to a solicitor may not be delayed on the grounds that he might advise the person not to answer any questions or that the solicitor was initially asked to attend the police station by someone else, provided that the person himself then wishes to see the solicitor.[159]

Moreover, the right of access to a solicitor encompasses the actual presence of the solicitor in the interrogation room, not

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156. *Id.* para. 6.3(d). Although the Interrogation Code contains this provision, which allows an interview to proceed if the suspect consents in writing or on tape, the Revised Interrogation Code, *supra* note 109, omits it. The Revised Interrogation Code does allow for written or taped consent if the suspect's solicitor cannot be contacted or has indicated a desire not to be contacted, or where he has declined to attend, but this is distinct from a general right to consent to an interview without legal advice. *Id.* para. 6.3. It is unclear if this is intended to bar further questioning following a request for legal advice. If so, such an approach would be similar to the American rule that bars further interrogation after a suspect invokes the right to counsel. *See* Oregon v. Bradshaw, 462 U.S. 1039 (1983); Edwards v. Arizona, 451 U.S. 477 (1981). The proposal appears to be in response to concerns raised by the Law Society that police have requested consent from detainees for an interview while awaiting the arrival of the solicitor in circumstances not specified in the Interrogation Code. LAW SOCIETY, LAW SOCIETY RESPONSE TO HOME OFFICE REVIEW OF PACE CODE OF PRACTICE para. 3 (1988) [hereinafter LAW SOCIETY RESPONSE TO REVIEW].

157. Interrogation Code, *supra* note 21, para. 6.4.

158. Despite police practice, the case law suggested that neither ground justified denial of access to legal advice. Regina v. Jones, 1984 CRIM. L. REV. 357 (C.A.); Regina v. Lemsatef, 64 Crim. App. 242 (1976). Nevertheless, even after passage of PACE, the Law Society reported "[a]necdotal evidence" that police were denying access to legal advice on the grounds that the solicitor might recommend silence. LAW SOCIETY RESPONSE TO REVIEW, *supra* note 156, para. 10.

159. Interrogation Code, *supra* note 21, annex B, para. 2. The Home Office has proposed that in cases where the solicitor has come to the police station at the request of someone other than the suspect, the suspect must be informed of that fact and asked to sign the custody record to indicate whether he wishes to see the solicitor. Revised Interrogation Code, *supra* note 109, annex B, para. 3.

merely the opportunity to consult before questioning begins.[160]

Developments since PACE have demonstrated that creating a statutory right to legal advice, coupled with more detailed code regulations, has made a substantial difference in the judicial reaction to police interference with legal representation in the stationhouse. The debates preceding the passage of the legislation indicated strongly that preventing a solicitor from consulting with his client would be viewed as an extreme measure, appropriate only if based on what the solicitor might do after the consultation rather than what he might say during the consultation.[161] In recent cases, British courts have shown that they intend to enforce this principle.

In *Regina v. Samuel*,[162] the Court of Appeal confronted a police effort to rely on PACE to justify denial of access to a solicitor. After first signing the police custody record indicating that he did not wish to have a solicitor in connection with his arrest for armed robbery, the suspect denied all involvement. When questioned again some six hours later after items had been discovered in a search of the suspect's home, he then indicated that he had changed his mind and wanted to consult with his solicitor. This was relayed to a superintendent at the police station who denied access on the grounds that a serious arrestable offense was involved, with considerable amounts of money outstanding and the likelihood that other suspects might be warned inadvertently.[163] At this point, however, the police did not know the identity of the suspect's solicitor.

In reviewing the police decision to delay access to legal advice, the Court of Appeal stressed the statutory requirement that the officer must have reasonable grounds to believe that allowing consultation with a solicitor would have one of the consequences specified in the statute.[164] This, in the Court's view, meant that there must be a strong probability that the solicitor will do something after consultation with the suspect that would amount to the unwitting transmittal of informa-

160. Interrogation Code, *supra* note 21, para. 6.5. Only when the solicitor in effect becomes disruptive may she be required to leave. *Id.* paras. 6.6-.9.

161. M. ZANDER, *supra* note 65, at 73 (citing debate in the House of Lords on Oct. 18, 1984).

162. [1988] 1 Q.B. 615 (C.A. 1987).

163. *Id.* at 618.

164. *Id.* at 625-26.

tion, or, if done intentionally, to a criminal offense.[165] As to intentional misconduct by a solicitor, the Court observed that "the number of times that a police officer could genuinely be in that state of belief will be rare," and that the belief would have to relate to a "specific solicitor" rather than "solicitors generally."[166] But the court was also skeptical that solicitors would inadvertently pass on information from a detained suspect. If police seek to delay access on this basis, the Court indicated that it would take "reference to specific circumstances, including evidence as to the person detained or the actual solicitor sought to be consulted."[167] Given that the solicitor involved in *Samuel* was a respected member of the profession and that the suspect was only twenty-four years of age, along with the fact that the suspect's mother had already been notified of the arrest, it is not surprising that the Court found that the police were not justified in denying legal consultation rights.[168]

The court recognized that in violating the suspect's right of access to a solicitor, the police subjected themselves to the provisions of the disciplinary code.[169] But significantly, the court also considered whether the court, in its discretion, could have excluded the suspect's statement under the provisions of PACE that allow excluding evidence "if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."[170] The court observed that although the solicitor

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165. *Id.* at 626.
166. *Id.*
167. *Id.* at 627.
168. *Id.* at 628, 630.
169. *Id.* at 629.
170. PACE, 1984, ch. 60, § 78(1). The Court of Appeal did not consider applying the mandatory exclusionary rule for confessions obtained as a result of oppression or under circumstances likely to render them unreliable. *Id.* at § 76(2). Nevertheless, the application of the fairness-based discretion under § 78 of PACE in a case such as *Samuel* has been criticized as improperly focusing on the fairness of events preceding the trial rather than the fairness of the proceedings after the introduction of the challenged evidence. *See* Robertson, *The Looking-glass World of Section 78*, 139 NEW L.J. 1223 (1989). There is, however, a different view:

> [Fairness under § 78 means] fair to both sides, or, more correctly, giving fair weight to all interests involved in the process: the public interests in detecting offenders, maintaining civil liberties, and encouraging the police as repositories of public power to behave in such a way as to make them worthy of public trust, which includes observing the conditions imposed on their

involved stated that he did not always advise silence in police interviews, he would have in this case because his client had already strenuously denied involvement and because the police had filed two serious charges. The court concluded that in all probability the police would have obtained no incriminating information from the suspect if he had consulted with the solicitor.[171] It quashed the defendant's conviction in light of the likelihood that upon proper analysis the trial judge might have exercised his discretion to exclude the confession, thereby leaving the prosecution with a seriously weakened case.[172]

Subsequently, in *Regina v. Alladice*,[173] another panel of the Court of Appeal followed *Samuel*'s approach. At the time of the suspect's arrest in *Alladice*, one of five robbers was still at large and none of the stolen money had been located. The police expressed concern that the offenders might have had contingency plans that could have been "activated by conveying apparently innocent information or requests to a solicitor which could lead to the alerting of others or the disposal or redisposal of property, however innocent and respectable the particular solicitor might be."[174] The court, however, believed that because the arrest had been public, the fear of alerting confederates was not justified. The court also was concerned over the possibility that "the real reason for the delaying of access to a solicitor was the fear that the solicitor might advise the appellant to say nothing, thereby preventing the police from obtaining the hoped for admissions of guilt."[175]

The *Alladice* court concluded that all of the explanations offered by the police for their decision to delay the suspect's consultation with a solicitor, even if sincerely believed, were unreasonable.[176] Moreover, the suggestion that the real police objective was to prevent the suspect's solicitor from advising silence was troubling because such conduct is specifi-

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powers by Parliament.

Feldman, *Regulating Treatment of Suspects in Police Stations: Judicial Interpretation of Detention Provisions in the Police and Criminal Evidence Act 1984*, [1990] CRIM. L. REV. 452, 470.

171. *Samuel*, [1988] 1 Q.B. at 630.

172. *Id.*

173. 87 Crim. App. 380 (1988).

174. *Id.* at 383.

175. *Id.* at 384.

176. *Id.* at 384-85.

cally barred by the Interrogation Code.[177] Unlike the *Samuel* court, however, the *Alladice* panel did not share the "apparent skepticism about solicitors being used as unwitting channels of communication. That such things do happen is within the experience of members of this Court."[178] In an unnecessary aside relating to the ongoing debate in Great Britain on the viability of the right to silence, the court went on to express hostility to rules barring comment on the accused's silence, urging that "such comment should be permitted together with the necessary alteration to the words of the caution."[179] But despite its hesitancy, the *Alladice* decision followed *Samuel* in its analysis of restrictions on the right of access to legal advice.

