A dark, moody photograph of a room. On the left, a desk lamp with a black base and a white shade is turned on, casting a bright beam of light onto a wooden desk. On the desk, a pair of black handcuffs lies in the foreground. To the right of the desk is a wooden chair with a slatted back. The background is dark and out of focus, showing another chair and a wall. The overall atmosphere is somber and investigative.

Securing reliable evidence: suspects' rights, exclusionary rules and other procedural irregularity avoidance techniques

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First principles: the search for truth and the reliability principle

Search for truth:

- ‘the aim of all judicial operations’ (Faustin Hélie)
- *condicio sine qua non* of the criminal process (Weigend; Kostaras)
- Indispensable to rectitude of decision making (Twining)

Unreliable evidence frustrates the search for truth

So we must prevent the contamination of the criminal process with unreliable evidence (to ensure we can achieve the truth discovery objective)

Preventing the contamination of the criminal process with unreliable evidence – part 1: suspects' rights (UK)

Notification of rights/caution

Right not to be detained incommunicado

Right to interpretation and translation

Right to consult with a lawyer privately

Right to access to a lawyer during interrogation

Right to silence

Right to medical examination

Right to have an appropriate adult present

Recording of the interview

But

- Legal aid
- Assigning custodial legal assistance to non-solicitor staff
- Restricting opportunities for face-to-face consultation
- Significant percentage of suspects not exercising right to legal assistance
- Right to silence curtailed

Oblivious to frustrating the search for truth? The right to legal assistance in other European legal systems

- France
- the Netherlands
- Scotland
- Belgium
- Ireland
- Malta

Salduz's 'legal earthquake'

Salduz v Turkey:

‘As a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police’

‘The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction’ [para 55]

Fundamental reforms in France, Scotland, Belgium, the Netherlands, Ireland and Malta.

EU procedural rights directives

2009 roadmap: gradual approach towards establishing a full catalogue of procedural rights for suspects across the EU

Directives on:

(2010)

(2012)

(2013)

(2015)

(2016)

(2016)

And across the Atlantic? The *Miranda* rights under attack

e.g. waivers, under *Miranda*: should be made ‘voluntarily, knowingly and intelligently’

But Supreme Court adopted narrow interpretations:

‘a defendant’s ignorance of the full consequences of his decisions does not vitiate their voluntariness’ – *Connecticut v Barrett*, 479 US 523 (1987)

Trickery did not necessarily invalidate a suspect’s waiver – *Morane v Burbine*, 475 US 412 (1986)

First concluding observation

Revolution, and counter-revolution, in strengthening suspects' rights at the police station

A long road to travel to make real the promise of the effective exercise of suspects' rights at the police station

So there remain significant risks that unreliable evidence will be adduced into the criminal trial, frustrating the search for truth and generating risks of miscarriages of justice



Preventing the contamination of the criminal process with unreliable evidence – part 2: exclusionary rules for violations of suspects' rights and unreliable evidence (UK)

Where a suspect is entitled to exercise a procedural right at the police station, what should happen where the police have deprived him or her from doing so?

Exclusionary rationales: *rights thesis/protective rationale; deterrent rationale; judicial integrity rationale; reliability rationale*

UK

Section 78 PACE 1984: *discretionary* exclusion where the admission of the evidence would have an adverse effect on the fairness of the proceedings

But

courts exercise discretion based on a contextual analysis of whether the procedural violation in question would have an adverse effect on the fairness of the proceedings

Ex post facto rationalisation (eg re access to a lawyer or right to silence)

No structured discretion, rather case-by-case approach

UK

Section 76(2) PACE 1984: categorical exclusionary rule where the confession 'was or may have been obtained by oppression' or 'in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by [the person who confesses] in consequence thereof'

Takes into account **personal characteristics** of the defendant that make him or her more susceptible to be influenced by something said or done: young age, being mentally handicapped or his or her naivety

Though not influences due to an internal condition

But commentators argue s. 76(2) not often applied in practice; judges adamant to retain their discretionary power under s. 78 (Fenwick)

A view from across the channel

France: automatic nullities for evidence obtained in violation of the right to custodial legal assistance (particularly after *Salduz*)

Greece: automatic nullities

Germany: strict exclusionary rule for confessional evidence obtained through oppression

The ECtHR backtracking on rights protection?

Ibrahim v UK:

Reversed *Salduz*'s key tenet, that the interrogation of the suspect in the absence of a lawyer will irretrievably prejudice the rights of the suspect and result in a violation of the right to fair trial.

