Questioning Police Interrogation Methods: A Comparative Study

(Chinese–English version)

Ira Belkin
Chao Liu
Amy Gao
Compile

法律出版社
LAW PRESS · CHINA

Questioning Police Interrogation Methods: A Comparative Study

(Chinese-English version)

Ira Belkin
Chao Liu *Compile*
Amy Gao

法律出版社
LAW PRESS · CHINA

图书在版编目(CIP)数据

追问警察讯问方法：比较法的视角：汉英对照／柏恩敬，刘超，高原编译. -- 北京：法律出版社，2018
ISBN 978-7-5197-2214-2

Ⅰ. ①追… Ⅱ. ①柏… ②刘… ③高… Ⅲ. ①预审学-汉、英 Ⅳ. ①D918.5

中国版本图书馆 CIP 数据核字(2018)第 088743 号

追问警察讯问方法:汉英对照
——比较法的视角
ZHUIWEN JINGCHA XUNWEN FANGFA: HANYING DUIZHAO
——BIJIAOFA DE SHIJIAO

柏恩敬 刘 超 高 原 编译

策划编辑 王旭坤
责任编辑 涂俊华
装帧设计 鲍龙卉

出版 法律出版社
总发行 中国法律图书有限公司
经销 新华书店
印刷 天津嘉恒印务有限公司
责任印制 张建伟

编辑统筹 市场研发部
开本 720 毫米×960 毫米 1/16
总印张 44.5
总字数 610 千
版本 2018 年 5 月第 1 版
印次 2018 年 5 月第 1 次印刷

法律出版社／北京市丰台区莲花池西里 7 号(100073)
网址／www.lawpress.com.cn
投稿邮箱／info@lawpress.com.cn
举报维权邮箱／jbwq@lawpress.com.cn
销售热线／010-63939792
咨询电话／010-63939796

中国法律图书有限公司／北京市丰台区莲花池西里 7 号(100073)
全国各地中法图分、子公司销售电话：
统一销售客服／400-660-6393
第一法律书店／010-63939781/9782 西安分公司／029-85330678 重庆分公司／023-67453036
上海分公司／021-62071639/1636 深圳分公司／0755-83072995

书号:ISBN 978-7-5197-2214-2 **总定价**:98.00 元

Introduction

By Ira Belkin

This book is the product of a multi – year project undertaken by the U. S. – Asia Law Institute at New York University School of Law to work with Chinese and global experts on criminal justice reform challenges suggested by China's 2012 amendments to its Criminal Procedure Law. This volume focuses on the topic of police interrogation, one of the primary concerns addressed by the amendments.

Every country's criminal justice system has struggled with the challenge of how to regulate police interrogation to eliminate police torture, coercion and false confessions, on the one hand, while still giving police sufficient leeway to investigate criminal offenses, on the other. As we demonstrate in the body of this volume, the United States and the United Kingdom, as well as the People's Republic of China, have all experienced scandals involving police torture and all have taken some steps to reform how police conduct interrogations.

In China, the Reform Era, which began in 1979, came about itself, in part, to address the abuses of the previous period, the Cultural Revolution. Those abuses included the use of torture to extort false confessions. In fact, the notorious Gang of Four were convicted of the crime of "coercing false confessions," among other things.[1] The public trials of the Gang of Four led to the

[1] A Great Trial in Chinese History, New World Press, 1981.

Reform Era and a new Criminal Law and Criminal Procedure Law ("CPL"), first promulgated in 1979 and since amended several times. Both laws explicitly prohibit extorting confessions by torture.[2]

In addition to promulgating domestic legal reforms to outlaw police torture, China also became one of the first nations to sign and ratify the U. N. Convention Against Torture, having done so in 1986.

