

***MIRANDA* IN TAIWAN: WHY IT FAILED AND WHY WE SHOULD CARE**

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In 1997, the Taiwanese legislature amended the Code of Criminal Procedure to incorporate the core of the American Miranda rule into the legal system. The Miranda rule requires police officers and prosecutors to notify criminal suspects subject to custodial interrogation of their right to remain silent and their right to retain legal counsel. In subsequent amendments, the legislature enacted a series of laws to further reform interrogation practices in the same vein.

What happened next is a study in unintended consequences and the interdependence of law and culture. Using ethnographic methods and data sources collected over the past four years from 48 police officers and 99 prosecutors in metropolitan Taiwan, this Article relates a cautionary tale. Under Taiwan's abbreviated Miranda system, suspects are encouraged to cooperate and give statements under the perception that they have been, and will continue to be, treated with politeness, dignity, and respect. Police and prosecutors use the Miranda mechanism (providing dignity, respect, and voice to suspects) to build rapport with suspects and distract them from the actual consequences of their full cooperation. Such concerns were implicated at a high level in the indictment of former Taiwanese president Ma Ying-Jeou in 2018, when prosecutors publicly denounced Ma for his "bad attitude" in exercising his right to remain silent during prosecutorial interviews.

* Research Social Scientist, American Bar Foundation. For extremely valuable comments and discussions I thank Ronald J. Allen, Elliot Aronson, John J. Donohue III, John Hagan, Deborah Hensler, Hsieh Meng-Chao (謝孟釗), Tonja Jacobi, Saul M. Kassir, Joshua Kleinfeld, Richard A. Leo, Robert J. MacCoun, Lawrence C. Marshall, Jonathan Simon, Charles D. Weisselberg, and Franklin E. Zimring. I owe special thanks to my mentors—Lawrence M. Friedman, David A. Sklansky, and Yang Yun-Hua (楊雲驊)—for their encouragement and guidance from the very beginning of this project. I am forever grateful for the kindness and wisdom of the late Joan Petersilia. Many thanks to the police officers, prosecutors, lawyers, media reporters, and advocates in Taiwan for sharing their stories and offering their friendships. I thank Tsai I-Tung (蔡沂彤) for her excellent research assistance. For significantly improving the piece, thank you to George D. Wilson, as well as to the superlative editors at *University of Pennsylvania Asian Law Review*.

In short, Miranda in Taiwan has become a double-edged sword: it provides dignified and respectful treatment for suspects while simultaneously placing heavy extralegal burdens on them to cooperate with law enforcement agencies. Because Taiwan's criminal justice system is a combination of western legal concepts and traditional Chinese social and cultural notions, Miranda and related rules have led to ever-greater discrepancies between what is written in the law books and how police interrogate in practice, and ever-greater gaps between suspects' expectations and prosecutorial realities.

Taiwan is not alone: more than one-hundred jurisdictions around the world now require warnings similar to the Miranda rule. It is possible that they suffer similar unintended consequences. I thus explore the effectiveness of alternative innovations beyond Miranda that could potentially reduce false confessions and minimize the risks caused by current interrogation practices.

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INTRODUCTION: THE *MIRANDA* REVOLUTION

By the 1950s and 1960s the criminal justice community in the United States had become increasingly dissatisfied with the nebulous due process voluntariness test.¹ As the general standard governing the admissibility of confession, the test offered little guidance to the police and the courts. A commentator later described the situation as being one where the U.S. Supreme Court [hereinafter the Court] created a test that made “everything relevant but nothing determinative.”² If the Court was to regulate police

¹ See Ronald J. Allen, *Miranda’s Hollow Core*, 100 NW. U. L. REV. 71, 75 (2006) (stating that “because of the ambiguity in what an “involuntary confession” is, and how one can be identified, the voluntariness test did not suffice to sort out truly voluntary from involuntary confessions resulting from police interrogation.”); Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 869–70 (1981) (stating that the pre-*Miranda* test “virtually invited” trial judges to “give weight to their subjective preferences” and “discouraged active review even by the most conscientious appellate judges”); William J. Stuntz, *Miranda’s Mistake*, 99 MICH. L. REV. 975, 980–81 (2001) (arguing that “the three decades before *Miranda* showed that a case-by-case voluntariness inquiry shorted badly, and at least part of the reason was that courts had a very hard time judging, case by case, the difference between good and bad police interrogation tacticsBy 1966, the voluntariness standard seemed to be failing, and so could not do the job for which it was designed”).

² Joseph D. Grano, *Miranda v. Arizona and the Legal Mind, Formalism’s Triumph Over Substance and Reason*, 24 AM. CRIM. L. REV. 243, 243–44 (1986). See also Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, SUP. CT. REV. 99 (1977) (discussing issues surrounding the voluntariness test and the Court’s response to it).

interrogation more effectively, it needed a clean test that did not require the complicated inquiry into whether the suspect had confessed voluntarily. It was in such a context that the Court issued the decision of *Miranda v. Arizona*, 384 U.S. 436 (1966).³ In *Miranda*, the Court concludes that the coercive atmosphere of custodial police interrogation compromises the Fifth Amendment privilege against self-incrimination, and that a level playing field requires a pre-interview waiver following a statement of a suspect's rights and the consequences of submitting to an interview. The Court thus requires police officers to inform suspects of their rights to remain silent and to the availability of legal counsel prior to confession. Statements made by defendants are inadmissible if a waiver of the rights to silence and counsel was not made "voluntarily, knowingly, and intelligently."⁴

The U.S. legal community has provided abundant resources for considering *Miranda's* social effects in the decades since the *Miranda* decision.⁵ Some empirical studies show that the *Miranda*

³ *Miranda v. Arizona*, 384 U.S. 436 (1966). See also Yale Kamisar, *Miranda: The Case, The Man, and the Players*, 82 MICH. L. REV. 1074, 1077 (1984) (suggesting that *Miranda* is a compromise between the old totality-of-the-circumstances test and extreme proposals that threaten to put an end to confession); Saul M. Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 LAW & HUM. BEHAV. 381, 383 (2007) (remarking that *Miranda* is "[o]ne of the best known legal opinion in American history").

⁴ *Miranda*, *supra* note 3 at 475.

⁵ Immediately following the decision, legal scholarship began to evaluate the empirical impact of the *Miranda* mechanism, including police compliance with the new *Miranda* requirement, law enforcement's attitudes toward *Miranda*, and the effect of the *Miranda* warnings generally. For legal scholarship on *Miranda*, see generally Lawrence S. Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DENV. L.J. 1 (1970); Richard J. Medalie, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968); Richard H. Seeburger & R. Stanton Wettick, *Miranda in Pittsburgh: A Statistical Study*, 29 U. PITT L. REV. 1 (1967); Michael Wald et al., *Interrogation in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967); James W. Witt, *Non-coercive Interrogation and the Administration of Criminal Justice: The Impact of Miranda on Police Effectuality*, 64 J. CRIM. L. & CRIMINOLOGY 320 (1973). For a general review of *Miranda*, see generally LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 301–04 (BasicBooks 1993); George C. Thomas III & Richard A. Leo, *The Effects of Miranda v. Arizona: "Embedded" in Our National Culture*, 29 CRIME & JUST. 203, 232–66 (2002); GEORGE C. THOMAS III & RICHARD A. LEO, CONFESSIONS OF GUILT: FROM TORTURE TO *MIRANDA* AND BEYOND (Oxford Univ. Press 2012) [*hereinafter* THOMAS & LEO, CONFESSIONS OF GUILT]; George C. Thomas III, *Is Miranda a Real-World Failure? A Plea for More (and Better) Empirical Evidence*, 43 UCLA L. REV. 821 (1996); Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-first Century*, 99 MICH. L. REV. 1000 (2001); Charles D.

warnings thwart the police and reduce conviction rates.⁶ Others argue that *Miranda* does not provide meaningful protection for the Fifth Amendment privilege against self-incrimination.⁷ Scholars

Weisselberg, *In the Stationhouse After Dickerson*, 99 MICH. L. REV. 1121 (2001) [hereinafter *In the Stationhouse*]; Charles D. Weisselberg, *Exporting and Importing Miranda*, 97 B.U. L. REV. 1235 (2017) [hereinafter *Exporting and Importing*]; Kit Kinports, *Pretrial Custody and Miranda*, 78 WASH. & LEE L. REV. 725 (2021).

⁶ For example, Paul Cassell argued that the conviction and confession rates have dropped significantly as the direct effect of the *Miranda* decision. For some of Paul Cassell's scholarship criticizing *Miranda*, see generally Paul G. Cassell, *Alternatives to the Miranda Warnings: The Paths Not Taken: The Supreme Court's Failures in Dickerson*, 99 MICH. L. REV. 898 (2001); PAUL G. CASSELL, NAT'L. CTR. POL'Y. ANALYSIS, HANDCUFFING THE COPS: MIRANDA'S HARMFUL EFFECTS ON LAW ENFORCEMENT, NO. 218 (1998); Paul G. Cassell, *Miranda's Negligible Effect on Law Enforcement: Some Skeptical Observations*, 20 HARV. J.L. PUB. POL'Y 327 (1997); Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996); Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 NW. U. L. REV. 1084 (1995); Paul G. Cassell & Richard Fowles, *Still Handcuffing the Cops: A Review of Fifty Years of Empirical Evidence of Miranda's Harmful Effects on Law Enforcement*, 97 B.U. L. REV. 685 (2017). In another article, Cassell attacked the *Miranda* decision on the grounds that it harms innocent suspects. According to Cassell, *Miranda* harms the innocent because it inhibits police from gaining confessions from truly guilty suspects that would therefore exonerate innocents who have been wrongfully convicted. See Paul Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—And from Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497 (1998) (arguing that *Miranda* does not protect the innocent). But see Stephen J. Schulhofer, *Miranda, Dickerson, and the Puzzling Persistence of Fifth Amendment Exceptionalism*, 99 MICH. L. REV. 941 (2001) (criticizing Cassell's position and stating that the "lost-convictions issue is . . . a nonexistent problem"); Tonja Jacobi, *Miranda 2.0*, 50 UC DAVIS L. REV. 1, 16 (2016) (discussing an ABA study that shows law enforcement and prosecutors do not think *Miranda* significantly impede their work). For other criticisms of *Miranda*, see generally Allen, *supra* note 1; Susan R. Klein, *Transparency and Truth during Custodial Interrogations and Beyond*, 97 B.U. L. REV. 993, 1004–24 (2017); Seeburger & Wettick, *supra* note 5; William J. Stuntz, *Miranda's Irrelevance: Miranda's Mistake*, 99 MICH. L. REV. 975 (2001); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 222–24, 234 (Harvard Univ. Press 2011); George C. Thomas III, *Miranda's Illusion: Telling Stories in the Police Interrogation Room*, 81 TEX. L. REV. 1091, 1094–106 (2003) ("Instead, I will argue that *Miranda*'s great protections were illusory from the very beginning, even if later Courts had tried to follow its spirit scrupulously."); George C. Thomas III, *Is Miranda a Real-Word Failure? A Plea for More (and Better) Empirical Evidence*, 43 UCLA L. REV. 821, 831–37 (1996) ("If these conjectures can be experimentally confirmed, it would suggest that *Miranda* permits police to control the interrogation process roughly the way they did in the pre-*Miranda* days.").

⁷ See, e.g., Andrew Guthrie Ferguson & Richard A. Leo, *The Miranda App: Metaphor and Machine*, 97 B.U. L. REV. 935, 940–48 (2017) (arguing that *Miranda* has been ineffective in protecting rights); Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3 (2010) (analyzing *Miranda* waivers and their relation to police-induced confessions); RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* (Harvard Univ. Press 2008) (detailing the police interrogation process, including *Miranda*, and its impact on the American justice system) [hereinafter LEO, *POLICE INTERROGATION*]; Richard A. Leo, *The Impact of Miranda*

often explain *Miranda*'s failure through three perspectives: first, police appear to have successfully adapted to the *Miranda* requirements and developed strategies that are intended to induce *Miranda* waivers.⁸ Studies consistently report that, in some jurisdictions, police are systematically trained to violate *Miranda* by continuing to question suspects who have invoked the right to counsel or the right to remain silent.⁹ Second, the Court has retreated from its original construction of the *Miranda* protection and has weakened its safeguards.¹⁰ Finally, scholars have also pointed out that creating a one-size-fits-all protection simply cannot ensure that suspects will be "empowered to choose between speech and silence during a pressure-filled interrogation."¹¹

Despite the disagreement and uncertainty in the past decades of *Miranda* impact studies,¹² there is little dispute that police appear

Revisited, 86 J. CRIM. L. & CRIMINOLOGY 621 (1996) (advocating for mandatory videotaping of custodial interrogations) [hereinafter Leo, *The Impact of Miranda Revisited*].

⁸ See, e.g., LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* 405 (Athenium, 1st ed.1983); Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by Miranda*, 84 MINN. L. REV. 397 (1999); THOMAS & LEO, *CONFESSIONS OF GUILT*, *supra* note 5; Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519 (2008).

⁹ See, e.g., Albert W. Alschuler, *Miranda's Fourfold Failure*, 97 B.U. L. REV. 849, 850–63 (2017) (explaining that *Miranda* does not protect against deceptive interrogations); Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 153–62 (1998) (analyzing whether *Miranda* should be reexamined to further its vision).

¹⁰ LEO, *POLICE INTERROGATION*, *supra* note 7, at 279–80; MARY L. PITMAN & LAWRENCE S. WRIGHTSMAN, *THE MIRANDA RULING: ITS PAST, PRESENT, AND FUTURE* 117–38 (Oxford Univ. Press 2010); Weisselberg, *supra* note 9.

¹¹ Weisselberg, *Exporting and Importing*, *supra* note 5, at 1236. See also Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 535, 538 (2002); Virginia G. Cooper & Patricia A. Zapf, *Psychiatric Patients' Comprehension of Miranda Rights*, 32 L. & HUM. BEHAV. 390, 390 (2008).

¹² Since the mid-1990s, there has been a second wave of the *Miranda* impact debate. Unlike the earlier studies conducted in the late 1960s, these studies focus largely on the quantitative impact of *Miranda* on confession, clearance, and conviction rates. For studies focused on the quantitative impacts of *Miranda*, see generally Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998); Paul G. Cassell & Brett S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839 (1996); Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Cost*, 90 NW. U. L. REV. 500 (1996). However, when conducting comprehensive empirical analyses of the *Miranda* effect, it is critical to be aware of the fact that differences in the data samples and in the ideological viewpoints of the studies may lead to extensively different conclusions about just how much *Miranda* has affected confession and conviction rates. As John Donohue points out, it is extremely

to issue and document *Miranda* warnings in virtually all cases.¹³ It is perhaps not surprising that, in *Dickerson v. United States*, 530 U.S. 428 (2000), the Court made an empirical claim that “*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.”¹⁴ Meanwhile, a significant number of nations have implemented or are implementing *Miranda*-like mechanisms, with warnings about the right to remain silent and the right to retain counsel prior to police questioning.¹⁵ The U.S. Library of Congress has reported that warnings similar to the U.S. *Miranda* mechanism are required in more than a hundred jurisdictions around the world.¹⁶ Taiwan is one of those places that implements *Miranda*-like protections. This Article examines the practices of police interrogation and the phenomenon of false confession within Taiwan’s criminal justice system. It aims to offer an empirical evaluation regarding police interrogation in Taiwan and provide critical analysis regarding the future development of the *Miranda* system. I argue that the failure of *Miranda* in Taiwan actually points the way to possible solutions of the *Miranda* dilemma in the United States and other jurisdictions where at least some *Miranda* mechanisms are in place. I argue that we ought to recognize the limited function of *Miranda* in curbing police interrogation practices and move onto a holistic approach to

difficult to find any direct effect of a legal intervention since “the complex forces that shape major social phenomena do not tend to shift dramatically or quickly in response to a legal intervention.” See John J. Donohue III, *Did Miranda Diminish Police Effectiveness*, 50 STAN. L. REV. 1147, 1149 (1997). For reviews and criticisms of the “*Miranda* impact studies,” see generally Hugo Adam Bedau & Michael L. Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161 (1988); Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat Miranda: Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY 557 (1998); Stephen J. Schulhofer, *Reply: Miranda and Clearance Rates*, 91 NW. U. L. REV. 278 (1996); George C. Thomas III., *Plain Talk about the Miranda Empirical Debate: A Steady-State Theory of Confessions*, 43 UCLA L. REV. 933 (1996). Given the methodological problems, confounded with other explanatory variables, and questionable crime data, empirical studies during the late 1990s leave us with only uncertainty about these statistical results.

¹³ Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 266–303 (1996); LEO, POLICE INTERROGATION, *supra* note 7, at 123–64; George C. Thomas III, *Stories about Miranda*, 102 MICH. L. REV. 1959, 1997–2000 (2004). See also Weisselberg, *supra* note 8, at 1547–62 (suggesting that officers routinely use pre-*Miranda* conversation to build rapport in order to obtain a waiver).

¹⁴ *Dickerson v. United States*, 530 U.S. 428, 430 (2000).

¹⁵ Weisselberg, *Exporting and Importing*, *supra* note 5, at 1251.

¹⁶ LAW LIBRARY OF CONG., GLOB. LEGAL RESEARCH. CTR., *MIRANDA WARNING EQUIVALENTS ABROAD* 1 (2016).

bring about better transparency and accountability as to police activities.

The first half of this Article provides an overview of Taiwan's modern interrogation rule and practices, focusing on how Taiwanese law enforcement officers explain and apply the new rule. Modern Taiwan's criminal justice system is a combination of western legal concepts and traditional Chinese social and cultural notions.¹⁷ Such a combination is more likely to lead to discrepancies between what is written in the law books and how police actually interrogate in practice. In the field of police interrogation, one of the major modern Taiwanese legal reforms was the three-step adoption of the *Miranda* rules. This Article focuses on the implementation of the Taiwanese *Miranda* system and how police in Taiwan systematically create backstage/front-stage interrogation practices to circumvent external oversight. I argue that the *Miranda* rule—together with other procedural mandates that seek to eliminate police discretionary power during interrogation—have caused police activities in some respects to go underground, where the police can tailor the criminal justice system to meet a myriad variety of goals and interests. The second half of the Article turns to the issue of false confessions. Until now, there have been many documented wrongful conviction cases in Taiwan.¹⁸ However, none of the existing social and legal studies have examined whether and how the structure and practices of police interrogation may contribute to the problem of false confessions. This Article empirically investigates practices in Taiwanese police interrogation and their impact on false confessions. I further evaluate the effectiveness of alternative innovations beyond the *Miranda* mechanism, which could be implemented to manage low-visibility police activities, identify false confessions, and minimize the damage arguably caused at times by current practices.

¹⁷ See generally WANG TAI-SHENG (王泰升), TAIWAN FALU XIANDAIHUA LICHENG: CONG NEIDI YANCHANG DAO ZIZHU JISHOU (台灣法律現代化歷程:從“內地延長”到“自主繼受”) [THE PROCESS OF LEGAL MODERNIZATION IN TAIWAN: FROM THE EXTENSION OF MAINLAND TO INDEPENDENT RECEPTION] (2015) (discussing the evolution of modern Taiwan's criminal justice system).

¹⁸ See generally TAIWAN YUANYU PINGFAN XIEHUI (台灣冤獄平反協會) [TAIWAN INNOCENCE PROJECT], <http://twinnocenceproject.org/index.php> [<https://perma.cc/CN7J-YPXV>] (last visited Sept. 20, 2021) (providing information on cases, exonerations, and latest news in Taiwan).

I. TAIWAN'S MODERN INTERROGATION RULE: THE THREE-STEP ADOPTION OF THE *MIRANDA*

In 1967, the government initiated the first reform of the Code of Criminal Procedure since 1949, when the Chinese Nationalist Party (國民黨) lost the Civil War and retreated to Taiwan.¹⁹ However, the basic inquisitorial structure and the reliance on confession remained intact. Between 1968 and 1982, the Legislative Yuan (Taiwan's congress) did not pass any amendments to the Code of Criminal Procedure.²⁰ Since 1996, as a relatively new democracy, Taiwan has begun to reform its criminal justice system in order to replace authoritarian rule with a system committed to human rights protection.²¹ Taiwan's legislative and judicial branches have played crucial roles in facilitating Taiwan's legal reform regarding criminal justice.²² The Legislative Yuan has amended the Code of Criminal Procedure at least once a year between 1997 and 2004.²³

¹⁹ ZHU SHIYAN (朱石炎), XINGSHI SUSONG FALUN (刑事訴訟法論) [COMMENTARY ON THE CODE OF CRIMINAL PROCEDURE] 4–5 (2020).

²⁰ See Tom Ginsburg, *The Warren Court in East Asia: An Essay in Comparative Law*, in EARL WARREN AND THE WARREN COURT 265, 283–86 (Harry N. Scheiber ed., 2007) (explaining that Taiwan's criminal procedure was underdeveloped under authoritarian rule).

²¹ See LIN YU-HSIUNG (林鈺雄), XINGSHI SUSONG FA (刑事訴訟法) [CRIMINAL PROCEDURE LAW] PART I 7–13 (7th ed. 2013); Zhang Li-Qing (張麗卿), *Xingshi Susong Fa Bainian Huigu yu QianZhan* (刑事訴訟法百年回顧與前瞻) [Overview of the Past Hundred Years of Criminal Justice Reform], 75 YUEDAN FAXUE ZAZHI (月旦法學雜誌) [TAIWAN L. REV.] 40, 40–59 (2001) (examining Taiwan's criminal justice reform). The Taiwanese experience of democracy is unique in its practices and structures. Although theories and practices of democracy in other countries have led to significant changes in Taiwan's political landscape, Taiwanese democracy continues to show its special character. See generally Anya Bernstein, *Why Taiwan is too Democratic: Legitimation, Administration, and Political Participation in Taipei* (June 2007) (unpublished Ph.D. dissertation, University of Chicago) (exploring the values and ideals that underlie Taiwan's democracy); PHILIP PAOLINO & JAMES MEERNIK, *DEMOCRATIZATION IN TAIWAN: CHALLENGES IN TRANSFORMATION* (Ashgate Publ'g Co. 2008); LEE TENG-HUI, *THE ROAD TO DEMOCRACY: TAIWAN'S PURSUIT OF IDENTITY* (1999). See also TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* 108 (Cambridge Univ. Press, 2003) (suggesting that one of the distinctive elements of Taiwan's experience is its "gradual and extended democratic transition").

²² For an overview of Taiwan's modern legal reform, see Tang Te-Chung (湯德宗) & Huang Kuo-Chang (黃國昌), SIFA GAIGE SHI ZHOUNIAN DE HUIGU YU ZHANWANG HUIYI SHILU (司法改革十週年的回顧與展望會議實錄) [THE TENTH ANNIVERSARY OF NATIONAL CONFERENCE ON JUDICIAL REFORM] (2010).

²³ See *Legislative History, LAW & REGULATIONS DATABASE OF THE REPUBLIC OF CHINA*, <http://law.moj.gov.tw/Eng/LawClass/LawHistory.aspx?PCode=C0010001>

Police in Taiwan played a critical role in the transition from an authoritarian regime to a democracy. The primary issue for Taiwan's policy makers was how to transform police from their formerly authoritarian incarnation to a form acceptable in a democratic system. In 1997, the Legislative Yuan passed an amendment to the Code of Criminal Procedure that essentially incorporated the *Miranda* rule into the legal system.²⁴ Article 95 requires prosecutors and police to inform suspects of their rights to silence and legal counsel, and to elicit knowing and voluntary waivers from suspects before commencing interrogation.²⁵ According to legislative documents, Taiwan's legislators modeled the new amendment on the U.S. Constitution's Fifth Amendment and the Court's *Miranda* decision.²⁶ The Taiwanese legislative record described the previous practices of interrogation in Taiwan as "manipulative," "oppressive," and threatening to the rational decision-making capacity of suspects ignorant of their rights.²⁷ The *Miranda* warnings, according to the legislature, would reduce the temptation of police officers to abuse their power in the interrogation room.²⁸

As part of the *Miranda*-series legislation, in 2003 the Legislative Yuan enacted Article 158-2, which states that any confession obtained from a suspect in violation of Article 95 shall not be admitted as evidence.²⁹ The amendment included an

[<https://perma.cc/F6BQ-FU6K>] (last visited Sept. 20, 2021) (listing the legislative history of the Code of Criminal Procedure). For the impact of criminal justice reforms on prosecutors' role, see MINISTRY OF JUSTICE, KUA SHIDAI DE ZHENGYI (跨時代的正義) [JUSTICE IN THE NEW ERA] (2008).

²⁴ See LI FA YUAN GONG BAO (立法院公報) [THE LEGISLATIVE YUAN GAZETTE], Vol. 86, No. 44, at 147–48 (amending the law to include rules similar to those in *Miranda*); LI FA YUAN GONG BAO (立法院公報) [THE LEGISLATIVE YUAN GAZETTE], Vol. 86, No. 52, at 65, 84, 189, 192 (1997) (stating that the revised Article 95 is based on the Court's *Miranda* decision). However, the revision did not include penalties if law enforcement officials neglected to inform the suspects of their right to remain silent.

²⁵ Code of Criminal Procedure, § 9, Art. 95 (1997) (Taiwan).

²⁶ *Id.*

²⁷ LI FA YUAN GONG BAO (立法院公報) [THE LEGISLATIVE YUAN GAZETTE], Vol. 86, No. 52, at 192, 195–96, 198 (1997). See also LI FA YUAN GONG BAO (立法院公報) [THE LEGISLATIVE YUAN GAZETTE], Vol. 86, No. 44, at 148 (1997) (describing a suspect under interrogation as a lab rat being teased by police). One of the lawmakers supporting the bill even shared his personal experience of being tortured by the police, see LI FA YUAN GONG BAO (立法院公報) [THE LEGISLATIVE YUAN GAZETTE], Vol. 86, No. 52, at 195 (1997).

²⁸ *Id.*

²⁹ Code of Criminal Procedure, § 12, Art. 158-2 (2003). See also Brian L. Kennedy, *Walking the Fine Line in Taiwan's New Criminal Code*, 10 AM. J. CHINESE STUD. 111,

exclusionary rule, applicable at the discretion of the trial judge, that was drawn directly from the Court's influence.³⁰ Also, the burden of proof for demonstrating that the confession had been voluntary was placed on the prosecution. In 2013, the Legislative Yuan further amended Article 95, Section 2. It now states that if the accused asserts the right to counsel, the interrogation must cease unless the suspect initiates further communication.