Having found a violation, the court next considered whether excluding the confession was necessary. Under the circumstances, however, it did not feel that the breach of the duty to allow access to legal advice amounted to oppression or to conditions that were likely to render the confession unreliable. The court recognized that it had discretion to exclude the evidence if it would jeopardize the fairness of the proceedings. Given the suspect's previous denial of involvement, the fact that he had been cautioned, his statement that he could cope with the interview, and his comment that he only wanted a solicitor to check the conduct of the police, which the court found had been entirely proper, the court concluded that exclusion was not required.[180]

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177. Interrogation Code, *supra* note 21, annex B, para. 2.

178. *Alladice*, 87 Crim. App. at 384.

179. *Id.* at 385. Great Britain is developing proposals to curtail sharply the right to silence under British law, including allowing adverse inferences to be drawn when suspects fail to answer police questions or refuse to testify at trial. *See* HOME OFFICE, REPORT OF THE WORKING GROUP ON THE RIGHT OF SILENCE (1989) [hereinafter HOME OFFICE, REPORT OF THE WORKING GROUP]. This follows steps that were taken in 1988 to restrict the right to silence in Northern Ireland prosecutions. *See* Criminal Evidence (Northern Ireland), S.I. 1988, No. 1987. Commentators have been debating the merit of the Home Office proposals for England and Wales. *Compare* Williams, *The Tactic of Silence*, 137 NEW L.J. 1107 (1987) *with* McConville, *Silence in Court*, 137 NEW L.J. 1169 (1987). For another discussion on the right to silence, see Berger, *The Self-Incrimination Debate*, CRIM. JUST., Summer 1990, at 6.

180. *Alladice*, 87 Crim. App. at 386-87. The *Alladice* approach was employed in Regina v. Dunford, 91 Crim. App. 150 (1990). Even though the argument was described as "not as strong," the Court of Appeal concluded that the trial judge was entitled to draw the same conclusions. *Id.* at 155. A recent commentary, however, has suggested that situations such as *Alladice*, in which a trial judge can conclude that the interview was conducted fairly despite the denial of access to legal advice and that the evidence should be admitted, are likely to be rare. If the solicitor was

Since the *Samuel* and *Alladice* decisions, the Home Office has proposed revisions in the Interrogation Code designed to accommodate the rulings of the Court of Appeal. The revisions, however, are included in the guidance notes rather than substantive code sections, thus eliminating the possibility of automatic disciplinary code violations if the new directive is not followed.[181] The change recommended by the Home Office is a provision informing the police that "the officer may authorize delaying access to a solicitor only if he has reasonable grounds to believe that [the] specific solicitor will, inadvertently or otherwise, pass on a message from the detained person which will lead to" the risk to evidence, persons, or property, or to the alerting of other suspects as specified in the Code.[182] In such cases, the Home Office recommends that police consider allowing the detainee access to legal advice from an individual on the duty-solicitor scheme as an alternative.[183]

Recognizing that economic necessity will often force solicitors to send a clerk to interview detainees, the Interrogation Code also extends its protection to such legal assistants.[184] Access may be denied, however, if the visit "will hinder the investigation of crime,"[185] as well as "if the police know or believe that the person is not capable of providing advice on behalf of the solicitor, whether because of his appearance, his age, his mental capacity or because of the police knowledge of him."[186] This policy gives police broader

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not present, and the defendant is forced to challenge police testimony with nothing more than his own testimony, there is inevitable unfairness in depriving the defendant of the opportunity to have had supporting evidence. *See* Knapman, *Commentary to* R. v. Walsh, 1989 CRIM. L. REV. 823, 824. In Regina v. Walsh, 1989 CRIM. L. REV. 822, the Court of Appeal ruled that the defendant's confession, made after the police failed to provide him with legal advice despite his request, should have been excluded pursuant to the fairness-based discretion of PACE, 1984, ch. 60, § 78. Despite rulings that have excluded confessions when the defendant had been denied legal advice, there is continuing concern that police may not be adhering to the requirements of PACE and the Interrogation Code on this obligation. *See* Letter to the Editor from his Honour Judge Roger Sanders, 1989 CRIM. L. REV. 763. More recent observational research suggests that the police may be failing to record and process requests for legal advice. *See* Sanders & Bridges, *Access to Legal Advice and Police Malpractice*, 1990 CRIM. L. REV. 494, 503-04.

181. *See supra* note 108 and accompanying text.

182. Revised Interrogation Code, *supra* note 109, notes for guidance, para. B4.

183. *See infra* notes 197-200 and accompanying text.

184. Interrogation Code, *supra* note 21, paras. 6.9, 6.10.

185. *Id.* para. 6.9.

186. Regina v. Chief Constable of the Avon & Somerset Constabulary, 90 Crim.

grounds to deny access to a clerk than to solicitors and does not carry with it the presumption of integrity that the *Samuel* court granted to solicitors. A recent case approved these restrictions.[187]

In addition to governing the denial of access to a solicitor, PACE and the Interrogation Code also address in what circumstances a solicitor may be excluded from the interview after he has consulted with the detainee. Unlike the American *Miranda* rule, the British system has had no provision to cut off questioning entirely by invoking the right to legal advice or the right to remain silent.[188] Instead, the Code provides a right to have a solicitor present during the interview[189] but allows the police to continue the questioning and

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App. 27, 29 (1990).

187. *Id.* To provide further guidance in this area, the Home Office has proposed an addition to the Interrogation Code identifying the following factors to be considered in the decision to exclude an individual designated by a solicitor:

> [T]he officer should take into account in particular whether the identity and status of the clerk or legal executive have been satisfactorily established; whether he is of suitable character to provide legal advice (a person with a criminal record is unlikely to be suitable unless the conviction was for a minor offence and is not of recent date); and any other matters in a written letter of authorisation provided by the solicitor on whose behalf the clerk or legal executive is attending the police station.

Revised Interrogation Code, *supra* note 109, para. 6.10.

188. In *Miranda*, the Court observed that, after being warned, "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." Miranda v. Arizona, 384 U.S. 436, 473-74 (1966) (footnote omitted). In subsequent cases, the Court held that under certain circumstances interrogation can be reinitiated following an assertion of the right to remain silent. *See, e.g.*, Michigan v. Mosley, 423 U.S. 96, 104 (1975) (allowing interrogation on a different subject after passage of a significant amount of time). Similarly, an assertion of the right to counsel may not prevent further questioning if the individual has initiated further communication with the police. *See* Oregon v. Bradshaw, 462 U.S. 1039 (1983); Edwards v. Arizona, 451 U.S. 477 (1981). Language changes proposed for the Revised Interrogation Code, however, may effectively eliminate the possibility that a suspect who has requested legal advice may thereafter consent to continue a police interview without it. *See supra* note 156.

189. Interrogation Code, *supra* note 21, para. 6.5. American cases do not illustrate police persisting in their questioning of the suspect in the presence of his counsel after he has invoked the right to remain silent. The *Miranda* Court did not foreclose this possibility:

> If an individual indicates his desire to remain silent, but has an attorney present, there may be some circumstances in which further questioning would be permissible. In the absence of evidence of overbearing, statements then made in the presence of counsel might be free of the compelling influence of the interrogation process and might fairly be construed as a waiver of the privilege for purposes of these statements.

even require the solicitor to leave "if his conduct is such that the investigating officer is unable properly to put questions to the suspect."[190] The guidance notes go on to provide that "a solicitor is not guilty of misconduct if he seeks to challenge an improper question to his client or the manner in which it is put or he wishes to give his client further legal advice, and should not be required to leave an interview unless his interference with its conduct clearly goes beyond this."[191]

Because access to a solicitor may not be delayed on the grounds that she might advise the detainee not to answer questions, it would seem that actually giving such advice cannot be a basis for requiring the solicitor to leave. On the other hand, might the repetition of this advice after every question constitute impermissible disruption? Neither the Act nor the Interrogation Code addresses exactly what solicitors may do in the interview, but at least one observer has concluded that a solicitor's advising silence after each question should not be sufficient to lead to her ejection.[192] This, of course, could result in a process in which the police would be able to insist on tendering their questions, even though the detainee was at the same time being urged to remain silent.

The Home Office's proposed revisions to the Interrogation Code appear to support this interpretation by providing that "[a]dvising a client not to reply to questions put to him does not count as [solicitor] misconduct."[193] Perhaps if the persistent questioning led the solicitor to not only advise silence but also interfere with police efforts to pose the questions, grounds

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Miranda, 384 U.S. at 474 n.44.

190. Interrogation Code, *supra* note 21, para. 6.6. The Code goes on to provide that the decision to exclude a solicitor from an interview requires that the investigating officer consult with a police official not below the rank of superintendent, if one is available, or otherwise inspector (and unconnected with the investigation) before removal, and that consideration be given to reporting the incident to the Law Society. *Id.* paras. 6.7-.8.

191. *Id.* notes for guidance, para. 6D.