Ibrahim instead requires courts to assess the overall fairness of the trial, which means that self-incriminating evidence obtained in the absence of a lawyer can eventually be admitted in trial where other procedural safeguards applied.

Can we rely on the EU Directives?

No - as they defer to 'national rules and systems on the admissibility of evidence'

Despite categorical exclusionary rule in first draft

Miranda's exclusionary rule?

The deterrence road to *Miranda's* perdition:

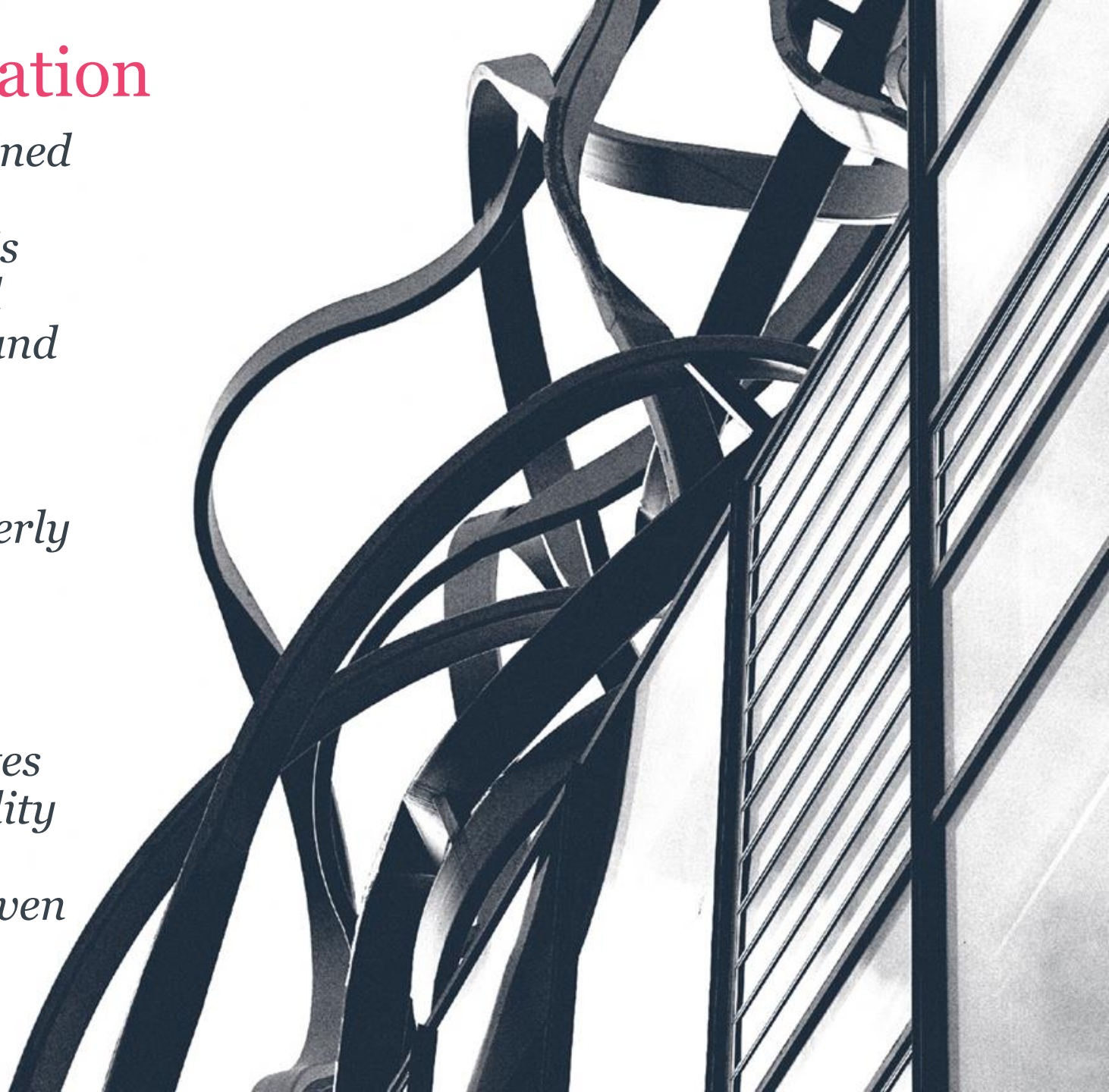
- Impeachment exception: *Harris v New York* (1971)
- Public safety exception: *New York v Quarles* (1984)
- Derivative evidence exception: *Berghuis v Thompkins* (2004)