Besides the three-step adoption of the *Miranda* rule, the Legislative Yuan also amended other interrogation rules, including: the requirement to record the whole interrogation without interruption in audio, and if necessary, in video (Article 100-1, amended in 1997); the forbidding of interrogation from 11 p.m. to 8 a.m. (Article 93, Section 5, amended in 2009); allowing defense attorneys to interview and correspond with a suspect under arrest or detention before interrogation (Article 34, Section 2, amended in 2010); and the extension of court-appointed counsel in pretrial investigation if the suspect is unable to make a complete statement, or is Taiwanese aborigine (Article 31, amended in 2006 and 2013).

Prior to the adoption of the *Miranda* rule in 1997, empirical research in Taiwan directed attention to the immediate effects of certain interrogation techniques on the suspect's rights to remain silent and obtain counsel.³¹ After 1997, the new legislation was widely discussed by law enforcement officers, prosecutors, professors, and the media. Commentators complained that the new rules would diminish police and prosecutors' investigative effectiveness and coddle criminals.³² Law professors compared

114–15 (2003) (pointing out that the right to counsel during interrogation in Taiwan is a “rich man’s right”).

³⁰ LI FA YUAN GONG BAO (立法院公報) [THE LEGISLATIVE YUAN GAZETTE], Vol. 92, No. 8, at 1831–32 (2003).

³¹ See Tsai Tun-Ming (蔡敦銘) & Wang Jaw-Perng (王兆鵬), *Jianmo Quan de Shizhen Yanjiu* (緘默權的實證研究) [*The Empirical Studies of the Right to Remain Silent*], 26 NAT'L TAIWAN U. L.J. 79, 79-116 (1996) (discussing techniques such as coercion, deception, the exchange of legal/illegal privilege, and the good cop/bad cop strategy).

³² For comments from Taiwanese prosecutors regarding criminal justice reforms, see generally TSAI PI-YU (蔡碧玉), JIANCHA SHOUJI: NI SUO BUZHIDAO DE JIANCHAGUAN (檢察手記：你所不知道的檢察官) [A PROSECUTOR'S PRIVATE NOTES: WHAT YOU DON'T KNOW ABOUT PROSECUTORS] (2013); CHEN RUI-REN (陳瑞仁), ZHIFA SUOSI (執法所思) [LAW & ORDER, JUDICIAL REFORM] (2014); JIANCHAGUAN GAIGE XIEHUI (檢察官改革協會) [PROSECUTORS REFORM ASSOCIATION], ZHENG YI ZHI JIAN: JIANGAIHUI SHIZHOUNIAN JINIAN ZHUANJI (正義之劍：檢改會十週年紀念專輯) [10TH ANNIVERSARY OF PROSECUTORS REFORM ASSOCIATION ARCHIVES] (2008).

Taiwan's new *Miranda* rules with similar regulations in Germany, the United Kingdom, and the decisions of the European Court of Human Rights.³³ Other studies commented on the judicial decisions and the relevant legal principles.³⁴ Some even traced the origin of Taiwan's *Miranda* rulings to the United States and discussed its function within the U.S. context.³⁵ However, the research focused almost entirely on the doctrinal issues and ethical dimensions of the new rules rather than on police trainings and criminal justice officials' routine practices. The previous research is missing a comprehensive analysis of the *Miranda* rules' actual effects on police interrogation practices. The lack of an empirical assessment in this field has exacerbated the gap between "law in theory" and "law in practice."³⁶

II. THE CURRENT INTERROGATION PRACTICES IN TAIWAN

To capture the variability among law enforcement agencies, my analysis is based largely on the type of data most Taiwan's

³³ For scholarly publications comparing Taiwan's *Miranda* rules with similar regulations in European jurisdictions, see, e.g., Huang Han-Yi (黃翰義), *Cong Bijiaofa zhi Guandian Lun Woguo Xingshi Susongfa Shang Weifa Daibu zhi Yansheng Zhengju yu Quanli Gaozhi Yiwu zhi Guanxi* (從比較法之觀點論我國刑事訴訟法上違法逮捕之衍生證據與權利告知義務之關係) [*The Violation of Miranda Warnings: A Comparative Law Perspective*], 52 JUNFA ZHUANKAN (軍法專刊) [MILITARY L.J.] 1 (2006); Lin Yu-Hsiung (林鈺雄), *Oushi Milanda* (歐式米蘭達) [*The European Model of Miranda Rule*], 72 YUEDAN FAXUE ZAZHI (月旦法學雜誌) [TAIWAN L.J.] 119 (2005); Wang Shih-Fan (王士帆), *Weifan Jianmoquan Gaozhi Yiwu zhi Zhengju Jinzhi* (違反緘默權告知義務之證據禁止) [*Exclusion of Evidence in Violation of Warning: Right to Silence: A Comparative View of German Law*], 120 ZHNEGDA FAXUE PINGLUN (政大法學評論) [CHENGCHI L. REV.] 159 (2011).

³⁴ See, e.g., He Lai-Jier (何賴傑), *Gongneng Xunwen yu Quanli Gaozhi Yiwu* (功能訊問與權利告知義務) [*Functional Interrogation and the Warning of Rights*], 179 TAIWAN FAXUE ZAZHI (台灣法學雜誌) [TAIWAN L.J.] 63 (2011) (comparing the interrogation in a Taiwan case with a German one); Wang Jaw-Perng (王兆鵬), *Kaichuang Zibai Fali de Xinjiyuan* (開創自白法理的新紀元) [*The Development of a New Generation of Confession Rules*], 154 YUEDAN FAXUE ZAZHI (月旦法學雜誌) [TAIWAN L. REV.] 153 (2008) (stating that the judiciary authorities should take actions to increase people's confidence in judicial process).

³⁵ See, e.g., Wang Jaw-Perng (王兆鵬), *Zibai yu Dushu Guoshi Yuanze* (自白與毒樹果實原則) [*Confession and the Fruit of the Poisonous Tree*], 101 YUEDAN FAXUE ZAZHI (月旦法學雜誌) [TAIWAN L. J.] 99 (2003) (discussing the fruit of the poisonous tree legal doctrine in the U.S. cases).

³⁶ See LAWRENCE M. FRIEDMAN, *IMPACT: HOW LAW AFFECTS BEHAVIOR* 129 (2016) (suggesting that the impact of *Miranda* rule is difficult to measure).

scholars have neglected: interviews with police officers, defense lawyers, officers in training divisions of police departments, and instructors at the Central Police University and Taiwan Police College; police training materials; interrogation transcripts, videotapes and police reports; and resources related to the legal aspects of interrogation and *Miranda* warnings.³⁷

Between December 2014 and December 2019, I documented—through hundreds of interviews and meetings with prosecutors,³⁸ former prosecutors,³⁹ police officers,⁴⁰ defense attorneys,⁴¹ officials from the Ministry of Justice (法務部),⁴² media reporters,⁴³ and reform advocates⁴⁴—the daily operation of the criminal justice system in Taiwan.⁴⁵ Up until December 2019, I conducted a total of seventy-five semi-structured interviews with police personnel in the Criminal Investigative Division of City Police Department (市刑大), Local Police Stations (派出所), and Police Precincts (分局).⁴⁶ I also attended the defense training

³⁷ This study uses empirical research methods to examine how professional legal actors in Taiwan understand and apply the *Miranda* rule. Specifically, I focus on evaluating how police and lawyers' attitudes, behaviors, and professional/cultural norms impact the *Miranda* system. The data collected for this research is *not* intended, however, to be representative of every law enforcement agency in Taiwan.

³⁸ N=99.

³⁹ N=12.

⁴⁰ N=48.

⁴¹ N=39.

⁴² N=18.

⁴³ N=10.

⁴⁴ N=12.

⁴⁵ See MARTYN HAMMERSLEY, *READING ETHNOGRAPHIC RESEARCH: A CRITICAL GUIDE* (1991) (introducing the nature of ethnographic research and providing criteria by which ethnographic studies should be evaluated); Harold E. Pepinsky, *A Sociologist on Police Patrol*, in *FIELDWORK EXPERIENCE: QUALITATIVE APPROACHES TO SOCIAL RESEARCH* 223 (William B. Shaffir et al., eds., 1980) (reflecting on the process of conducting fieldwork in police station).

⁴⁶ Interviews ranged in duration from 40 to 150 minutes, and were conducted in Mandarin Chinese, Taiwanese, or both languages, according to interviewee's preferences [hereinafter Interview]. Detailed notes were taken at each interview, and interviews were tape-recorded if allowed by the interviewees. I digitally recorded and transcribed interviews but did not translate the transcriptions because I wanted to preserve participants' language, which was often contained terminology specific to the police subculture. Throughout this Article, the interviewees' points of view are illustrated by quotation and analysis. The quotations serve as a bridge between a general thematic category and specific experiences. In this way the quotations serve to facilitate the relationship between interviewees' experiences and general categories or concepts. Fieldnotes were used to document contextual information and my reflections about the Taiwanese criminal justice

section organized by the local Bar Association.⁴⁷ I requested and took part in ride-along with police officers in local police stations and also participated in three routine traffic stops, one dispatch shift, and one search of a residence following a street stop.⁴⁸

system and police interrogation practices [hereinafter Fieldnote]. Initial fieldnotes, which contain detailed information about individuals I met and activities I observed, were written every day after my visit to police departments or interviews with police officers. The majority of my initial fieldnotes were handwritten. Due to the sensitivity of the subject and confidentiality, the name of the interviewee and details of each interview is not disclosed.

⁴⁷ Although the present piece relates the story of how *Miranda* legislation has changed interrogation practices in Taiwan, I focus only on the specific interrogation practices in “Taian City”—a fictitious name of a Taiwanese metropolitan area. There are two reasons for this: first, Taian City Police Department is one of the largest municipal law enforcement departments in Taiwan; second, by focusing the scope of this research in Taian City, I am able to draw stronger empirical conclusions. For general review of sampling method in qualitative study, see generally JOHN W. CRESWELL, *RESEARCH DESIGN: QUALITATIVE, QUANTITATIVE, AND MIXED METHODS APPROACHES* xix (2009) (advancing “a framework, a process, and compositional approaches for designing a proposal for qualitative, quantitative, and mixed methods research in the human and social sciences”); Mario Luis Small, *How Many Cases Do I Need? On Science and the Logic of Case Selection in Field-Based Research*, 10 *ETHNOGRAPHY* 5 (2009) (assessing the incorporation of quantitative methods into qualitative ethnographic case studies); Oisín Tansey, *Process Tracing and Elite Interviewing: A Case for Non-probability Sampling*, 40 *POL. SCI. & POL.* 765 (2007) (exploring the relationship between process tracing and the data collection technique of elite interviewing); Jan E. Trost, *Statistically Nonrepresentative Stratified Sampling: A Sampling Technique for Qualitative Studies*, 9 *QUALITATIVE SOCIO.* 54 (1986) (introducing a technique which is a kind of statistically non representative stratified sampling for qualitative studies).

⁴⁸ During the data analysis process, I first created an initial coding scheme based on the major themes and concepts I discovered in my research. Next, I coded transcripts by questions and developed a descriptive coding scheme based on the specific questions and the interview protocols’ domains. Then I read several cross-sections of my interviews. Based on this rereading I revised the coding scheme to include concepts and categories that had newly emerged. Each interview was read as many times as necessary to ensure that interviewees’ answers were understood in the most complete manner possible. Cross-case analysis of the content was performed. This analysis led to core themes being identified and compared as well as to the derivation of analytical categories. Later I identified pattern codes that allowed me to index data that illustrated emergent themes. I continued applying codes and memos to transcripts. When new codes emerged, I updated the coding scheme and reread all transcripts according to the new structure. I used a systematic line-by-line coding system to discover any other emerging themes and significant issues. Finally, I recoded each transcript for the additional themes and issues. Throughout the data analysis, the interviews and observations were closely examined by the author to evaluate the necessity of including new interviews and/or continuing the search for different data until no new information was being added either because of redundancy or a point of theoretical saturation. A theme was considered to be saturated if at least half the interviewees supported the author’s analysis. The theme saturation process helped address the internal validity of the findings. For interviews, I assigned a code to each of my interviewees (Interview 01 to Interview 204). Individuals who were interviewed several times will be assigned different numbers. The last two digits are page numbers from the documents. I

A. *Police Behaviors On and Off Camera*

While the analysis of official interrogation records remains of interest, it is improper to assume that these records provide a full account of police interrogation practices.⁴⁹ The videotapes are records of “*formal*” interrogations. They provide no insight into cases in which police resort to interrogation off camera. During this project, I tracked the behavior of officers both on and off camera and examined the implications of their behavioral changes to the original vision of the *Miranda* warning mechanism.

When police actions were undertaken, legal considerations were no doubt a major concern. But they were only one potential factor determining officers’ conduct in a given situation. Understanding how officers chose to act requires knowing how police activities operate within the larger arrangement of social relationships.⁵⁰ However, a high percentage of police-citizen

later generated a codebook that contains twenty main topics and about eighty sub-topics. Finally, I used the codebook to arrange my fieldnotes into forty-two documents (Fieldnote 01 to Fieldnote 42). The last two digits are page numbers from the documents.

⁴⁹ Researchers of Taiwan’s democratic transition and police reform have examined the development of policing in Taiwan from a historical, political, and anthropological perspective. These studies demonstrate the operational logic of police work in Taiwan and provide cultural explanations for the exemplary smoothness of Taiwan’s democratic transformation. See LIQUN CAO ET AL., *POLICING IN TAIWAN: FROM AUTHORITARIANISM TO DEMOCRACY* (2014) (examining the development of policing in Taiwan from various perspectives and considering the role of the police in the democratic transition); Jeffrey T. Martin, *Legitimate Force in a Particularistic Democracy: Street Police and Outlaw Legislators in the Republic of China on Taiwan*, 38 L. & SOC. INQUIRY 615 (2013) (exploring a “particularistic” concept of legitimacy important to Taiwanese democracy); Jeffrey T. Martin, *How Law Matters to the Taiwanese Police*, 53 ANTHROPOLOGY NEWS 10 (2012) (illustrating a cultural approach to understand the relationship between Taiwanese policing and the law); Sang Wei-Ming (桑維明) & Chang Kuang-Ming (章光明), *Taiwan Bainian Jingzheng Fang’an zhi Huigu yu Zhanwang* (臺灣百年警政方案之回顧與展望) [*The Exploration and Prospect on Taiwan Police Policy for Hundred Years*], 44 JINGXUE CONGKAN (警學叢刊) [POLICE SCI. Q.] 1 (2014) (reviewing the history of the changes of Taiwanese police policy).

⁵⁰ For a classic empirical study of the everyday activities of Japanese police detectives, see SETSUO MIYAZAWA, *POLICING IN JAPAN* 1–9 (Frank G. Bennet, Jr. & John O. Haley trans., State Univ. of N.Y. Press 1992) (arguing that the law grants police enormous power to acquire and control the information needed to perform their central tasks, and these legal rules give police an unparalleled capacity to “make crimes” and enable them to produce high clearance rates). See also DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN* 35, 215 (Oxford Univ. Press 2002) (showing the difficulties to create or reform the law in Japan due to the norm of unanimity, and that scholars disagree on what a high conviction rate and a low acquittal rate in Japan mean); Patricia G.

interaction occurs when it is beyond the view of official scrutiny. Under the current law, it is required that interrogation be recorded.⁵¹ However, in practice, this legal mandate does not include pre-interrogation interactions. It is up to each local police department to decide whether or not to record those proceedings. Even with the growing use of body-worn cameras, the vast majority of police activities remain undocumented and thus unseen by the public. Moreover, when a police officer carries a body-worn camera, the record will not become an official document unless the officer decides to provide the record. It is not legally required to submit these records to prosecutors or defense lawyers. Therefore, the off-camera behaviors of police officers remain a black box. The current practice of videotaping does not seem to provide satisfying answers to concerns surrounding police interrogation. Without taking into account these backstage police activities, we simply cannot properly understand the social-legal structure within which the modern interrogation rules operate.⁵²

Steinhoff, *Pursuing the Japanese Police*, 27 L. & SOC'Y REV. 827 (1993) (providing an overview of a growing literature on the Japanese police).

⁵¹ Code of Criminal Procedure, § 9, Art. 100-1 (1997) (Taiwan).

⁵² Although the requirement of video recording of police interrogation has commonly been seen as the solution to concerns over interrogation, the current practices in Taiwan clearly expose its limitations. See, e.g., JAMES R. ACKER & ALLISON D. REDLICH, *WRONGFUL CONVICTION* 201–04 (2011) (pointing out that “proponents of electronic recording consider the procedure as a win-win situation, one that facilitates convicting the guilty and freeing the innocent”); Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 304–07 (2006) (supporting the mandatory recordings of all interrogation despite some burdens); BRANDON L. GARRETT, *CONVICTING THE INNOCENT* 43–44 (2011) (arguing that “what goes on in the interrogation room should not remain undocumented, unregulated, unreviewed” and “[r]ecording can bring interrogation practices into the sunlight”); Jacobi, *supra* note 6, at 47 (suggesting that “requiring audiovisual recording of all interrogations would not only help establish actual coercion in some cases, it would reinforce *Miranda*’s “civilizing” effect on police behavior.”); Amy Klobuchar, *Eye on Interrogations: How Videotaping Services the Cause of Justice*, WASH. POST, June 10, 2002, at A21 (arguing that “[v]ideotaping . . . leads to real improvements in police interrogation practices that protect the rights of suspects”); LEO, *POLICE INTERROGATION*, *supra* note 7, at 302–03 (stating that “electronic recording professionalizes the interrogation function by opening it up to greater external review . . . by removing secrecy from interrogations, recording should increase public perceptions of the legitimacy of the criminal justice system more generally”); Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309, 314–21 (2003) (arguing that taping is required by constitutional provisions); THOMAS & LEO, *CONFESSIONS OF GUILT*, *supra* note 5, at 220–21 (suggesting that “[p]erhaps one hundred other writers are on record recommending some form of recording.”). *But see* Lawrence Rosenthal, *Against Orthodoxy: Miranda Is Not Prophylactic and the Constitution Is Not Perfect*, 10 CHAP. L.

B. *The Pre-Interrogation Police-Suspect Interactions*

(a) The Distinction Between Interview and Interrogation

Police interrogation raises complex legal, normative, and policy questions about justice administration and the relationship between the individual and the government. However, the criminal justice system begins to operate even before interrogation, starting with the preliminary police-suspect encounter when police, witnessing or responding to a reported crime, detain a person and bring him or her to the police station.⁵³

All of my interviewees mention a widely used preliminary interview tactic. The terms “*Fantan*” (泛談) [*Interview*]⁵⁴ and “*Xunwen*” (訊問) [*Interrogation*] refer to different police activities in Taiwan. Too often these terms are used interchangeably as though they refer to the same process. In fact, there are significant distinctions between the two. An interview is an informal process conducted before interrogation. Some of my interviewees mention that by maintaining a non-accusatory tone, the investigator is able to establish a much better rapport with the suspect. They hope that this

REV. 579, 607 (2007) (stating that “we cannot expect videotaping to curb what are already deemed abuses under current law . . .”).

⁵³ As this Article shows, the structural differences between the U.S. adversarial conception of criminal procedure and Taiwan’s long-held inquisitorial conception of criminal procedure may be so deeply enconced as to make it impractical to expect that individual reforms inspired by U.S. models are capable of somehow transforming an inquisitorial criminal system into a truly adversarial one. See generally Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT’L L.J. 1 (2004) (demonstrating that countries with inquisitorial system will not be Americanized by introducing American-style plea bargaining); Ugo Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 AM. J. COMPAR. L. 195 (1994) (examining legal transplants from the civil law to the common law); Wolfgang Wiegand, *Americanization of Law: Reception or Convergence?*, in LEGAL CULTURE AND THE LEGAL PROFESSION 137 (Lawrence M. Friedman & Harry N. Scheiber eds., 1996) (concluding that “a reception of American law has indeed taken place”).

⁵⁴ In the following paragraphs, I will use “interview” and “*Fantan*” interchangeably. Judges in Taiwan have recognized the routine practices of *Fantan*. See, e.g., Taiwan Gaodeng Fayuan (台灣高等法院) [Taiwan High Court], Xingshi 刑事 [Criminal Division], 105 Niandu Chong Shanggeng San Zi No. 30 (105 年度重上更(三)字第 30 號刑事判決) (2016) (Taiwan) (suggesting that *Fantan* took place before interrogation); Zuigao Fayuan (最高法院) [Supreme Court], Xingshi 刑事 [Criminal Division], 99 Niandu Tai Shang Zi No. 3965 (99 年度台上字第 3965 號刑事判決) (2010) (Taiwan) (mentioning *Fantan* as a routine practice).

connection will assist in any interrogation that might follow the interview.

The very purpose of an interview is to gather information. Officers evaluate the suspect's behavioral responses to interview questions. Sometimes the suspect will make an incriminating admission or full confession during the interview without any further interrogation. An important aspect of the interview is that it can be conducted in a variety of settings. The place for interviews is usually an office in the police department. However, a large number of interviews are conducted wherever it is convenient to ask questions, such as in a residence or office, on the street, or where an arrest was initiated. In some cases, police officers interview the suspect in the patrol car on the way back to the police station.⁵⁵ No matter where interviews are conducted, there usually will be no official taped record.

(b) *Different Themes in the Interview Settings*

1. Testing the Suspect's Will and Finding the Suspect's Weakness

During *Fantan*, police officers often employ a deceptive tactic that is designed to misrepresent the nature or seriousness of the offense for which the suspect is under questioning. Police will either withhold or exaggerate the information they show to the suspects. For example, police may suggest to the suspects that they are only interested in obtaining admissions to a minor crime, when in fact they are actually investigating a serious one.⁵⁶ Also, police routinely make use of sympathy, understanding, and compassion in order to play the role of the suspect's friend.⁵⁷ Police officers attempt to portray the conversation as a friendly exchange of

⁵⁵ Fieldnote10:03 (notes on file with the author).

⁵⁶ Fieldnote 18:05 (notes on file with the author); Fieldnote 19:02 (notes on file with the author).

⁵⁷ For similar practices in the U.S. police interrogation, see Richard A. Leo, *Miranda's Revenge: Police Interrogation as a Confidence Game*, 30 L. & SOC'Y REV. 259, 268 (1996) (finding that prior to any questioning, the detective begins by analyzing the suspect's behavior, his body movements, and demeanor, as well as the content of his responses to different types of questions or appeals, in order to "discern the suspect's apparent manner of lying and truth-telling as well as his apparent psychological vulnerabilities").

information as well as to convince the suspects that they are concerned about their situations.⁵⁸ As one police officer told me:

I will tell suspects that we should be friends. I will emphasize that I can understand their position. But every decision has its consequences, and it is time to face that. I will encourage them to help me out. I want them to understand that I am just doing my job. The last thing I want them to feel is that I look down on them.⁵⁹

The duration of interview varies from case to case. Some are less than five minutes, while others can last from twenty to thirty minutes. In the preliminary interactions with suspects, investigators use this chance to test the suspect's will. If the suspect has a strong will and refuses to cooperate with the investigator, the tension of the conversation will be heightened, and different techniques will be used. On the other hand, if the suspect appears to be cooperative and seems willing to talk with the investigator, the interview may soon be terminated, and the officer will proceed to a formal interrogation.⁶⁰

The practices of *Fantan* can be divided into several types, depending on what police officers believe to be the best strategy.⁶¹ The most common type of *Fantan* involves softening the suspect up and establishing empathy and rapport. These techniques serve to lessen the tension between the investigator and the suspect.⁶² Police officers intend to create a favorable climate for further interaction. Sometimes when the investigator successfully develops this sense of supportive emotional environment, they will choose not to ask any further questions, particularly about issues surrounding the crime. In these cases, the duration of the interview will be rather short and a formal interrogation will immediately follow. Meanwhile, most of

⁵⁸ Fieldnote 04:01 (notes on file with the author).

⁵⁹ Interview 07:04 (notes on file with the author).

⁶⁰ Fieldnote 08:06 (notes on file with the author).

⁶¹ For other commonly used interrogation techniques, see XU GUO-ZHEN (徐國楨), JIEKAI ZHENXUN DE SHENMI MIANSHA (揭開偵訊的神秘面紗) [UNVEILING THE MYSTERY OF INTERROGATION] (2008) (discussing various aspects of interrogation strategies).

⁶² Fieldnote 41:01 (notes on file with the author). See also CRIMINAL INVESTIGATION BUREAU, INTERROGATION TRAINING MANUAL FOR GANG-AFFILIATED CASES (archive on file with the author).

the police officers I interviewed told me that they would continue to describe the evidence against the suspect and persuade them that it was worthless to deny the crime. These investigators will explain the charges and provide the suspects opportunities to cooperate.

During *Fantan*, investigators use a variety of strategies to overcome the suspect's denial. The investigators seek to importune the suspect to confess for the good of his case, for the good of his family, or for the good of his conscience. Moreover, police officers can describe the evidence against the suspect and tell him (sometimes falsely) that other co-defendants have already confessed.⁶³ Also, during rapport building, investigators gather background information and seek out suspects' weaknesses based on this information. Once investigators secure the suspect's weaknesses, those weaknesses can later be used to enhance the suspect's desire to cooperate. A senior police officer told me:

If the suspect denies her involvement in prostitution, all you need to do is to call the media. You can ask her, 'Do you want to confess? If not, I will now call the media.' On the other hand, if the suspect is married, then you tell her that you will contact her familyBut this tactic only works on Taiwanese people. If the suspects come from mainland China, then they will probably ignore you because they have no social connections here in TaiwanSo, it really depends on what kind of suspect you are dealing with.⁶⁴

In another case, the officer seized the suspect's cell phone and secured the conversation record between the suspect and the woman with whom he was having an affair. The officer "suggested" to the suspect that if he continued to be uncooperative the officer would show the record to the suspect's girlfriend "by accident."⁶⁵

Very often these techniques are combined with the threat of putting the suspect into pretrial detention in order to trigger tremendous psychological pressure. The suspect is led to believe

⁶³ Fieldnote 27:05 (notes on file with the author).

⁶⁴ Interview 13:21 (notes on file with the author).

⁶⁵ Fieldnote 28:01 (notes on file with the author).

that confessing to the more understated version of the crime will lead to a kinder treatment and facilitate a speedier release from custody.⁶⁶ One of my interviewees provided a vivid example:

Pretrial detention poses an extreme burden on one's freedomA woman was caught by us for stealing smart phones. She put on a helmet when she was committing the crime. We only had the surveillance tape, and it was not very clear. To be honest, we could not confidently identify her as the suspectShe flatly denied committing the crimeThen I noticed she had a three-month-old baby. I told her that if she continued to deny the crime and did not cooperate with us, I would bring her back and suggest that the prosecutor consider pretrial detention. I told her that she would no longer be able to see her newborn baby. On the other hand, if she cooperated with me, I was going to see if we could get her out of here [police station] as soon as possible, so that she could go home and see her baby. And she finally confessed.⁶⁷

In sum, the tactics used during *Fantan* are often deceptive insofar as they create the illusion of intimacy between the suspects and the police officers and misrepresent the adversarial nature of the process.⁶⁸ The purpose of emulating a friendly role is to exploit the trust inherent in these relationships. Moreover, people under police questioning are especially drawn to immediate rewards and are less likely to think about the consequences of their actions. They are more likely to respond positively to police interrogation tactics.⁶⁹

⁶⁶ Fieldnote 04:02 (notes on file with the author).