192. D. WOLCHOVER, *supra* note 64, at 147.

193. Revised Interrogation Code, *supra* note 109, notes for guidance, para. 6D. As examples of misconduct by a solicitor, the Revised Interrogation Code lists "answering questions on the client's behalf, or providing written replies for the client to quote." *Id.* The police are also instructed that "[i]t is the duty of a solicitor to look after the interests of his client and to advise him without obstructing the interview." *Id.* In a separate provision, the Revised Interrogation Code states that potential conflict of interest problems arising out of the representation of more than one client do not constitute misconduct which police can use to justify excluding a solicitor. Instead, it is an issue "for the solicitor under his professional code of conduct." *Id.* notes for guidance, para. 6G.

to exclude the solicitor might arise. But as long as the detainee observes the solicitor's advice and the solicitor retains his composure, there would appear to be no justification for removing the solicitor.[194]

Although immediate access to a solicitor may be denied in limited circumstances, PACE and the Interrogation Code together create a vastly increased right of access to legal advice. In the United States, no special arrangements mandate immediate access to such advice.[195] As a result, if legal advice is requested, the police may well be forced to discontinue any further questioning. In any event, the assumption that an American lawyer would advise silence[196] makes any program to provide attorneys seem unnecessary, with the result that police either cease questioning the suspect or concentrate on attempting to secure a waiver of *Miranda* rights. Because this is not the pattern in British practice, the problem of providing legal advice is one that the drafters of PACE and the Code had to address.

The solution devised has been the development of a duty-solicitor scheme in which solicitors include themselves on a list indicating their availability to provide legal advice to detainees. The Government allocated funds to cover the cost of the system and linked the program to the legal-aid scheme in magistrates' courts so that it could require solicitors involved in the court schemes to participate in the police station program.[197] Significantly, the provision of legal advice under PACE is not conditioned on the indigence of the defendant.[198] Under the Home Office's proposed revisions to the Interrogation Code, detainees must be informed that "independent legal advice is available free of charge"[199] and given a written explanation of the arrangements for obtaining it.[200]

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194. If a solicitor is removed, the suspect must be given the opportunity to consult another solicitor. Interrogation Code, *supra* note 21, para. 6.7. An appropriate record must be made of any decision to exclude a solicitor. *Id.* para. 6.12. The notes for guidance warn that the officer who decides to exclude a solicitor "must be in a position to satisfy the court that the decision was properly made." *Id.* notes for guidance, para. 6E.

195. Indeed, many jurisdictions in the United States wait until an accused's first appearance before a magistrate before counsel is appointed. *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 15, at 14.

196. The *Miranda* Court recognized that attorneys might advise silence, but observed that this would not make them "a menace to law enforcement." Miranda v. Arizona, 384 U.S. 436, 480 (1966).

197. M. ZANDER, *supra* note 65, at 74.

198. *Id.* at 74-75. *See also* D. WOLCHOVER, *supra* note 64, at 157.

199. Revised Interrogation Code, *supra* note 109, para. 3.1(ii).

200. *Id.* para. 3.2. This proposal may be in response to concerns expressed by the

The objective is to ensure that neither lack of information nor inability to pay will interfere with the suspect's decision to request legal assistance.

C. Warnings and Waiver

The requirement that police caution or warn suspects before interrogating them was a core component of both the Judges' Rules and prior common-law practice.[201] The United States Supreme Court cited the British experience when it imposed warning requirements on American police in *Miranda*.[202] As recommended by the Royal Commission on Criminal Procedure,[203] PACE and the Interrogation Code retain, and in some respects expand upon, the principle that suspects must be cautioned before being interviewed.

The basic caution appears in paragraph 10.4 of the Interrogation Code: " 'You do not have to say anything unless you wish to do so, but what you say may be given in evidence.' "[204] Deviations in the words used are not critical, as long as the substance of the caution is conveyed.[205] The duty to administer the caution arises when there are grounds to suspect the individual of an offense and he is being questioned to generate evidence that can be used in court.[206] Moreover, even if the suspect is being questioned for another purpose, the caution must still be given as long as he has been arrested, unless it is impractical to do so or a caution has been administered before the arrest.[207] Significantly, if the caution is administered in connection with questioning and there is a break,

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Law Society that "suspects have been misled or provided with false information by police officers about solicitors [and/or] legal advice." LAW SOCIETY RESPONSE TO REVIEW, *supra* note 156, para. 6.

201. *See* Berger, *supra* note 38, at 518-20; Van Kessel, *supra* note 24, at 35-39. On the origins of the Judges' Rules, see *supra* note 38.

202. Miranda v. Arizona, 384 U.S. 436, 486-88 (1966).

203. ROYAL COMM'N REPORT, *supra* note 19, para. 4.110.

204. Interrogation Code, *supra* note 21, para. 10.4.

205. *Id.* Where the deviation has been more substantial, such as omitting a specific reference to the right to say nothing, even though the warning did inform the suspect of the use to which her statements could be made, exclusion of the statement has resulted. *See* Regina v. Saunders, 1988 CRIM. L. REV. 521 (Crown Court).

206. Interrogation Code, *supra* note 21, para. 10.1.

207. *Id.* para. 10.3.

police must ensure that the individual remains aware that he is still under caution when questioning is renewed, including repeating the caution in cases of uncertainty.[208]

Although not included as part of the formal regulations, the guidance notes in the Interrogation Code address the problem of the suspect who appears not to understand the meaning of the caution. They provide that in such a case the police officer should explain the caution in his own words[209] and convey "that the caution is given in pursuance of the general principle of English law that a person need not answer any questions or provide any information which might tend to incriminate him, and that no adverse inferences from this silence may be drawn at any trial that takes place."[210] Yet, the caution is administered in the context of a system that views citizens as having a duty to assist police in preventing crime and discovering offenders. The guidance notes, which describe this as a civic rather than a legal duty, state that the police are entitled to question anyone whom they think can provide useful information for an investigation.[211] They indicate further that an individual's "declaration that he is unwilling to reply does not alter this entitlement."[212]

The right to legal advice is also part of the information conveyed to detainees. Even though the former Administrative Directions, issued by the Home Office in conjunction with the Judges' Rules, required that "[p]ersons in custody should . . . be informed . . . of the rights and facilities available to them,"[213] the courts had interpreted this to require an initial request from the individual.[214] PACE and the Interrogation

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208. *Id.* para. 10.5. As guidance, the police are reminded that "the officer should bear in mind that he may have to satisfy a court that the person understood that he was still under caution when the interview resumed." *Id.* notes for guidance, para. 10A.

209. *Id.* notes for guidance, para. 10C.

210. *Id.* notes for guidance, para. 10D. The notes also state that the individual should not be led to believe that his immediate treatment will remain unaffected by noncooperation. For example, failure to reveal one's name and address after being charged with an offense can lead to detention. *Id.*

211. *Id.* notes for guidance, para. 1B.

212. *Id.* The protection lies in the right to legal advice and the presence of a solicitor; there is no right to terminate questioning. *See supra* notes 188-91 and accompanying text.

213. JUDGES' RULES, supra note 38, app. 12, at 160. The same provision also calls for police to draw the attention of detainees to conspicuously placed notices describing their rights. *Id.*

214. Regina v. King, 1980 CRIM. L. REV. 40, 41 (C.A. 1979).

Code combine to ensure that the right to legal advice will not be relinquished through ignorance.

The statute itself does not require police to inform a detainee of his right of access to legal advice. It refers only to the detainee's right, "if he so requests, to consult a solicitor privately at any time."[215] The Interrogation Code, however, explicitly requires that the custody officer inform anyone under arrest of the right to consult with a solicitor.[216] A written notice of the right must be provided, and the custody officer should secure written acknowledgement of its receipt.[217] She should also give the detainee a copy of the notice explaining available arrangements for obtaining legal advice[218] and obtain a written indication of whether the individual desires to have or forego the right of access to a solicitor.[219]

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215. PACE, 1984, ch. 60, § 58(1).

216. Interrogation Code, *supra* note 21, para. 3.1(ii). The Home Office has proposed including information that "independent legal advice is available free of charge" in the caution. Revised Interrogation Code, *supra* note 109, para. 3.1(ii). It also proposed that police give the individual a notice explaining the arrangements for securing legal advice. *Id.* para. 3.2. This procedure is currently merely a guidance note. Interrogation Code, *supra* note 21, notes for guidance, para. 3E.

