

RETHINKING THE LAW OF INTERROGATIONS AND  
CONFESSIONS IN CANADA

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## **ABSTRACT**

This thesis is a discussion about the inadequacy of the Canadian confessions rule in light of what modern forensic psychology reveals about the human mind, and the propensity of legally-sanctioned interrogation tactics to cause suspects to make false confessions.

Contemporary forensic psychology research makes it clear that many of the techniques used in police interviewing and interrogation can have the effect of subverting or overbearing an individual's free-choice and can cause them to make a false confession. Yet many of these same techniques are considered acceptable according to the Canadian law of voluntariness. This thesis examines the confessions rule and examines the key features of an involuntary confession as defined by the Canadian courts. The thesis also compares the structure and content of two different methods of interrogation used by contemporary police: the Reid Technique, and the PEACE model. The thesis will demonstrate the problems associated with each interrogation method, and will show how a suspect can be led into making an involuntary or false confession.

The content of this thesis can be broken down into a number of stages. The first stage takes a historical approach to the development of confessions law in England and shows how the judges of the nineteenth century gave shape to the basic rule for the admissibility of confessions evidence: the voluntariness doctrine. Next, the application of voluntariness in Canada is examined as the English law was adopted in Canadian cases. The concept of voluntariness then expanded on Canadian soil to take on additional features, which are discussed. These different historical developments are evaluated in light of Herbert Packer's crime-control and due process models.

Following this, there will be a discussion of the *Charter of Rights and Freedoms*' impact on interrogation and confessions, where the protective capability of the section 10(b) right to counsel is explored.

In the next stage, this thesis will discuss the privilege against self-incrimination with a focus on the fact that many scholars want to do away with this ancient right and move towards an "accused-speaks" model. This thesis presents an argument against this line of scholarship and argues in favour of the necessity of this right to trial fairness.

This study then focuses on an analysis of the different police interrogation techniques available and discusses their merits and shortcomings in light of findings in forensic psychology, sociology and police science. This analysis aims at shedding light on the practice of custodial interrogation, and the connection between police interrogation techniques and false confessions will be explored.

Finally, this thesis will suggest a model for reform in the area of pre-trial questioning: a return to the practice of examination by a magistrate in court. It will be argued that a revived model of magisterial examination with built-in protections to ensure fairness of the process would be the ideal replacement for pre-trial custodial police interrogations, would drastically reduce the number of false confessions and would be more in keeping with concerns of fairness and due process than current crime-control influenced police interrogations.

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## INTRODUCTION

Recent miscarriages of justice have highlighted serious failings within the criminal justice process. Perhaps the most important issues of those that might be raised relates to the significance of confessions evidence as being probative of guilt, the procedures governing the admissibility of confessions at trial, and the custodial interrogations that are used to procure confessions from suspects.

One of the major problems behind these miscarriages of justice is the false confession. Recent American research shows from a sample of 252 wrongful convictions, 42<sup>1</sup> were the result of false confessions.<sup>2</sup> These were not merely unelaborated admissions of guilt. The same research found that persons giving false confessions have a tendency to offer “surprisingly rich, detailed, and accurate information”<sup>3</sup> about how and why the crime was committed.<sup>4</sup> This body of research shows us that false confessions do not happen by chance<sup>5</sup>; “they are carefully constructed during an interrogation and then reconstructed during the criminal trial that follows.”<sup>6</sup>

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<sup>1</sup> Brandon L. Garrett, “The Substance of False Confessions” (2010) 62 Stan. L. Rev. 1051 at 1052.

<sup>2</sup> *Ibid.* In other words, 16% of wrongful convictions resulted from false confessions. These individuals were exonerated by post-conviction DNA evidence. Also, Bedau & Radelet identified false confessions as the leading cause of wrongful convictions in the 350 cases they studied in the United States. Hugo Adam Bedau & Michael L. Radelet, “Miscarriages of Justice in Potentially Capital Cases” (1987) 40 Stan. L. Rev. 21-179. Also see study of C. Ronald Huff, Arye Rattner & Edward Sagarin, “Guilty Until Proven Innocent: Wrongful Conviction and Public Policy” (1986) 32 Crime and Delinquency 518. See also Arye Rattner, “Convicted but Innocent: Wrongful Conviction and the Criminal Justice System” (1988) 12 L.& Hum Behav. 283-293.

<sup>3</sup> *Ibid.* at 1054.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.* at 1056.

<sup>6</sup> *Ibid.* at 1055. For a blatant example of a false confession that contains rich details of the crime in question, we can look at the case of *Commonwealth of Virginia v. David Vasquez*, [1984]. The defendant in this case was 37 years old and he was borderline mentally retarded (Vasquez Memorandum in Opposition p. 16, Found online [http://www.law.virginia.edu/pdf/faculty/garrett/falseconfess/vazquez\\_david\\_suppression\\_motions.pdf](http://www.law.virginia.edu/pdf/faculty/garrett/falseconfess/vazquez_david_suppression_motions.pdf)). On January 25, 1984, the body of the victim was discovered. Her hands were tied behind her and a noose around her neck was suspended from an overhead pipe. Vaginal swabs from the victim disclosed the presence of sperm (Memorandum in Opposition p.1). Forensic examination revealed that the noose used in the killing had been cut from a length of rope

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wrapped around a carpet in her basement (Memorandum in Opposition pp. 1-2). The neighbours disclosed that Vasquez had been observed walking in front of the victim's house within the general timeframe in which the victim had been murdered. The defendant used to live in that neighbourhood and he was known in the area. He was described by neighbours as having an abnormal personality. He was taken from his place of employment for questioning and the defendant eventually gave 3 statements (Memorandum in Opposition pp. 2-16). Vasquez repeatedly asked for information on why he was being questioned and during the course of the interview on several occasions he asked to see his mother and a psychiatrist. All of his requests were denied. On his last interview he confessed to the murder. The following transcript shows how the officers fed detailed facts to Vasquez:

Det 1: Did she tell you to tie her hands behind her back?

Vasquez: Ah, if she did, I did.

Det 2: Whatcha use?

Vasquez: The ropes?

Det 2: No, not the ropes. Whatcha use?

Vasquez: Only my belt.

Det. 2: No, not your belt...Remember being out in the sunroom, the room that sits out to the back of the house?...and what did you cut down? To use?

Vasquez: That, uh, clothesline?

Det. 2: No, it wasn't a clothesline, it was something like a clothesline. What was it? By the window? Think about the Venetian blinds, David. Remember cutting the Venetian blind cords?

Vasquez: Ah, it's the same as rope?

Det. 2: Yeah.

Det. 1: Okay, now tell us how it went, David-tell us how you did it.

Vasquez: She told me to grab the knife, and, and, stab her, that's all.

Det. 2: (voice raised) David, no, David.

Vasquez: If it did happen, and I did it, and my fingerprints were on it...

Det. 2: (slamming his hand on the table and yelling) You hung her!

Vasquez: What?

Det. 2: You hung her!

Vasquez: Okay, so I hung her.

Brandon L. Garrett, *Convicting the Innocent* (New York: Harvard University Press, 2011) at 43-44.

Despite the blatant manipulation of the defendant by the detectives, the Court admitted Vasquez's statement into evidence. As a result of this ruling, Vasquez plead guilty to second-degree murder in order to avoid the death penalty. However, 5 years later he was exonerated as the actual perpetrator was discovered (Dana Priest, "At Each Step, Justice Faltered for VA Man" Washington Post (16 July 1989,) A1.