⁶⁷ Interview 04:18 (notes on file with the author).

⁶⁸ Another detective told me that, "by chatting with the suspect, we found out that he had a girlfriend who was pregnant. He told us that he desperately needed some money for her and the coming newbornI explained to him that if he confessed and provided us all the information he knew, I would write a memo to the prosecutor and suggest that there was no need to put him in detentionI told him that this was the only way to ensure he would see his pregnant girlfriend." Interview 104:09 (notes on file with the author).

⁶⁹ Fieldnote 09:05 (notes on file with the author).

2. Promises and Negotiations

The deceptive tactics during *Fantan* often involve the use of promises and negotiation. The promises can explicitly offer leniency or be vague and indefinite.⁷⁰ Many police officers told me that they will suggest a promise of leniency to the suspect, such as informing the prosecutor of the suspect's cooperation; or, telling the suspect that displaying sincere remorse will be a mitigating factor; or, saying that they will help arrange the best resolution for the suspect if he/she confesses.⁷¹ These are in fact deceptive, since they falsely create expectations that will not be met.

Moreover, under-the-table negotiation is a common practice. In order to encourage the suspect to confess, investigators will make deals with them in the shadow of the law. Police officers use different strategies to increase their bargaining power. These sometimes include fabricating evidence or exaggerating the potential punishment.⁷² Again, creating psychological pressure is crucial at this stage. As one of my interviewees described:

In drug possession cases, you can tell suspects that you can choose to report the mere possession of drugs if the suspects confess. Otherwise, you can tell suspects that you will take a urine sample. These people know exactly the difference between drug possession and drug consumption. For instance, suppose you search a suspect's pocket and found a bag of amphetamines. But his urine sample might also show a heroin reaction. In such a case, he would be subject to two charges instead of one . . . Criminals are very quirky now. They will try to fool you and seek to make good deals with you. We have to let them know that we have sufficient evidence to put them in jail, and it is in their best interests to cooperate with us.⁷³

⁷⁰ Fieldnote 08:14 (notes on file with the author).

⁷¹ Fieldnote 20:08 (notes on file with the author); Fieldnote 26:08 (notes on file with the author).

⁷² Fieldnote 08:17 (notes on file with the author).

⁷³ Interview 02:15 (notes on file with the author).

3. The Framing of the “*Formal*” Interrogation

Many police officers told me that *Fantan* helps them sort out unnecessary information and better frame the structure of the later interrogation. Interrogation records are official documents. Once made by the interrogator, not a single word can be changed or reframed; otherwise, the police officer may be prosecuted for fabricating official documents. Anything said during the interrogation is videotaped and documented into the record. Also, if police officers later find out that there are missing issues that need to be addressed during interrogation, they cannot go back to the relevant section and revise it. The policy requires the interrogator to conduct a subsequent interrogation.⁷⁴ In doing so, the interrogator

⁷⁴ One of the most significant changes that took place during the 1980s police reform in Taiwan was an increased reliance on legal mandates as sources of authority. The main criticism of Taiwanese police officers was that policing was often based on stereotypes, biased motives, and political influence. People believed that law enforcement officers differentially enforced the law. Such public perceptions led to mistrust and even hostility toward the police. The passage of several laws and regulations in the 1980s provided necessary mandates and resources for police officers to operate as a professionalized law enforcement community. To achieve the goals of uniformity and equality, Taiwan’s National Police Agency adopted *Jingcha Zhencha Fanzui Shouce* (警察偵查犯罪手冊) [The Police Investigation Manual] (1980). Such written policies help ensure that individual police officers consider and ignore the same factors during investigations, while leaving them with the necessary discretion to do their job to the best of their abilities. The manual governs police officers’ daily activities, such as interrogation, search and seizure, and testifying in court. Each year, the National Police Agency replaces and supersedes all previous versions of the manual according to changes in the relevant statutes that were made during the year. Most importantly, the manual addresses notable new policies and provides sufficiently clear guidelines as to the ramifications of these policies for police officers. On the other hand, the manual is flexible enough to enable each police agency to establish different suitable procedures that define and assign responsibilities within each department. The manual consists of 250 rules and mainly serves to instruct police officers about the latest legislative and judicial decisions that are taken as national policy. From Rule 121 to Rule 132, the manual specifies, in great detail, the information that needs to be included in the interrogation record as well as the procedure for making an interrogation record. For instance, the Manual states that the suspect shall be permitted to read the record. If the suspect requests to change the record, his/her statement shall be added to the record. At the end of the interrogation, the suspect shall be ordered to affix his signature, seal, or fingerprint to the record immediately following the last line of the record. Also, the manual reminds officers that the interrogation record should be structured in the format of “Question and Answer.” (Rule 123). Regarding the procedural requirements of interrogation, the manual specifies that the interrogation should be conducted by two police officers. One officer is in charge of questioning and the other is in charge of recording, unless under the circumstance of exigency or inability. In the latter cases, where there is only one interrogator, it is required to have video recording during the whole interrogation. The purpose of having two interrogators is to increase the reliability of the interrogation

has to complete all procedural requirements, including giving the *Miranda* warnings, and produce a new interrogation record. Obviously, most police officers will try to avoid such a troublesome task; thus, they seek to record the interrogation in one official document. Another relevant incentive is that interrogation records are submitted to the department director or the head of the department for review. Multiple and/or cluttered interrogation records will be seen as unprofessional and negatively affect the officer's performance evaluation.⁷⁵ Therefore, interrogators need to figure out what questions must be asked and how to ask them before they turn on the camera and conduct the formal interrogation.⁷⁶

These official policies and procedures incentivize police officers to engage in backstage questioning. *Fantan* becomes a critical step in the investigation process since it provides interrogator a chance to identify and gather necessary information and set aside what is unimportant.⁷⁷ Interrogators can decide what issues need to be addressed during interrogation and even predict the answers the suspect may provide. Sometimes the interrogator will go through the questions in advance to make sure that the suspect will be able to understand them.⁷⁸ The two-step process of *Fantan* followed by the "official" interrogation makes the latter more like a well-rehearsed drama.⁷⁹ Backstage rehearsal explains

record and to enhance the quality of the communication between interrogator and suspect. Following the adoption of the manual, many police departments have provided more detailed supplementary explanations regarding the rules. These explanations sometimes include information about the interrogation room's design and about interrogation techniques, elaborating on the suggested steps of interrogation. For instance, some materials instruct that in a case where the suspect has chosen to remain silent, the interrogator has to specify this circumstance in the interrogation record but is *not* required to terminate the interrogation. In other materials prepared by an experienced sergeant in charge of the investigation of burglary, sixty-five suggestions are laid out for achieving a successful interrogation. Noticeably, in the preamble of the document, it remarks that for a long period of time police in Taiwan used the so-called "beat first, ask later" (打了再問) technique to overcome the objections of suspects and implies that this was a particularly useful tactic for recidivists. An additional comment is that "torture has helped Taiwanese police clear many cases;" and since the suspect often confessed to multiple crimes, it was a particularly "efficient and powerful" tool. The author even directly questions the reader as follows: "When torture is no longer available, what can the police use to overcome the objections of the suspect?" (archive on file with the author).

⁷⁵ Interview 12:02 (notes on file with the author).

⁷⁶ Fieldnote 02:03 (notes on file with the author).

⁷⁷ Fieldnote 02:04 (notes on file with the author).

⁷⁸ Interview 15:09 (notes on file with the author).

⁷⁹ Interrogation Recording 1; 2 (videos on file with the author).

many of the scenarios in the interrogation videotapes I observed. A detective sergeant described such practices:

You cannot really expect to get any useful information by merely conducting the formal interrogation. The formal interrogation must be conducted in the form of question and answer (一問一答), which seems rather bizarre if you compare it with our daily conversations In formal interrogation, you will not hear too much that is extraneous. But a real interrogation should look like daily conversation . . . so what we do is actually sort out unnecessary information before the formal interrogation. Sometimes I will take brief notes by just chatting. Then when I conduct the formal interrogation, all I need to do is to confirm answers to questions with the suspects and of course, do the videotaping.⁸⁰

By talking with the suspects beforehand, interrogators can even decide what crimes they want to deal with.⁸¹ Editing the information becomes practical if the suspects provide more than one clue or contradicting messages during *Fantan*.⁸² A police officer said to me:

Sometimes the suspects will talk nonsense. You really want them to clarify. If you put all this information into the interrogation record, prosecutors will definitely complain. Because it is required to

⁸⁰ Interview 13:47 (notes on file with the author).

⁸¹ According to some of the defense lawyers I interviewed, conducting *Fantan* is sometimes in their clients' interests because seasoned defense attorneys can assist their clients to "make deals" with investigative agents by confining the scope of the subsequent interrogation to certain offenses. Some attorneys described such practices as "de facto" plea bargains. Fieldnote 21:07 (notes on file with the author).

⁸² Sometimes police will include information collected from *Fantan* in the formal interrogation record, even when the suspect did not reiterate those statements. *See, e.g.*, Taiwan Gaodeng Fayuan (台灣高等法院) [Taiwan High Court], Xingshi 刑事 [Criminal Division], 91 Niandu Shanggeng Yi Zi No. 386 (91年度上更(一)字第386號刑事判決) (2002) (Taiwan) (involving a case in which police included multiple statements from *Fantan* into the official interrogation record and asked the suspect to confirm their accuracy at the end of the interrogation).

videotape the interrogation, you have to make sure you have control over the process. Otherwise, you are just getting yourself into troubleWhen you ask the suspect whom he bought drugs from, he gives you a name. You want to make sure that he does not come up with other names during the interrogation. Most importantly, you do not want the suspect to bring in other stories during interrogation. If they do so, the prosecutor will ask you to conduct further investigation and you really will not be able to close the caseLike yesterday, a guy told me that he had dozens of clues that he wanted to tell me. Do you think you can put all this information into the record? Well, no . . . not unless you want to create a special investigation team. If you do not want to be overloaded, then it is better to leave other clues to the future and simply focus on one particular matter.⁸³

C. THE OPERATION OF THE UNDERGROUND *MIRANDA* WARNINGS

The manipulation of the *Miranda* warnings by police officers poses a serious concern of its implementation. Police officers have incentives to change the content of the original *Miranda* warnings and discourage suspects from invoking their rights.⁸⁴ Such a situation has been exacerbated by the practices of *Fantan*. It is crucial to closely examine whether the original vision of *Miranda* protections can resonate with the practices of *Fantan*. Police officers in Taiwan are now legally required to inform the suspects that they have the rights to remain silent and to retain counsel.⁸⁵ Essentially, the warnings mark the beginning of an

⁸³ Interview 07:16 (notes on file with the author). Note that police in Taiwan do not have case disposition authority. Although police have been lobbying for the recognition of their independent investigative authority, there has been little change made to grant police the authority to dispose of cases without permission from prosecutors. The general Taiwanese habit and experience of distrusting police has continued after Taiwan's democratic transition. It is true that in recent decades the Taiwanese police have made noticeable progress in many respects. However, problems of misconduct and corruption continue to plague Taiwan's police force and tarnish its image.

⁸⁴ Fieldnote 17:06 (notes on file with the author).

⁸⁵ See *supra* Part I.

adversarial relationship. The message implied in the warnings is that the interrogator and the suspect do not share common interests. The original vision of the warnings is that after its issuance, the suspects will be able to understand the adversarial nature that police officers seek to hide.⁸⁶ However, the pre-interrogation police-suspect interactions substantially circumvent such a fundamental design of the *Miranda* mechanism. In fact, police officers have developed multiple strategies to avoid, deemphasize, and manipulate *Miranda*. During *Fantan*, investigators can issue the warnings in rather strategic ways or simply interrogate the suspects without providing the warnings.

(a) *Avoiding Miranda*

One of the most overlooked deception strategies police employ is questioning the suspect in an informal setting so as to circumvent any legal necessity of providing *Miranda* warnings. According to the *Miranda* legislation in Taiwan, the warnings must be given to a suspect prior to interrogation. The term “interrogation” is legally defined as any interactions between police officer and suspect, when the suspect is in custody or whose freedom has otherwise been significantly deprived. Most of the police officers indicate that they do not issue the *Miranda* warnings prior to *Fantan*. The reason is two-fold: first, some of the police officers that I interviewed told me that *Fantan* is a non-custodial stage where the suspect is free to leave at any time. By assuring the suspect that he is voluntarily answering questions, some police attempt to transform what otherwise would be considered an interrogation into an interview. By recasting an actual interrogation as an interview, police officers are committing a legal deception. Second, and perhaps more decisive, there is often no functional difference between *Fantan* and formal interrogation.⁸⁷ During *Fantan*, most of

⁸⁶ Interview 31:07 (notes on file with the author).

⁸⁷ See Zuigao Fayuan (最高法院) [Supreme Court], Xingshi 刑事 [Criminal Division], 99 Niandu Tai Shang Zi No. 1893 (99年度台上字第1893號) (2010) (Taiwan) (stating that police should videotape the entire process of an interview and inform the suspect his/her rights according to Article 95 of the Code of Criminal Procedure if the contact is the functional equivalent of an interrogation). However, this decision has very little influence on police actual practices. See also Zuigao Fayuan (最高法院) [Supreme Court], Xingshi 刑事 [Criminal Division], 101 Niandu Tai Shang Zi No. 2165 (101年度台

the suspects are already in custody. Some interrogators even conduct the *Fantan* in interrogation room.⁸⁸ The fact that there is no video recording explains why most police officers do not provide the *Miranda* warnings before questioning the suspects.

On the other hand, *Fantan* triggers further concerns regarding the nullification of the whole *Miranda* system. If *Fantan* is essentially another form of interrogation, then we have reasons to suspect that the *Miranda* warnings are nothing but flowery openings of a “legal drama.” *Fantan* and *Xunwen* should be seen as a “two-step” interrogation, where the former is completely out of judicial scrutiny. During *Fantan*, police officers can either neglect or downplay the significance of *Miranda*. Some even describe the negative effect if the suspects chose to invoke their rights.⁸⁹ Among all the tactics my interviewees described, the manipulation of the *Miranda* warnings is perhaps the main reason why the intended safeguards are largely circumvented. Police officers in Taiwan gradually developed what I refer to as the “underground” *Miranda* warnings.

(b) *Manipulating Miranda*

The empirical data I collected indicates that police officers in Taiwan always recite the familiar *Miranda* warnings before “formal” interrogation. The warnings are issued in a standardized form based on the requirements of the law. The “front-stage” *Miranda* warnings are videotaped and are under close judicial scrutiny. Here I would like to show how the “backstage” or “underground” *Miranda* warnings operate.

During the pre-*Mirandized* conversations, police officers often manipulate the context of the legally required *Miranda* warnings. They deliver the warnings in a perfunctory tone and ritualistically behavioral manner. By doing so, they attempt to convey that these warnings are little more than bureaucratic procedure. During initial contact with suspects, police officers will provide a preamble of the *Miranda* warnings. The purpose is to tell the suspects that later, when the officers turn on the camera and start

上字第 2165 號刑事判決) (2012) (Taiwan) (stating that *Fantan* practices could constitute “improper means” and affect the voluntariness of the confession).

⁸⁸ Fieldnote 37:05 (notes on file with the author).

⁸⁹ Fieldnote 37:07 (notes on file with the author).

the interrogation, they are legally obligated to issue these warnings.⁹⁰ Meanwhile, investigators seek to undermine the importance of *Miranda* by downplaying the potential significance of the warnings.⁹¹ At this stage, some police officers recite the warnings in a trivializing manner to maximize the likelihood that the suspect will waive these rights during the formal interrogation. These early actions could explain the reason why police officers are so successful in obtaining waivers at latter stages of the investigation.

In short, during *Fantan*, police officers often minimize, downplay, or deemphasize the *Miranda* warnings. The interrogators anticipate that the suspect will not see the *Miranda* warnings as a crucial transition point during the police-suspect interaction. They count on the suspect missing the significance of their opportunity to terminate the interrogation; instead, seeing the administration of *Miranda* warnings as something akin to routine bureaucratic practices where one can sign the form without reading or giving much attention to its implication. Police in Taiwan often portray the reading of *Miranda* warnings as a trivial bureaucratic ritual and indicate that they anticipate most suspects will waive their rights and make statements.⁹²

Interrogators can even directly manipulate the *Miranda* warnings. Instead of asking whether suspects wish to speak to them, interrogators tend to ask suspects whether they want to “explain his situation or excuses” or whether they want to “hear how officers can help them.”⁹³ Moreover, interrogators often provide what I call the “Taiwanese version of *Miranda* warnings,” where the police tell a suspect, “you may remain silent, but doing so will do you no good,”⁹⁴ and “you may retain a defense attorney, but it will simply waste your time and money.”⁹⁵ By convincing suspects that the interrogators are acting in their best interests, some interrogators

⁹⁰ Fieldnote 07:10 (notes on file with the author).

⁹¹ Fieldnote 07:06 (notes on file with the author).

⁹² Some defense attorneys believe that, with the greater involvement of the Taiwan’s Legal Aid Foundation (財團法人法律扶助基金會) in recent years to provide free legal counsel to suspects during police interrogation, police are less likely to conduct such practices. This is, of course, an empirical question to be examined in the future.

⁹³ Interview 13:15 (notes on file with the author).

⁹⁴ Interview 15:05 (notes on file with the author).

⁹⁵ Interview 16:08 (notes on file with the author).

seek to provide suspects with free “legal counsel.”⁹⁶ They seek to convince suspects that the warnings are simply a formality. Interrogators tell suspects that if they want to clarify their innocence or provide any information, they will first need to waive their *Miranda* rights. Since most suspects want to have their voice heard, waiving their *Miranda* rights becomes a matter of routine.⁹⁷ Moreover, if a suspect responds to the *Miranda* warnings by stating his/her intention to have a defense lawyer present during questioning, police officers often initiate further conversation with the suspect in the hope that the suspect will change his/her mind about invoking *Miranda* rights. There are various strategies for prompting suspects to waive their *Miranda* rights even after they have invoked the right to legal counsel. For instance, one police officer told me that when the suspect intends to get a lawyer, he will explain to them:

There is no need to waste your time and money on a lawyer at this stage. All a lawyer can do is sit silently behind you—and do nothing. I suggest that you [the suspect] save your money and hire a lawyer after you meet the prosecutor or go on to the court proceedings.⁹⁸

Most of the police officers believe that the role of a lawyer is simply to be a witness and make sure that the interrogators do not torture the suspect. They often tell suspects that since they are videotaping the process of interrogation, it is impossible for them to use torture. Moreover, some interrogators will provide suspects with what they believe is the “correct” legal advice, such as “a

⁹⁶ With a growing number of lawyers joining the Legal Aid Foundation to provide government-funded legal defense services during police interrogations, some lawyers I met suspect that the police are gradually becoming more accustomed to the presence of lawyers and less hostile towards them. Again, whether this means police have been less likely in recent years—and will be less likely in the future—to manipulate *Miranda* remains an open empirical question.

⁹⁷ By civilizing the process of interrogation, the warnings implicitly suggest to suspects that the police are respectful of their rights, the police are not only law-abiding but also fair and objective. Delivered in the proper manner, the warnings could even suggest to suspects that the investigators are sympathetic and willing to listen to whatever they have to say. Such a message enhances some suspects’ belief that they can actually convince the interrogator to release them.

⁹⁸ Interview 09:37 (notes on file with the author).

lawyer is not allowed to speak or assist you during the interrogation;”⁹⁹ “lawyers won’t tell you anything that I have not already told you;”¹⁰⁰ “most lawyers you hire are money-driven;”¹⁰¹ “free legal counsel is intended to encourage you to confess;”¹⁰² or “lawyers cannot accompany you during the interrogation, they can only watch the process through close-circuit television.”¹⁰³ Apparently, some of these legal advice are false. However, in the initial contact with the criminal justice system, most suspects do not have other channels to acquire basic legal knowledge. They tend to rely on what police officers tell them. This likely explains why suspects in Taiwan often respond to police questioning without defense lawyers present. Interrogators seek to convince suspects that the function of a defense lawyer is to be a mere witness. Therefore, the initial visions of the *Miranda* legislations are largely compromised.¹⁰⁴

⁹⁹ Interview 09:38 (notes on file with the author).

¹⁰⁰ Interview 12:09 (notes on file with the author).

¹⁰¹ Interview 03:12 (notes on file with the author).

¹⁰² Interview 14:07 (notes on file with the author).

¹⁰³ Interview 36:06 (notes on file with the author).

¹⁰⁴ Some investigators even told me that they expect the defense counsel to act like “Hello Kitty” (凱蒂貓)—a popular fictional cat that has no mouth—during the interrogation process. Under the proposed adversarial system in Taiwan, defense lawyers should stand in the position of greatest opposition to police and prosecutors. In reality, however, defense lawyers in Taiwan have little power to influence how law enforcement officers investigate, dispose of, or assist in the trying of cases. Throughout the criminal process, the function of defense lawyers is largely restricted by law, tradition, and legal culture. Therefore, defense lawyers can do very little for suspects and defendants. The practical result is that suspects may consider invoking their *Miranda* rights as meaningless and feel they have no choice but to talk to interrogators. Most of the defense lawyers that I interviewed mentioned that they should relate to police and prosecutors as cooperatively and constructively as possible. Interestingly, almost all my interviewees said that they had never actively recommended that a suspect or defendant exercise the right to remain silent. Only a few of them have ever suggested that their client to remain silent, most under circumstances when the suspect was uncertain or confused by police questions; the suspect had difficulty communicating; or the suspect and the police had violently quarreled during interrogation. More importantly, even under such rare circumstances, defense lawyers did not advise their clients to remain silent during the entire interrogation. Instead, clients were advised to answer some police questions and therefore only remain partially silent. Given the many psychological interrogation techniques for extracting *Miranda* waivers and confessions, and how infrequently Taiwanese defense lawyers counsel a strategy of silence, the fact that most suspects in Taiwan waive their *Miranda* rights and talk to the police is hardly surprising. For a social science study of defense attorneys’ role during criminal investigations in China, see SIDA LIU & TERENCE C. HALLIDAY, CRIMINAL DEFENSE IN CHINA: THE POLITICS OF LAWYERS AT WORK 52-53 (2016) (describing the difficulties in meeting and communicating with suspects).

Unlike the front-stage *Miranda* warnings, the underground *Miranda* system does not have a clear format. It is often bent into the conversation, consisting of various topics. Specifically, two reasons can be given to explain why the operation of the underground *Miranda* warnings is rather difficult to detect and address officially. First of all, there is no specific time when police officers *must* provide backstage warnings as compared to the clearly prescribed timing of the front-stage warnings codified in law. In fact, most of the so-called “*warnings*” are legal advice offered during pre-*Mirandized* conversation. For some suspects, this legal advice may be convincing because it is often well tailored to their cases. Investigators can describe the existing evidence and convince the suspect that hiring a lawyer will not make any difference. Or, as in the cases discussed above, investigators can use suspects’ weaknesses against them to diminish their intention to invoke any legally provided rights. Therefore, how police officers alter the wording of their warnings to convince suspects to waive their rights is no longer the central issue. The reality is even more complicated since the relevant rights have been framed and relocated to the context of the psychological process during *Fantan*.

Second, the underground *Miranda* system is still largely free from judicial scrutiny.¹⁰⁵ *Fantan* occurs in various settings. It could occur anywhere between an arrest’s initiation and the police station. Moreover, there is no official record that can be used to reconstruct such police-suspect interactions. Most of the defense lawyers I interviewed recognized the practices of *Fantan*. And they believed such practices seriously undermine the proper functioning of defense counsel. However, none of them sought to petition the court to argue such practices illegally damage *Miranda* protections. The lack of evidence is the main reason for their inaction. *Fantan* is most likely to occur when the suspect is not accompanied by a lawyer. In these cases, the suspect becomes the only witness.

In short, the legislators’ mandatory videotaping of interrogations has not resolved all problems. The safety net that the videotaping policy seeks to create can be achieved only if the entire

¹⁰⁵ In fact, the goal of introducing the *Miranda* rule in Taiwan was to limit, even eliminate, the exercise of police discretion during interrogation. However, the trend seems to be in the opposite direction—to eliminate discretion where it is most visible, as in the formal interrogation proceeding, while neglecting its continued existence where it is less visible, as it is at the *Fantan* stage.

session is recorded. However, the formal legal requirements have been compromised by the long-entrenched underground police activities and the sophisticated *Guanxi* network that exists among police, defense attorneys, and suspects. Judicial scrutiny is largely limited to the public, “front-stage” interrogation, and the “visible” *Miranda* system. The practices of *Fantan* are entirely overlooked—that is the missing story of *Miranda* in Taiwan.

III. POLICE INTERROGATION AND THE CONCERNS OF FALSE CONFESSIONS

A. *The Changing Landscape*

Prior to the advent of forensic DNA testing, most observers of the Taiwanese criminal justice system, professional and lay alike, believed that the risk of error in criminal cases was remote and negligible. For many of Taiwan’s law enforcement personnel, judges, prosecutors, and even defense lawyers, once a confession is made, the case was over—there was no need for further investigation or litigation. While the Code of Criminal Procedure recognized the possibility of false confessions and the potential unreliability of confession evidence,¹⁰⁶ in practice almost no one took the risk factors in individual cases seriously.

With the help of many non-governmental organizations, Taiwanese people now know better that both the perception of virtual infallibility of criminal procedure, as well as the intuitive sense that no suspect would falsely confess to a crime he/she did not commit, are inaccurate.¹⁰⁷ The specific DNA exonerations and the media coverage of wrongful conviction cases generally have shown that error in the criminal justice system is real and that false confessions are one of the leading contributors to wrongful

¹⁰⁶ See Code of Criminal Procedure, § 12, Art. 156 (2003) (Taiwan) (“Confession of an accused, or a co-offender, shall not be used as the sole basis of conviction and other necessary evidence shall still be investigated to see if the confession is consistent with the facts.”).