217. Interrogation Code, *supra* note 21, para. 3.2.

218. *Id.* notes for guidance, para. 3E. The Home Office has proposed that this guidance note be converted into a code provision. *See* Revised Interrogation Code, *supra* note 109, para. 3.2. There were concerns that police were discouraging exercise of the right of access to legal advice, and that more Interrogation Code protection for the right was needed. Interview with Eric Soden, Home Office (July 24, 1989). Although the accuracy of information about legal advice would seem to be an important requirement, the Court of Appeal in Regina v. Hughes, 1988 CRIM. L. REV. 519 (C.A.), sustained the admission of a confession after the police had mistakenly told a suspect, after the suspect's request, that a duty solicitor was not available. The Court found that the suspect had truly consented to the interview without a solicitor being present, despite the erroneous information he received from the police, and concluded that there would be no unfairness to the proceedings under § 78 of PACE in receiving the confession. *Id.* at 520. *Contra* Regina v. Vernon, 1988 CRIM. L. REV. 445 (Crown Court).

219. Interrogation Code, *supra* note 21, para. 3.4. The Law Society expressed concern that suspects were not taking advantage of their right to legal advice, and that one reason was the ease with which an individual could sign the custody record declining legal advice without his attention being drawn to what he was signing. It recommended the simple solution that the format of the custody record be changed to highlight the choice available to the suspect. LAW SOCIETY RESPONSE TO REVIEW, *supra* note 156, para. 6. The Home Office now recommends that a provision be added stating that "[t]he custody officer is responsible for ensuring that the person signs the custody record in the correct place to give effect to his decision." Revised Interrogation Code, *supra* note 109, para. 3.4. Researchers have suggested, however, that the real problem may be that the police use various "ploys," including failure to give the warning or administering it in an incomprehensible fashion, to avoid the assertion of the right of access to legal advice. *See* Sanders & Bridges, *supra* note 180, at 498-

Beyond the right to remain silent and the right to obtain legal advice, both of which are similar to the American *Miranda* warnings, British detainees are also informed of their right to have an interested individual notified of their arrest.[220] The police are obligated to inform the specified individual of the arrest and location of the detainee, unless there are specific grounds to justify a delay.[221] Additionally, police must inform callers to the police station with an interest in the detainee's welfare of his status and whereabouts,[222] unless the individual declines to have such information released.[223]

Although many of the rights are framed in terms of detainees and arrestees, there is a general policy in the Interrogation Code to protect similarly those who are not formally in police custody. The Notes for Guidance specifically provide that those who attend a police station "voluntarily to assist with an investigation should be treated with no less consideration (*e.g.*, offered refreshments at appropriate times) and enjoy an absolute right to obtain legal advice or communicate with anyone outside the police station."[224] Nor can British police keep secret their custodial intentions. The Interrogation Code provides that anyone voluntarily attending a police station may leave unless placed under arrest, and, if the authorities determine that the individual should not be allowed to leave, he must be so informed and taken before the custody officer.[225] If a caution has been administered, but

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503, 507.

220. Interrogation Code, *supra* note 21, para. 3.1(i). A written notice to this effect must be provided to the individual, and written acknowledgement of its receipt should be obtained. *Id.* para. 3.2. The right itself has a statutory basis in PACE, 1984, ch. 60, § 56. The individual can designate someone he knows or someone "who is likely to take an interest in his welfare." Interrogation Code, *supra* note 21, para. 5.1.

221. Interrogation Code, *supra* note 21, annex B, para. 1. The factors which justify a delay in notifying another person of the detainee's arrest are the same as those that must be satisfied to justify a delay in access to legal advice. These include reasonable grounds to believe that notification will lead to interference with or harm to evidence, interference with or harm to other persons, the alerting of other suspects not yet arrested, or hindering the recovery of property obtained in connection with the commission of the offense. *Id.*

222. *Id.* para. 5.5.

223. *See id.* para. 5.9(c). Under recent Home Office proposals, the detainee must be asked to countersign the record of any such refusal. Revised Interrogation Code, *supra* note 109, para. 5.9(c).

224. Interrogation Code, *supra* note 21, notes for guidance, para. 1A.

225. Interrogation Code, *supra* note 21, para. 3.9.

the individual has not been arrested, he must be notified that he has not been arrested and that he has no duty to remain with the police; if the individual remains, however, he is entitled to legal advice.[226]

The decision to charge a suspect with an offense has a significant impact on the interrogation process. First, the charging decision obliges the police to notify the suspect of the exact charge, the particulars of the case, the identity of the investigating officer, and to reiterate the caution that the suspect need not answer any questions, but that anything he might say can be used as evidence.[227] More importantly, however, the decision to charge curtails sharply the opportunities for further police interrogation. This is developed in an extended section of the Interrogation Code that provides:

> Questions relating to an offence may not be put to a person after he has been charged with that offence, or informed that he may be prosecuted for it, unless they are necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement, or where it is in the interests of justice that the person should have put to him and have an opportunity to comment on information concerning the offence which has come to light since he was charged or informed that he might be prosecuted.[228]

In the case of any such questioning, moreover, the police are obligated to recaution the suspect.[229]

PACE directs the authorities to reach promptly a charging decision. Under the terms of the Act, the custody officer must either charge or release a suspect when he "determines that he has before him sufficient evidence to charge the person arrested with the offence for which he was arrested."[230] The

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226. *Id.* para. 10.2. Anyone voluntarily at the police station who inquires about legal advice is entitled to the notice explaining the arrangements for obtaining it. *Id.* notes for guidance, para. 3G.

227. *Id.* para 17.3.

228. *Id.* para. 17.5. The Interrogation Code allows an individual who has been charged to be confronted with any written statement or interview of another individual, but admonishes the officer to "say or do nothing to invite any reply or comment." *Id.* para. 17.4.

229. *Id.* paras. 17.2, 17.4-.5.

230. PACE, 1984, ch. 60, § 37(7).

Interrogation Code provides that when the police officer "considers that there is sufficient evidence to prosecute a detained person he should without delay bring him before the custody officer who shall then be responsible for considering whether or not he should be charged."[231] Even though both provisions clearly rely on subjective police judgments, they nevertheless indicate that delay past the point when the police have sufficient evidence to charge a suspect is inconsistent with the policy of both PACE and the Interrogation Code. Nor can these requirements be avoided by delaying the imposition of custody. Whether the individual is detained or not, the Interrogation Code directs that "[a]s soon as a police officer who is making enquiries of any person about an offence believes that a prosecution should be brought against him and that there is sufficient evidence for it to succeed, he shall without delay cease to question him."[232]

The extended treatment of the circumstances that obligate the police to warn the suspect of her rights, as well as the substantial attention given to the conditions that preclude further police questioning, stand in marked contrast to the lack of any detailed consideration of the requirements for a valid waiver of interrogation rights. The Interrogation Code does no more than require satisfactory records of the decision to forego an interrogation right; it does not delve into the circumstances behind the choice. The Interrogation Code requires only that the individual "be asked to sign on the custody record to signify whether or not he wants legal advice at this point."[233] The focus on this procedural aspect of relinquishing the right to legal advice, however, is not supplemented by anything addressing the substantive standard for evaluating the suspect's decision to decline the assistance of a solicitor. This stands in marked contrast to the extensive judicial attention given to the waiver doctrine under *Miranda*.[234]

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231. Interrogation Code, *supra* note 21, para. 17.1. Under proposed Home Office revisions, the officer must also evaluate if "there is sufficient evidence for a prosecution to succeed" as well as whether the individual has "said all that he wishes to say about the offence." Revised Interrogation Code, *supra* note 109, para. 16.1. The effect of this proposal would be to grant police somewhat greater leeway to delay the charging decision.

232. Interrogation Code, *supra* note 21, para. 11.2.

233. Interrogation Code, *supra* note 21, para. 3.4.

234. *See, e.g.*, Colorado v. Connelly, 479 U.S. 157 (1986); North Carolina v.

D. Persons at Risk

The structure of PACE and the Interrogation Code creates a series of protections for those who are or appear to be particularly vulnerable.[235] The guidance notes set out the reason for this approach:

> It is important to bear in mind that, although juveniles or persons who are mentally ill or mentally handicapped are often capable of providing reliable evidence, they may, without knowing or wishing to do so, be particularly prone in certain circumstances to provide information which is unreliable, misleading or self-incriminating.[236]

Permitting such statements to be used as evidence would be inconsistent with the Interrogation Code's general objective of "obtain[ing] from the person concerned his explanation of the facts, and not necessarily . . . an admission."[237]

Central to the scheme for protecting persons at risk, including juveniles, the mentally ill, and the mentally handicapped, is the police obligation to involve an appropriate adult. In the case of a juvenile, this category includes her parent or guardian, the organization responsible for her if she has been placed in care, a social worker, or, failing the above, another responsible adult who is not a police officer or em-

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Butler, 441 U.S. 369 (1979); *see generally* Berger, *supra* note 119 (discussing the *Miranda* waiver doctrine). The absence of substantive waiver standards is of particular concern in light of available evidence that police use various tactics to deter the use of solicitors. This, at least, was the conclusion of a report prepared for the Lord Chancellor's Department. *See* The Times (London), Nov. 29, 1989, at 7, col. 1.