The Supreme Court of Canada has recognized that false confessions occur.<sup>7</sup> In *R. v. Oickle*, Iacobucci J. “...drew on social science research, accepting that hundreds of verifiably false confessions have been offered in real cases, cataloguing various types of false confessions, and discussing the police tactics that are prone to elicit untruthful statements.”<sup>8</sup> He also “...explained that the confessions rule needed to be restated in light”<sup>9</sup> “...of the phenomenon of false confessions.”<sup>10</sup> “At the same time, the majority emphasized that the protections afforded the accused under the confessions rule must always be balanced against society’s interest in effectively investigating crimes.”<sup>11</sup> Professor Lisa Dufraimont has argued that “[s]o long as the confessions rule reflects this balance, difficult questions about the fair treatment of suspects and the reliability of confessions are unavoidable. The law requires trial judges to draw the line between acceptable persuasion and improper coercion on a case-by-case basis. Despite its merits, this approach leaves open the door for coercive practices to be used by police and condoned by courts in individual cases.”<sup>12</sup>

This thesis argues that at the root of the problem of false confessions is the coercive nature of custodial interrogation. Although the Supreme Court of Canada has not, to date,

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<sup>7</sup> Lisa Dufraimont, “The Common Law Confessions Rule in the *Charter* Era: Current Law and Future Directions” in Jamie Cameron & James Stribopoulos eds., *The Charter and Criminal Justice: Twenty Five Years Later* (Markham: LexisNexis, 2008) at 257. In a recent Supreme Court ruling in *R. v. Hart*, [2014] S.C.J. No. 52, the Court reconfirms the possibility of false confessions in the context of Mr. Big operations. The Court stated:

Suspects confess to Mr. Big during pointed interrogations in the face of powerful inducements and sometimes veiled threats – and this raises the spectre of unreliable confessions. (Paragraph 5)

<sup>8</sup> *Ibid.* at 252.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.* at 260.



recognized police custodial interrogations as inherently coercive, the Supreme Court of the United States did so in its seminal *Miranda v. Arizona* ruling.<sup>13</sup>

It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles – that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.<sup>14</sup>

Ensuring that any confession given is the result of an individual's free choice is thought to be the best way to ensure that the contents of that confession are reliable. When free choice is vitiated, the police run the risk of obtaining a false confession, and putting an innocent in serious legal jeopardy. "Involuntary confessions are excluded because they are often untrue."<sup>15</sup>

The seriousness of the legal jeopardy results because of the way confessions evidence is treated in court. There is a widely held view that confessions evidence is indispensable to the discovery and prosecution of criminal offences because of its compelling character. Wigmore writes:

[t]he confession of a crime is usually as much against a man's permanent interests as anything well can be ... no innocent man can be supposed ordinarily to be willing to risk life, liberty, or property by a false confession. Assuming the confession as an undoubted fact, it carries a persuasion which nothing else does, because a fundamental instinct of human nature teaches each one of us its significance.<sup>16</sup>

It has been claimed that more than any other type of evidence, confession evidence works to "...alleviate doubts in the minds of police officers, judges and jurors."<sup>17</sup> Confession evidence

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<sup>13</sup> *Miranda v. Arizona* 384 U.S. 436 (1966).

<sup>14</sup> *Ibid.* at 467-58.

<sup>15</sup> *Supra* note 7 at 251.

<sup>16</sup> Wigmore, *Evidence* (Chadbourn rev. 1970), vol. 3, 820b at 303.

<sup>17</sup> E.D. Driver (1968) "Confessions and the Social Psychology of Coercion", 82 Harv. L. Rev. at 42.

plays a crucial role in a large proportion of criminal convictions.<sup>18</sup> The potential for false confessions and the evidentiary significance of a confession once obtained, is insightfully summed up by H. Richard Uviller, who writes:

We have so little difficulty sliding along the connective inferences from a direct verbal report of culpability to factual guilt that a detailed description of the route seems almost superfluous. Our ready acceptance takes little account of the misperceptions, the distortions of supposition, and the misplaced psychological or moral responsibility that may divert the mind to a false conclusion of self-accusation. Despite its hidden frailty, the confession remains the queen of the evidentiary chessboard.<sup>19</sup>

The false confessions that plague our justice system are, predominately, coerced ones.

The interrogation room is isolated and austere, and save for a phone call to his or her lawyer, the detainee is cut off from anyone who will help him to resist the interrogation tactics that are deployed against him by his adversary, an agent of the state. The police have themselves developed and trained in the use of an arsenal of manipulative psychological techniques to use against their captives. The most widespread training program is the Reid Technique. In this thesis it is shown how the Reid Technique is used to turn the recalcitrant suspect into one that is pliant and willing to make a confession.

The common law confessions rule does not provide adequate protections against Reid tactics. the confessions rule is designed to provide protection against manipulative behaviour by

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<sup>18</sup> M. McConville, & J. Baldwin, "The Role of Interrogation in Crime Discovery and Conviction" (1982) 22(1) Brit. J. Crim. 165 at 166. Moreover, the Supreme Court in *Hart*, (*Supra* note 7) stated that:  
unreliable confessions present a unique danger. They provide compelling evidence of guilt and present a clear and straightforward path to conviction (paragraph 6). Unreliable confessions have been responsible for wrongful convictions – a fact we cannot ignore (Paragraph 6).

<sup>19</sup> H. Richard Uviller, "Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint" 87 Colum. L. Rev. 1137 at 1138.

persons in authority by excluding unreliable or coerced statements<sup>20</sup> The test for admissibility is voluntariness and not reliability.<sup>21</sup> Involuntary statements are excluded.

But since involuntary confessions are often unreliable, Canada's "common law confessions rule is well-suited to protect against false confessions."<sup>22</sup>

This thesis is in disagreement with the suitability of this rule for guarding against false confessions, in light of the kind of tactics that are available to police. The confessions rule says that any statement that is either the result of police trickery<sup>23</sup> that would shock the conscience of the society or a *quid pro quo* threat or promise held out by a person in authority; has been procured under oppressive circumstances; or is not the product of an operating mind or an informed choice, is involuntary and should be excluded from evidence, taking the totality of the circumstances into account.<sup>24</sup> The finding of the trial judge is entitled to considerable deference.<sup>25</sup>

There are two problems with this. First, the tactics available have the power to provoke confessions that are factually involuntary, but are not involuntary at law. The confessions rule does not go far enough to ensure the fair and decent treatment of interrogated suspects or to inhibit police trickery.<sup>26</sup> However, the police have been given a very wide latitude to employ a

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<sup>20</sup> *Dufraimont*, *supra* note 7 at 251.

<sup>21</sup> *Ibid.* at 252.

<sup>22</sup> *Ibid.*; Also see *R. v. Oickle*, [2000] S.C.J. No. 38 at para 47.

<sup>23</sup> Welsh S. White, "False Confessions and the Constitution: Safeguards against Untrustworthy Confessions" (1997) Harv. C.R. -C.L.L. Rev. 105 at 145. See also Welsh S. White, "Police Trickery in Inducing Confessions" (1978-1979) 127 U. Pa. L. Rev. 581 at 582. Professor White condemns all forms of police trickery.