¹⁰⁷ For example, in 2012 the Taiwan Association for Innocence was established, modeled on the Innocence Project in the United States. It is currently the most active non-governmental organization helping to exonerate the wrongly convicted and providing the public with the latest studies of wrongful convictions in countries such as Japan and the United States.

convictions.¹⁰⁸ In particular, false confessions both directly and indirectly influence wrongful convictions. Previous examinations on Taiwan's wrongful conviction cases reveal that a substantial percentage of cases in which an innocent individual was convicted, he/she falsely confessed to being a perpetrator.¹⁰⁹

Inducing confessions have remained central to Taiwanese law enforcement practices even following the enactment of modern criminal procedural rules.¹¹⁰ Torture was still widely seen as an acceptable method of obtaining a full confession as of the late 1990s.¹¹¹ Examples of documented methods of extracting confessions include: sleep deprivation, promise of timely release, threatening more stringent punishments, isolation, lack of privacy, slapping, punching, kicking, or beating suspects, extended questioning often starting early in the morning and lasting until late at night, binding fingers, making suspects stand in certain positions, shouting in a suspects' ears, and forcing suspects to drink large amounts of water.¹¹² The deep-rooted value of truth-seeking, and

¹⁰⁸ See also Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 923 (2004) (suggesting that “[c]onfession evidence . . . is so biasing that juries will convict on the basis of confession alone, even when no significant or credible evidence confirms the disputed confession and considerable significant and credible evidence disconfirms it”).

¹⁰⁹ See TAIWAN YUANYU PINGFAN XIEHUI (台灣冤獄平反協會) [TAIWAN INNOCENCE PROJECT], <https://twinnocenceproject.org> [<https://perma.cc/L7NC-446N>] (last visited Sept. 20, 2021).

¹¹⁰ The traditional Chinese legal system has been characterized as one of substantive justice, which we can contrast to the procedural justice model favored by Western liberal democracies. The hallmarks of a substantive justice model are the pursuit of truth and the achievement of a just result. Accordingly, traditional Chinese criminal procedures were designed to uncover the truth as a necessary part of the justice process. The value of truth-seeking (發現真實) was later incorporated into the inquisitorial model of the modern Taiwanese criminal justice system. Within the inquisitorial system, Taiwan's court was actively involved in investigating the facts of the case. Moreover, during criminal investigations, the police and prosecutors placed great importance on the process of obtaining confessions, regardless of whether a suspect's rights were violated in the process.

¹¹¹ For general review, see generally CHANG CHUAN-FEN (張娟芬), WUCAI QINGCHUN (無彩青春) [COLORLESS YOUTH] (2004); JUDICIAL REFORM FOUNDATION (財團法人民間司改基金會), ZHENGYI DE YINYING (正義的陰影) [THE SHADOW OF JUSTICE] (2002). For a study of the use of torture by the Chicago Police Department, see LAURENCE RALPH, *THE TORTURE LETTERS: RECKONING WITH POLICE VIOLENCE* xiii, 144 (2020) (arguing that police torture is a transnational concern).

¹¹² The most famous case recently was the torture of Chiou Ho-Shun (邱和順), who was tortured by police officers during interrogation in 1988. Chiou was wrongfully sentenced to death and imprisoned for almost 23 years. He was released in 2011. The shocking process of torture, including slapping, cursing and beating, was later revealed to

the obsession of confession, in Taiwan's criminal justice system has caused a significant problem because sacrificing citizens' rights in order to obtain *the truth* challenges the legitimacy of the Taiwanese criminal justice system by undermining the very concepts of democracy.

Modern criminal justice reforms in Taiwan have successfully suppressed the use of physical coercion during police interrogation. However, the changing nature of police interrogation in Taiwan poses yet another serious problem. Psychological manipulation and deception have replaced physical coercion as the strategic underpinnings of the information-gathering techniques Taiwanese police employ. Where police questioning once routinely involved physical coercion, it now involves sophisticated psychological ploys, tricks, manipulative techniques, persuasion, and deception. The majority of police officers I met strongly condemn the use of physical force during interrogation.¹¹³ They believe that psychological tactics can be effective at securing confessions. In short, the use of deception and psychological manipulation has become an alternative to the use of violence. Many police officers believe further that abolishing the use of torture and physical force means false confessions are no longer an issue of concern.¹¹⁴ In the following sections, I examine the current structure of the criminal justice system and evaluate the changing landscape of false confessions.

B. *The Problems of Backstage Policing*

Discretion is a necessary component in daily police practices.¹¹⁵ Police officers in Taiwan enjoy high levels of

the public. For the sound record, see <https://www.youtube.com/watch?v=rEZSfDr-AQ> [<https://perma.cc/49AR-CCZE>]; <https://www.youtube.com/watch?v=b72uWB1Dc6s> [<https://perma.cc/7GKK-EXAP>] (last visited Sept. 20, 2021).

¹¹³ Fieldnote 33:14 (notes on file with the author).

¹¹⁴ Fieldnote 35:02 (notes on file with the author). See also Deborah Davis & Richard A. Leo, *Interrogation-Related Regulatory Decline: Ego Depletion, Failures of Self-Regulation, and the Decision to Confess*, 18 *PSYCHOLOGY, PUBLIC POLICY, AND LAW* 673, 676 (2012) (suggesting that “[e]xcept in the most egregious circumstances of suspect vulnerability and physical coercion . . . [confession] will likely be presumed true and voluntary by police (even defense) attorneys, judges, juries and appellate courts”).

¹¹⁵ In a comparative context, the American Bar Foundation (ABF) Survey of Criminal Justice between 1953–1969 was a groundbreaking study in the history of policing. It reversed the long pattern of neglect by opening a window, through its unique research

discretion given the at times difficult nature of their job.¹¹⁶ Yet discretion often leads to abuse and creates difficulty for effective oversight. It is usually expected that tighter controls and supervision will curb abuse. However, one problem with tighter control is that it causes abuse to become more secretive and harder to detect. This perhaps explains the current front-stage/backstage interrogation practices in Taiwan. My empirical data shows how interrogators in Taiwan have adapted to the *Miranda* rule. Police officers have developed sophisticated strategies for circumventing *Miranda*'s obstacles to a successful interrogation. The underlying strategy is to convince suspects it is not only expected that they waive their rights and make a statement but also advantageous for them.

During my fieldwork, I discovered that interrogators are most likely to employ sophisticated interrogation strategies when the camera is off. In backstage settings, law only plays a marginal role in directing and moderating police behaviors. Personal relationships are constructed, and various social norms are relied upon. Police interrogation is a discretion-heavy activity in which interrogators enjoy considerable latitude in determining how the law should be framed and executed. Criminal investigation involves complex tasks which no set of rules, guidelines, and instructions can fully regulate. In fact, the main goal of Taiwan's modern criminal justice reform is to limit, if not fully eliminate, police discretion. However, police persistently find ways to cope with legal reforms and restrictions by conducting backstage work.

My findings show that interrogators are now able to minimize *Miranda*'s impact most effectively when it is most important for them to secure a confession. My findings also suggest that police interrogation is like a theater stage on which

methodology, into the world of policing. The study's observations painted a picture of police operations in which the discretion of individual officers was pervasive. In the original field reports, the ABF researchers recorded incident after incident in which officers at the lowest level in the organization were making extremely important decisions with little, if any, guidance (archives on file with the author). Since the ABF survey, many studies have been completed that have added substantially to our understanding of police discretion. Meanwhile, documentation of this vast sea of discretion, found from the top to the bottom of a policy agency, raised profound questions about fairness, accountability, and control.

¹¹⁶ Anne M. Coughlin, *Interrogation Stories*, 95 VA. L. REV. 1599, 1610–18 (2009) (arguing that the law imposes only minimal constraints on police interrogation and that “the police are left with plenty of room to maneuver when assisting suspects to make confession”).

interrogators and suspects perform their particular roles. By minimizing outside scrutiny, they negotiate, practice, and rehearse before they go on stage. It is therefore safe to conclude, in a sense, that the whole practice is deceptive.

C. *Pretrial Detention and the Devastating Impact of Silence*

The manipulation of *Miranda* and the practices of pre-interrogation interview, or *Fantan*, pose serious roadblocks to the proper functioning of the *Miranda* rule. Suspects may be confused about their rights which undermines the importance of invoking those rights. Moreover, the current practice of pretrial detention further exacerbates the situation. It conveys a clear message to suspects under interrogation: invoking one's *Miranda* rights is a risky and worthless decision.

The function of pretrial detention helps police officers secure a suspect's confession through a subsequent two-stage process: first, heighten the pressure of interrogation and, later, prolong the duration of interrogation. Police officers tend to use pretrial detention as a threat to induce suspect's cooperation. As I have demonstrated, one of the main goals of the pre-interrogation interview setting is to weaken the suspect's resistance and find his/her weakness. Pretrial detention is the most useful weapon for police as it places a tremendous burden on one's freedom. Taiwan's Supreme Court has ruled that merely informing the suspect of the possibility of detention does not constitute a "*threat*" and thus is not a violation of Article 98 of the Code of Criminal Procedure.¹¹⁷ In this sense, suspects may decide to waive their *Miranda* rights in order to avoid pretrial detention.

More importantly, the actions of police officers indicate another issue that is almost disappearing from the current debate: the lack of judicial scrutiny over the practice of pretrial detention. That is, if prosecutors believe a suspect should be detained further, they must ask a judge, within eight hours of receiving the case, to approve up to two months of additional detention. Prosecutors may

¹¹⁷ See Zuigao Fayuan (最高法院) [Supreme Court], Xingshi 刑事 [Criminal Division], 103 Niandu Tai Shang Zi No. 1438 (103 年度台上字第 1438 號刑事判決) (2014) (Taiwan); Zuigao Fayuan (最高法院) [Supreme Court], Xingshi 刑事 [Criminal Division], 109 Niandu Tai Shang Zi No. 2660 (109 年度台上字第 2660 號刑事判決) (2020) (Taiwan).

later ask for another two-month extension. Therefore, police and prosecutors can detain a suspect for up to four months for investigation. During such pretrial period, interrogations can be long and very intense. Police and prosecutors can routinely interrogate suspects several hours each time. Some Taiwanese defense lawyers have described such practices as having the power to break even the toughest soul.¹¹⁸ Confessions obtained during extended lawful detention are not considered as coerced and are not subject to exclusion in court.

Under the current practice, judges rarely reject prosecutors' requests for detention, especially when a suspect refuses to provide "his/her side of the story" or remains silent.¹¹⁹ Many defense lawyers also criticize that judiciary as acting merely as a rubber stamp of approval as to these requests. But some judges may be genuinely concerned about public safety, afraid that if they deny prosecutors' requests for detention, they will have to take full responsibility for the suspects' behavior if more crimes are committed during release from detention.

¹¹⁸ Similar concerns have been documented in studies of Japanese police interrogation practices. See, e.g., Johannes Feest & Masayuki Murayama, *Protecting the Innocent Through Criminal Justice: A Case Study from Spain, Virtually Compared to Germany and Japan*, in *CONTRASTING CRIMINAL JUSTICE: GETTING FROM HERE TO THERE* 49, 68 (David Nelken ed., 2000); Steinhoff, *supra* note 50, at 844 (stating that Japanese police achieved "a very high rate of confession, not because Japanese criminal suspects were falling all over themselves to confess voluntarily, and not because the police flagrantly violated the law to coerce confession, but rather because the legal environment itself was so enabling"). See also COLIN P. A. JONES & FRANK S. RAVITCH, *THE JAPANESE LEGAL SYSTEM* 257, 257 (2018) (suggesting that "some suspects might . . . reasonably conclude [that] a confession is the only way to escape from the very stressful conditions of the interrogation room"). In fact, contrary to the *Miranda* rule, the law requires arresting authorities to invite suspects to make a statement rather than informing them of their right to remain silent. Article 203(1) of the Japanese Code of Criminal Procedure requires that, once a suspect has been arrested, he/she must be informed of the nature of the crime for which he/she has been arrested on suspicion of as well his/her right to have defense counsel appointed, and *be given the opportunity for explanation* (弁解). See also Weisselberg, *Exporting and Importing*, *supra* note 5, at 1240–43 (explaining how confessions are central to the Japanese legal system and how their laws "facilitate interrogations").

¹¹⁹ The overall approval rate is about 80%, although there has been a slight decline in more recent years. See Ministry of Justice, *Difang Jianchashu Xin Shou Xingshi Zhencha Anjian ji Xiang Fayuan Shengqing Jiya Qingxing* (地方檢察署新收刑事偵查案件及向法院聲請羈押情形) [*The District Public Prosecutor's Office Newly Accepted Criminal Investigation Cases and Applications to the Court for Detention*], FAWU TONGJI (法務統計) [LEGAL AFFAIRS STATISTICS], https://www.rjtd.moj.gov.tw/rjtdweb/common/WebList3_Report.aspx?list_id=822 [<https://perma.cc/F8G3-JCXC>] (last visited Sept. 20, 2021).

Finally, combined with the duty to submit to questioning and the format of the written interrogation record, invoking the right to remain silent is more like a direct ticket to pretrial detention. Under current interrogation practices, police officers will not terminate the interrogation even after the suspect invokes his/her *Miranda* rights and remains silent. The interrogator will continue to ask questions and write down the interrogation record at the same time. If the suspect refuses to answer, the interrogator will simply write down “remained silent” or “refused to answer.”¹²⁰ When the court later reviews the written interrogation record, the suspect’s reaction will look rather suspicious. Judging from the format of the interrogation record, remaining silent is akin to admitting guilt.¹²¹ Also, such practices indicate that the suspect has the right to remain silent but does not have the right to refuse police questioning or terminate the interrogation.¹²² The absence of the right to terminate police questioning has in practice been transformed into a duty to submit oneself to an often prolonged interrogation.¹²³ In short, the suspect

¹²⁰ Fieldnote 33:04 (notes on file with the author).

¹²¹ Invoking one’s *Miranda* rights may be seen as a rational decision only when defense lawyer can be expected to perform their defense work efficiently. Simply remaining silent is a devastating decision when no one else will speak for you. John Langbein’s classic analysis regarding the origins of the privilege against-incrimination remain an accurate depiction of what actually happened in Taiwan: “the right to remain silent when no one else can speak for you is simply the right to slit your throat, and it is hardly a mystery that defendants did not hasten to avail themselves of such a privilege . . . Without defense counsel, a criminal defendant’s right to remain silent was the right to forfeit any defense . . . Only when defense counsel succeed in restructuring the criminal trial to make it possible to silence the accused did it also become possible to fashion the true privilege against self-incrimination . . . The privilege against self-incrimination became functional only as a consequence of the revolutionary reconstruction of the criminal trial worked by the advent of defense counsel and adversary criminal procedure.” John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1054, 1084 (1994).

¹²² For a comparative study of interrogation practices in France that treat the suspect as a source of information, see Bron McKillop, *Anatomy of a French Murder Case*, 45 AM. J. COMP. L. 527, 575, 577 (1997) (suggesting that an accused “was expected . . . to divulge what he knew about the relevant event to complement the version otherwise established,” and that an accused “is obliged to submit to interrogation”).

¹²³ Moreover, subsequently in trial, Taiwanese prosecutors can impeach a defendant with his/her silence following the provision of *Miranda* warnings. The prosecution can also bring out the fact that a defendant invoked his/her *Miranda* rights. Such practices are in stark contrast with U.S. *Miranda* jurisprudence, where a suspect’s silence or invocation following a *Miranda* advisement may not be used by the prosecution in any fashion except where the suspect introduces the topic or falsely testifies to having given exculpatory information during the interview. The Court held it was improper to cross-examine about

may choose not to answer questions. However, the suspect has to remain present and listen to police questioning. The original *Miranda*'s protections in Taiwan should have included the right to terminate interrogation. Ideally, as soon as the suspect expresses his/her unwillingness to submit to police questioning, the interrogation would have to be terminated. The *Miranda* protections have in effect been eradicated in Taiwan in light of the existence of the obligation to submit to questioning. In this sense, suspects in Taiwan only have the right not to answer any questions against their will, not the right to silence. If an interrogator can get the suspect to change his/her mind during the questioning, then the suspect's answer to questions is not in violation of the Code of the Criminal Procedure. In attempting to get the suspect to change his/her mind and decide to cooperate, the police will almost always continue to question the suspect even after the invocation of the right to silence.¹²⁴

Unlike the common scenario in the United States, where once suspects assert their right not to answer questions or right to counsel the interrogation must stop,¹²⁵ the current interrogation practices in Taiwan neither compel the cessation of interrogation

the failure to provide the exculpatory information to the arresting officer, where the suspect had remained silent after a *Miranda* warning. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976). *But see* Alschuler, *supra* note 9, at 860 (proposing new *Miranda* jurisprudence in which prosecutors are permitted to comment on silence). For a comparative perspective from France, see *id.* at 676 (suggesting that “[t]he legal culture in France would not support a rule, as in some common law jurisdictions, prohibiting comment by a judge or a prosecutor to a jury on the failure of an accused to answer questions from the police”).

¹²⁴ See also TAIPEI LÜSHI GONGHUI (台北律師公會) [TAIPEI BAR ASSOCIATION], QIANGJIU BEIGAO: LUSHI ZAI JINGJU JIAOZHAN SHOUCHE (搶救被告：律師在警局教戰手冊) [ADVISING A SUSPECT IN THE POLICE STATION: MANUAL FOR ATTORNEYS] 59–60, 132 (2014) (recommending defense counsel to inform their clients of such practices).

¹²⁵ The *Miranda* decision itself stated unequivocally that, when an attorney is requested, interrogation must cease until counsel is present. The suspect must have an opportunity to confer with the attorney and have the attorney present during any subsequent questioning. *Miranda*, *supra* note 3, at 474 (1966). The Court later made it clear that there is a total ban on police initiating a reinterview after such an invocation. *Edwards v. Arizona*, 451 U.S. 477, 484 (1981). It has also held that post-invocation responses to further questioning may not be used to cast doubt on an unambiguous request for counsel. *Smith v. Illinois*, 469 U.S. 91, 100 (1984). See also Alschuler, *supra* note 9, at 874 (stating that *Miranda*'s promise of a right to counsel during questioning is not really a right to counsel; rather “[i]t is an incantation that suspects can use to shut down questioning.”); PAUL BUTLER, CHOCK HOLD: POLICING BLACK MEN 208–09 (2017) (describing that once the right to counsel is asserted in the United States, the interrogation should stop).

nor prohibit future interrogation sessions. Therefore, suspects are obliged to submit to police questioning even when they have stated their refusal to answer questions. It suggests that a duty to attend interrogation—merely being present and subjected to questioning—is not inconsistent with the protections of the Taiwanese *Miranda* mechanism.

Furthermore, as mentioned above, police and prosecutors have up to four months to detain a suspect before prosecuting him or her. Legally speaking, the suspect can be forced to sit through police questioning continuously. The suspect's insistence on invoking his/her right to remain silent will likely to be undermined following the daily questioning that ensues over such a long period. The duty to submit to police questioning essentially prevents the suspect from exercising his/her right to silence. Very few suspects can insist on such right not to answer questions while being physically subject to questioning. For the rest, the right to silence is very likely eroded by daily questioning over many consecutive days.

D. *Is False Confession a Live Issue? The False Confession Phenomenon*

Although the concept of a false confession actually dates back centuries, academic research in Taiwan has seldom paid much attention to this issue. In the United States, a substantial academic literature on false confession began to accumulate as early as the 1980s. Scholars have long pointed out the importance of interrogation and the potential for false confession. Saul M. Kassin and Lawrence Wrightsman first pioneered this research. They identify three categories of false confession: voluntary, coerced-compliant, and coerced internalized.¹²⁶ Since Kassin and Wrightsman, Richard Ofshe and Richard Leo have been the leading false confession scholars in the United States. While generally accepting Kassin and Wrightsman's triple-pronged framework, Ofshe and Leo have developed a four-part false confession typology: stress-complaint, coerced-compliant, non-coerced persuaded, and coerced persuaded.¹²⁷ In a later article, Leo and Mark Costanzo

¹²⁶ Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125 (1996).

¹²⁷ Richard A. Leo & Richard J. Ofshe, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 997 (1997). See also Richard A.

developed different classification criteria by looking across two dimensions: instrumental or authentic, and voluntary or coerced.¹²⁸

The current interrogation practices in Taiwan are dangerously conducive to producing false confessions.¹²⁹ However, social psychologists and legal scholars in Taiwan have not provided sufficient guidance for reforming the current system. Nor has the judicial system actively sought to address issues surrounding police-induced false confessions. Social science studies in the United States demonstrate that prolonged physical torture is likely to induce suspects to confess to crimes they did not commit.¹³⁰ However, a less stringent form of interrogation allows individual strengths and vulnerabilities to have an effect. A significant number of young adults falsely confess when subjected to a psychologically coercive interrogation that lasts several hours.¹³¹ When the situational

Leo & Richard J. Ofshe, *Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998) (studying sixty cases of police-induced false confession) [hereinafter *Consequences of False Confessions*].

¹²⁸ Mark Costanzo & Richard A. Leo, *Research and Expert Testimony on Interrogations and Confessions*, in EXPERT PSYCHOLOGICAL TESTIMONY FOR THE COURTS 69, 69–82 (Mark Costanzo et al., eds., 2007).

¹²⁹ A common practice among local police is to build long-term relationships with certain suspects in order to “make crime” at the right time. For instance, a detective explained to me, “I arrest many prostitutes in my jurisdiction. I will always treat them with politeness. They use their own labor to make money and do not hurt anyone. I will interact with them and try to build a pleasant atmosphere. Then, they will often share their life stories with me If later the court issues an order of detention and it needs to be executed here at the local police station, I will do them [the prostitutes] a favor and provide them “human sentiment” (賣人情). I will let them choose the day on which they prefer to fulfill their legal duty. Most of them choose the week when they have their period, because they won’t be able to work during that week anyway On other occasions, when I face the pressure of performance assessments (績效壓力) from supervising agencies and I must achieve certain quotas, I will ask them to do me a favor (還人情). I will ask them to come to my police station and confess to offenses so that I can increase my execution rate. If you do not know how to build such relationships with them, they will often run away, and you will have a hard time doing your job.” Interview 105:05 (notes on file with the author). For a similar practice in drug cases observed by a former Taiwanese prosecutor, see WU HSIN-YIN (吳忻穎), NIUQU DE ZHENGYI (扭曲的正義) [DISTORTION OF JUSTICE] 155–56 (2021).

¹³⁰ LEO, POLICE INTERROGATION, *supra* note 7, at 195–236.

¹³¹ See generally Steven A. Drizin & Beth A. Colgan, *Tales from the Juvenile Confession Front: A Guide to How Standard Police Interrogation Tactics Can Produce Coerced and False Confessions from Juvenile Suspects*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 127, 128, 152 (G. Daniel Lassiter ed., 2004); Feld, *supra* note 52, at 244–46; Ferguson & Leo, *supra* note 7, at 945; Allison D. Redlich et al., *The Police Interrogation of Children and Adolescents*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 107, 109–10, 113 (G. Daniel Lassiter ed., 2004); Elizabeth S. Scott &

pressures are weak, only the most psychologically vulnerable people are likely to falsely confess. The most dangerous situation is when a psychologically vulnerable suspect is subjected to a highly coercive interrogation.¹³²

Social scientists and legal scholars in the United States have continually argued that false confessions may involve not just coercion but also the ability to convince an innocent suspect to develop a crime narrative.¹³³ When that narrative is contaminated by the disclosure of key facts, absent DNA tests, the criminal justice system cannot untangle what has actually transpired. U.S. scholars have long recommended that judges evaluate the reliability of the entire interrogation rather than simply focusing on *Miranda* warnings or voluntariness.¹³⁴ Unfortunately, concerns regarding contaminated confessions are missing from both academic and criminal justice debates in Taiwan. In the previous sections, I have demonstrated and explained the shift from coercive to deceptive styles of interrogation in Taiwan. The use of force and duress to elicit confessions has given way to psychologically sophisticated techniques. To some extent, the movement from coercion to deception represents a triumph of the rule of law since police in Taiwan have become oriented to the legal norms of due process and human right protections. Police generally no longer resort to physical violence or other highly coercive interrogation tactics. Nevertheless, the current interrogation practices inevitably entail risks of false confessions. *Miranda* warnings and the legal mandate

Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 156–76 (1997).

¹³² Allison D. Redlich & Saul M. Kassin, *Police Interrogation and False Confession: The Inherent Risk of Youth*, in CHILDREN AS VICTIMS, WITNESS, AND OFFENDERS: PSYCHOLOGICAL SCIENCE AND THE LAW 275, 280 (Bette L. Bottoms et al., eds., 2009) (suggesting that the two most commonly cited risk factors for false confessions—as to the characteristics of the suspect—are youth and mental impairment). See also ACKER & REDLICH, *supra* note 52, at 160–61; Cloud et al., *supra* note 11, at 495, 590; I. Bruce Frumkin, *Expert Testimony in Juvenile and Adult Alleged False-Confession Cases*, 50 COURT REVIEW 12, 15 (2014); Kassin et al., *supra* note 7, at 30; Saul M. Kassin, *The Social Psychology of False Confessions*, 9 SOCIAL ISSUES AND POLICY REVIEW 25, 41–42 (2015) (arguing that *Miranda* warnings do not adequately protect adolescents and individuals who are mentally retarded); Allison D. Redlich et al., *Self-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness*, 34 LAW & HUM. BEHAV. 79 (2010).

¹³³ See generally Kassin & Kiechel, *supra* note 126, at 125–28; Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOLOGIST 221, 221–32 (1997).

¹³⁴ Kassin et al., *supra* note 7, at 27.

to record interrogations are two major protections for suspects. However, police in Taiwan systematically create a backstage interrogation setting in which *Miranda* warnings are being manipulated and no official records are available. Without complete information on backstage policing, we simply do not know how many Taiwanese suspects have falsely confessed to a crime they did not commit.

For researchers in Taiwan, there have been at least two obstacles to empirical research in the field of false confessions. To begin with, it is difficult to know for certain whether a contested confession is truly false. However, in recent years, the use of DNA identification technology—along with the resulting exoneration of innocent prisoners has fortunately provided a major boost to research on this issue by helping scholars identify scores of proven false confessions to serious crimes.¹³⁵ A second obstacle has been the difficulty of studying false confessions in the laboratory setting. A convincing laboratory simulation of a police interrogation would require the researchers to induce certain levels of stress in participants that would eventually violate ethical standards. Also, the most important potential consequences of a false confession, including a trial and prison sentence, cannot be fully simulated in the laboratory setting. Although experimental research in this area remains difficult, many laboratory studies in the United States have contributed to our understanding of the psychology of interrogation (such as revealing the perceptual biases that sometimes contribute to wrongful convictions based on false confessions).¹³⁶ Future research into the phenomenon of false confession in Taiwan should focus on risk factors that could trigger police-induced false confessions.