Despite these impressive legislative achievements, China's struggle to eradicate police torture, coercion and false confessions continues. Passing a law prohibiting a practice and ratifying a convention outlawing that practice do not, in and of themselves, guarantee eradication of that practice. In China, a confession has traditionally been considered the "king of evidence." China is not alone in this regard and, as demonstrated in this book, both the United States and the United Kingdom, despite progress in legal reform, still struggle to address this challenge.[3]

Every law enforcement agency relies upon interrogation as one of its most effective tools to investigate crime and to discover evidence to prove the guilt of a suspect. At the same time, in virtually every society, police have, from time to time, used coercive methods, including physical torture and psychological pressure, or some combination of both, to induce individuals to provide information and statements. Most criminal justice systems, including the Chinese and Anglo – American systems, started out as confession – based systems. In a confession – based criminal investigation, once the police begin to suspect that a particular individual might be guilty, they interrogate him until he confesses. Then they investigate the details to see if they corroborate the confession. While

---

[2] See Article 136 of the 1979 Criminal Law and Article 32 of the 1979 Criminal Procedure Law, as well as Article 247 of the current Criminal Law and Article 50 of the current Criminal Procedure Law.

[3] This is not so different from the West, where a confession has sometimes been referred to as the "gold standard of evidence." Chapter 3, infra, at 93.

this primitive approach has certainly yielded many convictions, there have also been many cases where this method has led to torture, coercion and false confessions.

History is replete with examples of false confessions obtained by overzealous police leading to innocent people being wrongly convicted of crimes and sometimes even executed. False confessions have been documented in countries all over the world, including Canada, Norway, Finland, Germany, Iceland, Ireland, the Netherlands, Australia, New Zealand, China, Japan, England and the United States.[4] This universal experience demonstrates the risk common to all societies that over – reliance upon confessions can lead to disastrous injustices.

In China, the recent cases of Zhao Zuohai and She Xianglin shocked society as each was convicted, based upon their confessions, of the supposed murder of a person who turned out not to have been murdered at all but was still alive. Western countries have experienced similar embarrassments. In 17th century England, there was *Perrys' Case*, in which a mother and two brothers were convicted and executed based upon their confession to a murder that was later discovered to be false when the supposed murder victim turned up alive.[5] In 19th century America, two brothers, Steven and Jesse Brown, were convicted and sentenced to death in Manchester, Vermont for the murder of their brother – in – law, Russell Colvin. They had both confessed to the murder but fortunately for them their lawyers located Colvin, who was still alive, before the execution could be carried out.[6]

Inevitably, the public scandal that follows the disclosure that an innocent person has been convicted and punished for a crime he did not commit leads to public outrage and demands for criminal justice reforms. No society wants to

---

[4] See infra, Chapter 3 at 96.

[5] Id., at 105.

[6] Id.

accept the gross injustice of convicting and punishing innocent people. Of course, even when it turns out that the suspect was guilty and his confession was accurate, the use of torture and coercion is still inhumane and a violation of the suspect's fundamental human rights.

The question for legal reformers then becomes how to strike the right balance between giving police an opportunity to interrogate a suspect and learn valuable information on the one hand, but restraining themselves from conduct that overcomes the will of the suspect, violates his right to fundamental human dignity and possibly leads to a false confession and wrongful conviction, on the other. Is it enough to simply leave it to the police to figure out how best to do this? That approach has been tried but has yielded deeply unsatisfying results.

As Professor Stephen Schulhofer wrote in his article, *Some Kind Words for the Privilege against Self – Incrimination*, reproduced in this volume as Chapter 1, about American police during the period before the 1966 *Miranda v. Arizona* decision:

> Unfortunately, when we asked a conscientious law – abiding officer to question a stubborn defendant suspected of a brutal crime, and also asked the officer to use only fair means and not apply too much pressure, we were really asking the impossible … It should not be surprising that decent officers charged with solving brutal crimes sometimes gave in to fatigue or frustration and lost their tempers.

In other words, simply leaving it to the police to figure it out is not a workable solution; nor is it fair to the police. Every criminal justice system must develop its own solutions to guide police investigators to properly draw the line between acceptable interrogation methods and unlawful and unacceptable ones.