235. Prior law treated the admission of confessions from such individuals as a matter of trial court discretion. As the Court of Appeal in Regina v. Miller, 83 Crim. App. 192 (1986), observed "a judge here has a discretion whether to refuse or to admit to evidence a confession which came from a mind which at the time was possibly irrational and what the defendant said may have been the product of delusion and hallucinations." *Id.* at 200. In fact, some believe that concern over police interrogations involving three teenagers who falsely confessed and were wrongly convicted of a homicide in 1972 was the immediate impetus for establishing the Royal Commission on Criminal Procedure. *See* Reiner, *The Politics of the Act,* 1985 PUB. L. 394, 397.

236. Interrogation Code, *supra* note 21, notes for guidance, para. 13B.

237. *Id.* notes for guidance, para. 12A.

ployed by the police.[238] For those who are mentally ill or mentally handicapped, appropriate adults include a relative, guardian, other person responsible for her care, or someone not a police officer or employed by the police who has experience dealing with the mentally ill or mentally handicapped.[239] If none of these persons is available, another responsible adult who is not a police officer or employed by the police can fulfill the role.[240] Solicitors may act as the appropriate adult for all categories of persons at risk, but the Home Office has recommended that this be a last resort.[241] Finally, the Interrogation Code directs police to treat individuals as juveniles, mentally ill, or mentally handicapped if they appear to fit in the category, thereby resolving doubts in favor of extending the extra Interrogation Code protections.[242]

In the overall structure of PACE and the Interrogation Code, the appropriate adult acts as an aide to the detainee. The police must first notify the appropriate adult as soon as practicable of the person's detention and her whereabouts and must inform the adult of the right to consult with a solicitor and review the Code requirements.[243] More significantly, police are instructed not to interrogate or obtain statements from juveniles, the mentally ill or the mentally handicapped in the absence of an appropriate adult unless urgent conditions are present involving "an immediate risk of harm to persons or serious loss of or serious damage to property."[244] Moreover, the requirement that questioning take place in the

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238. *Id.* para. 1.7(a).

239. *Id.* para. 1.7(b)(i)-(ii).

240. *Id.* para. 1.7(b)(iii).

241. Revised Interrogation Code, *supra* note 109, notes for guidance, para. 1F.

242. Anyone appearing to be under 17 must be treated as a juvenile in the absence of clear evidence that he is older. Interrogation Code, *supra* note 21, para. 1.5. If the police have any suspicion or are told in good faith that a person is mentally ill, mentally handicapped, or incapable of understanding the significance of questions put to her or of her replies, she must be treated as mentally ill or handicapped for purposes of the Interrogation Code. *Id.* para. 1.4.

243. *Id.* para. 3.6 (stating that the detainee must be informed of the appropriate rights in the presence of the adult, effectively informing the adult as well).

244. *Id.* annex C, para. 1; *see also id.* para. 13.1. Once "sufficient information to avert the immediate risk has been obtained," questioning cannot continue in the absence of the appropriate adult. *Id.* annex C, para. 2. The same standard must be met if police wish to interview immediately an individual "heavily under the influence of drink or drugs." *Id.* annex C, para. 1(a). Otherwise, "[n]o person who is unfit through drink or drugs to the extent that he is unable to appreciate the significance of questions put to him and his answers may be questioned about an alleged offence in that condition." *Id.* para. 12.3.

presence of an appropriate adult, absent urgent conditions, is mandatory and not limited to police station interviews.[245] As long as the police questions are designed to obtain admissions, only conditions meeting the test for urgent interviews warrant proceeding without making the necessary contact.[246]

Any caution administered in the absence of the appropriate adult must be repeated in her presence unless the interview has been concluded,[247] and the appropriate adult may also request legal advice for the detainee.[248] The instructions contained in the guidance notes reiterate the importance of these procedures:

> The appropriate adult should be informed that he is not expected to act simply as an observer. The purposes of his presence are, first, to advise the person being questioned and to observe whether or not the interview is being conducted properly and fairly; and, secondly, [sic] to facilitate communication with the person being interviewed.[249]

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245. *See* Regina v. Fogah, 1989 CRIM. L. REV. 141 (Crown Court 1988). Because the authorities violated the requirement, the judge excluded the confession under the discretionary authority of § 78 of PACE. *Id.* at 141. In Regina v. Lamont, 1989 CRIM. L. REV. 813 (C.A.), the Court of Appeal was similarly faced with a challenge to the admissibility of a confession made by a mentally handicapped individual without the presence of an appropriate adult. The Court passed over the admissibility of the confession to rule that the trial judge should have directed the jury to exercise caution in its consideration of the defendant's statements as required by § 77. *Id.* at 814. Most similar cases have been handled by excluding the statement rather than admitting it subject to a cautionary warning to the jury, and *Lamont* does not necessarily indicate that the warning procedure is an adequate alternative. *See* Cowan, *Commentary to* R. v. Lamont, 1989 CRIM. L. REV. 814.

246. *See, e.g.*, Regina v. Absolam, 88 Crim. App. 332, 336 (1988). A more recent case, Regina v. Maguire, 1989 CRIM. L. REV. 815 (C.A.), seeks to distinguish situations in which the police are not asking questions designed to obtain admissions, from those in which the police are seeking an explanation at or near the scene of the offense tending to exculpate the suspect, is. The latter would not be considered an interview and thus would not be subject to the restrictions of PACE and the Interrogation Code. This approach has been criticized, however, as "not in itself sustainable" and "dangerous." Knapman, *Commentary to* R. v. Maguire, 1989 CRIM. L. REV. 816-17.

247. Interrogation Code, *supra* note 21, para. 13.1.

248. *Id.* para. 13.2. Proposed Home Office revisions make it clear that if the individual requests legal advice himself, police should not wait until the arrival of the appropriate adult before acting on the request. Revised Interrogation Code, *supra* note 109, notes for guidance, para. 3F.

249. Interrogation Code, *supra* note 21, notes for guidance, para. 13C.

It is possible that the appropriate adult, acting as an advisor, might interfere with police efforts to obtain statements from the detainee. The Interrogation Code, however, does not provide for such a case, although one might expect the police to treat the problem the same as if the interference came from a solicitor.[250]

E. Taking and Recording Statements

Although English law presents opportunities to challenge the lawfulness of a police interrogation, available evidence indicates that challenges more frequently are based on the accuracy of alleged statements offered in court. Defendants are more likely to claim that they never said what the authorities claim they did, or that the way police phrased their statements was misleading or incomplete, than to assert that their statements were the result of oppression or were obtained under conditions likely to render them unreliable.[251] The Interrogation Code addresses these concerns.

Initially, the Code admonishes police that "[a]n accurate record must be made of each interview" whether or not it occurs at a police station.[252] With respect to interviews at a police station or other premises, police must make a record of the place and time of the interview, all witnesses, all breaks, and a statement of when the record itself was made.[253] The interview record must include the actual statement made by the interviewee, and the Interrogation Code further provides:

> [T]he record must be made during the course of the interview, unless in the investigating officer's view this would not be practicable or would interfere with the

250. *See supra* notes 188-94 and accompanying text.

251. "Disputes over the accuracy or completeness of the officer's record were three to four times as frequent as challenges to the admissibility of incriminating statements." Vennard, *Disputes Within Trials Over the Admissibility and Accuracy of Incriminating Statements: Some Research Evidence*, 1984 CRIM. L. REV. 15, 21; Interview with J. Vennard, Home Office (Aug. 3, 1989).

252. Interrogation Code, *supra* note 21, para. 11.3(a).

253. *Id.* para. 11.3(b)(i). The record should be made during the course of the interview or, if not, as soon as practicable after the completion of the interviews. *Id.* paras. 11.3(b)(ii), 11.4. Moreover, the officer must record the reason for any delay in completing the interview record. *Id.* para. 11.6.

> conduct of the interview, and must constitute either a verbatim record of what has been said or, failing this, an account of the interview which adequately and accurately summarises it.[254]

Records of police station interviews must also be shown to the interviewee who may indicate inaccuracies or sign it as correct.[255]

After the individual has been charged, the Interrogation Code attempts to provide even more security to ensure the accuracy of the record of the individual's statements. The regulations provide that "[a]ny questions put after charge and answers given relating to the offence *shall* be contemporaneously recorded in full on the forms provided and the record signed by that person or, if he refuses, by the interviewing officer and any third parties present."[256] This reflects the greater restrictions applicable to questioning after a charge has been filed.[257]

The police must give anyone who has been cautioned the opportunity to write down his own statement.[258] The police are instructed not to prompt the individual in the preparation of her statement, except to identify which matters are material and to point out any ambiguity.[259] The individual can request that the police write the statement for him, in which case the officer "must take down the exact words spoken by

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254. *Id.* para. 11.3(b)(ii). In response to a Home Office consultation document, the Law Society urged that the requirement of a contemporaneous record of the interview be retained. LAW SOCIETY RESPONSE TO REVIEW, *supra* note 156, para. 15a. Despite police criticism of contemporaneous note taking, the Law Society was concerned that any change would lead to public criticism of the police and would create the potential for abuse. Proposed code changes issued by the Home Office retain the original code requirements. Revised Interrogation Code, *supra* note 109, para. 11.3(c).