At the preliminary stage, researchers in Taiwan should make use of the existing social science literature regarding false confession in other countries.¹³⁷ These studies provide Taiwanese

¹³⁵ See TAIWAN YUANYU PINGFAN XIEHUI (台灣冤獄平反協會) [TAIWAN INNOCENCE PROJECT], <https://twinnocenceproject.org> [<https://perma.cc/L7NC-446N>] (last visited Sept. 20, 2021).

¹³⁶ Saul M. Kassin et al., *I'd Know a False Confession If I Saw One: A Comparative Study of College Students and Police Investigations*, 29 LAW HUM. BEHAV. 211, 211–28 (2005).

¹³⁷ For the use of social science knowledge in legal settings, see generally ELIZABETH MERTZ, *THE ROLE OF SOCIAL SCIENCE IN LAW* (Elizabeth Mertz ed., 2008).

policy makers a comprehensive review of police practices; laws concerning the admissibility of confession evidence; and core principles of psychology involving confessions. Researchers and policy makers have come to realize the fundamental role that social science studies can play in the understanding and prevention of wrongful convictions. Among cases of wrongful conviction, the most common reason has been eyewitness misidentification. Researchers have succeeded at identifying the problems with eyewitness misidentification and proposing concrete reforms.¹³⁸ In 1998, a committee of the American Psychology-Law Society published a white paper reviewing the scientific evidence concerning eyewitness identification and proposed rules for how lineups and photo spreads should be conducted.¹³⁹ Following this white paper, the U.S. Department of Justice assembled a working group of research psychologists, prosecutors, police officers, and lawyers. Later, this group published guidelines for how law enforcement agents can minimize eyewitness identification error.¹⁴⁰ Compared to the issues of eyewitness misidentifications, scientific study of false confessions has come much later. It was not until 2010 that the U.S. DOJ published another white paper focusing on the issues surrounding police-induced confession and summarized what is known about false confession.¹⁴¹ The paper also identified suspect characteristics, interrogation tactics, and the phenomenology of innocence that influence confessions, as well as the effects confessions have on judges and juries.¹⁴² This indicates that scientific knowledge in the field of false confession has been developed at a much slower pace compared to eyewitness identification. For both Taiwan and the United States, it is necessary to transfer the scientific knowledge of false confessions from research laboratories to criminal justice practitioners.

The next question is the relevance of *Miranda* in the future development of the rules of police interrogation. Using Taiwan as

¹³⁸ BRIAN L. CUTLER, EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION (Brian L. Cutler ed., 2009); PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION (Siegfried Ludwig Sporer et al. eds., 1995).

¹³⁹ Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 1, 1–39 (1998).

¹⁴⁰ U.S. DEPARTMENT OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999).

¹⁴¹ Kassin et al., *supra* note 7.

¹⁴² *Id.*

an example, I propose a new approach to the *Miranda* jurisprudence and confession laws. In particular, I propose three strategies: (1) introducing expert testimony on false confession; (2) increasing judicial scrutiny of the *entire* videotaped police-suspect interaction; (3) and, changing the police culture. I begin my discussion with the broader theoretical question: how important a role should *Miranda* play?

IV. POLICY IMPLICATIONS

A. *Standing at the Crossroads: The Future of Interrogation Law*

To construct a more adequate account of the *Miranda* mechanism, it is imperative for us to recognize that discretion is everywhere in the criminal justice system, even where the formal law seems to preclude it. Police officials' discretionary power enables them great leeway to choose between options or craft—even “conjure”—alternative arrangements.¹⁴³ *Miranda* warnings were once believed to have transformed police interrogation from a practice of inherent coercion to an occasion for suspects to express their stories without fear. However, empirical research regarding *Miranda*'s effects in the United States demonstrates that such a notion was astonishingly naïve. Research has revealed that the warnings lose most of their significance and protective power once the interrogation begins. Once suspects agree to talk to the police, they almost never call a halt to questioning or invoke their *Miranda* rights.¹⁴⁴ Moreover, once the interrogator issues the warnings and secures the waiver, *Miranda* protections are almost irrelevant to

¹⁴³ WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 153–64 (1965) (discussing different methods of controlling the exercise of police discretion). See also Herman Goldstein, *Improving Policing: A Problem-Oriented Approach*, 25 CRIME & DELINQUENCY 236, 236–58 (1979) (proposing a new perspective of the police function in which the police are committed, first and foremost, to respond to a wide array of community problems).

¹⁴⁴ See generally LEO, POLICE INTERROGATION, *supra* note 7; THOMAS & LEO, CONFESSIONS OF GUILT, *supra* note 5; THOMAS, *supra* note 5, at 1959–2000. See also BAKER, *supra* note 8, at 407 (suggesting that *Miranda*'s major weakness is that it does not require that a suspect first consult with a lawyer, or actually have a lawyer present, in order for the waiver to be deemed valid).

both the process and the outcome of the subsequent interrogation.¹⁴⁵ Any protections that *Miranda* might offer a suspect typically evaporate as soon as the suspect provides a waiver and the interrogation begins. *Miranda* may actually increase the suspect's bravado at the beginning of the interrogation, which, in fact, has the effect of facilitating the interrogation. Once the police obtain a waiver, the trickery and psychological coercion the Court originally sought to address (along with new psychological techniques developed since then) can still be used in the interrogation room. As long as the police do not physically torture the suspects or threaten them with immediate bodily harm, virtually any statements made after a waiver can be used in court.

It is impossible to reflect on the impact of *Miranda* without considering the functions of police questioning within a nation's criminal justice system and its society as a whole. As we consider whether *Miranda*-like mechanisms could serve as the main protections against false confessions, we should focus on the roles of legal actors; the specific challenges facing a criminal justice system; the society in which a system operates; and most importantly, the capacity of a system to implement and enforce the legal mandates.

The scope of *Miranda* reform in Taiwan has not resembled the American practice since its inception. The *Miranda* mechanism in the United States consists of not just the issuance of warnings. It also includes regulations governing the timing of the warnings, the warnings' wording, the invocation and waiver of the rights, and the exceptions to the warnings, to name just a few. To understand the functioning of the *Miranda* mechanism, one needs to consider not only the Court's 1966 *Miranda* decision but also a series of post-*Miranda* decisions. It is through these later decisions that the Court dealt with issues including the meaning of "interrogation,"¹⁴⁶ the meaning of "custodial interrogation,"¹⁴⁷ the waiver and invocation

¹⁴⁵ Alschuler, *supra* note 9, at 859; Ferguson & Leo, *supra* note 7, at 937, 947-48; Thomas & Leo, *supra* note 5, at 231-66.

¹⁴⁶ See generally *Rhode Island v. Innis*, 446 U.S. 291 (1980) (discussing the meaning of "interrogation" under *Miranda*).

¹⁴⁷ See generally *Oregon v. Mathiason*, 429 U.S. 492 (1977) (discussing the meaning of "custodial interrogation" under *Miranda*).

of the rights,¹⁴⁸ the application of “the fruit of a poisonous tree” doctrine,¹⁴⁹ “two-step” interrogations,¹⁵⁰ questioning “outside *Miranda*,”¹⁵¹ and public safety exceptions.¹⁵² Any legal practitioner in the United States will recognize the constancy and complexity of the *Miranda* jurisprudence and *Miranda*-related motions.¹⁵³ In short, the *Miranda* jurisprudence in the United States is actually built on multiple Court’s rulings.¹⁵⁴

Taiwan, on the other hand, has a quite different experience. Taiwan’s *Miranda* system was initially developed by the legislature through Article 95 and Article 158-2 of the Code of Criminal Procedure.¹⁵⁵ It was and still is unlikely that two articles could or ever will be able to fully incorporate every aspect surrounding the implementation of *Miranda*. Therefore, continual judicial intervention is essential for Taiwan’s *Miranda* system. The Taiwanese judiciary has to be able to deal with all the remaining questions surrounding *Miranda*. It must be able to instruct and direct law enforcement agencies with clear rulings on these questions. However, legal authority will not automatically affect

¹⁴⁸ See generally *Berghuis v. Thompkins*, 560 U.S. 370 (2010) (discussing waivers and invocations of rights under *Miranda*). See also Leo & White, *supra* note 8, at 414–31.

¹⁴⁹ See generally *Oregon v. Elstad*, 470 U.S. 298 (1985) (discussing “the fruit of a poisonous tree” doctrine under *Miranda*).

¹⁵⁰ See generally *United States v. Patane*, 542 U.S. 630 (2004) (discussing “the two-step interrogations” procedure under *Miranda*). See also Leo & White, *supra* note 8, at 460–63.

¹⁵¹ See generally *Missouri v. Seibert*, 542 U.S. 600 (2004) (discussing questioning outside *Miranda*).

¹⁵² See generally *New York v. Quarles*, 467 U.S. 649 (1984) (discussing public safety exceptions under *Miranda*).

¹⁵³ For example, the 21st edition of *The Autobrief*, a manual that helps California prosecutors answer commonly encountered defense arguments, contains thirty-nine arguments surrounding interrogation and confession. Among those arguments, thirty-one are related to the *Miranda*. See *THE AUTOBRIEF 21: AN AUTOMATED SYSTEM OF STANDARD LEGAL ARGUMENTS FOR CALIFORNIA PROSECUTORS* (Craig Fisher ed., 2016). In another manual published to assist California practitioners on issues regarding confession, *Miranda* rule occupies nine out of nineteen chapters. See VINCENT J. O’NEILL, JR., *CALIFORNIA CONFESSIONS LAW* (2016). See also CALIFORNIA PEACE OFFICERS LEGAL SOURCEBOOK (2015) (providing comprehensive summaries of *Miranda*-related case law for law enforcement agencies).

¹⁵⁴ For a discussion of the early development of *Miranda* jurisprudence, see O. John Rogge, *Confession and Self-Incrimination*, in *THE RIGHTS OF THE ACCUSED* 77–80, 91–93 (Stuart S. Nagel ed., 1972). See also William T. Pizzi & Morris B. Hoffman, *Taking Miranda’s Pulse*, 58 VAND. L. REV. 813, 844 (2005) (criticizing the doctrinal confusion caused by the *Miranda* decision).

¹⁵⁵ See *supra* note 25 and 29.

police behavior. It needs a channel to be incorporated into police decision-making processes. In routine policing, officers enjoy considerable discretion because society does not want a rigid application of rules, guidelines, or instructions to hinder the discretion necessary for responsive action in particular, situations. Police officers enjoy the power of policy making, in some sense, because legislation and judicial rulings become empty words without police cooperation. Moreover, internal police culture—including ideas, values, language, expectations, and attitudes toward the law and legal system as a whole¹⁵⁶—substantially affects how officers exercise discretion.¹⁵⁷ Therefore, it is necessary to examine the factors influencing police discretion so as to understand the real-world implementation of *Miranda*.

To help delineate Taiwan's current situation, it is worthwhile to examine another comparative perspective. Social science literature in the United States shows that police officers largely follow the instructions of interrogation training manuals. One of the major findings is that current police training has undermined the effectiveness of a system of warnings and waivers.¹⁵⁸ However, such training appears to be largely consistent with the views of the Court and lower courts' rulings. Most of the current training manuals legitimately encourage police officers to make use of the advantages the Court has given to police. The trickiest problem for

¹⁵⁶ See generally Sharon Hays, *Structure and Agency and the Sticky Problem of Culture*, 12 SOCIOLOGICAL THEORY 57, 65 (1994) (defining culture as “a social, durable, layered pattern of cognitive and normative system that are . . . embedded in behavior, passed about in interaction, internalized in personalities, and externalized in institutions”); BENJAMIN LE WHORF, *LANGUAGE, THOUGHT, AND REALITY* (MIT Press 1956) (examining the contribution of language structure to understanding the way speakers in different cultures think about and approach the practicalities of social life).

¹⁵⁷ See, e.g., Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 WAKE FOREST L. REV. 611, 613–14, 666 (2016) (suggesting that police culture “too often flatly refuses to acknowledge systemic factors that contribute to misconduct and castigates any form of criticism as misplaced, uninformed, and affirmatively dangerous to offices and communities”). See also LARRY KRASNER, *FOR THE PEOPLE: A STORY OF JUSTICE AND POWER* 180 (2021) (suggesting that cultural change is required in reforming the criminal justice system); JONATHAN RAPPING, *GIDEON'S PROMISE: A PUBLIC DEFENDER MOVEMENT TO TRANSFORM CRIMINAL JUSTICE* 82–84 (2020) (describing the importance of cultural change in reforming public defenders' offices).

¹⁵⁸ See Kassir et al., *supra* note 7, at 6–7; Weisselberg, *supra* note 8, at 1529–37. But see Joseph P. Buckley, *CLARIFYING MISREPRESENTATIONS ABOUT LAW ENFORCEMENT INTERROGATION TECHNIQUES* (JOHN E. REID AND ASSOCIATES, INC. 2020) (reacting to criticisms of the Reid technique).

the U.S. *Miranda* system is not how to end interrogation practices that are contrary to the rulings of the Court. Instead, the doctrinal structure of *Miranda* and the real-world evolution of police interrogation basically work together. The training manuals are generally faithful to judicial opinions regarding the timing and content of the warnings, as well as the implied waiver and invocation doctrines.¹⁵⁹ Thus, the pattern of the U.S. model is that as police officers exercise discretion in interrogation practices they generally consult training manuals, which, in turn, successfully transmit judicial rulings.

Unlike the practices in the United States, in Taiwan police training and training manuals do not serve the function of transmitting judicial opinions into practice(s).¹⁶⁰ Most police officers I encountered in Taiwan do not read legal documents or actively follow the latest legislation or judicial decisions.¹⁶¹ The official training mechanism is thus critical for providing police officers with such information.¹⁶² However, most training simply

¹⁵⁹ Weisselberg, *supra* note 8, at 1592.

¹⁶⁰ The most widely used interrogation manual is *Interrogation Practices* written by Zhuang Zhong-Jin, who is an instructor at the Taiwan Police College. The manual was first used as part of the course material for “Police Interrogation Practices” at the Taiwan Police College. It was later published by the Taiwan Police College in 2011. See ZHUANG ZHONG-JIN (莊忠進), ZHENXUN SHIWU (偵訊實務) [INTERROGATION PRACTICES] (2011). This manual is important for a number of reasons. With a forward by the minister of the Interior and the director of the National Policy Agency, the manual was described as “the milestone for the teaching of police interrogation.” From the opening pages, the author describes the manual’s goal as aiming to make police interrogation more transparent so that the public will come to respect and trust the police. The manual also serves to help establish police interrogation as a process that focuses on truth finding and human rights protections. Chapter 2 of the manual discusses the problem of illegitimate interrogation techniques. It argues that torture, threat, inducement, fraud, exhausting questioning or other improper means should not be used because these methods undermine the goal of eliciting truthful confessions and getting convictions. The manual enumerates seventeen basic psychological interrogation techniques and strategies that are later be repeated and elaborated by numerous other police training manuals.

¹⁶¹ Fieldnote 40:02 (notes on file with the author); Interview 12:02 (notes on file with the author).

¹⁶² Zhuang’s manual elaborates the existing regulations in the Code of Criminal Procedure. It seeks to educate police officers about the changing, and rather complicated, law of criminal procedure that regulates police interrogation. It has, by far, the most detailed descriptions of the laws regulating the interrogation process and the numerous legal issues generated by the *Miranda* legislations. In the section on “*Miranda* Warnings,” the manual suggests that the interrogator make use of the standardized *Miranda* warnings provided in the attachment to the manual. It also distinguishes different kinds of suspects and different process. When the suspect is mentally handicapped or aborigine, the manual

restates the existing statutes or basic official instructions given by the National Police Agency. Nor does training provide interrogators with practical guidelines or judicial interpretations. My examination of the currently circulated interrogation manuals and subsequent interviews with police officers reveals that police officers in Taiwan do not give much credit to official interrogation training.¹⁶³ They believe that formal education training and on-the-

suggests that after the initial warnings and suspects decide not to appoint defense counsel, the interrogator should still contact the Legal Aid Foundation and request free counsel for the suspect. On the other hand, if the suspect is from a low-income household or a near poor household, the interrogator only needs to inform the suspect that he/she may request defense counsel for free. In the latter case, the manual informs interrogators that they do not need to contact the Legal Aid Foundation if the suspect waives his/her right to defense counsel. In addition, Chapter 8 of the manual focuses on preparing an interrogation record. The manual breaks the process down into four stages: inquiry of the identity, procedure requirement, substantive questioning, and general overview. Providing the *Miranda* warnings constitutes the main element of the procedural requirement. The manual proposes several changes in the existing standardized interrogation template in order to conform to the latest amendments to the Code of Criminal Procedure. Since typing the interrogation records are now computer-based, the manual suggests that interrogators first provide oral *Miranda* warnings and then print out the standardized *Miranda* warning form for the suspects to sign. The interrogators should confirm with the suspect that he/she understood the content of the *Miranda* rights. Another important issue discussed in the manual is the timing of the *Miranda* warnings. It is clear that before conducting formal interrogations police officers are required to provide the *Miranda* warnings. However, the Code of Criminal Procedure does not make clear whether or not police officers should give the *Miranda* warnings when putting the suspect into custody. The manual suggests that police officers should provide oral *Miranda* warnings when making an arrest, since any subsequent communication between police officers and the suspect will be the functional equivalent of interrogation. However, the manual also emphasizes that it is not legally required for the police officers to provide the *Miranda* warnings after arrest. Therefore, the manual tells police officers that it is not necessary to inquire whether or not *Miranda* warnings were provided at the initial arrest. So long as *Miranda* warnings are provided prior to formal interrogation the subsequent confession will be admissible, regardless of whether or not the original officers also provided warnings. Finally, the manual suggests police officers use a “confirmation procedure.” After the oral *Miranda* warnings and the suspect signs the standardized *Miranda* warning form, the interrogator should ask the following questions: “Did the police officer inform you of the above rights?” and “Do you want to retain defense counsel?”

¹⁶³ Another widely used interrogation manual is HE ZHAO-FAN (何招凡), ZHENXUN YU YISONG SHIWU (偵訊與移送實務) [INVESTIGATION AND INTERROGATION PRACTICES] (2014). This training manual is originally used in a seminar on interrogation psychology at the Central Police University. The highlight of this training manual is its inclusion of many interrogation theories and techniques from foreign countries, especially those adopted by law enforcement officers in the United States. The first part of the manual provides police officers the principle for conducting interrogation. The author of the manual attempts to establish a scientific basis for police interrogation that focuses on educating police officers about the behavioral methods of lie detection and the psychology of interrogation from a comparative legal perspective. The manual repeats many of the same techniques that are

job training do not provide them with useful interrogation strategies and techniques. Such circumstances generate what I called the state of “*legal void*” in which legal authorities, such as legislative and judicial decisions, have not been accurately transmitted to police officers through training.¹⁶⁴ It further indicates that police officers

discussed in Zhuang’s *Interrogation Practices*. The second part of the manual consists of sixty-three sample interrogation templates. It provides police officers with the basic structure of interrogation, the main questions to be asked, and commentaries from the prosecutors. The third part of the manual includes two case studies. These focus on how the techniques mentioned in the manual were used to solve real cases. *Investigation and Interrogation Practices* reflects the ideology of police interrogation that seeks to replace previous practices of torture with psychological interrogation methods. This training manual serves several functions for the police. First, the manual educates police officers about legally appropriate and inappropriate interrogation techniques. It defines the professional standards of interrogation. Second, it teaches police officers psychological methods of interrogation. The main theme of the manual is that psychological methods are far more effective at eliciting truthful confessions than traditional physical torture. Third, citing the training manuals in the United States, the author argues that psychological methods, unlike torture, could not induce an innocent person to confess falsely. Finally, *Investigation and Interrogation Practices* is the only training manual that provides police officers with practical instructions regarding interrogation. The interrogation templates involve six different kinds of crime and provide junior police officers useful guidance. However, issues related to the *Miranda* warnings are not the primary focus of this training manual. It only restates the existing regulations and incorporates the statutes’ language into the interrogation templates. Similar to Zhuang’s *Interrogation Practices*, the manual suggests interrogators ask two further questions before asking substantive questions: “Do you understand the above rights?” and “Do you want to retain defense counsel?”

¹⁶⁴ Some training materials in Taiwan have tried to introduce U.S.-oriented interrogation techniques. But those materials did not attract wide attention among rank-and-file officers. For instance, Gao ZHONG-YI (高忠義), XINGSHI ZHENXUN CONGSHU (刑事偵訊叢書) [THE COLLECTION OF INTERROGATION TRAINING] (2009) is used as course material in the advanced education program at the Central Police University. The lecturer of the seminar divided the course into seventeen sections, focusing on the introduction of various interrogation techniques developed in foreign legal practices. The first part of the manual translates and summarizes the techniques proposed in the Inbau & Reid manual and other training manuals. It offers police a nine-step psychological process that emphasizes a sequential logic of influence and persuasion. The manual states that interrogation is a lengthy and repetitive process in which the interrogator should establish psychological control over the suspect and gradually elicit a confession by raising the suspect’s anxiety levels while simultaneously lowering the perceived consequences of confessing. See FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 183–441 (2013). The manual concludes that successful interrogation can encourage most suspects to waive *Miranda* rights, regardless of whether or not they are actually guilty. The author believes this is because some suspects are actually innocent and are eager to share their side of the story. However, most of the time, it is because suspects know intuitively that asking for a lawyer is tantamount to admitting guilt, and they believe that relying on the right to remain silent is almost a clear admission of guilt. No matter what, the manual instructs interrogators do not violate the *Miranda* rulings based on the false assumption that the warnings will thwart the police and encourage the suspects to refuse to answer.

need to rely on other informal channels (such as the mentorship system) to help them execute their discretion.

In short, Taiwanese *Miranda* reform is largely incomplete in the sense that judicial opinions and legislations leave many *Miranda*-related questions unanswered. For future reforms related to police interrogation and false confessions, Taiwan is left with two options. On the one hand, Taiwan can further develop its *Miranda* jurisprudence and implement it strictly. In order to do that, multiple topics will need to be fully addressed: (1) what is the content of a valid advisement; (2) at what stage will the *Miranda* protection be attached (the custody requirement); (3) what types of encounters between police officers and suspects qualify as interrogation; (4) shall the *Miranda* rule apply only to interrogation conducted by law enforcement officials (the state action requirement); (5) what are the exceptions of the *Miranda* rule; (6) what counts as a valid waiver and invocation of the *Miranda* rule; (7) the legitimacy of re-interview after waiver, invocation, or violation of the *Miranda* rights; (8) shall special rules apply to the interrogation of juveniles.¹⁶⁵ If the content of the Taiwanese *Miranda* rule is fully elaborated, it could be expected that more litigations will follow.

On the other hand, Taiwan can leave *Miranda* as it is and move on to a search for alternative solutions without abandoning it entirely. For the following reasons, I argue that Taiwan should embrace this approach:

To begin with, the U.S. experience illustrates that police have successfully adapted to *Miranda*. Following an initial adjustment period, police have learned how to comply with *Miranda* and still elicit confessions from suspects. Because police have learned how to “work” *Miranda* to their advantage, such protections exert minimal restraint on police, contrary to the intentions of the Warren Court.¹⁶⁶ The Taiwanese judiciary and legislature could try to consolidate the *Miranda* as “law on the

¹⁶⁵ See, e.g., Thomas Grisso, *Juveniles’ Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1154 (1980) (finding that the majority of juveniles who received Miranda warnings did not understand them well enough to waive their rights); THOMAS GRISSO, *JUVENILES’ WAIVERS OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE* 106–07 (1981) (reporting that only about half of mid-adolescents understand the *Miranda* warning).

¹⁶⁶ Weisselberg, *supra* note 8, at 1588–99; Yale Kamisar, *The Rise, Decline, and Fall (?) of Miranda*, 87 WASH. L. REV. 965, 967–70 (2012).

books” and hope that the “law in action” will comply with their original goals. But this is a long shot.

Second, the implementation of the *Miranda* in the United States has caused an “unintended consequence.” Besides displacing de facto the case-by-case voluntariness standard as the primary test of the admissibility of a confession, the *Miranda* jurisprudence has shifted courts’ analysis from the voluntariness of a confession to the voluntariness of a *Miranda* waiver. As long as police have informed the suspects of their *Miranda* rights and secured a waiver, courts will often minimize the scrutiny afforded interrogation practices following a waiver.¹⁶⁷ Once police have received a *Miranda* waiver, the defendants bear a heavy burden to establish that the confession was involuntary and should be excluded. In short, *Miranda* not only offers little protection against coercive interrogation, but it may have further weakened the existing safeguards by shifting the courts’ focus from whether the interrogation process was coercive to whether the police follow *Miranda* protocol.¹⁶⁸

Third, Taiwan’s *Miranda* system has not followed the same pattern of development as in the United States. Precisely unlike in the United States, police officers in Taiwan do not use *Miranda* warnings to calm and reassure the suspect into waiving the rights at the outset of the interrogation. As I have shown in previous sections of this Article, police officers in Taiwan systematically create an underground interrogation process. During the pre-interrogation interaction, police officers question suspects and seek to secure incriminating statements from them. The “formal” *Miranda* warnings do not have any significant role to play during this interaction. The warnings only have symbolic value, indicating that the “legal drama” of formal interrogation will begin during the front-stage.¹⁶⁹ The irrelevance of *Miranda* occurs not only during police interrogation, but the Taiwanese courts also almost never consider the *Miranda* waiver as a safe harbor for interrogator. The voluntary test and the due process test remain the dominate standards for the admissibility of the suspect’s statements. The

¹⁶⁷ Brandon L. Garrett, *The Substance of False Confession*, 62 STAN. L. REV. 1051, 1092–94 (2010).

¹⁶⁸ LEO, POLICE INTERROGATION, *supra* note 7; Thomas & Leo, *supra* note 5, at 231–66.

¹⁶⁹ See, e.g., Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 883 (1981) (asserting that “*Miranda* undoubtedly serves important symbolic functions”).

irrelevance of *Miranda* in Taiwan actually provides an opportunity for the courts to continue develop the jurisprudence of the voluntary test and the due process clause. Moving past the “*Miranda* fantasy” would cost relatively little for Taiwan and is the most promising way toward the reform of police interrogation practices.

Miranda probably does work, but imperfectly, and better under some conditions than others. I believe that Taiwan probably could get along fine without trusting in the *Miranda* protections, and certainly without believing that *Miranda* could ever work perfectly. The idea that “Of course *Miranda* doesn’t work perfectly, but we have to find better ways to improve it” causes us to engage in the messy task of assessing when *Miranda* instructions are most likely to work, how *Miranda* can be made more effective, and what should follow from a recognition that *Miranda* works only so well. Such an approach spares us the important task of accessing other potentially more effective alternatives. So, from a cost- benefit perspective, we should at least leave *Miranda* as the status quo and start pondering the question: besides reimagining or reintegrating *Miranda*, where can we go and how can we move on? In the following sections, I try to provide some possible, realistic alternatives.