The 2012 reforms to the CPL are designed to address this challenge. The

reforms with regard to police interrogation came about in response to the public outcry over repeated scandals of innocent people being convicted of the most serious crimes: Zhao Zuohai, Nie Shubin, She Xianglin and others. These wrongly convicted innocents have become household names in China. As noted above, in the Zhao Zuohai and She Xianglin cases, the defendants were convicted of murdering individuals who had disappeared and were presumed to have been murdered. Years later, the "victims" who had been missing re – appeared in their home villages, leaving no question that Zhao Zuohai and She Xianglin were innocent and had been dealt a terrible injustice. In the Nie Shubin case, long after Nie was executed, another person came forward and claimed responsibility for the murder that sent Nie to his death. In each of these wrongful conviction cases, the defendant's false confession played a pivotal role in the proof that led to his unjust conviction. These and other scandals spurred efforts to reform the CPL in 2012 to address police torture and false confessions.

In response to these wrongful convictions of innocents and the public's understandable demands for reform, China amended its CPL in 2012 to include three types of reforms to prevent and deter the use of torture and coercion and to protect the rights of individuals subjected to interrogation: a) a privilege against compelled self – incrimination; b) an exclusionary rule for unlawfully obtained confessions; and 3) a requirement that interrogations be electronically recorded from beginning to end in serious criminal cases.

The goal of our project was to promote an exchange of knowledge and experience about the types of laws and practices that have proven effective in addressing police torture, coercion and false confessions. We hope to stimulate a rich and meaningful discussion among Chinese and global experts and practitioners about how best to implement the 2012 reforms to the Chinese CPL and to ensure that their purpose is met, that is, that police torture, coercion and false confessions will be substantially reduced and, eventually, eradicated.

Before turning to the foreign experiences documented and explained in de-

tail in the chapters of this book, it is worthwhile to say a few words about the 2012 CPL reforms and clarify what they did and did not do. What questions did they answer and what questions did they leave open?

First, what is the meaning of the CPL's privilege against compelled self – incrimination? Is it similar in meaning and scope to the current understanding of the 5th Amendment to the Constitution of the United States which employs similar language? Throughout the history of criminal justice in the United States, the 5th amendment privilege has generated controversy. Its basic meaning, as interpreted by United States courts, is that in the trial phase, an accused has an absolute right to decline to testify or say anything at trial. The purpose of the trial is to determine whether the prosecution has sufficient evidence to prove his guilt beyond a reasonable doubt and the defendant is under no obligation to assist the prosecution by testifying and subjecting himself to cross – examination. In the investigation phase, the 5th Amendment also gives a suspect an absolute right to assert the privilege and if he does so, he has a right to refuse to answer any police questions during interrogation.

As noted, Chinese CPL Article 50 appears to adopt, for the first time in China, an explicit "privilege against compelled self – incrimination:"

> Judges, procuratorial personnel and investigators ... are strictly prohibited from extorting confessions by torture, collecting evidence through threats, enticement, deception or other unlawful means, or *forcing anyone to provide evidence proving his/her own guilt* ... (emphasis added)

When the CPL was amended in March 2012, the National People's Congress, China's national legislature, issued a press release announcing that the law marked a milestone that China had established a doctrine against compelled self – incrimination. Although Article 50's language seems to create such a privilege, the amended Criminal Procedure Law, in Article 118, preserved a

provision that seems, on its face, to contradict Article 50. Article 188 provides:

> *The suspect shall truthfully answer the questions raised by the investigators.* However, he shall have the right to refuse to answer any question irrelevant to the case.

Thus, it still seems unclear to what extent Article 50 provides criminal suspects in China with the right to refuse to answer questions during interrogation. It is also unclear to what extent criminal defendants at trial can safely refuse to answer any questions from the judge or prosecutor. These questions were left to the implementation of the law. Our project, including the articles in this book, are intended to stimulate thinking about the most effective ways to carry out implementation.