<sup>24</sup> Skolnick and Leo describe this test as an elusive standard and they assert that "Under that loose and subjective guideline, an admission is held up against "all the facts" to decide whether it was the product of a "free and rational will" or whether the suspect's will was "overborne" by police pressure." Jerome H. Skolnick and Richard Leo, "The Ethics of Deceptive Interrogation" (1992) 11 Crim. Just. Ethics 3 at 4.

<sup>25</sup> *Supra* note 7 at 252.

<sup>26</sup> *Ibid.* at 256.

wide range of tactics to extract confessions from suspects.<sup>27</sup> The Court in *Oickle* held that “proper police techniques” rarely give rise to false confessions.”<sup>28</sup> But the Court did not define what constitutes proper techniques.<sup>29</sup> The existing rules of confession permit officers to use pressure tactics to extract confessions from detained individuals.<sup>30</sup> The officers do not have to take “no” for an answer and the case of *R. v. Singh* highlights the sad reality that saying “no” 18 times may not be enough to argue that the suspect’s free will has been overwhelmed. The Court in *Singh* pointed out the need for taking a contextual approach to the issue of statement admissibility. However, as Professor Dufrainmont reminds us:

The contextual approach which eschews categorical judgements about specific interrogation practices, gives police flexibility to use a wide range of tactics to pressure suspects to confess. From the perspective of law enforcement, this flexibility is a desirable feature of the confessions rule.<sup>31</sup>

Second, the contextual approach to assessing voluntariness in combination with the deference shown to the trial judge provides far too much of an opportunity for judges to import judgements about the accused at the *voir dire* on the admissibility of the statement<sup>32</sup> that may not be fair. Allowing for an analysis that is necessarily contextual,<sup>33</sup> may invite the trial judge to consider factors such as an accused person’s age, race, gender, prior criminal record or lack thereof, or demeanour and conclude that the accused is the type of person who would not be influenced by any threats or promises that may have occurred, or would not find the atmosphere of the interrogation room intimidating. Other accused persons may be treated more leniently based on their personal characteristics.

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<sup>27</sup> *Ibid.* at 258.

<sup>28</sup> *Ibid.* at 260.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.* at 261.

<sup>31</sup> *Ibid.* at 259.

<sup>32</sup> *Ibid.* at 266.

<sup>33</sup> *Supra* note 22 at paras. 22-23; *R. v. Spencer*, 2007 SCC 11, [2007] S.C.J. No. 11 at para. 71.

Some have suggested that the solution to the problem of coercive interrogation is to change the way that interrogations and confessions are carried out. It is thought that by eliminating certain types of interrogation room practices the protection of the accused in the interrogation room could be improved. Steven Penney, for example, has argued that "...limiting the length of interrogations, restricting the questioning of vulnerable suspects, banning the use of false evidence, and prohibiting specific misrepresentations as to the strength of evidence"<sup>34</sup> Others have called for a reform in the training program used by Canadian officers; a move from the Reid Technique to the PEACE<sup>35</sup> model.

In my view, such recommendations, while certainly an improvement, do not go far enough toward addressing the problem of coercive interrogation. What is really required, if it is our objective to ensure that confessions are truly voluntary, is the replacement of custodial interrogation with a different kind of system for questioning criminal accused.

What is proposed in this thesis is a revival of a system of judicial examination of accused persons. The judicial examination model would involve justices of the peace asking an accused to make a statement regarding the Crown's allegations against him, in open-court, at his appearance for bail, within 24 hours of arrest. The accused would be asked to make the statement directly, without the benefit of counsel speaking on his behalf, but he would be free to assert and effectively exercise his right to silence, indicate as much to the court and refrain from providing any reply to the magistrate's questioning. Upon such an assertion, the questioning

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<sup>34</sup> Penney, cited in *Dufraimont*, *supra* note 7 at 297-298. See also: Professor Don Stuart states that the Supreme Court's ruling in *Oickle* provides the "...police with a manual for a wide range of excessively coercive interrogation techniques." Don Stuart, "*Oickle*: The Supreme Court's Recipe for Coercive Interrogation" (2000) 36 C.R. (5<sup>th</sup>) 188 at 188-91; Don Stuart, *Charter Justice in Canadian Criminal Law*, 4<sup>th</sup> ed., (Toronto: Thomson Carswell, 2005) at 134-42; Edmund Thomas, "Lowering the Standard: *R. v. Oickle* and the Confessions Rule in Canada" (2005) 10 Can. Crim. L. Rev. 70; Penney, cited in *Dufraimont*, *supra* note 7 at 262.

<sup>35</sup> PEACE is an acronym which stands for Planning & Preparation, Engage & Explain, Account, Closure, and Evaluation. These components provide a structure that can be used for all types of investigative interview.

would stop. If the accused provided an explanation, it would be the prerogative of the presiding justice of the peace to conduct an examination for the truth.

A system of this kind would eliminate the coercive nature of interrogation, and would ensure that nearly all statements given were voluntary. From a false confessions standpoint, nothing could be more effective in terms of almost eliminating them, than a model such as the one proposed.

With an understanding that modern practices of obtaining confessions and dealing with them at trial may be more fully understood when considered in historical context, this thesis begins in the first chapter by tracing the development of the practices deemed acceptable and unacceptable to the courts' with respect to the admissibility of confessions in nineteenth century England. It documents the courts development and treatment of the doctrine of voluntariness, which holds that only confessions that were made voluntarily are admissible into evidence. Of additional concern is the reliability of evidence as being the chief motivation for the inquiry into a statement's voluntariness. The courts' view that statements which are reliable should be admitted into evidence takes shape during this period and informs the scope of the voluntariness inquiry. Also of concern during the nineteenth century is the assumption by police of a power that hitherto belonged to the judiciary: the power to question suspects. With the statutory creation of professional police services and legislative reform to the powers of judges we see the examination of suspects move from magistrates to police, and begin to see custodial interrogation develop as a mode of procuring confession evidence.

Moving from the nineteenth century into the twentieth, the thesis will continue to chart the course of the development of the full modern-day doctrine of voluntariness. We see many

issues which arose in the nineteenth century settled in the 1914 ruling of *R. v. Ibrahim*, where a narrow definition of voluntariness is subscribed to by the court. We then see the doctrine emerge in the Canadian case law in the 1922 case of *R. v. Prosko*.

By the time voluntariness enters the Canadian case law, the scope of voluntariness is such that threats or promises made to an accused person by a person in authority during the course of questioning will lead to the inadmissibility of any confession that resulted from that questioning. Throughout the twentieth century in Canada we see a more robust definition of voluntariness take shape, where the additional considerations of operating mind, oppressive circumstances and informed choice are added to the doctrine through the case law. These rulings will be examined in light of Herbert Packer's models of due process and crime control to show how these imperatives have influenced judicial thinking and the development of the law. Herbert Packer's models are a useful tool that we use to characterize developments in the case law on voluntariness. We can see how, over time, the confessions rule comes to take on a shape that is more favourable to either due process imperatives or crime control imperatives. In other words, Packer's two models provide us with a means by which to track and measure the ebb and flow in the law governing interrogations and the admissibility of confessions.

Chapter 2 will deal with section 10(b) of the *Canadian Charter of Rights and Freedoms*, and examine how this section has impacted the admissibility of statements procured by interrogation into evidence. Of particular interest in this examination is the question of whether the section 10(b) right is capable of providing any protection, in addition to the voluntariness doctrine, to detained individuals.