B. Using Expert Testimony

(a) The Knowledge Transfer Function

Many researchers in the United States discuss the relationship between police interrogation tactics and false confessions.¹⁷⁰ We now have a large body of academic studies regarding false confession, including its causes and effects.¹⁷¹ This knowledge must be transferred from the academic community to the

¹⁷⁰ Saul M. Kassin & Lawrence S. Wrightsman, *Confession Evidence*, in THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE (Saul M. Kassin & Lawrence S. Wrightsman eds.) 67, 76 (1985) (identifying three types of false confessions, a taxonomy still universally accepted today). *But see* Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. L., POL. & SOC. 189, 207–10 (1997) (criticizing Kassin and Wrightsman’s classification and proposing a revised categorization).

¹⁷¹ See, e.g., Sara C. Appleby et al., *Police-Induced Confessions: An Empirical Analysis of Their Content and Impact*, PSYCHOLOGY, CRIME & LAW 1 (2011); Davis & Leo, *supra* note 114.

criminal justice one. Transferring academic understandings of police-induced false confession to legal practices can be accomplished in many ways, including legislative action, and training for law enforcement investigators, attorneys, and judges. One common reform proposal is to drastically change police interrogation practices to prevent false confessions. However, there are problems with relying on training officers in alternative methods to end false confessions. For example, budgets for training are normally quite meager, while educational standards vary widely across particular law-enforcement agencies. These agencies often have limited research capabilities, especially in the areas of social and behavioral science needed for providing alternative investigation practices and evidence-based approaches.

Providing expert testimony to factfinders during trial is another critical mechanism for knowledge transfer.¹⁷² As wrongful convictions have become more widely recognized as problems confronting the criminal justice system, policy makers have struggled with finding effective mechanisms to prevent such errors.¹⁷³ One solution has been an increasing number of attempts to introduce expert witness testimony in cases with disputed

¹⁷² For the use of expert witness testimony in areas of interrogations and confessions, see generally Mark Costanzo et al., *Juror Beliefs About Police Interrogations, False Confessions, and Expert Testimony*, 7 J. EMPIRICAL LEGAL STUD. 231, 233–34 (2010); Iris Blandon-Gitlin et al., *Jurors Believe Interrogation Tactics Are Not Likely to Elicit False Confessions: Will Expert Witness Testimony Inform Them Otherwise?*, PSYCH., CRIME & LAW 1, 3–4 (2010); Saul M. Kassin, *False Confessions: Causes, Consequences, and Implications for Reform*, 17 CURRENT DIRECTIONS IN PSYCH. SCI. 249, 252 (2008); Kassin, *supra* note 132, at 44; Richard A. Leo & Brittany Liu, *What Do Potential Jurors Know About Police Interrogation Techniques and False Confessions?*, 27 BEHAV. SCI. LAW 381, 397 (2009); LEO, POLICE INTERROGATION, *supra* note 7, at 314–16; Nadia Soree, *When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony*, 32 AM. J. CRIM. L. 191 (2005). See also Morgan S. Moffa & Judith Platania, *Effects of Expert Testimony and Interrogation Tactics on Perceptions of Confessions*, 100 PSYCH. REP. 563 (2007) (investigating the effect of expert witness testimony on mock jurors' perceptions of a confession).

¹⁷³ For the problem of mass wrongful conviction in the criminal justice system, see, e.g., NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT 185–86 (2016). See also Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 LAW & CONTEMP. PROBS. 125, 129–33 (1998) (discussing how there are likely thousands of undiscovered wrongful convictions just in death row); Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1158–63 (2005) (discussing how once the legal process against an innocent suspect begins, it is unlikely to be derailed due to the minimum standards set forth to maintain a prosecution).

confessions or problematic interrogation practices. It is suggested that expert testimony assist factfinders understand the phenomenon of false confession by displacing the intuitive misconception that a person would not succumb to pressure and falsely confess¹⁷⁴ Such testimony addresses matters beyond an ordinary person's knowledge, and, in many cases, reveals reality to be contrary to one's "common-sense" intuition.¹⁷⁵ Expert witnesses can serve as educators in a range of knowledge-transfer contexts. For example, they may educate the factfinder, and the court generally, about psychology, and how it might be applied to their evaluation of the confession evidence in the case at hand.

Furthermore, the systemic study of false confessions was developed in academic research laboratories, instead of as the product of law enforcement agencies studying the effectiveness of their interrogation practices. Much of the responsibility for scientific research and development has fallen to academics. Additionally, there are simply very few collaborative projects between academics and law enforcement. It would be beneficial and efficient if comprehensive research and systemic evaluation of false confessions could be conducted inside the criminal justice system. However, no effective research and development organization embedded within the criminal justice system in either Taiwan or in the United States has evaluated the issues surrounding false confessions addressed by academic research. The way in which law enforcement holds onto confrontational interrogation techniques is based on a commitment to customary (yet questionable) knowledge and a rejection of scientific findings.¹⁷⁶

¹⁷⁴ Saul M. Kassin et al., *On the General Acceptance of Confessions Research: Opinions of the Scientific Community*, 73 *AMERICAN PSYCHOLOGIST* 63 (2018) (surveying eighty-seven confession experts worldwide and indicating areas of high consensus suitable for expert testimony).

¹⁷⁵ See LEO, POLICE INTERROGATION, *supra* note 7, at 314–15 (discussing how expert witness testimony educates triers of fact about social scientific research on interrogation and confession which helps them make a more accurate judgement regarding the reliability of confessions).

¹⁷⁵ See LEO, POLICE INTERROGATION, *supra* note 7, at 314–15 (discussing how expert witness testimony educates triers of fact about social scientific research on interrogation and confession which helps them make a more accurate judgement regarding the reliability of confessions).

¹⁷⁶ See Eli Hager, *The Seismic Change in Police Interrogations*, THE MARSHALL PROJECT (Mar. 07, 2017), <https://www.themarshallproject.org/2017/03/07/the-seismic-change-in-police-interrogations> [<https://perma.cc/52M2-XN43>] (reporting that multiple police departments have decided not to train their officers using the Reid technique

The Taiwanese and American criminal justice systems have allocated to academics the work of developing and using scientific knowledge to evaluate and improve demonstrably flawed interrogation techniques, rather than bringing scientific knowledge into the criminal justice system.

In short, before scientific knowledge regarding false confessions becomes a routine part of law enforcement, it is necessary to find other solutions for making the knowledge gained through the social sciences available to police agencies and the courts. Expert testimony can serve as an effective way to fill this “knowledge gap.”

(b) The Development and Content of Expert Testimony
Regarding False Confessions¹⁷⁷

On December 10, 1984, U.C. Berkeley student Bradley Page falsely confessed to murdering Bibi Lee and to the later rape of her dead body. Bradley Page was led to falsely confess in the usual way—through an unconscionably long police interrogation in which he was isolated, relentlessly accused of having killed his lover, made to feel guilty and distressed, and lied to (about why he was there, the nature of evidence against him, his interrogators’ motives and intentions, and what would happen to him if he refused to confess).¹⁷⁸ Unlike countless false confessors before him, Page soon turned to an expert on social influence to explain to the trial jury how police interrogation tactics could influence a person of normal intelligence and mental health to falsely confess to such a

because research and exonerations over the years have shown that it can lead to false confessions). See also Kassin, *supra* note 172, at 250–51 (discussing police interrogation tactics that may cause innocent people to confess); Douglas Starr, *The Interview: Do Police Interrogation Techniques Produce False Confessions?*, THE NEW YORKER (Dec. 01, 2013), <https://www.newyorker.com/magazine/2013/12/09/the-interview-7> [<https://perma.cc/2953-4M2C>] (discussing the fallibility police interrogation techniques, particularly the Reid technique, that are commonly used to generate confessions); Weisselberg, *supra* note 8, at 1530–31 (suggesting that the Reid technique is “widespread, if not pervasive”).

¹⁷⁷ The following analysis of expert testimony is primarily based on my conversations with eight scholars who have regularly served as expert witnesses (notes on file with the author).

¹⁷⁸ Deborah Davis, *Lies, Damned Lies, and the Path from Police Interrogation to Wrongful Conviction*, in THE SCIENTIST AND THE HUMANIST: A Festschrift in Honor of Elliot Aronson 211 (Marti Hope Gonzalez et al., ed., 2010).

heinous crime. Thus, on March 30, 1988, Elliot Aronson, then teaching at U.C. Santa Cruz, became the first psychologist in the United States to testify as an expert witness on the causes of false confession.

As described by Deborah Davis and Saul M. Kassin, 1988, the year Aronson testified in court—was the dawn of what later became widespread interest in false confessions among psychologists. Though there had been several previous analyses of police-induced false confessions, experimental studies of the phenomenon had only just begun around the time of Page’s (false) confession. Many of the early studies focused on the issues of individual vulnerability to interrogative influence and the effects of confession evidence on juror reactions. It was not until the early 1990s that experimental tests on the ability of interrogation tactics to promote false confession finally began, and only after that was the first experimental study published.¹⁷⁹ At the time of Page’s trial, an experimental science of police-induced false confession did not exist. Consequently, it is worth emphasizing that Aronson’s testimony only included how the already scientifically documented principles of social influence might apply to Page’s interrogation.¹⁸⁰

In the two decades since Aronson’s testimony, social science has provided increasingly sophisticated analyses of police interrogation tactics, along with experimental tests of the influences of these tactics.¹⁸¹ Meanwhile, a series of DNA exonerations has

¹⁷⁹ See Kassin & Kiechel, *supra* note 126 (conducting the first ethical laboratory paradigm for experimentation on false confessions).

¹⁸⁰ In Page’s case, the judge ruled that because he had never been in a police interrogation room, he was not allowed to testify, in any detail, about the interrogation itself—which meant that Aronson could not make the linkage between certain aspects of the interrogation with social psychology experiments. Aronson later remarked that: “I am convinced that this decision made a huge difference because the jury had a hard time digesting the importance of the social psychology experiments in the absence of my being able to spell it out for them . . . That issue still haunts me.” Fieldnote 23:03 (notes on file with the author).

¹⁸¹ See, e.g., Davis, *supra* note 178, at 218–19; Miriam Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 *FORDHAM URB. L. J.* 791 (2006); Saul M. Kassin & Gisli Gudjonsson, *The Psychology of Confession: A Review of the Literature and Issues*, 5 *PSYCH. SCI. IN THE PUB. INT.* 35 (2004); Saul M. Kassin et al., *Behavior Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 *LAW & HUM. BEHAV.* 187 (2003); Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 *LAW & HUM. BEHAV.* 233 (1991); Saul M. Kassin & Rebecca J. Norwick, *Why People Waive Their Miranda Rights: The Power of Innocence*,

highlighted the role of false confession in proven wrongful convictions.¹⁸² This has resulted in increasing awareness of the role of false confessions in the criminal justice system, and an exponential increase in legal and scientific publications examining the causes of false confessions.¹⁸³ Such a development has fueled the growth of social science experts providing expert testimony on interrogation-induced false confessions in the United States. Many of the experts I interviewed pointed out that, although today's experts tend to testify to many of the same causes of false confession as Aronson did in 1988, the scientific basis of their testimony has vastly expanded.¹⁸⁴

The general role of expert witnesses in cases involving a potentially false confession is to educate the jury or judge about the process and tactics of interrogation and the psychological factors that might lead a suspect to falsely confess.¹⁸⁵ When an objective record of the interrogation exists, the expert can review that record.

28 LAW & HUM. BEHAV. 211 (2004); Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule*, 21 LAW & HUM. BEHAV. 27 (1997); Jennifer T. Perillo & Saul M. Kassin, *Inside Interrogation: The Lie, The Bluff, and False Confession*, 35 LAW & HUM. BEHAV. 327 (2011).

¹⁸² According to the Innocence Project, the false confessions of innocents are a known contributing factor in approximately 29% of all DNA exoneration cases. See *DNA Exonerations in the United States*, INNOCENCE PROJECT, <https://innocenceproject.org/DNA-EXONERATIONS-IN-THE-UNITED-STATES/> [<https://perma.cc/KHE7-VU8D>] (last visited Oct. 24, 2021). See also Drizin & Leo, *supra* note 108 (discussing how DNA tests have exonerated numerous individuals who gave false confessions); LEO, POLICE INTERROGATION, *supra* note 7, at 239–40 (stating how DNA testing has proven wrongful convictions in “scores of cases,” and discussing that in a study of twenty-eight wrongful convictions exonerated via DNA testing, eighteen percent were attributable to false confessions); DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 161–62 (2012) (discussing a study that found that jurors believed three out of every four false confessions).

¹⁸³ Kassin & Wrightsman, *supra* note 170, at 63–65 (providing a historical overview on the scientific study of police interrogations and confessions).

¹⁸⁴ Fieldnote 23:04 (notes on file with the author).

¹⁸⁵ Several courts have ruled on the admissibility of expert testimony about false confession. Such a decision is entrusted to the discretion of a trial court judge pursuant to the rules governing the admissibility of scientific and expert testimony. See *U.S. v. Benally*, 541 F.3d 990 (10th Cir. 2008) (stating that as long as the trial court applied the correct legal standard regarding admissibility expert testimony, the appellate court only reviews for abuse of discretion); *State v. Wright*, 247 S.W.3d 161 (Mo. Ct. App. 2008) (stating that it is generally within the trial court's discretion to admit or exclude expert testimony); *Boyer v. State*, 825 So. 2d 418 (Fla. Ct. App. 2002) (concluding that the trial court does have initial discretion, but if expert testimony goes to the “heart” of the case, then the jury is entitled to hear it).

Experts are generally permitted to offer an analysis of which factors may be present in the specific confession being considered by the court. Oftentimes, it is the duty of the expert witness to assist the factfinder by pointing out what factors should be considered when evaluating the reliability of a confession so that the jury can decide how much weight should be assigned to the confession. Many of the experts I interviewed endorse the use of responsible expert testimony on interrogation practices and the psychology of false confession. In fact, in recent years, a number of scholars have called for the use of expert testimony.¹⁸⁶ There is now a well-accepted body of social science study on this topic. The use of expert testimony in cases involving disputed interrogation practices or confession has become increasingly common.

In sum, it serves the interest of justice to present social science research on the psychology of police interrogation, coercion, and false confession to judges and jurors. Absent the educational effect of expert testimony, judges and jurors may simply accept a confession without considering whether it may be coerced and false.¹⁸⁷ Failure to allow expert testimony may contribute to the erroneous conviction and incarceration of an innocent person.¹⁸⁸

¹⁸⁶ See generally *supra* note 172.

¹⁸⁷ See, e.g., Costanzo et al., *supra* note 172, at 240–42 (reporting that the majority of jurors find expert testimony helpful regarding why innocent people might confess to a crime). See also Kassin & Sukel, *supra* note 181, at 43 (finding that mock jurors voted to convict the defendant even when the judge admonished the jury to disregard the coerced confession); Saul M. Kassin & Lawrence S. Wrightsman, *Coerced Confessions, Judicial Instruction, and Mock Juror Verdicts*, 11 J. APPLIED SOC. PSYCH. 489 (1981) (reporting that jury instructions might not be an effective mechanism for the jury to disregard coerced confessions).

¹⁸⁸ In fact, the use of expert testimony in the area of false confession has been even more important after the passage of the Citizen Judges Act (國民法官法) in 2020. This new “mixed panel” system will come into effect in 2023. It will allow citizen participation in criminal trial rulings on certain selected crimes. Verdicts will be decided by a panel comprising three professional judges and six lay judges. This legislation marks a new era for Taiwan’s criminal justice system. Two main reasons were given to justify the creation of greater lay participation in Taiwan. First, it was believed that lay participation would produce better criminal justice by ensuring that court decisions reflect citizens’ experiences. Second, allowing civilian participation would promote the democratic values, make the criminal justice system more responsive to Taiwanese society’s needs, and further increase the legitimacy of criminal court decisions. See Fawubu Quanguo Fagui Ziliaoku: Guomin Faguan Fa (法務部全國法規資料庫:國民法官法) [Ministry of Justice Laws and Regulations Database of the Republic of China: Citizen Judges Act], at <https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=A0030320> [<https://perma.cc/T4EF-2FQ7>] (last visited Sept. 20, 2021). For the earlier effort to introduce a lay judge system in

(c) Concerns Regarding the Practices of Expert Testimony

The vast majority of case law in the United States supports the admissibility of expert testimony in false confession settings.¹⁸⁹ Although there have been a few cases in which courts have not permitted expert testimony, they are exceptional.¹⁹⁰ However, social psychologists have testified in hundreds of criminal and civil trials that have generated no written opinions. Both Kassin and Thomas Grisso pointed out that expert witnesses now testify on various issues concerning false confession.¹⁹¹ It is critical to document the content and scientific basis of their testimony. Such data will help policy makers develop better regulations for the practice of expert testimony.

Specifically, experts come from different backgrounds. Some are from academic settings while others come from private settings. Importantly, we do not have enough empirical data regarding how they might testify differently. According to Grisso, if one makes his/her living through expert testimony, it is expected that the quality of the testimony may be affected by financial incentives.¹⁹² Thus, there are at least two advantages to experts from academic settings. To begin with, these experts have financial support from their universities or research institutions, so they do not rely on the number of cases in which they testify for income. Take Kassin as an example. He indicated that he seldom testifies in

Taiwan, see RIEKO KAGE, WHO JUDGES? DESIGNING JURY SYSTEMS IN JAPAN, EAST ASIA, AND EUROPE 138–53 (2017); Margaret K. Lewis, *Who Shall Judge? Taiwan's Exploration of Lay Participation in Criminal Trials*, in TAIWAN AND INTERNATIONAL HUMAN RIGHTS 437 (Jerome A. Cohen et al., eds., 2019). See also Dimitri Vanoverbeke & Hiroshi Fukurai, *Lay Participation in the Criminal Trial in Japan A Decade of Activity and Its Sociopolitical Consequences*, in JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE (Sanja Kutnjak Ivković et al., eds, 2021) 69, 69–71 (discussing the growing public concerns about wrongful convictions in Japan and the diminishing public trust in the criminal justice system that eventually led to the development of the *Law on the Participation of Lay Judges in the Criminal Procedure*).

¹⁸⁹ See, e.g., *Vent v. State*, 67 P.3d 661 (Alaska Ct. App. 2003) (stating that various courts have upheld the admissibility of false confession expert testimony).

¹⁹⁰ Danielle E. Chojnacki et al., *An Empirical Basis for the Admission of Expert Testimony on False Confession*, 45 ARIZ. ST. L.J. 1, 45 (2008) (“Courts . . . often exclude expert testimony on false confessions, holding that such topics are already within the common knowledge of the average juror and therefore would not assist the jury in evaluating the reliability and credibility of the confession.”).

¹⁹¹ Fieldnote 24:02 (notes on file with the author).

¹⁹² Fieldnote 24:03 (notes on file with the author).

court nowadays. Given his position as a professor, he can be selective when choosing the cases in which he will testify. He will only testify when he believes that the case will set a precedent in that jurisdiction. Instead, he refers the cases to other experts he trusts.¹⁹³ There is the potential danger that those who testify for a living may simply say whatever is favorable to one side. If one's livelihood depends on the amount of testimony given, one will be more inclined to provide "helpful" testimony and be subject to bias. Interestingly, Aronson told me that he no longer testifies in court since he does not want to become such a "*hired gun*."¹⁹⁴ In the last few years before his retirement from testifying, he only chose cases that he believed had a truly innocent defendant. Yet other professionals do not have the same privilege as Kassin and Aronson to decline opportunities to provide expert testimony.

Another advantage of experts from an academic setting is that their research goes hand in hand with the quality of their testimony. Frequently, experts will use their own assessment instruments to empirically assess various aspects of false confession. Their credibility and expertise are thus less likely to be challenged in court. Many of the experts I interviewed told me that they only testify on the particular issues on which they feel more comfortable providing their opinions. This resembles the process of professionalization. However, as Grisso observed, we cannot over-generalize as to such a claim. There are many experts from academic settings who testify on virtually every issue surrounding false confession, including individual vulnerability, police interrogation techniques, *Miranda* comprehension, and numerous other risk factors. Some may be motivated by financial incentives, others may be eager to build their reputations, and yet still others may simply want to "*change the world*." So, there clearly could be a potential quality issue that needs to be considered even with witnesses from academic settings.¹⁹⁵

In sum, expert testimony becomes more complicated and often involves multiple empirical assessments with the development of social science research on false confession.¹⁹⁶ What are the

¹⁹³ Fieldnote 25:04 (notes on file with the author).

¹⁹⁴ Fieldnote 23:07 (notes on file with the author).

¹⁹⁵ Fieldnote 24:05 (notes on file with the author).

¹⁹⁶ See, e.g., Deborah Davis & Richard A. Leo, *To Walk in Their Shoes: The Problem of Missing, Misunderstood, and Misrepresented Context in Judging Criminal Confessions*,

backgrounds of these experts? What kind of professional training have they received? How often do they testify? Do their testimonies rely on credible assessment instruments? More importantly, how do we guarantee the impartiality of experts, especially when they have a strong incentive to favor one party? Without official records of their opinions, there is no way we can properly answer these questions.

In fact, in addition to examining the rules governing police interrogation and the admissibility of confession, policy makers in Taiwan have started considering other possible interventions that are designed to allow more accurate assessment of the reliability of confessions, such as admitting expert testimony to help educate judges about the existence of false confessions and contributing factors.¹⁹⁷ It is suggested that a comprehensive database should be developed in order to better promote and regulate the practices of expert testimony in the field of false confession.

C. *Videotaping the Entire Police-Suspect Interaction*

Expert testimony is necessary because adversarial proceedings are not sufficient to protect innocent individuals against the likelihood of wrongful conviction. The core purpose of expert testimony is to educate judges and juries about the findings of scientific research about interrogation and confession. Such testimony helps the triers of fact understand the psychological principles, practices, and processes of modern interrogation so they can better discriminate between reliable and unreliable confessions.

However, expert testimony may better assist the factfinders only when there is a complete record of interrogation. According to Aronson, a major barrier for his testimony in Page's case was the lack of a full recording of the two crucial sections of Page's interrogation: the polygraph session and the interrogation that followed. Therefore, he had to rely on the less informative recordings of the sessions preceding the polygraph and the recording of the confession after it had been shaped by the later stage of the interrogation.¹⁹⁸ The only interrogation record available

46 NEW ENG. L. REV. 737 (2012) (reviewing studies regarding the psychological processes linking false confessions to wrongful conviction).

¹⁹⁷ Interview 69:09 (notes on file with the author).

¹⁹⁸ Fieldnote 23:04 (notes on file with the author).

to him was the recording of interviews with the prosecutor, where Page explained how and why he developed and recounted his false story. Since the subsequent accounts of Page and the detectives differed with respect to what happened during the interrogation, no indisputable record of the police's tactics existed. What else would Aronson add into his testimony if he had had a complete transcript of Page's interrogation? What other deceptions do interrogators employ? How do such lies and misdirection continue to affect a suspect after he/she confessed?

Relevance is one threshold for the admissibility of an expert testimony. In the absence of factual basis of individual case supporting the analysis, an expert might only be able to provide broad statements that a particular psychiatric diagnosis or interrogation technique is consistent with a false-confession claim. In fact, without a full record of the interrogation process, the court might look unfavorably on sweeping expert testimony that fails to consider the characteristics of specific defendant and the specific circumstances involved in the interrogation. As a result, comprehensive review of documentation surrounding the interrogation/questioning process is essential for the assessment of false-confession claims.¹⁹⁹ Ideally, such a review should be based on an evaluation of the complete/unedited video recording of the police-suspect interaction.

The easiest way to enable such a judicial review is to require police to record the entire interrogation.²⁰⁰ In fact, many police agencies in the United States have embraced interrogation

¹⁹⁹ See Saul M. Kassin & David Thompson, Videotaping All Police Interrogations, *NY TIMES* (Aug. 2019), <https://www.nytimes.com/2019/08/01/opinion/police-interrogations-confessions-record.html> [<https://perma.cc/JZ76-HMFS>] (arguing that “Justice requires that all police interrogations—the entire process, not just the final confession—should be recorded on video.”) [emphasis added]. See also Vanoverbeke & Fukurai, *supra* note 188, at 81–82 (discussing how the lay judge system in Japan helped create a window of opportunity for requiring videotaping interrogations).

²⁰⁰ For critics of the lack of an electronic recording in the United States, see Christopher Slobogin, *Manipulation of Suspects and Unrecorded Questioning: After Fifty Years of Miranda Jurisprudence, Still Two (or Maybe Three) Burning Issues*, 97 *B.U. L. REV.* 1157, 1189–90 (2017) (stating that “interrogation at the stationhouse may not be recorded in full, and any softening up of the suspect prior to arrival at the stationhouse is virtually never subject to recording”).

recording so that they can always show later in court that the confession was reliable and voluntary.²⁰¹

The major issue surrounding the proposal of videotaping the entire interrogation is its implementation. Recording is an important step but should not be the end of the reform endeavor. Studies surrounding false confessions vividly illustrate that what goes on in the interrogation room should not remain undocumented, unregulated, and unreviewed. Recording the entire police-suspect interaction can bring interrogation practices into the sunlight.²⁰² It can eventually facilitate the professionalization of police interrogations and make judicial review possible and far more effective.²⁰³

Now, I am aware that my proposal will be inherently contradicted by the current functions of police intelligence network. In fact, policing in Taiwan remains a largely local practice. The police system operates twenty-four hours a day and is responsible for crime prevention, detection and detention. Each police officer is assigned to a local region and has to promptly react to any incidents that occur in his/her jurisdiction, even when off-duty. Local police often build close connections with the community. In Taiwan, individual police patrolmen are assigned direct jurisdiction over populations of individual families. Each local police station will therefore be responsible for several police beats (勤區). The direct supervising unit of the local police station is the police department within each precinct of the city. Some of the investigators in the police department keep their own beats and directly handle the cases brought to them by the local police station. It is worth noting that the local police station is a self-sustaining, community-based unit

²⁰¹ See Thomas P. Sullivan, *The Police Experience: Recording Custodial Interrogations*, CHAMPION, Dec. 2004, at 24, 27 (“Law enforcement personnel who oppose recording custodial interviews speculate about hypothetical problems they have never encountered because they haven’t given recordings a try. Those who have recorded for years do not express similar misgivings. Experienced officers from all parts of the United States support recording custodial interrogations in felony investigations from the time the *Miranda* warnings are given until the suspect leaves the room.”); *The Reid Technique Tips: The Value of Recording Interrogations*, YOUTUBE (Feb. 2021), https://www.youtube.com/watch?v=ODwicr_H7Pg&t=24s [<https://perma.cc/3MKM-5V98>] (advising investigators to record their interviews and interrogations, as it “protect the integrity of their work”).