As for the exclusionary rule, the 2012 amendments to the CPL adopted a set of rules that provide, for the first time, a potential remedy for the right to be free from coercion and torture during interrogation. This is critically important, for a right without a remedy is merely an unenforceable statement of principle. CPL Articles 54 through 57 provide for a new procedure giving Chinese courts the authority to exclude from evidence any confession "extorted from a criminal suspect or defendant by illegal means such as torture." Questions remain as to what type of showing a defendant must make to trigger a hearing under the rules and what type of proof is acceptable to a court to demonstrate that the police used unlawful means to obtain a confession. Perhaps most importantly, there is an open question about whether all "fruit of the poisonous tree" will be excluded. In other words, if the police use unlawful means to coerce one confession but then use only lawful means to confirm the substance of that confession in a second interrogation, should both confessions be excluded? The first confession was coerced and must be excluded. No coercion was used during the second in-

terrogation but isn't that confession a product of the first coercive interrogation? Is it possible to remove the taint of an unlawfully obtained confession simply by re – interrogating the defendant? Can a subsequent interrogation ever be considered untainted by a previous unlawful one? It is only logical that unless all confessions that follow unlawful police conduct are excluded, the police will have an incentive to use unlawful coercion during the first rounds of interrogation. Once a suspect has confessed, albeit under torture, how can he face his interrogators and deny the substance of the confession?

The CPL's third anti – torture reform can be found in Article 121, which provides that when interrogating a criminal suspect, investigators "may record or videotape the interrogation process, and shall do so where the criminal suspect is involved in a crime punishable by life imprisonment or capital punishment or in an otherwise major criminal case." This is an advance that goes beyond the reforms of many jurisdictions in the United States. While the United Kingdom has adopted the requirement that police interrogations be recorded in their entirety, only federal law enforcement authorities and a handful of jurisdictions in the United States have required that interrogations must be recorded in their entirety. In this respect, China's law is more advanced than many jurisdictions in the United States as well as other countries.

Of course, the newly enacted recording requirement also raises many new questions regarding implementation. What is the consequence of failing to record? Must the recording be shown to the defense prior to trial? What consequence, if any, follows if there are gaps in the recording? Should the evidence of the confession be the recording itself or should it be a written and signed statement? The answers to these and other concrete questions will determine how effective the recording requirement is in deterring torture and coercion and in creating a proper record to review the lawfulness and accuracy of the interrogation.

Finally, it is worth noting that the significant reforms of the CPL enacted

into law in 2012 did not address some of the issues that Chinese reformers have raised over the course of many years. Under Chinese law, police may, without any approval from a prosecutor or judge, detain a suspect for up to 37 days and subject him to repeated interrogation without a lawyer or third party witness present. In the *Miranda v. Arizona* decision of the United States Supreme Court, the Court determined that all in – custody interrogation is inherently coercive and that some affirmative action must be taken to dispel the coercive effect of custody. This begs the question of whether, despite the admirable reforms enacted by the Chinese National People's Congress in 2012, they will be sufficient, without more, to overcome the inherently coercive nature of custodial interrogation permitted by the Chinese CPL.

In this regard, we should note that the Supreme People's Court, the Supreme People's Procuratorate and the Political – Legal Committee of the Chinese Communist Party have all issued guidance prohibiting of the use of sleep and food deprivation and other forms of physical coercion to make clear that physical assault is not the only form of coercion prohibited in China.[7] These directives seek to fill a gap in Chinese law concerning how to define unlawful police conduct that constitutes "extorting confessions by torture" but they did not address what *Miranda* called the inherently coercive nature of custodial interrogation.

The question remains: what are the most effective tools for eliminating police torture, coercion and false confessions. To stimulate discussion on this top-

---

[7] For the relevant provisions of the Supreme People's Court judicial interpretation see Articles 8 and 95, respectively, at: http://www.chinacourt.org/article/detail/2013/11/id/1148623.shtml; http://www.chinacourt.org/article/detail/2012/12/id/807049.shtml; For the relevant provisions of the Supreme People's Procuratorate, see Article 3 and 13 at http://www.jianfazhiku.com/ReadNewsAll.asp? newsid = 10570; For the relevant provisions of the Political – Legal Committee of the CCP's guidance, see Article 3 and 13 at http://www.360doc.com/content/15/0105/23/19128036_438499196.shtml; For relevant provisions of the Ministry of Public Security, see Article 196 at http://news.china.com.cn/politics/2012 – 12/27/content_27528419_14.htm.