Second concluding observation

Exclusionary rules for improperly obtained evidence are notoriously controversial; exclusionary solutions fluctuate vis-à-vis changing socio-political conditions, and increasing politicisation of debates around criminal justice

This is so even when it comes to improperly obtained confessional evidence, and exclusion on reliability grounds

UK's categorical exclusionary rule creates scope for engaging directly with reliability considerations, but is not reproduced in comparative law and seems not to be given sufficient attention in domestic legal practice

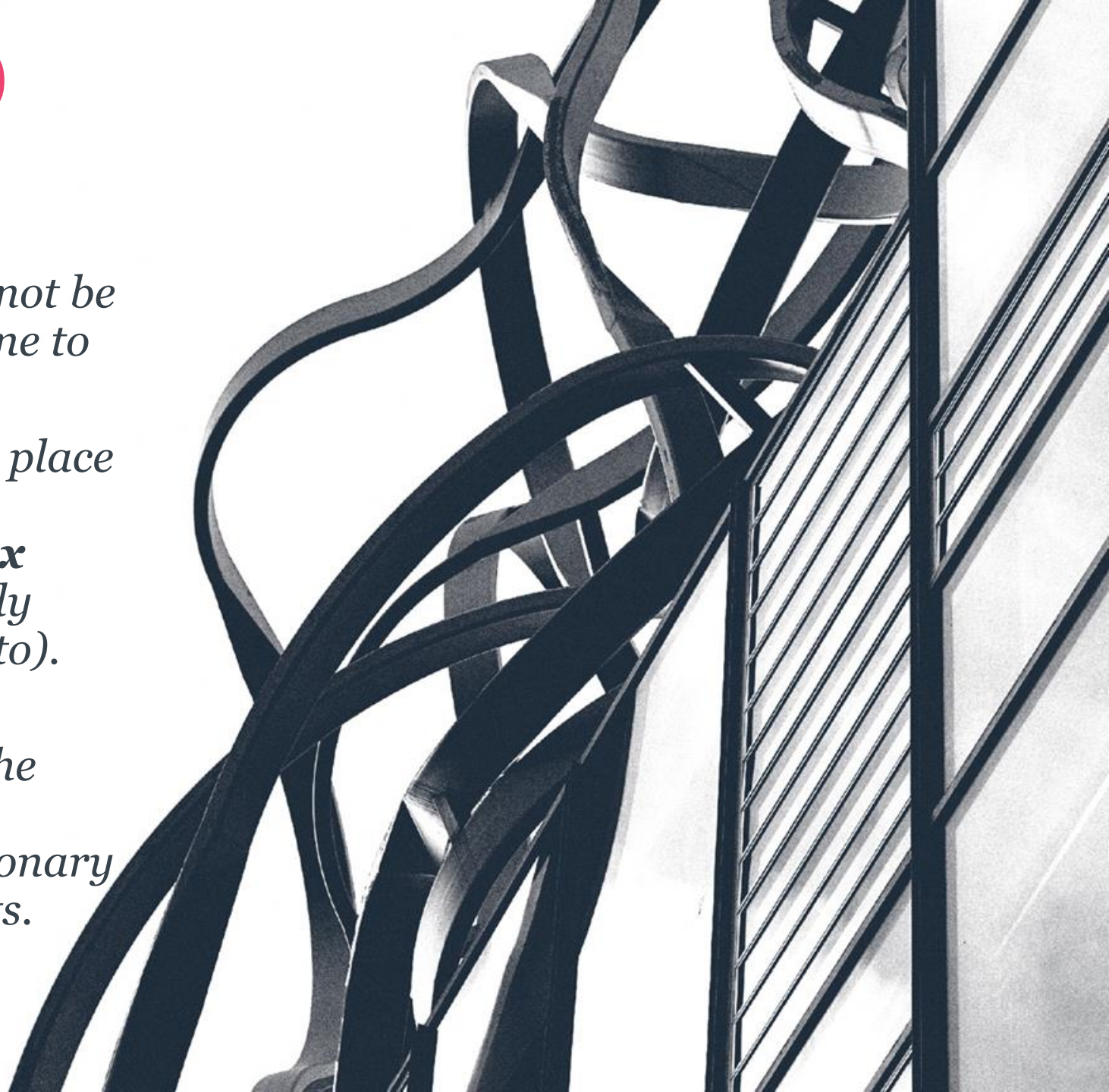


What we can (tentatively) deduce from all this

If (political, cultural, institutional etc) pressures on the exclusionary rule cannot be avoided, perhaps something can be done to alleviate their effect.