From a discussion of the right to counsel, we move to a considered examination of the related privilege against self-incrimination in Chapter 3, which is a battle-ground between proponents of crime-control and due process. This chapter will explore the arguments for and against retaining such a right, and will ultimately argue in favour of its retention. Whereas the fiercest critics of the privilege, like Jeremy Bentham, argue that it is of great assistance to criminals, the privilege should be understood, it is argued, as representing a “complex of values” which defines the nature of the relationship between the state and the individual in a liberal democracy and is an integral part of our criminal justice system.

The chapter will then turn its attention to the historical development of the privilege in the Canadian context and the scope of the protections afforded by it. There will also be a discussion of the section 7 right to silence, and how this right has been treated in the case law.

Following the discussion of the privilege’s history, the thesis will turn to the rationales for a privilege. Here we find two types of rationale, the systemic rationales which justify the operation of the privilege in relation to other aspects of the criminal justice system; and individual rationales that attempt to frame the importance of the privilege in terms of respect for individuals. The arguments for systematic rationales highlight the need for allowing witnesses to safely testify without the danger of incriminating themselves and the need to force the state to meet its burden of proof without using the accused as a testimonial resource. The arguments for individual rationales tend to focus on the inherent cruelty of compelling an individual to incriminate himself, the need to combat the invasion of privacy that this entails, and the need to show respect for the individual and their autonomy. While some advocates of eliminating the privilege argue that it is natural that persons should be called on to account for their actions to their peers, it is argued in this thesis that the relationship between the individual and the state is



of a fundamentally different nature than one between peers. In a liberal democracy, for a set of reasons that are explored, the individual is clearly recognized as sharply differentiated from the state.

The rationales for keeping the privilege are then themselves explored. They are: the fact that ours is an accusatorial rather than an inquisitorial system of justice; to prevent inhumane treatment in eliciting statements; notions of fair play; to prevent the abuse of power by the state; because self-deprecatory statements are unreliable; the cruelty of compelled testimony; to prevent the innocent against wrongful conviction; to avoid the strengthening of circumstantial cases through questioning; and because the privilege safeguards the individual's private enclave from state intrusion.

Chapter 4 will discuss one of the main models of police interrogation, and a major cause of false confessions, the Reid Technique. It will be shown that within the scope of the legal requirements of voluntariness and the *Charter* protections, there is ample room for police scientists to have developed an arsenal of highly effective interrogation techniques. These techniques, it will be argued, can cause an accused person's will to be overborne in actual fact, but still fall within the scope of a legally voluntary confession. This situation leads to the predicament of the prisoner who is led through the nine-steps of the Reid Technique into making a false confession.

This chapter will discuss the prevalence of Reid tactics in Canadian interrogation rooms; outline the main tactics; discuss the nine-step Reid model; and address the ethics of using the technique. Following this, the reaction of detained persons to the use of these techniques upon them shall be explored. Here the various classifications of confession are discussed, and it is

shown that the Reid interrogation tactics create a substantial risk of railroading detainees into making false confessions. On this ground, it is argued that the Reid Technique should be prohibited from use.

In the next chapter, Chapter 5, the thesis discusses the effect that confessions evidence has in court and the reasons why jurors are unlikely to believe that an accused person who made a confession could be innocent. The chapter then continues on to give some examples of false confessions that have happened in Canada and the United States. The narrative provided is intended to illustrate for the reader just how these things happen in our system of justice and to provide some context for the higher level discussions already encountered.

Following this there will be a discussion of how the courts in various jurisdictions around the country treat Reid Technique-obtained statements and view the use of police trickery. It is found that courts tend to downplay factors relating to the atmosphere created by Reid interrogation and its impact upon the suspect. The Supreme Court of Canada and the Ontario Court of Appeal, in particular, have given very wide latitude to the amount of permissible trickery in a custodial interrogation setting.

After having introduced the reader to the Reid Technique, and following as well from the discussion of how confessions evidence is treated in court, an alternative model is introduced. Chapter 6 acquaints the reader with the PEACE model of investigative interviewing. PEACE has been introduced as an ethical alternative to the Reid Technique and similar interrogation models in the United Kingdom.

The PEACE model specifically avoids many of the interrogation tactics employed in a Reid-style interrogation and makes use of active listening and rapport-building between the

interviewer and the suspect, in order to coax a confession from him. It is thought that the PEACE model is less likely to result in false and unreliable confessions than more aggressive approaches exemplified by Reid.

After discussing the real and perceived advantages of PEACE, criticisms of the model and the responses to them are discussed. Namely that it is merely an incomplete version of the Reid Technique; the PEACE model will not work effectively in Canada because our laws are different than those in the United Kingdom; or that the model is simply “soft” and does not get confessions. A further consideration is then discussed: whether the PEACE model poses a threat to the right to silence. Since its introduction in the United Kingdom in the nineties, the right to silence has effectively been undermined by creating an adverse inference against an accused person who refuses to answer questions during their interrogation.

In the final chapter of the thesis a proposal for the reform of interrogation and confessions in Canada is proposed. That proposal is the return to judicial examination of arrestees with new safeguards built in for their protection.<sup>36</sup> In this chapter the shortcomings of both the Reid Technique and its proposed alternative, the PEACE model are discussed. Then a

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<sup>36</sup> To my surprise towards the end of my research for this thesis, I discovered that in as far back as 1931, there had been some discussions about replacing police interrogations with in-court questioning. This was in response to the urgent need to remedy the problem of police beatings. In 1946, Professor McGormick summarized the findings of the Wickersham Commission in 1931 in the following fashion:

The Wickersham Commission in 1931 reported that probably the best remedy for the evils of the third degree "would be the enforcement of the rule that every person arrested charged with crime should be forthwith taken before a magistrate, advised of the charge against him, given the right to have counsel and then interrogated by the magistrate. His answers should be recorded and should be admissible in evidence against him in all subsequent proceedings. If he choose not to answer, it should be permissible for counsel for the prosecution and for the defense, as well as for the trial judge, to comment on his refusal" [Footnote #139 in Professor McGormick's article cites: National Commission on Law Observance and Enforcement, Report No. 11, Lawlessness in Law Enforcement (1931) 5]. Doubtless he should be informed also that he is not required to answer [Footnote # 140 of Professor McGormick's article reads as follows: See the rule proposed by Prof. J. B. Waite, a member of the Advisory Committee, Prel. Draft, FED. RUIEs CrIM. Proc (1943) 249. It was rejected by the Committee. Id. at 253]. Even so, it has been suggested that the procedure would infringe the constitutional privilege against self-incrimination. - C.T. McGormick, "Some Problems and Developments in the Admissibility of Confessions" (1946) 24 Tex. L. Rev. 239 at 277.

description of what judicial examination is, is provided. Following this, there is a discussion of what new safeguards must be introduced to ensure that the examinations meet a greater level of fairness than the judicial examinations from days of yore. Finally, there will be a discussion of the advantages of such a system in comparison to regimes of pre-trial custodial interrogation. Possible arguments against the proposal will be addressed.

## Chapter 1: Introduction to the Doctrine of Voluntariness

As it will be shown, the eighteenth century English courts developed a concept that all statements made to persons in authority had to pass the test of “voluntariness”. The original aim of this new concept or doctrine was to ensure that the statements procured from suspects were indeed reliable, before those statements could be admitted into evidence against them.