ic, we decided to present information about how the privilege against self – incrimination, the exclusionary rule and the recording requirement work in other criminal justice systems. In our workshops in China, which were held in six cities in China, in addition to expert presentations, we also demonstrated a suppression hearing conducted under U. S. law and screened a film called *The Central Park Five* that describes in detail how five teenagers were induced to confess to a heinous crime they did not commit. We also asked Chinese prosecutors, police, defense attorneys, judges and academics to discuss their perspectives on the regulation of police conduct during interrogation and the most effective ways to implement China's reforms. The discussions were diverse, rich and productive.

As much as we found the workshops meaningful and productive, they were limited to a particular time, place and audience. We decided that to be more effective, it would be best to present some of the key information in written form, with the hope of stimulating thinking and discussion among an even wider audience of individuals and institutions interested in criminal justice reform. To that end we have produced this volume of essays which we believe present some of the most recent and best analyses of the questions surrounding police interrogation from different jurisdictions outside of China, specifically, the United States and the United Kingdom.

In this book, we include seven articles from the English language literature on police interrogations and the problems of torture, coercion and false confessions. As described in more detail below, these articles reflect the struggle other societies have had finding the right balance between regulating police conduct and allowing the police sufficient leeway to investigate crime. Out of those struggles has emerged a steady stream of new ideas and practices for the best ways to eradicate police torture and coercion and to give investigators the best possible chance of obtaining truthful confessions while avoiding false ones.

We begin with some of the historic struggle in the United States and two

articles from our NYU colleague, Professor Stephen Schulhofer. In *Some Kind Words for the Privilege Against Self – Incrimination*, Professor Schulhofer noted back in 1991 that even within the United States, the privilege had long been the subject of controversy. The privilege, the right to refuse to answer questions whether at the police station or in court, appears to be, as its critics charge, an obstacle to the truth – seeking function of the police and the courts. After all, the person who should be in the best position to provide information about whether the defendant committed the crime, the defendant, himself, is shielded by the privilege from making any statement.

As Professor Schulhofer powerfully argues, however, the privilege not only protects the fundamental rights of the accused but also enhances the truth – seeking function of both the police and the courts by seeking to ensure that only "voluntary" statements of the accused may be admitted into evidence. In other words, as noted above, to protect the rights of the individual and to enhance the reliability of the statements a defendant chooses to make, the United States Constitution demands that the statements must be voluntary and not coerced. Schulhofer's article carefully describes the American debate over the value of the privilege, traces it to its historical roots and clarifies its rationale. Despite the large number and variety of criticisms there is almost a universal consensus among American legal experts that the privilege is absolutely necessary during the pre – trial investigative stage to prevent coercion during interrogation. As Professor Schulhofer so eloquently argues, the rationale for the privilege is that it is "essential to fundamental fairness" and a safeguard to protect the innocent from unjust conviction.

As for the rationale justifying the privilege during trial, there is perhaps less consensus. What is clear, however, is that by asserting the privilege a defendant calls upon the prosecution to fulfill its obligation, to present evidence to prove the defendant's guilt beyond a reasonable doubt and that the defendant has no obligation to make the prosecution's job easier by testifying. With the privi-

lege, a defendant may testify if he chooses but if he remains silent neither the jury nor the judge may draw the inference that because he is silent he must be guilty.

In his second article on the privilege, *Miranda v. Arizona, A Modest but Important Legacy*, Professor Schulhofer focuses on perhaps the most famous and, certainly one of the most controversial, U. S. Supreme Court decisions interpreting the privilege against self – incrimination, *Miranda v. Arizona*. As Professor Schulhofer points out, *Miranda* was one of a series of Supreme Court decisions handed down in the 1960's that was intended to rein in police misconduct in the United States:

> [Before *Miranda*] the interrogation cases posed a distinctive set of problems. The effort to separate legitimate police questioning from illegal abuse was framed by the "voluntariness" test. But in nearly three decades of experience using this test, its practical problems had become impossible to ignore. The voluntariness standard left police without essential guidance in what they were permitted to do... The test ... allowed considerable interrogation pressure that many considered inherently incompatible with "voluntary" choice. Minority suspects, the unsophisticated and the psychologically vulnerable were especially susceptible to manipulation and abuse. That factor in turn was not only troubling in itself, but it also posed a major risk of eliciting false confessions. Meanwhile hardened criminals were left at a relative advantage. And extreme physical brutality, while clearly illegal, was not adequately checked by the test and in some ways was indirectly encouraged.