255. Interrogation Code, *supra* note 21, para. 12.12. If "the appropriate adult or another third party is present at an interview" and available, he must be asked to read and sign the written record of the interview as correct or indicate any inaccuracies. *Id.* para 12.15. Any refusal to do so by the individual must be recorded by the police. *Id.* Under Home Office proposals, the same opportunity should be given to the person's solicitor under similar circumstances. Revised Interrogation Code, *supra* note 109, paras. 11.9, 11.10.

256. Interrogation Code, *supra* note 21, para. 17.8 (emphasis added).

257. *See supra* notes 227-32 and accompanying text.

258. Interrogation Code, *supra* note 21, annex D, para. 1. In conjunction with the individual's written statement, the Code calls for her to be asked to prepare and sign a written document indicating that she has made her statement with knowledge that it is not required and can be used in court. *Id.* annex D, para. 2.

259. *Id.* annex D, para. 3.

the person making it and . . . must not edit or paraphrase it."[260] If this procedure is employed, the person must be asked to sign the statement indicating that he has requested that the police write down his remarks with knowledge that he may remain silent and that anything he does say can be given as evidence.[261] He must be asked to read the statement after the police have prepared it and to sign a declaration that it is truthful, after being given the opportunity to make corrections and additions.[262] If the individual refuses to verify the statement, the senior officer present is directed by the regulations to read it over to him, ask for alterations and the interviewee's signature, and then certify what occurred.[263]

Case law since the adoption of the Interrogation Code has indicated that the recording requirement is a serious obligation that police ignore at their own risk. In one Crown Court ruling, *Regina v. Saunders*,[264] the suspect stated that she would not consent to an interview if a written record were made. The officers proceeded with the questioning and later wrote down her responses from memory, but without noting why they failed to make a contemporaneous record and without presenting the record to the suspect to review for accuracy.[265] As a result, the court excluded the confession.[266] For the police, the simple solution to this problem is to prepare a record of the interview after its conclusion, explain that the suspect's objection was the reason the record was not made contemporaneously, and offer the record to the individual to review. If the suspect's real objective was to have no record of the interview made at all, her wishes clearly are not being respected. PACE and the Interrogation Code do not provide for the kind of off-the-record discussion this would entail.[267]

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260. *Id.* annex D, para. 5.
261. *Id.* annex D, para. 4.
262. *Id.* annex D, para. 6
263. *Id.* annex D, para. 7.
264. 1988 CRIM. L. REV. 521 (Crown Court).
265. *Id.* at 521-22.
266. *Id.* at 522.
267. The solution of one commentator is to inform the individual that a record must be made of the interview and to recommend that it be contemporaneous. *See* Davies, *Commentary to* R. v. Saunders, 1988 CRIM. L. REV. 522. From the police perspective, however, this may create a risk that the suspect will choose not to speak

Another excuse offered to justify the failure to make contemporaneous notes has been that it disrupts the spontaneity of the questioning session and gives the suspect too much time to think of an untruthful answer. In *Regina v. Maloney*,[268] the Crown Court rejected this explanation, and the relevant statements were excluded under the fairness-based discretion of section 78 of PACE.[269] The result was similar to the decision to exclude the confession in *Regina v. Foster*.[270] In *Foster*, the court found that the quick chat between the police and the suspect, which produced incriminating admissions, did not comply with Interrogation Code requirements in that no contemporaneous note was made of the exchange, nor was the suspect given the opportunity to verify the accuracy of the police description of the conversation.[271]

Although contemporaneous note taking and review of the statement by the suspect at the conclusion of the interview may improve the reliability of the record of the interview, it still remains short of the accuracy achievable through tape recording. Despite repeated calls for a systematic tape recording program,[272] resistance to such suggestions has

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at all.

268. 1988 CRIM. L. REV. 523 (Crown Court). The report of the case notes further Interrogation Code breaches, including failing to give suspects an opportunity to check the record of the interview and failing to secure assistance for the apparently illiterate suspects. *Id.* at 524.

269. *Id.* at 524.

270. 1987 CRIM. L. REV. 821 (Crown Court).

271. *Id.* at 821-22; *see also* Regina v. Keenan, [1990] 2 Q.B. 54 (C.A. 1989). Yet, as Regina v. Waters, 1989 CRIM. L. REV. 62 (C.A. 1988), indicates, the very same fairness-based discretion can be used to admit the confession evidence following the failure to make a contemporaneous record of the suspect's statement. *Id.* at 63. In a very literal reading of Interrogation Code, *supra* note 21, para. 12.12, the Court of Appeal ruled in a later case that the obligation to present the record of the interview to the suspect for verification or rejection applies only to interviews in a police station. Regina v. Brezeanu, 1989 CRIM. L. REV. 650, 651 (C.A.). Reacting quite differently, in Regina v. Canale, 91 Crim. App. 1 (1989), the Court of Appeal strongly rebuked the police for failing to follow Code provisions requiring a record of the interview and excluded the resulting statements. *Id.* Thereafter, in Regina v. Dunn, 91 Crim. App. 237 (1990), the Court of Appeal allowed contested statements to be admitted, despite similar Code breaches, because of the presence of a solicitor's clerk during the interview. *Id.* at 243. The inconsistent pattern of decisions raises serious questions as to how the fairness-based discretion of § 78 of PACE is being employed. *See generally* Gelowitz, *Section 78 of the Police and Criminal Evidence Act 1984: Middle Ground or No Man's Land?*, 106 LAW Q. REV. 327 (1990).

272. As far back as 1972, the Criminal Law Revision Committee recommended that police begin experimenting with using tape recorders during interrogation. *See* CRIMINAL LAW REVISION COMMITTEE, ELEVENTH REPORT: EVIDENCE (GENERAL), 1972,

been persistent and vehement. Police were concerned that introducing tape-recording equipment into the interrogation room would lessen their ability to obtain incriminating statements.[273]

The Royal Commission on Criminal Procedure considered but ultimately rejected the police objections in its 1981 Report.[274] Believing that tape recording entire interviews would create problems involving the recording of much irrelevant material, as well as transcription difficulties, the Commission recommended a more limited program. It called for the police to record an oral summary of the main points of the interrogation at the conclusion of the session, with the suspect being given the opportunity to offer her comments on the oral summary.[275] The Commission rejected calls to experiment further before implementing its tape recording system, observing that "the time for further experiments to test feasibility is past" and that "tape recording could start now."[276]

When Parliament finally considered the PACE proposals, it decided to reject the limited Royal Commission plan in favor of a full-scale system of tape recording the entire interrogation procedure. This was embodied in section 60 of PACE, which directed the Secretary of State to issue a code of practice to govern the tape recording of interrogations.[277] The first step toward this goal was a series of field trials to assess the impact and feasibility of tape recording.[278] The success of the experiments, in turn, led to the Code of Practice on Tape Recording (the "Tape Recording Code"), which was issued in 1988.[279]

CMND. No. 4991, para. 51. *See generally* Baldwin, *The Police and Tape Recorders*, 1985 CRIM. L. REV. 695.

273. Police evidence submitted to the Royal Commission on Criminal Procedure identified other arguments against tape recording: the potential cost of tape recording; a negative impact on the evidentiary value of unrecorded evidence; and disputes as to conditions preceding the point at which the tape recorder was turned on. *See* Berger, *supra* note 38, at 530 n.147 and accompanying text.

274. ROYAL COMM'N REPORT, *supra* note 19, paras. 4.16-.30.

275. *Id.* paras. 4.26, 4.27.

276. *Id.* para. 4.29.

277. PACE, 1984, ch. 60, § 60.

278. The results of the field experiments are reported in C. WILLIS, THE TAPE-RECORDING OF POLICE INTERVIEWS WITH SUSPECTS: AN INTERIM REPORT, HOME OFFICE RESEARCH STUDY NO. 82 (1984); C. WILLIS, J. MACLEOD & P. NAISH, THE TAPE-RECORDING OF POLICE INTERVIEWS WITH SUSPECTS: A SECOND INTERIM REPORT, HOME OFFICE RESEARCH STUDY NO. 97 (1988).