²⁰² Kassin et al., *supra*, note 7, at 25–27.

²⁰³ See also Schulhofer, *supra* note 6, at 953, 955 (emphasizing that “[a] videotape unaccompanied by the existing *Miranda* system will make matters much worse, not better”).

that undertakes various missions and tasks. Criminal investigation is just one part of routine duty. However, since the local police station is an integral element of the local community, people often report crimes and disputes to the local police station instead of going to the police department. Therefore, it is appropriate to state that local police stations are the gateway to the Taiwanese criminal justice process. Police officers in local stations will produce the initial reports and forward all the materials to the police departments within each precinct. It is the investigators in the police department who then conduct further investigations. Police departments and local police stations have joint responsibility to maintain local order and reduce the crime rate.²⁰⁴ Localized networks enhance police officers' abilities to gather information and (sometimes) to quickly resolve conflicts. One of my interviewees shared his experience as follows:

I was on a routine street patrol that day. I recognized that that person was someone who had a long list of previous drug offense convictions. I remembered that I had arrested him several times. I decided to approach him and have a chat. I demanded he stop, basically treating him as a younger brother. I knew him too well and I knew exactly what his weakness was. I said: 'Come! Come here! Are you still using [drugs]? Come back to the station with me and have a urine test.' I acted as his "big brother" (老大). Of course, I knew that I didn't have the legal authority to do so. But it was a command that he could not reject. You have to understand that people who have previous drug offense convictions are too willing to betray their friends. Under-the-table negotiation is very common. This guy promised to provide me some useful hints in exchange for not arresting himA good police officer should know the potential criminals in his jurisdiction. Networking is a crucial ability.²⁰⁵

²⁰⁴ See generally CAO ET AL., *supra* note 49.

²⁰⁵ Interview 11:22 (notes on file with the author).

Moreover, Taiwan's National Police Agency routinely provides a list of quotas to assess officers' individual and police department's collective performance. It is important for officers to achieve their quotas and avoid being the under-performers that reduce the evaluation of the whole department. Commanding officers are held strictly accountable for the behaviors of all their subordinates. Under the current performance evaluation mechanism, a police department often maintains its own crime database and local networks. Because police officers are competing with one another, police departments often are unwilling to share information with other agencies unless there is a joint operation. Therefore, one feature of the Taiwanese police system is the information gap it generates. It is not at all hard to imagine that most of police-suspect interactions will not be captured by a camera.

One possible solution is to introduce the use of body-worn cameras.²⁰⁶ Such a practice can demonstrate police commitment to transparency, ensure accountability, and increase the public's trust.²⁰⁷ Most patrol officers in large city police departments in Taiwan are equipped with body-worn cameras and routinely record police-citizen interactions. However, without a comprehensive policy regulating the use of such cameras, the actual power of the cameras to increase accountability will be limited. To begin with, police do not have any legal obligation to document the recordings and are allowed to watch them (and sometimes even to delete them). Also, most of the investigators (偵查佐) in the police department do not wear body cameras unless they have already decided to initiate formal criminal justice proceedings. As one investigator described to me:

A body-worn camera is generally used by uniformed police officers. Its main purpose is to protect police from unjustified complaints of misconduct and to preserve evidence for use in criminal investigations We [investigators] are in plain clothes, and we don't usually carry body-worn

²⁰⁶ Slobogin, *supra*, note 200, at 1192–93 (arguing that the police body camera can serve as a tool for ensuring that “any encounter before entering the stationhouse . . . is accurately depicted at later proceedings”).

²⁰⁷ See Jacobi, *supra* note 6, at 53–55 (discussing concerns with regard to the use of body cameras).

cameras. We are equipped with the cameras when we are involved in formal criminal proceedings. Most of our investigative techniques, such as house visits, intelligence gathering, or casual conversations with potential suspects, will not be captured by the body-worn cameras.²⁰⁸

In this sense, police have largely unchecked discretion in deciding what types of interactions to record and, perhaps later, to present in court. I suspect that most of the subtle interactions between police and suspects still fall outside this domain. Police possess the power to decide what counts as “*formal*” and what counts as “*informal*” criminal justice proceedings. Along with this power is the ability to separate the “*backstage*” from the “*front-stage*.” In brief, secrecy remains a key feature of Taiwanese police actions.

Hoping that a single intervention could change such practices is unrealistic. However, I do think that there are “baby steps” that could help better manage the issue. First and foremost, a general policy on the use of body-worn cameras needs to be established. The policy should cover issues such as: (1) specifying the categories of authorized and prohibited use of the equipment; (2) training on the operation and documentation of the device; (3) setting up the program administrator; (4) determining the conditions of the terminations of recordings; (5) reviewing procedures of the recordings; (6) storing and using the recordings; and (7) duplicating and distributing the recordings.²⁰⁹

Furthermore, even without the recordings of the entire police interrogation process, experts on police matters should be allowed

²⁰⁸ Interview 10:23 (notes on file with the author).

²⁰⁹ In 2016, due to concerns about the potential for privacy intrusion, the National Police Agency issued a three-page document of guidelines for the use of body-worn cameras and data storage/sharing. The policy applies to every on-duty recording by police officers, including the data recorded by a police officer’s privately-owned device. However, police officers still enjoy broad discretion to decide when it is “necessary” under the new guidelines to initiate recording (Article 3, Section 1). Moreover, with just a few exceptions, data will only be preserved for one month (Article 4, Section 3). See Jingcha Jiguan Zhiqin Shiyong Weixing Sheyingji ji Yingyin Ziliao Baocun Guanli Yaodian (警察機關執勤使用微型攝影機及影音資料保存管理要點) [Guideline for the Use of Body Cameras and Audiovisual Recording Data Management] (2016). For the use of police body cameras and the implications as to a prosecutor’s duty of disclosure, see generally Andrew Guthrie Ferguson, *Big Data Prosecution & Brady*, 67 UCLA L. REV. 180 (2020).

to testify about department-based practices. Absent records regarding specific cases, experts can still provide courts with useful knowledge regarding the trainings and common practices within a particular police department. Such testimony will be valuable for the factfinder to decide whether the statements provided by a given suspect are voluntary and reliable. Of course, my proposal will only be feasible if researchers have enough access to police daily activities. In the next section, I will demonstrate that proper documentation of police activities and standardized/formalized trainings need to be the cornerstone for any reforms to be successful.

D. *Changing the Police Culture*

The functioning of modern policing is a complex social phenomenon, in which the relationship between a variety of competing interests and formal legal demands must be properly managed. Controlling information is crucial in order to successfully manage these relationships. The operation of the police institution often relies on secrecy.²¹⁰ Secrecy in police work is not just hiding the truth. It also includes the positive construction of subordinated social relationships.²¹¹ The backstage interrogation practices and the underground *Miranda* system are essentially the production of police secrecy. Backstage policing further facilitates a network of police-suspect interactions, in which the rule of law cannot effectively serve as the last word for regulating such social relationships.²¹²

²¹⁰ See Yale Kamisas, *Kauper's "Judicial Examination of the Accused" Forty Years Later—Some Comments on a Remarkable Article*, 73 MICH. L. REV. 15, 32 (1974) (indicating that the most unique feature of police interrogation is “its characteristic secrecy”); RALPH, *supra*, note 111, at x-xi (stating that police torture in Chicago is an “open secret” that “many people who work for the city of Chicago . . . have chosen to remain silent about . . . because of this delicate tangle of connections”). See also Peter K. Manning, *The Police: Mandate, Strategies, and Appearance*, in POLICING: A VIEW FROM THE STREET 26–27 (Peter K. Manning & John Van Maanen eds., 1978) (“The use of secrecy by the police is . . . a strategy employed not only to assist them in maintaining the appearance of political neutrality but to protect themselves against public complaints.”).

²¹¹ See generally JEAN-PAUL BRODEUR, *THE POLICING WEB* 223–54 (2010) (introducing the use of various relationships in policing).

²¹² For earlier empirical studies on backstage policing and the exercise of “low visibility decisions” in the United States, see generally LAWRENCE P. TIFFANY ET AL., *DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT* (1967); LAFAYE, *supra*, note 143.

But the backstage practices will not thrive if they cannot be passed on to the next generation of police officers. The tricky problem is that in order to maintain the secrecy of these backstage practices, formal training cannot be relied on to reproduce them. My research suggests that the police system in Taiwan has created an elaborate informal mechanism that dominates current interrogation practices. What emerges is a mentorship system. This system generates greater incentives for police officers to follow than the formal interrogation training system does. A high percentage of interview practices are actually developed through the mentorship system. In daily interrogation activities, police officers are influenced by what appear to be common and long-followed practices. Most of the newly recruited officers will be assigned a senior officer (學長) as their master (師傅). They conduct daily patrol, investigation, and other policing activities together. Junior officers acquire practical techniques through close observations of their seniors, and sometimes, through actual practices.

The reliance on the mentorship training system is one of the main features of Taiwan's police culture.²¹³ Police departments work as close groups that gradually develop unwritten rules to dictate an officer's conduct in various circumstances. The world of police interrogation practices is like a sophisticated game, an officer needs to know all the rules in order to play properly.²¹⁴ The police

²¹³ Culture has long been seen as a persistent barrier to police reforms. Scholars have described the role of culture in shaping police behaviors, perceptions, and attitudes. *See, e.g.*, WILLIAM K. MUIR, POLICE: STREETCORNER POLITICIANS 190 (1977) (arguing that a successful policeman must be alert to the different responses his authority evokes and describing four types of policeman); ELIZABETH REUSS-IANNI, TWO CULTURES OF POLICING: STREET COPS & MANAGEMENT COPS 86 (1983) (discussing the situation in the New York Police Department has wider implications for understanding of police behavior nationwide and the theme in the "two cultures of policing"); JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR 233 (1968) (discussing how to understand the concept of political culture and how political culture affects police behaviors). *See also* Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 522–45 (2004) (explaining how to structure legal remedies to address the organizational causes of police brutality.); Julian A. Cook III, *Police Culture in the Twenty-First Century: A Critique of the President's Task Force's Final Report*, 91 NOTRE DAME L. REV. ONLINE 106, 114 (2016) (concluding that an aggressive and unconstitutional police organizational culture has been more pronounced in the U.S. since the Warren Court era).

²¹⁴ *See* Bryant G. Garth & Joyce Sterling, *Exploring Inequality in the Corporate Law Firm Apprenticeship: Doing the Time, Finding the Love*, 22 GEO. J. LEGAL ETHICS 1361, 1367 (2009) (suggesting that legal field is a "semi-autonomous social space with its own rules of the game . . . Success in navigating the rules of the game relates to positions and

system in Taiwan has developed norms and values that are mandates peculiar to and appreciated only by its members in the context of interrogation. Mentorship training generates and supports norms of internal solidarity. Senior police officers substantively instruct new recruits with respect to interrogation techniques. Many police officers I interviewed recalled that their mentorship training had shaped their entire professional careers. During my interviews with police officers, I focused on their experiences regarding the mentorship training mechanism. All of my interviewees shared their experiences as trainees and some of the senior officers provided their approaches as trainers.

The heavy reliance on a mentorship system could indicate that modern legal reforms in Taiwan might play only a marginal role in police interrogation practices. Mentorship training works to channel old practices and values into new blood. It essentially keeps the police system stable and free from outside intervention. Furthermore, mentorship training creates an environment in which police may develop values and practices at odds with the rule of the law. Therefore, the traditional police culture of truth seeking, the reliance on personal relationships (關係), and the insistence on striking a proper balance between sentiment (情), reason (理), and law (法), could continually remain the defining elements of police interrogation practices. I submit that the mentorship mechanism provides a sound explanation as to why these elements are fundamentally integrated into my interviewees' narratives of interrogation and the *Miranda* warnings.

In sum, secrecy is a central element of current police interrogation in Taiwan. Secret practices are built on a traditionally well-functioning mentorship system. This system helps keep the whole police system stable and basically free from outside scrutiny. As a result, interrogation practices largely function without any serious disturbance from the constant, and perhaps radical, changes to the criminal justice system.²¹⁵ The distinct responsibilities and

dispositions of the players. A favorable position to play the game depends on advantages that come from the possession of capital valued in the fieldSkill in playing the game comes in part from dispositions toward certain kinds of behavior socialized into the players—and that are rewarded in the field.”)

²¹⁵ My empirical data shows that police agencies in Taiwan have successfully created a loosely coupled system in which they are capable of making visible, public commitments to satisfy external demands for reform while keeping these commitments as just myth and

risks of law enforcement generate an internal police culture. Police officers' behaviors and attitudes toward the law coupled with their large scope of job-discretion essentially form a unique police culture that substantially affects the fulfillment of their institutionalized duties and functions.²¹⁶

Nevertheless, like every cultural system, police culture is ever-changing. As ideals and ideology evolve and new ones emerge, police culture is subject to transformation.²¹⁷ There are already

ceremony. By doing so, police are able to ensure that day-to-day, behind-the-scenes work and culture were unaffected by those pronouncements. For discussions about organizational decoupling and symbolic forms of compliance, see Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 407, 410 (1999) (suggesting that organizations and professions strive to construct rational responses to law); LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 31–41, 136–38 (2016) (arguing that the law regulating companies are broad and ambiguous, and managers play a critical role in shaping what the law means in daily practice); Lauren B. Edelman & Jessica Cabrera, *Sex-Based Harassment and Symbolic Compliance*, 16 ANNU. REV. LAW SOC. SCI. 361, 372 (2020) (concluding that many organizational policies prevent liability more than they prevent sex-based harassment and its reasons); John Hagan et al., *Ceremonial Justice: Crime and Punishment in a Loosely Coupled System*, 58 SOCIAL FORCES 506, 506–52 (1979) (finding that the involvement of probation officers in sentencing decisions is often ceremonial); Linda Hamilton Krieger et al., *When “Best Practices” Win, Employees Lose: Symbolic Compliance and Judicial Inference in Federal Equal Employment Opportunity Cases*, 40 LAW & SOC. INQUIRY 843, 846 (2015) (discussing that when judges uncritically use the presence of organizational structures to reason about whether discrimination occurred, employers are much more likely to prevail); John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AMERICAN JOURNAL OF SOCIOLOGY 340, 340–63 (1977) (discussing how institutional rules function); Ashley T. Rubin, *The Birth of the Penal Organization: Why Prisons Were Born to Fail*, in THE LEGAL PROCESS AND THE PROMISE OF JUSTICE: STUDIES INSPIRED BY THE WORK OF MALCOLM FEELEY 163 (Rosann Greenspan et al., eds., 2019) (arguing that “[w]hile organizations include a variety of formal structures like official, written rules and staff hierarchies, they also develop extensive informal structures, which are more difficult to observe and control”).

²¹⁶ For general discussions about how personal values and beliefs affect police behavior, see Eugene A. Paoline, *Shedding Light on Police Culture: An Examination of Officers' Occupational Attitudes*, 7 POLICE Q. 205, 205 (2004) (researching on police culture and its association with a monolithic police culture); Eugene A. Paoline, *Taking Stock: Toward a Richer Understanding of Police Culture*, 31 J. CRIM. JUST. 199, 206 (2003) (explaining police occupational culture and its causes, prescriptions and outcomes by constructing a conceptual model).

²¹⁷ Cultural change requires organizational members to give up long-held assumptions and to adopt radically new ones. It is essentially a process of *unlearning* and *relearning*. It is therefore unrealistic to expect that leaders of police agencies can change culture immediately. Major cultural change involves forging new identities and perceptions, thus generally necessitating a long—if not very long—time to achieve. Studies of organizational culture have generally assumed that organizational cultures are created top-

some indicators suggesting that police culture in Taiwan is at a turning point. I surmise that today there is a new wave of officers who are, once again, transforming police culture in Taiwan. A leader of an investigation team frankly expressed his observations and concerns to me:

Times are now very different. A lot of newly recruited officers have a rather high degree of education, and they don't give much respect to senior officers. They believe that everything they need can be found through the Internet. For them, they do not see the value of senior officers' experience. Old does not mean good, they [the junior officers] often claimNowadays, if you try to give them some practical instruction, they may even rebuke you, telling you that you have no authority to get involved in their cases. Some might even directly tell you that the old practices are illegalI think most senior officers are just trying in good faith to help them. If they do not want to listen, then we will probably stop instructing them. For me, I have not served as a mentor for many years. I am not going to share my experiences with every junior officer. It really depends on our predestined relationship (緣分).²¹⁸

Similar comments can be seen in many of the narratives of my interviewees. They believe that the new generations of officers are rather too proud to consult with senior officers.²¹⁹ Combined with other negative incentives (such as peer competition, the risk of

down by leaders. This widespread notion has been that cultures reflect the values, beliefs, and actions of organization's leaders. *See, e.g.*, EDGAR A. SCHEIN, ORGANIZATIONAL CULTURE AND LEADERSHIP 2, 317 (3rd ed. 1985) (describing the importance of organizational culture); James N. Baron & Michael T. Hannan, *Organizational Blueprints for Success in High-tech Start-ups: Lessons from the Stanford Project on Emerging Companies*, 44 CAL. MANAGEMENT REV. 8 (2002) (analyzing which kind of human resource management capable to endure and prosper and its reasons). However, empirical evidence regarding the influence of organization's leaders on culture formation and change actually remains inconclusive. *See, e.g.*, Benjamin Schneider et al., *Organizational Climate and Culture*, 64 ANN. REV. PSYCHOL. 361, 372 (2013) (suggesting that empirical studies supporting the role of leaders in organizational culture are difficult to find).

²¹⁸ Interview 30:27 (notes on file with the author).

²¹⁹ Fieldnote 35:09 (notes on file with the author).

being involved in illegal interrogation practices, and the perceived waste of personal time) few officers now are willing to work to train closely as mentor-mentee with other officers. Not to mention that mentorship means teaching everything you know to your potential competitor. The old officers' attitudes toward the mentorship system can be summed up in the pithy aphorism: "Doing more, more trouble; doing nothing, no problem." Moreover, a leader of a City's Police Department wants to take a further, overt step and reform the tradition of the mentorship practices. During the interview, he told me:

We do not have systemic training. For such a long period, police in Taiwan were trained through the mentorship system. I personally think we need to enhance the training regarding interrogation. We should refer to the training in other countries, especially the Reid Method that is used in the United States, or other training techniques . . . Why did I say we do not have interrogation training? Well, maybe we do. But it is limited to informing officers about the format of the interrogation record and the basic procedural requirements . . . In terms of how to interact with the suspect or what techniques to use . . . these are totally neglected aspects of our current training system . . . Police officers usually learn from doing. I think such a system completely lacks efficiency.²²⁰

My ideal model is to systematically incorporate training techniques from other countries. Our training can be modeled on the Reid Method, the training in the U.K., or trainings in other countries. The core idea is to have a standardized procedure and encourage all the police officers to follow it.²²¹

The commander went on to criticize the current mentorship system:

²²⁰ Interview 32:14 (notes on file with the author).

²²¹ Interview 32:27 (notes on file with the author).

Criminal investigation in Taiwan is largely based on the mentorship system. Senior officers take responsibility to teach junior officers (學弟). I was trained through such a system. It is really ineffective. First of all, not all the senior officers have substantive experience. It is fine if you are lucky enough to meet a good mentor. But things can go really wrong if you are taught the wrong techniques or improper practices. Also, even if your mentor is well experienced, nobody can guarantee that he will teach you everything or be able to convey his experience clearly . . . it is time to change the current training regime into a systematized one.²²²

Whether old Taiwanese practices will continue to thrive in the future remains to be seen. However, one thing is certain: Taiwan needs to survey the best practices of police interview and interrogation in different criminal justice systems. Given the dark history of past practices and the risk to suspects' dignity in the interrogation room, one should be especially disconcerted by techniques that can lead innocent people to incriminate themselves.

V. A TALE OF TWO *MIRANDA* FAILURES

The U.S.-oriented *Miranda* mechanism can probably only function in “a truly adversarial criminal justice system and culture.”²²³ Despite the strong U.S. influence on Taiwan's Code of Criminal Procedure over the past decades, few have argued that the Taiwanese criminal justice system is truly adversarial.²²⁴ In practice,

²²² Interview 32:33 (notes on file with the author).

²²³ Richard A. Leo, *Miranda, Confessions, and Justice: Lessons for Japan?*, in *THE JAPANESE ADVERSARIAL SYSTEM IN CONTEXT* 212 (Malcolm M. Feeley & Setsuo Miyazawa eds., 2002). *But see* ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 79, 80 (2003) (suggesting that adversarial legalism only offers limited protections to the defendant and those protections are often overly complicated for legal actors to comprehend and apply).

²²⁴ In a series of reforms since 2002, criminal trials in Taiwan began to take steps from a non-adversarial system toward a more adversarial one. Prior to 2002, the prosecutor would simply read the opening statement word for word, and the defense attorney had little if any role to play during trial proceedings. The revisions of the Code of Criminal Procedure reiterated that the burden of proof should be on the prosecution, not on the judge. By design, the judge is expected to play a much more neutral, passive role. *See generally*

implementing *Miranda* is exceedingly difficult in Taiwan, and perhaps in many other jurisdictions also, because it conflicts with the broader societal and legal culture. Nevertheless, I believe that the failure of *Miranda* in Taiwan and the United States offers an opportunity for worthwhile reflection on *Miranda* jurisprudence. In fact, the comparative angle adopted in this Article may well offer a valuable cautionary tale for other legal systems that have implemented or are contemplating implementing mechanisms similar to the U.S. *Miranda* rule.

The fate of implementing *Miranda*-like mechanism may have been determined by its origin. The *Miranda* decision was not based on a comprehensive understanding of police activities and the profound discretion that police are able to exercise. Instead, the Warren Court in 1966 relied on police training manuals as a proxy for actual empirical studies to describe the techniques and methods of police interrogation, and more broadly, police activities.²²⁵ In fact, studies of the role of discretion in the criminal justice system were only in their infancy in 1965 following the publication of a groundbreaking book series from the American Bar Foundation (ABF)'s Survey of the Administration of Criminal Justice in which police discretion was finally put under the spotlight.²²⁶ The ABF survey study employed an ethnographic approach by sending field observers to report on the problems encountered, the actions

Brian L. Kennedy & Chun-Ling Shen, *The Best of Times and the Worst of Times: Criminal Law Reform in Taiwan*, AM. J. CHINESE STUDIES 107, 115–18 (2005); Margaret L. Lewis, *Taiwan's New Adversarial System and the Overlooked Challenge of Efficiency-Driven Reforms*, 49 VA. J. INT'L L. 651, 662–79 (2009).

²²⁵ See Coughlin, *supra* note 116, at 1635; Ferguson & Leo, *supra* note 7, at 942.

²²⁶ See generally *supra* note 115. For other studies around this time period, see generally FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (1969); DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966); ROBERT O. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH, AND CONDITIONS OF SENTENCE (1969). For earlier scholarly publications on techniques and methods on police interrogation, see, e.g., Edward L. Barrett, Jr., *Police Practices and the Law—From Arrest to Release or Charge*, 50 CALIF. L. REV. 11, 11–55 (1962); Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Lo-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 543–94 (1960); Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 904–31 (1962); Wayne R. LaFave & Frank J. Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, MICH. L. REV. 987, 987–1012 (1965).

taken,²²⁷ and the considerations involved in making discretionary decisions in law enforcement.²²⁸ For the first time, the ABF research focused on the discretionary decisions of all participants—including police, prosecutors, judges, and probation and parole officers—in the criminal justice system. The survey cleared up a number of misunderstandings concerning the role of the police.²²⁹

²²⁷ For the development and operation of research methods in the study, see JAMES D. TURNER, *THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE UNITED STATES: PILOT PROJECT REPORT VOLUME I, SECTION E. 1–58* (1958) (presenting the history and objectives of the project).

²²⁸ See ARTHUR H. SHERRY ET AL., *THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE UNITED STATES: PLAN FOR A SURVEY TO BE CONDUCTED UNDER THE AUSPICES OF THE AMERICAN BAR FOUNDATION* (1955) (explaining that an initial product of the decision to initiate a survey was a detailed plan that described the design of the study and early sponsorship). Interestingly, Fred E. Inbau, one of the co-authors of the police training manual—*Criminal Interrogation and Confession* (1962)—was actually one of the early consultants on the ABF project. See AMERICAN BAR FOUNDATION, *SURVEY OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE UNITED STATES: HISTORY AND STATUS REPORT* (1959) (archives on file with the author). Inbau was the author of two pilot project reports, addressing topics such as “on the street” police detention, frisking, and questioning of suspected persons; arrest, search and seizure; and other police activities; see *THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE UNITED STATES: PILOT PROJECT REPORT VOLUME VII* (1958).

²²⁹ The original field reports of the ABF study documented multiple interrogation practices. See, e.g., ABF Field Report 10031, 10061; 10076; 10171; 10234; 10271 (archives on file with the author). For instance, during the interrogation of one seventeen-year-old male, the field report documented that the defendant “sat with his head down and appeared to ignore the questioning of the detective. The detective then raised his voice to the defendant and asked ‘Am I boring you?’ He then instructed the defendant: ‘Sit up and speak to me. I can talk to you just as easily next Sunday as I can now.’ The detective stated: ‘I will hold you for several days so that you may cool off in jail.’ The defendant straightened up somewhat and, in answer to the questions shot at him by the detective, indicated that he was involved in a fight with a fellowThe defendant still did not admit to breaking the glass. The detective said ‘Maybe you need about thirty days to straighten you out. What the hell good are you? You don’t want a job and you don’t earn a living. Why don’t you go back to school?’ There was no response from the defendant. The detective then asked ‘How did the glass get broken?’ The defendant said, ‘I know I did it, but I don’t know how.’ Breaking the defendant down further, the detective said ‘You are no damn good to anybody. You keep this up and you will be doing time . . . in a matter of months.’ The detective then reviewed the previous arrests of this defendant with himApparently, the detective was satisfied with the fact that he had obtained an admission from this fellow, and had him returned to his cell.” ABF Field Report 11084 (archives on file with the author). See also O. W. WILSON, *POLICE TREATMENT OF SUSPECT DURING DETENTION PRIOR TO RELEASE OR INITIAL APPEARANCE IN COURT* 41–61 (1957) (documenting police interrogation practices during the investigation of multiple types of crimes). The ABF field studies in Wisconsin additionally found that, although there were no indications of actual or threatened physical mistreatment in the questioning of suspects by police, the field representatives concluded that the practices reflected a low level of training and unfamiliarity with legal rules. An example was the use of interrogation in

For instance, Wayne LaFave's (1965) study, which was based on the ABF survey, revealed that policing was more about peacekeeping than crime control and that police officers appeared to be guided by anything but legal guidelines and organizational controls.²³⁰ Based on their findings of the prevalence of discretion in policing, many researchers "were struck less by the illegality of

investigating a person who was suspected of having shot another. During questioning, the suspect said that his gun had been stolen but contradicted himself about the circumstances under which it had been taken. The detective told the suspect that he had witnesses who would testify that the suspect was present when the victim was shot, but the suspect then said that he would talk no more until he saw his attorney and the detective took him back to his cell. Still, the detective interviewed the suspect again for one-half hour on the same day. There is no reference in the field representative's account of the interrogation of the suspect that the suspect had been advised of his constitutional rights including the fact that his statements to the police might be used against him. Nevertheless, the fieldnotes did show that the field representative had watched three other interrogations and that, in each instance, the detective informed the suspect of his rights in such a manner that "*I have no doubt that the detective has done it many times [emphasis added].*" ABF Field Report 10520:14; 10527:03 (archives on file with the author). Another field representative, who asked a Kansas highway patrolman whether he was required to advise suspects of their constitutional rights, was told by the patrolman: "A [recent] ruling from the attorney general's office, directed to the highway patrol, stated that in this state we are not required to advise a man of his rights before he gives [a] statement. However, in order to save time and trouble, I'm sure you will find that the uniform practice is for the patrolman to do so." *Id.* at 10390.3 (archive on file with the author). For an overview of contemporary police interrogation trainings, see Weisselberg, *supra* note 8, at 1529–35.