One of the great contributions of the Court that decided *Miranda* was its explicit recognition that custodial interrogation is inherently coercive. In other words, any time a suspect is being held by the police and is not free to leave

there is pressure on the suspect to tell the police what they want to know. The now – famous *Miranda* warnings were the Supreme Court's suggestion of one way the police might dispel the inherent pressure of interrogation while in custody. In fact, at the time the Supreme Court decided *Miranda*, the Federal Bureau of Investigation and several police departments around the country were already using similar warnings before they began interrogating suspects. The effect of the *Miranda* decision was to require all police to do so or the statements they obtained would be excluded from evidence.

The recognition of what seems like a common sense conclusion had the legal effect that courts need not make a case – by – case decision based upon the "totality of the circumstances" as to whether the suspect's statements were voluntary. Moreover, the police were given a clear road map to follow in protecting the rights of the accused while fulfilling their responsibility to question the suspect. As long as they advised a suspect of his rights and he waived them, the interrogation could proceed and the resulting statements would be admissible.

The second innovation provided by the *Miranda* Court was to give some power over the interrogation process to the accused. He could stop the interrogation at any time by simply saying he did not want to answer any questions or by requesting the presence of an attorney during interrogation. If he was willing to answer questions, however, the Court required that he make an explicit statement acknowledging that he understood his rights and agreed to waive them.

Professor Schulhofer makes the case that the Court was deferential to the legitimate needs of law enforcement and crafted user – friendly, bright line rules to guide the police in how to conduct a lawful interrogation while simultaneously protecting the rights of the suspect. The Court still left open the possibility of individual police departments and legislatures developing alternatives that provided equivalent assurances that the rights of the suspect under interrogation would be protected.

It should be noted that under U. S. constitutional law, another protection afforded suspects during interrogation is that the time period for interrogation is limited to the period before the suspect is represented by counsel. Once counsel is involved the police must obtain the consent of counsel before proceeding with interrogation. Secondly, counsel must be provided at the initial court appearance of an arrested person, which must take place promptly after arrest,[8] usually within 24 hours. In other words, the police have a limited window of time, generally less than 24 hours, within which they may subject an unrepresented suspect to interrogation. They can only do so after advising the suspect of his rights and obtaining a waiver of those rights. The suspect can terminate the interrogation at any time. If the police obtain a statement in violation of the rules, and the legality of the interrogation is challenged in court, the court must exclude the confession from evidence.

Of course, this is a uniquely American solution to this universal problem, based upon the text of the United States Constitution and its common law tradition of judicial interpretation. As is demonstrated elsewhere in this book and in other materials, other societies have made other choices. In the United Kingdom, for example, all interrogations are recorded in their entirety and the suspect has a right to have an attorney present during interrogation.

As Professor Schulhofer wrote on the occasion of the 40th anniversary of the decision, the *Miranda* Court left a modest but important legacy, that is, in order to assure that statements made in response to custodial interrogation are voluntary, some affirmative steps need to be taken to give the suspect some

[8] The concept of "arrest" under U. S. constitutional law, is very different from "daibu" under Chinese law, even though "daibu" is the most common way to translate "arrest." Under American constitutional law, a person is under "arrest" whenever a reasonable person under the circumstances would believe that he is not free to leave. This is in contrast to "daibu," which is a formal procedure in which the police request the prosecutor to approve "daibu" for a criminal suspect, confirming that there is sufficient evidence to charge the person with a serious crime and that the person should be detained pending trial.