From its humble beginnings the doctrine of voluntariness has taken a long journey towards refinement both in England and in North America. Throughout the centuries the concept of voluntariness has been expanded from an initial concern regarding reliability to incorporate considerations such as threats and inducements, free-choice, operating mind, oppressive circumstances, and the notions of overborne wills, and totality of circumstances.<sup>1</sup>

From its inception the inquiry into the voluntariness of a statement has always revolved around official questioning. It later evolved into the examination of police interrogation methods and the effects of interrogation on the admissibility of a particular confession.

The term “voluntariness”, by its definition emphasizes freedom of will and in the context of criminal law the doctrine is an inquiry into “...volitional and cognitive impairment.”<sup>2</sup> The subject matter of the voluntariness inquiry consists of notions such as overborne wills, volitional and cognitive impairments, the effects of inducements on the minds of suspects<sup>3</sup> and “...the issue of causation.”<sup>4</sup>

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<sup>1</sup> Joseph D. Grano, *Confessions, Truth and the Law* (Ann Arbor: University of Michigan Press, 1993) at 59-61.

<sup>2</sup> *Ibid.* at 60.

<sup>3</sup> *Ibid.* at 59-61.

<sup>4</sup> *Ibid.* at 61.

However the task of defining voluntariness is not restricted to criminal law; rather this problem occupies a large part of moral philosophy. Philosophers have grappled with the problem of free will versus pre-determination for thousands of years, and this particular problem occupies an important place in moral philosophy. For example, Aristotle ties the question of voluntariness into the issue of initiative<sup>5</sup> when he argues that if the action of a person is caused by internal initiative then that action is voluntary, but if the action is initiated by an external source, it is involuntary.<sup>6</sup>

Hence, a person under severe threat of harm should be excused from committing immoral actions as he or she was operating under duress.<sup>7</sup> However, by the same token, certain actions, like murdering one's own mother, can never be forgiven,<sup>8</sup> even if the person is left with the choice of dying or else committing such a terrible deed.<sup>9</sup>

However, Aristotle's definition has limited utility outside of moral philosophy as it appears that he sets the bar too high. The law should allow for greater latitude "...for human weakness."<sup>10</sup> Unfortunately, moral philosophers like Aristotle were not criminal lawyers and therefore, the realities of the inherent pressures inside police interrogation rooms, did not inform their thought processes. The prospect of being strip-searched before being forced to sit alone in the interrogation room, which usually consists of a single chair and a table, for hours, before one is visited by a state agent for questioning presents a very different challenge than the ones that individuals usually encounter in their normal, everyday lives.

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<sup>5</sup> *Ibid.*

<sup>6</sup> Aristotle, *Ethics, book V* (Middlesex: Penguin Books, 1986). See also *supra* note 1 at 61.

<sup>7</sup> *Grano, Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.* at 62.

As social animals, every day we have to make decisions about our lives, and often these decisions are guided by a cost-benefit analyses. The exercise of free choice in our every day decisions may be constrained to some extent by economic and social factors, or by personal shortcomings; however being in police custody presents a very different set of pressures. A person in police custody is isolated from all his or her friends, family and resources. The state has total control and power over the person and even the preservation of his or her dignity is at the discretion of the police. While in police custody, there is no equality or parity between the state and individual<sup>11</sup> and when one adds the coercive stresses of interrogation, one may rightfully become very sceptical of the argument that a person still retains his or her free-will.

While in custody, the police have the resources and the training to manipulate the suspect's free-will or the police can resort to trickery to overbear a person's will not to confess.<sup>12</sup> Hence, it is argued that at times there may be a causal connection between police conduct and the impairment of volition or cognition.

As Professor Donald Dripps states:

The vast majority of confessions do not result from the suspects "free will and rational intellect" any more than they result from irrationality, mistake and manipulation. Any expectation that truly voluntary confessions are available on a systemic basis depends either on insupportable factual assumptions or on an interpretation of voluntariness that reduces the word to signifying no more than the absence of third degree methods.<sup>13</sup>

It is therefore suggested that the test of voluntariness, at least in the custodial setting, is inadequate to address the coercive nature of custodial confessions. The Supreme Court of

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<sup>11</sup> Irene Rosenberg & Yale Rosenberg, "A Modest Proposal for the Abolition of Custodial Confessions" (1989) 68 N.C. L. Rev. 69 at 110. See also *R. v. Hebert*, [1990] 2 SCR 151.

<sup>12</sup> *Supra* note 1 at 33.

<sup>13</sup> Donald A. Dripps, "Against Police Interrogation – And the Privilege Against Self-Incrimination" (1988) 78 J. Crim. L. & Criminology 699 at 700.

Canada in *R. v. Oickle*<sup>14</sup> held that the key consideration for admission of a statement is the determination of the issue of “whether the will of the subject has been overborne”.<sup>15</sup> This simplest of formulations, however, runs counter to the proposition that a person in custodial interrogation typically does not possess much free-will.<sup>16</sup>

As Professor Steven Penney explains, the notion that we can “isolate a person’s “free will””<sup>17</sup> is highly problematic.<sup>18</sup> He notes that the decision to speak to authorities is informed by various considerations<sup>19</sup> and “it is impossible to say whether a decision stems purely from “internal” influences or whether it has been introduced by an “external” force.”<sup>20</sup>

Professor Penney notes that courts have sometimes substituted other “proxies”<sup>21</sup> for voluntariness.<sup>22</sup> He notes that these courts substitute some other proxy for the “subjective measure of free choice.”<sup>23</sup> He argues that the nature of the proxies is determined by the political orientation of the judges. The conservative minded judges “...use reliability”<sup>24</sup> as a proxy for voluntariness. The liberal judges use the “but for”<sup>25</sup> test for voluntariness. The “but for” test refers to statements “...that would not have been made “but for” the coercive pressures of

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<sup>14</sup> *R. v. Oickle*, [2000] 2 S.C.R. 3

<sup>15</sup> *Ibid.* at para. 57. According to professor Herbert Fingarette, the concept of “overborne” (p. 82) will is a dead end if we assume the legal implication of this concept (p. 82) “...as arising out of some subjective condition of inner psychic trauma or breakdown” (P. 82) – Herbert Fingarette, “victimization: A Legalist analysis of coercion, deception. Undue influence, and excusable prison escape” (1985) 42 Wash. & Lee L. Rev. 65. Also see *supra* note 1 at 82.

<sup>16</sup> *Fingarette, ibid.* at 77. The author claims that the courts lack the tools to conduct an objective assessment of when someone’s will has been overborne. P. 76-77.

<sup>17</sup> Steven Penney, “What’s Wrong with Self-Incrimination? The Wayward Path of Self-Incrimination Law in the Post-*Charter* Era – Part II: Self-Incrimination in Police Investigations” (2004) 48 *Crim. L. Q.* 280 at 300.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.* at 301.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*



interrogation.”<sup>26</sup> The problem with the proxies, he observes, is that “...they produce extreme results.”<sup>27</sup>

Professor Penney suggests that according considerable deference to courts to exclude what they may perceive to be unreliable statements does not sufficiently insulate the system against wrongful convictions.<sup>28</sup> Some judges may not be sophisticated enough to understand “the phenomenon of false confessions.”<sup>29</sup> Hence, to lower the risk of false confessions, “prophylactic protection”<sup>30</sup> is needed. He argues that the confessions rule should prohibit “...all interrogation techniques that experience and study have shown are apt to produce false confessions.”<sup>31</sup>

Based on these assertions one of the central claims of this thesis is that the confessions rule is not very well suited to prevent false or involuntary confessions. This claim is based on the proposition that the confessions rule provide the police with wide latitude to badger and pressure reluctant suspects and the rules allow the courts to show a high degree of tolerance toward questionable police tactics. Given that there are only few loose constraints on police questioning, the prosecutors can often persuade judges “...who are ill-informed about or unsympathetic towards the false confession problem”<sup>32</sup> that the confessions obtained are indeed reliable and hence admissible.<sup>33</sup>

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<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.* at 296.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*; See also Welsh White, “False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions” (1997) 32 Harv. C.R.-C.L. L. Rev. 105 at 153.