279. Tape Recording Code, *supra* note 21.

The Tape Recording Code describes procedures for the open recording of interviews,[280] with suspects specifically informed that the interview will be recorded.[281] If the suspect objects, the police should record the objections before turning off the tape machine;[282] the Tape Recording Code does not provide for surreptitious taping. The goal is to ensure confidence that the tape recording represents "an impartial and accurate record of the interview."[283] A system of twin deck tapes and other security measures are included to further this objective.[284]

In light of equipment considerations, such as the different physical conditions in police cars or on the street, the Tape Recording Code is limited to stationhouse interviews.[285] It applies to all statements under caution relating to indictable offenses, questioning about such offenses after a suspect has been charged or informed that he may be prosecuted, and situations in which an officer wishes to bring a statement made by some other person to the attention of an individual who has been charged or informed that he may be prosecuted.[286] Those voluntarily attending a police station interview are also covered by the tape recording requirements once the police have reasonable grounds to believe that the individual is a suspect.[287]

If tape recording is otherwise required, the custody officer can approve a decision not to tape record the questioning in the limited cases in which the equipment is unavailable or has failed and there are reasonable grounds for not delaying the questioning, or where it is clear that there will be no prosecution.[288] When tape recording is required, "[t]he whole of

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280. *Id.* para. 2.1. This is consistent with the rejection of surreptitious recording by the Royal Commission. ROYAL COMM'N REPORT, *supra* note 19, para. 4.27.

281. Tape Recording Code, *supra* note 21, para. 4.2(a).

282. *Id.* para. 4.5. The section goes on the provide that if "the police officer reasonably considers that he may proceed to put questions to the suspect with the tape recorder still on, he may do so." *Id.* The notes for guidance warn that "to continue recording against the wishes of the suspect may be the subject of comment in court." *Id.* notes for guidance, para. 4G. The Code, however, does not specify what factors would justify the officer's belief that he may continue to use the tape recorder after the suspect objects.

283. *Id.* para. 2.1.

284. *Id.* paras. 2.2, 6.1-.3.

285. *Id.* para. 3.1.

286. *Id.* The notes specifically exclude terrorist offenses related to Northern Ireland and violations of the Official Secrets Act of 1911. *Id.* para. 3.2.

287. *Id.* para. 3.4.

288. *Id.* para. 3.3.

each interview shall be tape recorded, including the taking and reading back of any statement."[289] Police are warned in the guidance notes that "[a] decision not to tape record . . . may be the subject of comment in court" and they "should therefore be prepared to justify [the] decision in each case."[290]

Even though the Tape Recording Code envisions recording interviews, it does not provide for transcribing all of the resulting tapes. One of the concerns in a system with universal taping of interviews is that it will entail much unnecessary cost and time in preparing transcripts or monitoring the tapes. The Code's solution to this has been to direct police to prepare a written (but not verbatim) record of the interview.[291] The defense can then accept or reject the police version,[292] and if accepted it can "be used for the conduct of the case by the prosecution, the defence, and the court."[293] On this basis, "[t]he record shall, therefore, comprise a balanced account of the interview including points in mitigation and/or defence made by the suspect."[294]

III. IMPLICATIONS OF PACE AND THE INTERROGATION CODE

PACE and the codes of practice represent a dramatic overhaul of British criminal justice procedures. The legislation and regulations altered significant features of both common-law legal standards and more informal police practices. The police found themselves subject to a variety of new restraints governing very specific details of their interrogation procedures and presenting a risk to the admissibility of any confessions they might obtain if they did not adhere to the new standards. Yet, despite the magnitude of the change, the

289. *Id.* para. 3.5.
290. *Id.* notes for guidance, para. 3K.
291. *Id.* para. 5.3. The guidance notes provide that the purposes of the interview record include enabling the prosecutor to make informed judgments about the case and to comply with advance disclosure requirements. *Id.* notes for guidance, para. 5B.
292. *Id.* para. 5.4.
293. *Id.* notes for guidance, para. 5B.
294. *Id.*

British government developed and implemented the system in an orderly fashion. In reviewing and revising the codes, only limited changes have proven necessary.[295]

What Great Britain has accomplished, through PACE and the Interrogation Code in particular, demonstrates that it is possible to combine legislative and regulatory control of police interrogation practices to produce an effective structure of supervision. As the British system illustrates, the structure can incorporate protections for the suspect alongside other provisions that spell out the scope of police authority in the questioning process. Great Britain's experience indicates that the criminal justice system can adjust to these changes without undue disruption, even though in some respects they provide greater protections for the suspect.[296]

An American replication of PACE is not possible, however, because criminal justice procedures are defined at the state level in the United States, subject to constitutional minimums,[297] unlike in Great Britain, which has a centralized policing system under the supervision of the Home Secretary and no comparable system of constitutional review.[298] Additionally, different traditions, values, and crime problems in the two countries would make any effort to adopt the British approach without adjustment unwise. Instead, Great Britain's

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295. The number of changes actually made in the Revised Interrogation Code, *supra* note 109, was limited, and most changes were of a technical nature. The Home Office official responsible for evaluating comments about the Interrogation Code, as well as preparing the revision, maintained that there had been general satisfaction with how the Code had functioned. Interview with Eric Soden, Home Office (July 24, 1989).

296. There was some indication of a slump in the clearance rate for offenses after the implementation of PACE and the Interrogation Code, but this was a temporary drop, and clearance rates (the percentage of reported offenses "cleared" by arrest) picked up again. In light of other criminal justice changes during this period, including the institution of the Crown Prosecution Service, the entire responsibility for the temporary reduction in clearance rates cannot be attributed to the interrogation law changes. Interview with Julie Vennard and David Brown, Home Office Research Unit (Aug. 3, 1989).

297. *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 15, at 2; *see also* Israel, *On Recognizing Variations in State Criminal Procedure*, 15 U. MICH. J.L. REF. 465 (1982). State courts have, in fact, been urged to interpret their constitutions more broadly than Supreme Court interpretations of the United States Constitution to achieve greater protection for individual rights. *See, e.g.*, Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). This process has been referred to as the "new federalism." Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 437-40 (1973).

298. *See supra* note 18 and accompanying text.

reformulation of its confession law system can serve as a blueprint for how to approach the regulation of interrogation procedures, rather than as a series of specific solutions to the issues raised by police questioning practices. It highlights the kinds of problems that should be addressed in a legislative and regulatory framework.

Central to any legislative and regulatory scheme for supervising of police interrogation procedures is ensuring the right to legal advice. British authorities recognized this necessity and clearly articulated in PACE and the accompanying Interrogation Code that suspects have the right to consult with a solicitor, except under the narrowest of circumstances,[299] and that the solicitor may provide legal advice even if it amounts to a recommendation that the suspect not answer police questions.[300] Moreover, the government developed a duty-solicitor scheme to ensure that solicitors would be available to provide legal advice.[301] The resulting structure incorporates far more protection than was previously available under the Judges' Rules.[302]

In light of the British movement toward increased reliance on the right to legal advice in the interrogation process, the United States Department of Justice proposal to eliminate the *Miranda* rule and return to the voluntariness test,[303] under which denials of requests for counsel had been tolerated by the courts,[304] appears to represent a step backward. The British have concluded that a protected right to legal advice is entirely consistent with the goal of ensuring the reliability of statements obtained through police interrogation.[305]

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299. *See supra* notes 145-49 and accompanying text.

300. Interrogation Code, *supra* note 21, annex B, para. 2.

301. *See supra* notes 197-200 and accompanying text.

302. *See supra* note 38.

303. REPORT NO. 1, PRETRIAL INTERROGATION, *supra* note 6, at 542-49.

304. *See, e.g.*, Cicenia v. Lagay, 357 U.S. 504, 508-11 (1958); Crooker v. California, 357 U.S. 433, 438-41 (1958). Both *Cicenia* and *Crooker* have been discredited. *See* Escobedo v. Illinois, 378 U.S. 478 (1964); Miranda v. Arizona, 384 U.S. 436 (1966).

305. Critics of the right to legal advice in the police interrogation process express concern that the result may be a decrease in the number of confessions obtained by the police. *See, e.g.*, Blair, *Silence: Change the Law in the Cause of Justice*, The Times (London), Nov. 7, 1987, at 10, col. 1. This has led to a proposal within the Home Office to restrict substantially the scope of the right to silence in police interrogations by allowing silence to be used to impeach and as the basis for an adverse inference against the accused. *See* Berger, *supra* note 179, at 39; HOME OFFICE, REPORT OF THE WORKING GROUP, supra note 179. The summary of the

This scheme includes informing the suspect of the right[306] and even providing access to a solicitor without charge.[307] Rather than eliminating the *Miranda* requirement that suspects be informed of their right to counsel, American legislatures would do well to consider statutory protection for the availability of legal advice in the police interrogation process as the British have done.

Neither British nor American law has required that suspects consult with counsel before submitting to police questions, even though this has been proposed in both countries.[308] Instead, suspects are given the option to secure legal advice but are free to answer police questions if they so desire. British reforms have not addressed in detail the problem of supervising the decision to accept or forego the right of access to a solicitor. This presents an area requiring attention.