*A pragmatic way forward would be to place heavier emphasis on the **effective protection of substantive rights ex ante** (so as to reduce the need to strictly apply the exclusionary rule ex post facto).*

Put simply, concentrate on averting violations of suspects' rights to avoid the public interest-centred dilemmas that surround the application of the exclusionary rule to remedy violations of these rights.



Way forward?

Continue to enhance procedural guarantees for suspects at the police station

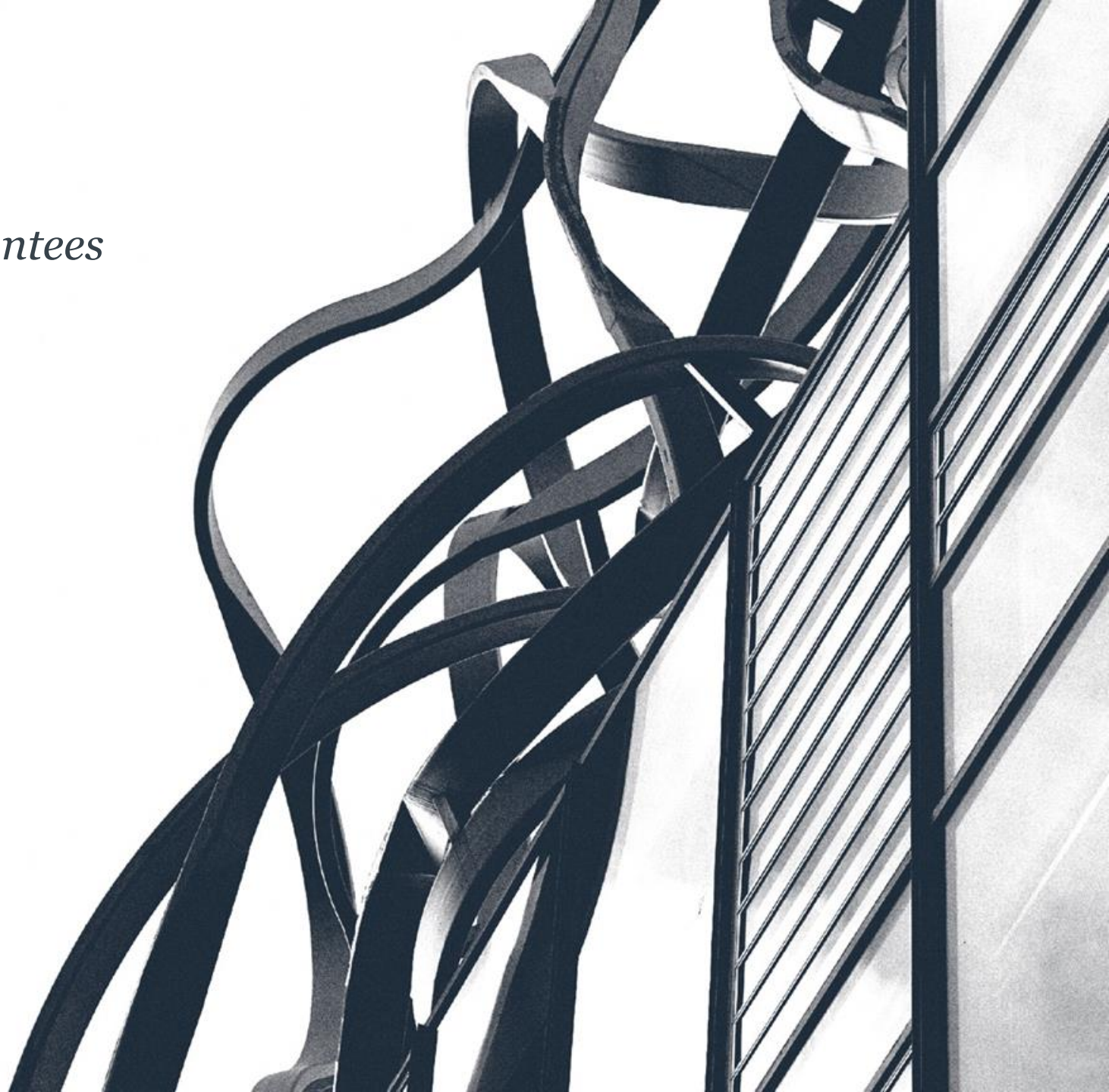
Evidence-based interviews?