<sup>32</sup> *Penny, Ibid.* at 297.

<sup>33</sup> *Ibid.*

Keeping these introductory remarks in mind, let us now examine the emergence of the doctrine of voluntariness in England and the refinement of this doctrine in Canada.

### **The Development of Voluntariness:**

The nineteenth and early twentieth century was an important time in the development of voluntariness. During this time we see the crystallization in the case law of a concern with the unreliability of involuntary confessions as being the key reason for the evolution of an exclusionary rule. The cases that follow show the process by which the confessions rules took shape and how reliability became a key concern.

Also of importance to our inquiry in this chapter is the shift of pre-trial questioning of accused persons from magistrates in court<sup>34</sup> to police, and then eventually to no one, as judges began to come down against police custodial questioning altogether,<sup>35</sup> only to have custodial questioning once again assumed by police in the early twentieth-century shortly after the issuance of the Judges' Rules.<sup>36</sup>

Professor Levy finds that an exclusionary rule for involuntary confessions was recognized as early as 1726.<sup>37</sup> Lord Chief Baron Geoffrey Gilbert, in his *Law of Evidence* (written before that year, but actually “not published until thirty-years later”<sup>38</sup>), “...stated that though the best evidence of guilt was a confession:”<sup>39</sup> but this Confession must be voluntary and without Compulsion; for our Law ... will not force any Man to accuse himself; and in this we do certainly follow the Law of Nature, which commands every Man to endeavor his own

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<sup>34</sup> Ian Bryan, *Interrogation and Confession: A Study of Progress, Process and Practice* (Aldershot: Dartmouth Publishing, 1997) at 31-36

<sup>35</sup> David Bentley, *English Criminal Justice in the Nineteenth Century* (London: Hambledon Press, 1998) at 230.

<sup>36</sup> *Ibid.* at 234.

<sup>37</sup> Leonard W. Levy, *Origins of the Fifth Amendment* (New York: Oxford University Press, 1968) at 327.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

Preservation; and therefore Pain and Force may compel Men to confess what is not the truth of Facts, and consequently such extorted Confessions are not to be depended on.”<sup>40</sup> From this early treatise, there was a concern with unreliable evidence.<sup>41</sup>

During the late eighteenth-century the rules of confessions began to find their first clear articulation through the courts.<sup>42</sup> In *R. v. Warickshall*<sup>43</sup> “the judges had defined an involuntary confession as one “got by promises or threats,”<sup>44</sup> and gave this as the proper basis for exclusion. The court also introduced reliability to the case law as the basis for a confessions rule,<sup>45</sup> and provided the rule that derivative evidence gained from an induced confession is admissible even where a confession is not.<sup>46</sup>

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<sup>40</sup> Reprinted in L. Levy, *Origins of the Fifth Amendment* 327 (1968) Also cited in, Capitan Fredric Lederer, “Voluntariness Doctrine” (1976) 74 Mil. L. Rev. 72.

<sup>41</sup> According to Gudjonsson, the case of *R. v. Perry* (1660), 14 How St. Tr. 1312 was a decisive turning point in the emergence of the doctrine of voluntariness in England. In this case, the defendant, John Perry, after a rigorous “interrogation by the Justice of the Peace” (Gisli H. Gudjonsson. *The Psychology of Interrogations and Confessions: A Handbook* (West Sussex: John Wiley & Sons, Ltd., 2003) at 166) confessed to murdering his master William Harrison (p. 166). Perry also implicated his mother and his brother in the murder - (Fred Kaufman, *The Admissibility of confessions*, 3<sup>rd</sup> ed., (Toronto: The Carswell Company Limited, 1979) at 15). As a result of this confession, all “three were executed.” (Kaufman p. 15). However, 2 years later, Harrison returned to the village, stating that “he had been kidnapped and sold to the Turks.” (Kaufman p. 16). Gudjonsson states that this case had a chilling effect on the consciousness of English judiciary to a point that it lead to:

Legal re-evaluation of uncorroborated confessions in England, although a corroboration requirement was never universally accepted and was not applied to prosecutions other than murder. (p. 167)

<sup>42</sup> *R. v. Warickshall* (1783), 168 E.R. 234 is the first clear statement of the voluntariness principle (Steven Penney, “Theories of Confession Admissibility: A Historical View” (1997-98) Am. J. Crim. L. 309 at 320). However *White’s Case* (1741) 17 How St. Tr. 1079, and *Rudd’s Case* (1775) 1 Leach. 115 demonstrate that there was some concern in the courts before *Warickshall* with voluntariness (Steven Penney, “Theories of Confession Admissibility: A Historical View” (1997-98) Am. J. Crim. L. 309 at 321). In *White’s Case*, White’s counsel asked the Court to inquire whether the confession had been voluntarily made, for “if it was not ... it ought not to be read.” According to Levy, after White’s case, the judge agreed that a statement obtained by threat/promise should not be used (*Supra* note 37 at 328). “A generation later it had become an accepted rule that any confession not free and voluntary must be rejected because no credit could be given to it.” (*Supra* note 37 at 328).

<sup>43</sup> *Ibid.*

<sup>44</sup> *Supra* note 35 at 221.

<sup>45</sup> William Gangi, *The Court and Confessions: Justice at the Expense of Truth?* (Ann Arbor: University Microfilms, 1971) at 14.

<sup>46</sup> *Supra* note 42. “Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not entitled to credit. A free and voluntary confession is deserving of the highest credit ... but a confession forced from the mind by the flattery of hope, or fear comes in so questionable a shape when it is to be considered as the evidence of guilt that no credit ought to be given to it; and it is therefore rejected.”

This limited definition of voluntariness “left unanswered two important questions”<sup>47</sup> for nineteenth-century judges to struggle with.<sup>48</sup> “First, did the identity of the person offering the inducement matter?”<sup>49</sup> Secondly, “would any promise or threat exclude a confession, however trivial and whatever its subject matter?”<sup>50</sup>

By 1840 the answer to the first question was given.<sup>51</sup> “Only an inducement held out by”<sup>52</sup> or with the sanction of a person in authority (that is a person in a position to influence the conduct of the prosecution) would exclude.”<sup>53</sup> With Regards to the other question, in *R. v. Warickshall* and later cases, it was stated that the reason for the exclusionary rule<sup>54</sup> was “...the likely unreliability of confessions obtained by inducements, it followed that the only inducements which ought to exclude were those of a kind calculated to lead the prisoner to make an untrue confession.”<sup>55</sup> This is the narrow interpretation of voluntariness. Although there was some equivocation on this issue between different rulings, the matter was settled by *R. v. Ibrahim*.<sup>56</sup>

In 1842, Lord Chief Baron Joy published a treatise on confessions wherein he advocated for the proposition that reliability should be the true test of admissibility.<sup>57</sup> Joy wrote that the “threat or inducement held out must have reference to the charge, and be such as would lead [the suspect] to suppose that it would be better for him to admit himself guilty of an offence which he had never committed.”<sup>58</sup> Joy cited in support of his view, a number of English cases, including

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<sup>47</sup> *Supra* note 35 at 221.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *R. v. Taylor* (1839) 8 C & P 733. See also *Ibid.*

<sup>52</sup> *Bentley, Ibid.*

<sup>53</sup> *Ibid.*; *R. v. Moore*, [1852] 169 Eng. Rep. 608.