²³⁰ LAFAVE, *supra* note 143, at 61–82. For other pre-*Miranda* era police interrogation practices, see TIFFANY ET AL., *supra* note 212, at 6–94 (discussing the goals and process of "field interrogation" conducted by police). Field interrogation is a practice which commonly involves confrontation between the police and the minority groups residing in high-crime areas. In many circumstances, it may be difficult to distinguish a field interrogation from crime-preventive street practices which have an objective other than arrest and prosecution of suspects. Moreover, the ABF study found that police did not, in conducting field interrogation, provide warnings to the person about their right not to answer. See ABF Field Report 10258; 10286; 10290; 10291 (archives on file with the author) (discussing the practice of field interrogation and the police's lack of notifying certain rights during a field interrogation). The authors of the ABF study concluded that "the success of a field interrogation program must depend not on a feeling of social or moral obligation to respond to questioning but on a fear of the legal and practical consequences of contumacy". See TIFFANY ET AL., *supra* note 212, at 67. See also Lawrence P. Tiffany, *Field Interrogation: Administrative, Judicial and Legislative Approaches*, 43 DENV. L.J. 389, 391–92 (1966) (discussing whether *Miranda* rule applies to field interrogation); STUDIES OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN WISCONSIN: A REVIEW AND EVALUATION OF THE RESULTS OF THE PILOT PROJECT PHASE OF THE CRIMINAL JUSTICE PROJECT 55–57 (Arthur H. Sherry et al., eds., 1956) (documenting the functions of field interrogation reports).

so much police behavior than by the sheer fact that so much decision making had so little relationship to law on the books.”²³¹

With this background in mind, it is perhaps not surprising that even after decades of development of *Miranda* jurisprudence in the U.S., *Miranda* has not changed police officers’ basic approaches to interrogation, nor has it been effective in reducing incidents of false confessions.²³² Police are confronted with a variety of important social and political problems which are dealt with by means other than the formal processes of the criminal justice system. The effort to eliminate or reduce discretion at one stage in the process where it is visible, such as the warning or waiver of *Miranda*, will create a risk that discretion will merely shift to another stage where its exercise is less visible, such as during pre-interrogation interaction and post-waiver interrogation.²³³

My proposed agenda in this Article is based on the understanding that the *Miranda* rule should never be expected to serve as a principal tool to eliminate or at least “tame” police discretion during interrogation. The “failure” of *Miranda* in Taiwan and the United States, and perhaps in many other jurisdictions, is built on our wishful thinking that the complete elimination of police discretion is possible and desirable. I believe it is time to set *Miranda* free from such shackles. However, the idea of leaving *Miranda* behind and moving ahead seems to be a costly and unpredictable strategy for the United States. The *Miranda* jurisprudence has been widely litigated and quite well developed. After the Court’s decision in *Dickerson*, it was clear that *Miranda*, being a constitutional decision, could not be effectively overruled

²³¹ Samuel Walker, *Origins of the Contemporary Criminal Justice Paradigm: The American Bar Foundation Survey, 1953–1969*, 9 JUST. Q. 47, 68 (1992).

²³² See LEO, POLICE INTERROGATION, *supra* note 7, at 123–32, 280–81 (stating that the “scholarly consensus is that *Miranda*’s impact in the real world is, for the most part, negligible” and that “once a suspect has waived his rights, *Miranda* does not restrict deceptive, suggestive, or manipulative interrogation techniques’ hostile or overbearing questioning styles; lengthy confinement; or any of the “inherently compelling” conditions of modern accusatorial interrogation that may lead a suspect to confess”). See also Richard A. Leo, *Miranda’s Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC’Y REV. 259, 260–61 (1996) (arguing that contemporary police interrogation “bears many of the essential hallmarks of a confidence game”); Thomas, *supra* note 13, at 1999 (suggesting that “*Miranda* has not changed very much about police interrogation.”).

²³³ See LEO, POLICE INTERROGATION, *supra* note 7, at 281.

by legislation passed by the U.S. Congress.²³⁴ Under such circumstances, there is little if any support among scholars and the American legal community generally to argue for overruling *Miranda*.²³⁵

In contrast, Taiwan's *Miranda* mechanism was originally established by the legislature.²³⁶ Even though the Taiwanese Congress gradually added new elements to the protections, many of the critical aspects of *Miranda*, particularly the duty of police to cease questioning if a suspect asserts the right to remain silent, have never taken root in Taiwan. While *Miranda* has a significant presence in Taiwanese popular culture,²³⁷ it has an insignificant presence in the formal domain of the law.²³⁸ It is in fact very

²³⁴ See generally Pizzi & Hoffman, *supra* note 154, at 823–24; Weisselberg, *In the Stationhouse*, *supra* note 5.

²³⁵ Paul G. Cassell & Richard Fowles, *Still Handcuffing the Cops: A Review of Fifty Years of Empirical Evidence of Miranda's Harmful Effects on Law Enforcement*, 97 B.U. L. REV. 685, 827–28 (2017) (citing the original language of the *Miranda* decision, some scholars argued that “while the Court’s later decision in *Dickerson* gave a narrow reading of this language, it certainly did not retreat from the proposition that *Miranda* could be replaced by other alternatives”). However, no state attorney general supported the U.S. Department of Justice’s position that *Miranda* does not unduly impede law enforcement and it is easier to administer than other alternative mechanisms, see Bruce A. Green, *Gideon’s Amici: Why Do Prosecutors So Rarely Defend the Rights of the Accused?*, Yale L.J., 2336, 2350 (2013). See also Kamisa, *supra* note 210, at 23 (revisiting Paul Kauper’s proposal for magisterial interrogation and suggesting that a judicially supervised interrogation “would present an attractive alternative to the *Miranda* model”).

²³⁶ Kennedy & Shen, *supra* note 224, at 119 (arguing that Taiwan’s *Miranda* rule is one of the many American legal “buzz words” adopted by the legislature to “give their reforms some veneer of being a big change”).

²³⁷ Some police departments in Taiwan routinely upload excerpts of body camera footage to social media. These records often vividly capture the moment of the *Miranda* warnings. For instance, see Kaohsiung Police, FACEBOOK (November 4, 2021), <https://www.facebook.com/KaohsiungPolice/videos/> [https://perma.cc/6HJD-SHKS] (providing various video clips of law enforcement activities); SET News, *Qiang Jincha Xuandu Quanli Chao Liuli Xianfan Tingwan Shayan* (強! 警察宣讀權利超流利 嫌犯聽完傻眼) [Superb! The Police Read the Rights Super Fluently, The Suspect Dumbfounded After Listening], YOUTUBE (June 27, 2016), <https://www.youtube.com/watch?v=atKf48CsZJw> [https://perma.cc/8V3G-X4Y2] (showing unique style of how a police officer provided the *Miranda* warnings.). Also, many Taiwanese TV crime/detective series have hired veteran police officers as consultants. These officers often serve as interpreters of legal language and mediators of legal knowledge. And, indeed, as one of the lawmakers proposing the introduction of the *Miranda* rule in Taiwan stated, the Taiwanese people have long been exposed to “the spirit of *Miranda*” through American TV dramas and movies, see LI FA YUAN GONG BAO (立法院公報) [THE LEGISLATIVE YUAN GAZETTE], Vol. 86, No. 52, at 192 (1997).

²³⁸ In fact, the Taiwanese media often describe suspects who exercise their right to silence as individuals who “use their legal knowledge to game the system” (知法玩法).

unlikely for a court in Taiwan to ever find a *Miranda* violation. As I have demonstrated, exercising one's *Miranda* rights is extremely demanding.

The central argument of this Article is that it is time for policy makers in both Taiwan and the United States to prioritize other protections against false confessions and to better manage police interrogations. *Miranda* has almost become an obstacle for any potential reform proposals in the United States. But it need not be so. The failure of *Miranda* in Taiwan to date is certainly not something to be celebrated. Nevertheless, Taiwan offers an example for other systems to rethink the development of their *Miranda* jurisprudence.

I believe managing police interrogation is possible. But it is not through the *Miranda* rule. Instead, my proposed solution is to increase the visibility of police discretionary practices. Discretionary practices are likely to survive after they become publicly visible *only if* the practices achieve objectives that have public support. Also, visibility may eventually lead to formality and cultural change. In other words, my three main proposals—using expert testimony, videotaping the entire police-suspect interaction, and changing police culture—increase the visibility of police interrogation activities and may result in “*organic control*” of police discretion. In brief, echoing the wisdom of the ABF survey more than sixty years ago, I argue that it is naïve to think that police interrogation can operate sensibly by the *Miranda* rule alone without the exercise of discretionary judgment. Instead of relying on the *Miranda* rule to reduce or eliminate police discretion, I believe the better approach is to design a system where “good judgment” can be encouraged. Increasing the visibility of police activities is the critical first step.

See, e.g., Yang Zheng-Yu (羊正鈺), *Ma Ying-Jeou Yin San Zhong An Zaici Yingxun Weihe Quancheng Si Xiaoshi Dou Xingshi Jianmoquan* (馬英九因「三中案」再次應訊，為何全程 4 小時都行使「緘默權」?) [*Ma Ying-Jeou Responded to the Hearing Again Because of the “San Zhong An”, Why Did He Exercise His “Right to Silence” for the Entire Four Hours?*], THE NEWS LENS, (April 26, 2018) <https://www.thenewslens.com/article/94345> [<https://perma.cc/3FZ8-W5EL>] (involving the Former Taiwanese President Ma Ying-Jeou); Xiao Bo-Wen (蕭博文), *Chen Yu-Zhen Xingshi Jianmoquan Chahui Zhuangqiang* (陳玉珍行使緘默權 查賄撞牆) [*Chen Yu-Zhen Exercises Rights to Remain Silent in Anti-Corruption Case*], CHINATIMES, (December 14, 2012 1:17AM) <https://www.chinatimes.com/newspapers/20121214000840-260106?chdtv> [<https://perma.cc/CC95-VYBM>] (involving the former prosecutor Chen Yu-Zhen).

Before we can finally move forward to the future of *Miranda*, it is necessary to clarify and respond to two conventional propositions regarding *Miranda* rule:

*Proposition one: Miranda should be abolished due to its harmful effects on crime clearance rates and, very possibly, on confession and conviction rates.*²³⁹

*Proposition two: Miranda should not be abandoned since it provides a bright-line rule that imposes restraints on the police.*²⁴⁰

Proposition one suggests that the implementation of the *Miranda* mechanism had a major adverse effect on the willingness of suspects to respond to police questioning. However, it is crucial to note that no empirical measure can capture the value of dignity and the respect for individual autonomy. We cannot properly and empirically measure the value of respect for individual autonomy or the value of constructing an adversarial criminal justice system. Without definitive knowledge of *Miranda*'s empirical effect, some scholars resort to arguments about the symbolic value of treating everyone equally and the value of having additional assurance that confessions are voluntary and intelligent.²⁴¹ In this sense, a cost/benefit analysis is utterly unsuited to the task.

Meanwhile, some empirical studies regarding the impact of *Miranda* are based on the assumption that we need to choose between the protection of dignity and autonomy and the

²³⁹ See generally *supra* note 6.

²⁴⁰ A great value of the initial *Miranda* decision is its simplicity. See, e.g., *J.D.B. v. North Carolina*, 564 U.S. 261, 285 (2011) (Alito, J., dissenting) (“[W]ith [*Miranda*’s] rigidity comes increased clarity. *Miranda* provides a ‘workable rule to guide police officers’” See also Leo & White, *supra* note 8, at 465, 471–72 (suggesting that “the restraints *Miranda* does impose on the police are important ones”); Schulhofer, *supra* note 12, at 561–62 (arguing that “*Miranda*’s stated objective was not to eliminate confessions, but to eliminate compelling pressure in the interrogation process” and that *Miranda* marks a critical leap forward to substitute psychological manipulation for physical coercion). But see RONALD J. ALLEN ET AL., *COMPREHENSIVE CRIMINAL PROCEDURE* 856–59 (3d ed. 2011) (discuss whether to preserve *Miranda* on the ground that it has little effect); Jacobi, *supra* note 6, at 56–64 (criticizing the per se rule of *Miranda* and proposing a variable standard for reforming *Miranda*).

²⁴¹ PITMAN & WRIGHTSMAN, *supra* note 10, at 155–72; See Weisselberg, *supra* note 9, at 170–71 (“A cost/benefit analysis is utterly unsuited to the task, for there is no single metric that can encompass *Miranda*’s costs and its benefits.”).

maintenance of social order.²⁴² That is to say, we cannot expect our legal system to implement safeguards without having, at least, a deleterious effect on law enforcement efforts. As with any rules that provide fundamental protections to suspects, law enforcement activities will always incur costs.

Based on such a rationale, legal scholars put different emphasis on the balance sheet. Some argue that the costs are too substantial and thus outweigh the *Miranda* warnings' proposed protections.²⁴³ Others say that we should tolerate the costs because doing so ensures that the legal system remains a fair process for the accused, in accord with its adversarial structure.²⁴⁴ And, as a fair process, such a system provides people with confidence in cases' ultimate just outcomes.²⁴⁵ No matter what, when starting with the presumption that legal protections for suspects will inhibit police action, we ultimately must determine the relative importance of these contradicting values in light of our own preferences, beliefs, and, perhaps, legal cultures.²⁴⁶

As for Proposition two: the danger of such a proposition is that it further suggests *Miranda* functions as a replacement for the due process test. Under such a rationale, *Miranda* protection becomes the substitute for the voluntariness test. With the bright-line rule of *Miranda*, courts often are reluctant to apply due process scrutiny after determining that a *Miranda* waiver was valid. If warnings were delivered by the police and a waiver was given or signed, it becomes difficult to persuade a judge that a confession is

²⁴² See generally *supra* note 6.

²⁴³ See STUNTZ, *supra* note 6, at 222–25 (arguing that *Miranda* does not achieve equality); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 832–36 (2006) (arguing that *Miranda* is the wrong conduct rule because it favors sophisticated suspects); William J. Stuntz, *Miranda's Mistake*, 99 MICH. L. REV. 975–98 (2001) (“*Miranda* imposes only the slightest of costs on the police, and its existence may well forestall more serious, and more successful, regulation of police questioning.”).

²⁴⁴ See Weisselberg, *supra* note 9, at 170–72 (“We tolerate those costs because doing so ensures that our legal processes rest on long-standing principles instead of ever-changing balance sheets.”).

²⁴⁵ MARY L. PITMAN & LAWRENCE S. WRIGHTSMAN, *THE MIRANDA RULING: ITS PAST, PRESENT, AND FUTURE* 15–21 (Oxford Univ. Press 2010).

²⁴⁶ For a methodological reflection on comparing legal cultures, see generally Jacqueline Hodgson, *Comparing Legal Cultures: The Comparativist as Participant Observer*, in *CONTRASTING CRIMINAL JUSTICE: GETTING FROM HERE TO THERE* 139 (David Nelken ed., 2000).

involuntary.²⁴⁷ The warning/waiver helps judges deny the defendant's motion to suppress the subsequent statement. In short, *Miranda* has practically displaced the court's voluntariness scrutiny. However, due process rights exist independently of *Miranda*. The Court never talks about developing a mechanism that will replace the due process test. *Miranda* has never been designed to cure the limitation of the case-by-case approach mandated by the due process test. We have placed and continue to place too much hope on *Miranda*—and blame it after the warning system fails to meet our unrealistic expectations. *Miranda* has been overloaded and it is time to revitalize due process jurisprudence and other more effective protections suggested in this Article.

Once we have at least refuted the above two assertions, the door is open for future reforms on police interrogation. Compared to the U.S. *Miranda* system, Taiwan has developed a much weaker version in which police are required to deliver the warnings to suspects but do not advise suspects that they can immediately terminate interrogation.²⁴⁸ Whether such a weak version of *Miranda* is preferable is open for further debate.²⁴⁹ But regardless of the nature of a *Miranda* system a country has developed, it is simply unrealistic to put all of our faith in *Miranda*, hoping that a single warning system can prevent false confession. With the help of well-established social science and clinical studies regarding false confession, and a better system of video recording for the entire police interrogation process, perhaps it can at least be time, after its fiftieth anniversary, to treat *Miranda* as a ritual and

²⁴⁷ See Charles Weisselberg & Stephanos Bibas, *Debate, The Right to Remain Silent*, 159 U. PA. L. REV. 69, 80 (2010) (“*Miranda*, in essence, has become a substitute for serious voluntariness scrutiny.”); Weisselberg, *supra* note 8, at 1595 (arguing that judges would automatically assume voluntary confession when *Miranda* warnings were given); George C. Thomas III, *The End of the Road for Miranda v. Arizona: On the History and the Future of the Rules for Police Interrogation*, 37 AM. CRIM. L. REV. 1, 18 (2000) (“Judges seem to assume that once a suspect knows his rights and chooses to talk to the police, any subsequent statement must be voluntary.”).

²⁴⁸ Moreover, a statement obtained in violation of *Miranda* rule does not have to be excluded unless the police acted in bad faith or the statement was involuntary. See *supra* note 29.

²⁴⁹ Although Taiwan was not specifically mentioned, Cassell and Fowles proposed a modified version of *Miranda* that essentially emulates the actual practices in Taiwan. See Paul G. Cassell & Richard Fowles, *Still Handcuffing the Cops: A Review of Fifty Years of Empirical Evidence of Miranda's Harmful Effects on Law Enforcement*, 97 B.U. L. REV. 685, 828–38 (2017) (explaining that *Miranda* warnings have little effect on confession rates).

symbolic procedure and place greater emphasis on other more effective mechanisms.

I am not trying to deny the impact *Miranda* has brought to the criminal justice system. *Miranda* has civilized police activities and has increased public awareness of criminal suspects' constitutional rights.²⁵⁰ It demonstrates that the police are: first, benevolent and caring; second, concerned about the suspect's situation, concerns, and needs; third, considering the suspect's willingness to terminate the interrogation; and fourth, trying to be fair and neutral. *Miranda* also provides dignified treatment to the suspect; it shows that the police officer takes the rights and status of the suspect seriously. Most importantly, dignified and respectful treatment is something that the police can easily provide to everyone with whom they deal.

Did *Miranda* hamstring the police? Did it make crime control more difficult? Did it tie the hands of the police and coddle criminals, at the expense of victims and the public? For policy makers and police interrogation researchers, it is important to bear in mind that the *Miranda* warnings should not be seen as the flowery opening of a "legal drama." The appearance of *Miranda* legislation represents a government's commitment to democracy and respect for a suspect's dignity and autonomy. What is the practical impact of *Miranda* on the criminal justice system? After decades of endeavor, I think the answer is still murky and needs further, more comprehensive, empirical study. However, one thing

²⁵⁰ See, e.g., BAKER, *supra* note 8, at 407 (suggesting that *Miranda* "remind[ed] the officer of the law that however miserable the one who stood before him, however savage the crime of which he was accused, he was still a man, possessed of all the attributes, including the constitutional rights, of other men"); Steven B. Duke, *Does Miranda Protect the Innocent or the Guilty*, 10 CHAP. L. REV. 551, 558–60 (2007) ("The warnings implicitly suggest to the suspect that the police are respectful of the suspect's rights, that the police are not only law-abiding, but that they are also fair and objective."); Kassin et al., *supra* note 7, at 7; Leo, *The Impact of Miranda Revisited*, *supra* note 7, at 668 ("*Miranda* has exercised a civilizing influence on police interrogation behavior, and in so doing has professionalized police practices."); Leo & White, *supra* note 8, at 466 ("The abolition of *Miranda*'s warning and waiver requirements would send the symbolic message to police that their interrogation practices would be less scrutinized by the courts and, therefore, their latitude to exert pressure on reluctant suspects to confess would be greater."); Schulhofer, *supra* note 12, at 562 (stating that *Miranda*'s symbolic effects are not irrelevant as they "help shape the self-conception and define the role of conscientious police professionals . . . [and] underscore our constitutional commitment to restraint in an area in which emotions easily run uncontrolled").

is for sure, the future of *Miranda* lies in the way we judge the value of procedural fairness and our continued insistence on it.

CONCLUSION

This Article has examined critically the functioning of the *Miranda* rule within Taiwan's criminal justice system. I have demonstrated how Taiwan has translated the American *Miranda* system into its own legal culture and criminal justice system. I have argued that the *Miranda* protection is a failed mechanism in both Taiwan and the United States, although for quite different reasons. Over the years, Taiwanese reformers have unsuccessfully advocated for implementation of genuine *Miranda*-like protections. The current *Miranda* mechanism clearly fails to serve as an adequate safeguard against police abuse in Taiwan. Empirical evidence shows that *Miranda* does very little to protect individuals from coercive interrogation and false confession. The people of Taiwan will not fully enjoy their *Miranda* rights until we can place the current underground police interrogation practices in the sunshine. The use of deceptive interrogation techniques not only is completely obscured from judicial scrutiny, but it also poses ethical dilemmas in a modern democratic society that is supposed to be committed to the values of both crime control and due process of law.

This Article makes some suggestions for reforming the "failed" *Miranda* system—by *not* reforming it. First, expert testimony regarding interrogation and confession should be introduced into the criminal justice system. Expert testimony may reduce the number of police-induced false confessions that cause wrongful convictions. As scholars in the United States argue, the use of social science expert testimony at pretrial suppression hearings makes judges more likely to exclude questionable confessions from evidence.²⁵¹ Therefore, it results in the admission of fewer police-induced false confessions into evidence at trial, which in turn results in fewer wrongful convictions.

²⁵¹ See Brain Cutler et al., *Expert Testimony on Interrogation and False Confession*, 82 UMKC L. REV. 589, 591 (2014) (arguing that "expert testimony on false confessions has a more solid research base, and is at least as reliable, if not more so, than other types of social science evidence that courts routinely admit"); LEO, POLICE INTERROGATION, *supra* note 7, at 314–16 (explaining courts often exclude false confessions when the use of social science expert testimony is present).

A confession is a powerful piece of evidence.²⁵² Social science expert testimony can aid the factfinder by discussing the scientific research literature documenting the phenomenon of police-induced false confessions.²⁵³ Experts can helpfully and credibly explain how and why particular interrogation methods and strategies can cause the innocent to confess. Moreover, experts can identify the conditions that increase the risk of false confessions. By educating the factfinder about the existence, psychology, and cause of police-induced false confessions, social science expert testimony at trial can reduce the number of confession-based wrongful convictions. Finally, expert testimony may indirectly change the behavior of police and prosecutors. By exposing flaws, social science expert testimony may deter misbehavior and eventually improve law enforcement agencies' screening practices. Its use should lead eventually to a decline in the reliance on psychologically coercive interrogation methods and a reduction in the number of false confessions. With the introduction of expert testimony, fewer innocent people will be wrongfully convicted in Taiwan because of false confessions.

Yet in practice confessions frequently constitute powerful incriminating evidence to determine guilt, and deceptive interrogation techniques can often seem to be a necessary evil. While physical coercion during interrogation is repugnant to most people, there is little shared consensus in Taiwan or elsewhere about where to draw the line between "permissible" and "impermissible" deceptive tactics. Moreover, the mere comprehension of the right to remain silent and the right to request defense counsel is insufficient to dispel the coercion inherent in the interrogation room. Several other mechanisms of the criminal justice system ought to be taken

²⁵² Blandon-Gitlin et al., *supra* note 172, at 1; Kassin, *supra* note 172, at 249; Ofshe & Leo, *supra* note 170, at 193; SIMON, *supra* note 182, at 160–62. A defense expressed to me, "I often asked my client why they appointed me in such a late stage when the case was already in front of the court or when they have already been severely sentenced by district courts? The most common answer is that they mistakenly trust the investigator and waive their right to have a legal counsel presented during interrogation . . . I can hardly imagine just how many suspects abandon such a life-saving protection of having a lawyer based merely on the instructions of police officers . . . my clients sometime complained to me that why I did not defend their innocence in court. The reality is, when clients confessed during police or prosecutor's investigation, it became fruitless to argue their innocence in court." Interview 43:08 (notes on file with the author).

²⁵³ See, e.g., Leo & Ofshe, *Consequences of False Confessions*, *supra* note 127, at 472–91 (discussing various consequences of false confessions).

into consideration instead, including: (one) the abuse of pretrial custody; (two) the function of defense lawyers during police interrogations; and (three) the unique two-step police/prosecutor interrogation structure. I have speculated here that the originally envisioned *Miranda* protections are largely compromised by these other legal practices in Taiwan. Taiwanese attorneys have also suggested to me that defense lawyers often perceive that their clients may be harmed by asserting the right to silence, such as through longer periods of pre-charge detention; therefore, lawyers may be hesitant to advise their clients to remain silent.²⁵⁴ If police officers and prosecutors continually use pretrial custody as a “*legalized threat*” to secure confessions, if suspects do not receive efficient and sufficient guidance from defense lawyers, and if prosecutors function merely as rubber stamps approving what has been said or done during police interrogation, then the *Miranda* protections are and will remain nothing but empty promises in Taiwan. In the worst-case scenario, innocent people will continue to falsely confess and be punished.

²⁵⁴ See, e.g., TAIPEI BAR ASSOCIATION, *supra* note 124, at 117–18 (recommending defense counsel inform their clients of the risk of remaining silent during interrogation).