Audio-visual recording?

Training programmes?

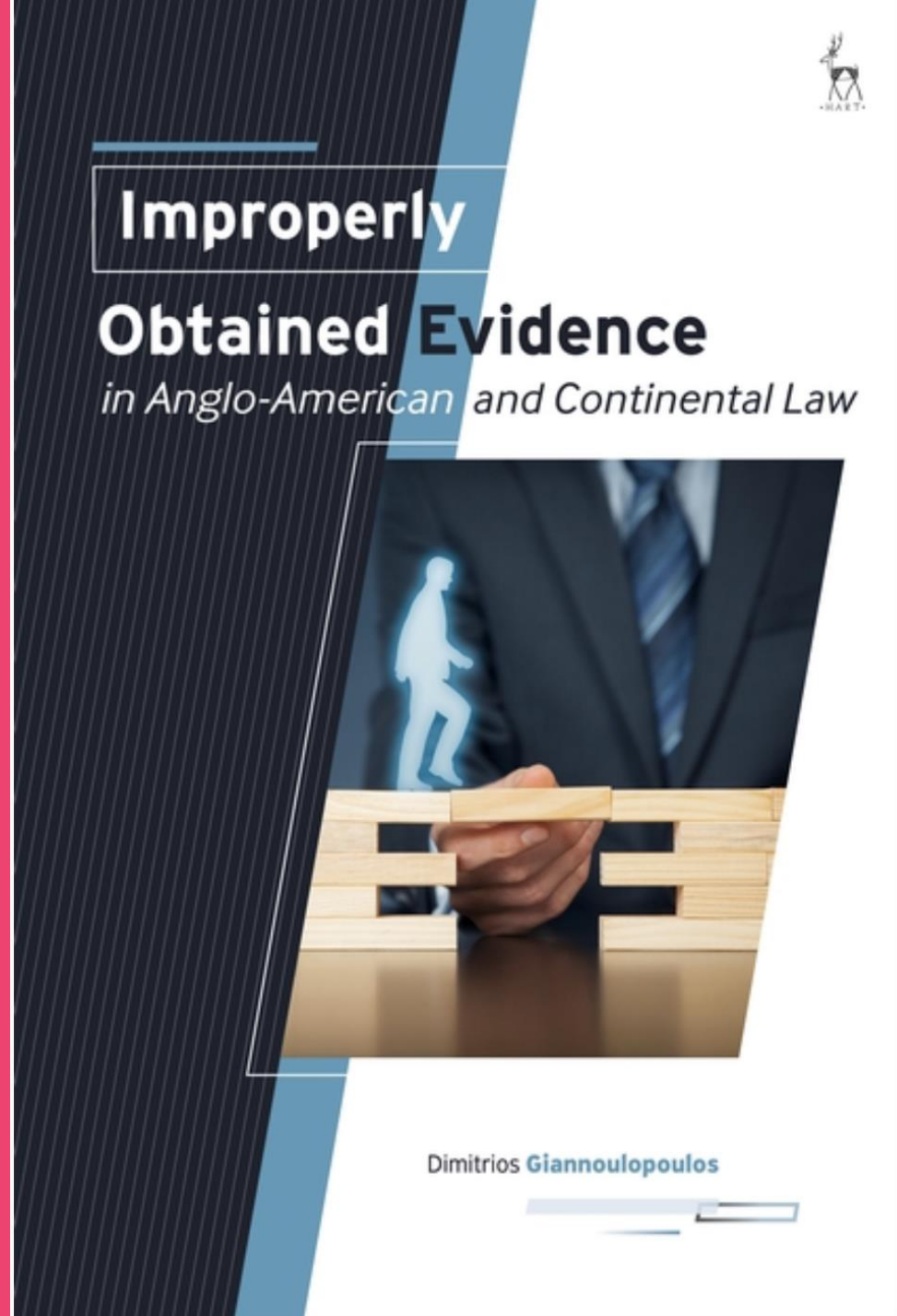
Resources and incentives to motivate officials to establish best-practice investigative protocols?

Embedding a human rights culture



Thank you

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