<sup>54</sup> *Bentley, Ibid.*

<sup>55</sup> *Ibid.* at 221 and 222; See also *supra* note 42.

<sup>56</sup> *Ibrahim v. R.*, [1914] A.C. 599.

<sup>57</sup> *Supra* note 35 at 222

<sup>58</sup> Henry Holmes Joy, *Confession in Criminal Cases* (Dublin, 1842) at 13.

*R. v. Green*<sup>59</sup> and *R. v. Lloyd*,<sup>60</sup> "...where the removal of the prisoner's handcuffs, and a promise to allow him to see his wife, were respectively held not to render the confessions which followed inadmissible."<sup>61</sup>

As Joy was writing his treatise, the reliability test was not yet commonplace despite *Warickshall*.<sup>62</sup> Proof of any kind of temporal inducement was generally "sufficient to exclude,"<sup>63</sup> obviating the need for any kind of voir dire to examine the possibility of whether a particular inducement may have caused the accused make a false confession.<sup>64</sup> Judges took this approach for two reasons.<sup>65</sup> First, because there was no foolproof way of examining the influence of a given inducement upon suspect's mind;<sup>66</sup> and second because many judges felt that there was need for caution before introducing a confession into evidence.<sup>67</sup> Cases where the suspect had been given an exhortation to tell the truth, such as "it would be better to confess"<sup>68</sup> or some other such phrase indicating an advantage, would also lead to the exclusion of any confession that followed.<sup>69</sup> In *R. v. Drew*, the Court "...held that to caution a person that anything he said would be given in evidence *for or against* him constituted an inducement,"<sup>70</sup> because that may motivate the suspect to lie in the hope of gaining an advantage for his trial.<sup>71</sup>

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<sup>59</sup> *R. v. Green* (1834) 6 C & P 655

<sup>60</sup> *R. v. Lloyd* (1834) 6 C & P 393.

<sup>61</sup> *Supra* note 35 at 222; see also *Ibid.* and *supra* note 59.

<sup>62</sup> *Bentley, ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*; Peter Mirfield, *Confessions* (London: Sweet & Maxwell, 1985) at 50.

<sup>66</sup> *Bentley, ibid.*; See also Thomas Starkie, *Evidence, ii: A Practical treatise on the Law of Evidence* (London: Hansard and Sons, 1824), at 36; *R. v. Thompson* (1783) 1 Leach 291 "It is almost impossible to be too careful ... on this subject" (Hotham B).

<sup>67</sup> *Bentley, ibid.*; See also *R. v. Thomson, ibid.*

<sup>68</sup> *Bentley, ibid.*

<sup>69</sup> *Ibid.* at 222-223; see also *R. v. Kingston* (1830) 4 C & P 387; *R. v. Dunn* (1831) 4 C & P 543; and *R. v. Jarvis* [1867] LR 1 CCR 96.

<sup>70</sup> *Bentley, ibid.* at 223.

<sup>71</sup> *Ibid.* Coleridge J, the judge in *Drew*, applied the same reasoning in other cases such as *R. v. Morton* (1843) 2 M & Rob 514; and *R. v. Hornbrook*, (1843) 1 Cox 54.

The practice of frequently excluding confessions was coming under increasing criticism.<sup>72</sup> Some critics called for reform by advancing the position that "...all confession evidence should be admitted, leaving it for the jury to decide what weight it deserved, subject to the safeguard that no jury should be permitted to convict upon confession evidence alone."<sup>73</sup>

In *Baldry* (1852), the Court took up the reformers point of view and overruled the line of cases exemplified by *R. v. Drew*.<sup>74</sup> The Court held that the current state of affairs, which meant the generous approach of the judiciary to voluntariness, was too favourable to suspects.<sup>75</sup>

But it should be understood that the pre-*Baldry* legal environment was not completely rosy for suspects taken into custody.<sup>76</sup> Significantly, courts refused to "...treat oppressive and unfair conduct towards a prisoner, falling short of improper inducement, as a ground for exclusion."<sup>77</sup> If no improper inducement was found to have been used then a suspect's confession would be found admissible,<sup>78</sup> regardless of "...how unfair or reprehensible his

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<sup>72</sup> *Bentley, ibid* at 224. See also *R. v. Row* (1809) Russ & Ry 153.

<sup>73</sup> *Bentley, ibid.* See also *Law Magazine* (1842) Law Mag (1st series) 17; Criminal Law Commissioners, 8th Report, app A, at 281 & 307.

<sup>74</sup> *Bentley, ibid.*; See also *R. v. Baldry* (1852) 5 Cox 523.

<sup>75</sup> *Bentley, ibid.* at 225; Baldry's defence counsel argued that "the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner and therefore excludes the declaration if any degree of influence has been exerted," (*Supra* note 65 at 57). The presiding judges rejected this. Pollock C.B.: "The question now is whether the words employed amount to a promise or a threat? We are not to torture this expression, or to say whether a man misunderstood their meaning, for ... the words are to be taken in their obvious meaning."

In 1872, then, a confession extracted from two young boys was allowed into evidence notwithstanding that there had been an exhortation to tell the truth. *R. v. Reeve and Another* (1872) 12 Cox 179. The exhortation was: "you had better as good boys tell the truth".

<sup>76</sup> *Supra* note 34 at 74.

<sup>77</sup> *Supra* note 35 at 226.

<sup>78</sup> *Ibid.*

treatment might have been in other respects.”<sup>79</sup> Thus, certain police tactics designed to deceive a suspect to confess would not necessarily lead to exclusion of confession.<sup>80</sup>

There was also an effort by judges in the first half of the nineteenth-century to find solutions to the problem of the misreporting of confessions.<sup>81</sup> There were cases in the 1820s and 1830s where confessions were excluded because they had not been written down at the time of the interrogation<sup>82</sup> and because they had not been recorded *verbatim*.<sup>83</sup> But this issue was settled in favour of admission in *R. v. Roche*<sup>84</sup> in 1841.<sup>85</sup> In that case Denman LCJ declined to exclude a statement of a prisoner that was taken down in the third person. Thereafter, “... judges no longer treated paraphrasing”<sup>86</sup> as a reason to exclude a statement.<sup>87</sup>

The questioning of suspects by police, rather than by a magistrate in court, began to enter the recorded cases in the 1820s with *R. v. Thornton*.<sup>88</sup> In that case, the Court held admissible a confession extracted by police questioning, where there were some oppressive circumstances at play.<sup>89</sup> This raised the issue of how far police would be permitted to go in questioning those they

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<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.* at 226-227; Bentley explains that the law was extremely tolerant of the police practice of using oppressive and unfair tactics to extract statements from suspects. He cites a number of cases to support his position. He states that confessions extracted from suspects in state of drunkenness (*R. v. Spilsbury*), distress (*R. v. Dewey*), severe pain (*R. v. Mitchell*) or coercing a confession from a child (*R. v. Wild*), illegal arrest, lying about the strength of the case (*R. v. Barley*), promises that the confession would not be used in court (*R. v. Shaw*), using a clergy (*R. v. Gilham*) were all admitted to evidence.