Initially, standards should define the procedures for exercising or declining the right to legal advice. British rules now require an explicit choice in writing,[309] whereas waivers under American law are determined from the totality of the

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available research contained in the appendix to the Home Office Working Group Report provides only raw numbers indicating the frequency of confessions in two small surveys, without considering other possible contributing factors and without any comparative figures indicating confession rates prior to the passage of PACE. *Id.*, app. C, at 60-65. More accurately, "[t]here is not as yet any reliable evidence that the number of people exercising the right of silence post PACE has increased." LAW SOCIETY, THE RIGHT OF SILENCE: LAW SOCIETY'S RESPONSE TO THE HOME OFFICE WORKING GROUP PAPER ON THE RIGHT OF SILENCE para. 14 (1989). In much the same way, the major studies on implementing *Miranda* provide no definitive conclusions on the impact of interrogation warnings when given to suspects before the start of questioning. *See* Medalie, Zeitz & Alexander, *supra* note 4; Seeburger & Wettick, *supra* note 4; Project, *supra* note 4. Indeed, the New Haven project concluded that "warnings had little impact on suspects' behavior. No support was found for the claim that warnings reduce the amount of 'talking.' " *Id.* at 1563.

306. *See supra* notes 216-19 and accompanying text.

307. No means test applies to the provision of legal advice in connection with police interrogations. *See supra* note 198 and accompanying text.

308. The National Council for Civil Liberties in Great Britain recommended in its proposals to the Royal Commission on Criminal Procedure that the right of access to a solicitor be made nonwaivable. Remarks of Harriet Harmon, Counsel, National Council for Civil Liberties, at the Inner Temple Conference on Questioning and the Rights of the Suspect, in London, U.K. (Sept. 26, 1981). A proposal for mandatory presence of counsel during interrogation was made by the ACLU in its *Miranda* brief. *See* Brief of the American Civil Liberties Union, Amicus Curiae, Miranda v. Arizona, 384 U.S. 436 (1966) (No. 759), *reprinted in* 63 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 727-36 (1975).

309. Interrogation Code, *supra* note 21, para. 3.4.

circumstances and may be implied.[310] By requiring that the choice be explicit and ensuring that the proof of the choice is clear-cut, the British have opted for a system that minimizes any doubt regarding exactly what the defendant chose. There are no persuasive reasons for allowing less. More importantly, however, any comprehensive system governing the interrogation process should identify what police may do, if anything, to secure a waiver of the right to legal advice. Explanations of the suspect's rights may be necessary, but the British reforms do not authorize any police persuasion or trickery. There is no authority under American law for such tactics either, but legislative clarification of the waiver process would be helpful.

Along the same lines, guidelines are necessary for the interrogation session itself. Within the British system, questioning of a suspect may proceed if the suspect has requested legal advice and a solicitor has been secured.[311] The presence of a solicitor provides some assurance against police overreaching and represents a source of evidence as to what took place in the interrogation room. The result would be very much the same in the United States as well if police conduct their questioning of the suspect in the presence of his attorney. The more serious problems arise in those cases in which the interrogation follows a waiver of the right to legal advice. Without the presence of a legal advisor for the accused, who could also serve as an outside witness to the events in the interrogation room, police have opportunities for abuse with no external control or verification of their actions.

At the very least, there is a need for a legislative review in the United States of what police do in the interrogation process, either confirming or rejecting the kinds of tactics referred to in the police manuals.[312] Obviously, threats and violence must be prohibited, but what of such tactics as deceit, trickery, promises of favorable treatment and repeated efforts at persuasion? Ignoring the methodology of police interroga-

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310. *See, e.g.*, Fare v. Michael C., 442 U.S. 707, 724-25 (1979); North Carolina v. Butler, 441 U.S. 369, 374-75 (1979).

311. PACE, 1984, ch. 60, §§ 58, 59; Interrogation Code, *supra* note 21, paras. 6.1-.12.

312. The *Miranda* Court observed that police manuals were "[a] valuable source of information about present police practices," *Miranda*, 384 U.S. at 448, and surveyed the tactics they recommended. *Id.* at 448-55. A recent review of F. INBAU, J. REID & J. BUCKLEY, CRIMINAL INTERROGATION AND CONFESSIONS (3d ed. 1986), an earlier edition of which was among those interrogation manuals mentioned by the Supreme Court, appears in Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662 (1986).

tion allows police to use every means at their disposal to gain answers to their questions. Instead, the British examine this methodology through the courts applying the reliability standard for admitting confessions.[313] The central importance of the issue argues in favor of tackling it head on and informing police through the legislative process of tactical limitations they must observe.

In a similar vein, the legislature should also regulate the more objective characteristics of the interrogation process. British reforms have addressed the durational limits of questioning sessions,[314] the need for refreshments and breaks,[315] the physical environment in which the interrogation occurs,[316] the obligation to allow a full night of sleep,[317] and comparable matters.[318] Such details are lost if confessions are evaluated under a totality-of-the-circumstances test at the time their admissibility is challenged. To the contrary, these are matters entirely appropriate for legislative attention.

As a result of British reforms, substantial periods of detention are now permitted under PACE, albeit with various levels of supervisory and magistrate involvement as the period becomes more extended, and with legislative standards defining the conditions that must be met before extended detention can be authorized.[319] The reality of detention practices in the United States, however, also may mean substantial police control of the accused before any judicial involvement. The *McNabb-Mallory* rule,[320] which barred the admission in federal court of statements obtained from a detainee following unnecessary delay before his presentment

313. *See supra* notes 76-100 and accompanying text.

314. Along with more substantial breaks for meals and for sleep, short refreshment breaks every two hours are called for unless this would present a risk of harm to persons or serious damage to property, unnecessarily delay the individual's release from custody, or otherwise prejudice the outcome of the investigation. Interrogation Code, *supra* note 21, para. 12.7.

315. *Id.* paras. 8.6, 12.7.

316. Interrogation rooms should be adequately heated, lit, and ventilated. *Id.* para. 12.4.

317. *Id.* para. 12.2.

318. *E.g., id.* para. 12.5 (suspects may not be required to stand during interrogation).

319. *See supra* notes 120-23 and accompanying text.

320. Mallory v. United States, 354 U.S. 449 (1957); Upshaw v. United States, 335 U.S. 410 (1948); McNabb v. United States, 318 U.S. 332 (1943). *Contra* United States v. Mitchell, 322 U.S. 65 (1944).

in court, has been superseded by Congress,[321] and it does not appear that many states have been interested in adopting the prompt appearance approach.[322] If not, the issue of how long a suspect may be detained by the police and for what reason should be confronted directly.

American interrogation standards make no special provision for suspects who are impaired as a result of the ingestion of chemicals or alcohol; nor do they make any special provisions for the young or mentally handicapped. Again, using a totality-of-the-circumstances approach, American courts could effectively ignore the disabilities of the suspect in determining the admissibility of any statements he may have made. Such an approach, however, fails to recognize very serious risks that the suspect's responses may be unreliable. Requiring the presence of another responsible individual, as the British have done,[323] would seem a modest step to minimize that risk.

Finally, because police testimony concerning oral confessions is frequently challenged, the British devised strict controls to regulate the taking and recording of statements by the suspect. A Code of Practice on Tape Recording has been issued,[324] and if does not apply in particular circumstances, the police are required to prepare a contemporaneous written record of what the suspect said and allow him to review it.[325] No doubt audio and even video tape recording of statements occur in the United States, but encouraging or perhaps requiring its use would be worth considering. At the very least, where a suspect responds to police questions orally, police should be obligated to convert this into a written statement and allow the suspect to verify its accuracy.

The object of regulating the police interrogation process is not to increase or decrease the frequency with which suspects incriminate themselves in response to police questions. Rather, it is to allow police to question suspects within a framework that protects the reliability of any statements they obtain and ensures that the suspects are treated in an acceptable manner. The American legal system, however, has

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321. Omnibus Crime Control and Safe Streets Act of 1968, § 701(a), 18 U.S.C. § 3501(b)(1), (c) (1988); *see also* M. BERGER, *supra* note 5, at 133-34.

322. *See* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 6.3(c) (1985).

323. *See supra* notes 235-50 and accompanying text.

324. Tape Recording Code, *supra* note 21.

325. Interrogation Code, *supra* note 21, paras. 11.3(b)(ii), 12.12.

avoided undertaking the task of identifying what should be the proper scope of police authority to interrogate suspects. Instead, it has dealt with the admissibility of confessions on a case-by-case basis, first focusing on whether the statement met the voluntariness test, and later, after *Miranda*, adding the additional inquiry of whether the suspect had been properly warned and had effectively waived his rights. As recent British reforms indicate, interrogation issues can be legislatively addressed in a manner that is not limited to framing a standard for admitting confessions. The results of the British experience thus far further demonstrate that the police interrogation process in the United States would benefit from a comparable effort.