The review of the cases provided by Bentley confirms his position. For example, in *R. v. Spilsbury*, “the prisoner was drunk at the time; and it was imputed that the constable had given him liquor to cause him to be so.” (*Supra* note 34 at 74).

<sup>81</sup> *Bentley, ibid.* at 227.

<sup>82</sup> *Ibid.*; See also *R. v. Sexton* (1822) 1 Burn’s *Justice of the Peace* (29<sup>th</sup> Ed., 1848-49) at 1086.

<sup>83</sup> *R. v. Mallet* (1830) MSS Greaves.

<sup>84</sup> *R. v. Roche* (1841) C & M 341.

<sup>85</sup> *Supra* note 35 at 227.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *R. v. Thornton* (1824) 1 Moo 27. Thornton was arrested “perhaps illegally” (according to Bayley J). He was a 14 year old boy at the time of his arrest and “...before he had eaten lunch. He had been given no food before he confessed, over five hours later.” (*Supra* note 65).

<sup>89</sup> *Supra* note 35 at 229.

arrested.<sup>90</sup> There was debate on this point in the early part of the nineteenth-century, particularly on the point of whether the administration of a caution would suffice to allow police questioning or whether, on the other hand, there was a bright-line prohibition.<sup>91</sup> But by the 1850s, a new doctrine came into force.<sup>92</sup> All forms of police questioning were declared to be improper,<sup>93</sup> hence, overruling the judgment in *Drew* "...that to caution a prisoner was an inducement rendering his reply inadmissible,"<sup>94</sup> LCJ Campbell remarked emphatically in *Baldry* "...that prisoners were not to be interrogated."<sup>95</sup> This case resolved this important issue for the rest of the century.<sup>96</sup>

The broader question of "...how far officers might legitimately question persons against whom there was suspicion but who had not yet been arrested"<sup>97</sup> went in the other direction. The judges ruled that until the point of arrest, "...a suspect might be questioned after a proper caution, although even here the power should be exercised sparingly."<sup>98</sup> Mellor J., in *R. v. Mick* states:

... magistrates are not allowed to question prisoners, or to ask them what they have to say; and it is not for policemen to do these things. It is assuming the functions of the magistrate without

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<sup>90</sup> *Ibid.* at 230.

<sup>91</sup> *Ibid.* at 233; *Hill's Case* (1838); *R. v. Doyle* (1840) 1 *Craw & D* 396; and *R. v. Toole* (1856) 7 *Cox* 244.

<sup>92</sup> *Bentley*, *ibid.* at 230.

<sup>93</sup> *Ibid.*; See also *R. v. Baldry* (1852) 2 *Den* 430.

<sup>94</sup> *Bentley*, *ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.* at 232.

<sup>98</sup> *R. v. Berriman* (1854) 6 *Cox C.C.* 388; and *R. v. Reason* (1872) 12 *Cox* 228. In *Berriman* the trial court set out the following standards for police questioning: "If there is evidence of an offence, a police officer is justified, after a proper caution, in putting to a suspected person interrogatories with a view to ascertaining whether or not there are fair and reasonable grounds for apprehending him. Even this course should be sparingly resorted to. But here there was nothing whatever to show that any offence had been committed by any one ... and then it is sought, by questioning the prisoner on the subject, to establish from her own lips, the crime itself, as well as her guilty connection with it. What has been done here I have every reason to believe was done from no improper motive. It was, doubtless, an error of judgment, but I wish it to go forth amongst those who are inferior officers in the administration of justice, that such a practice is entirely opposed to the spirit of our law."



those precautions which the magistrates are required by the law to use, and assuming functions, which are entrusted to the magistrates and to them only.<sup>99</sup>

It was further noted by the Court in *R. v. Reason*,<sup>100</sup> that “after the prisoner is taken into custody it is not the duty of the constable to ask any questions.”<sup>101</sup>

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<sup>99</sup> *R. v. Mick*, (1863) 176 Eng. Rep. 376 at 376.

<sup>100</sup> *Reason*, *Supra* note 96 at 228; *Penney*, *supra* note 42 at 324 note 81.

<sup>101</sup> *Penney*. *ibid.* at 324 n. 80 & 81

One wonders why judges were so inclined to exclude confessions and prevent the involvement of police in the mid-nineteenth century compared to today. Wigmore states that during the early nineteenth century, judges developed “a general suspicion of all confessions, a prejudice against them ... and an inclination to repudiate them upon the slightest pretext” (3 Wigmore, 1970).

Judges during this period seemed to limit themselves to “...simply decide whether there had been a threat or a promise” (*Supra* note 65), and did not concern themselves with the question of “whether such a threat or promise would have been likely to induce an untrue confession” (*Supra* note 65). In *Enoch and Pulley*, for example, “a woman who had Pulley in her custody told Pulley that she had better tell the truth or it would lie upon her and the man would go free.” – (*Supra* note 65) Parke J. held Pulley’s resulting statement inadmissible since it was made following an inducement (*Enoch and Pulley*, (1833) 5 C. & P. 539; See also *supra* note 65). Conversely, in *Thornton*, the focus on whether there had been a promise or a threat was to the detriment of the accused, as no attention was paid by the Court to the long duration of the detention in view of the fact that the accused had not eaten lunch before his arrest (*R. v. Thornton*, 1 Mood 27; See also *supra* note 65). In *R. v. Spilsbury* (1835) 7 C. & P. 187, “...Coleridge J. admitted a confession made while the accused was drunk specifically because it had not been obtained through hope or fear” (See also *supra* note 65). In some cases a different approach was taken (*Supra* note 64 at 50). In *R. v. Court* (1836) 7 C. & P. 486, “the accused had been told “to be sure to tell the truth”. Littledale J.” rejected the argument that the accused “...would have taken this to mean that it would be better for him to confess” (*Supra* note 65)

Moreover, the law evolved in such a way as to be “...rigid and unable to adapt to the circumstances of the individual case. It became settled law that any statement to the accused to the effect that he “had better confess” or that “it would be better for him to confess” would render his confession inadmissible” (*Supra* note 65 at 51). This was so, in spite of the fact that these were relatively vague statements. On the one hand they may be taken to mean that the suspect would gain advantage at his trial if he confessed; but it might equally be taken to mean simply that he ought to confess (*Supra* note 65 at 51). In *R. v. Croydon* (1846) 2 Cox C.C. 67, “...a person seeking a statement from Croydon about a burglary said to him: “I dare say you had a hand in it; you may as well tell me all about it.” counsel for Croydon argued that “You may as well tell me” was the equivalent of “You had better tell me”” (*Supra* note 65 at 51). The judge “ruled that the words were a sufficient inducement and excluded the confession.” (*Supra* note 65 at 51).

Additionally, judges appear, on occasion, to be concerned with the “...propriety of the conduct of the person questioning the suspect” (*Supra* note 65 at 51). In *R. v. Sexton*, for example, the suspect told the policeman who was questioning him “...that he would tell all about it” (a burglary) if the officer provided him with “...a glass of gin (*R. v. Sexton* (1822) 1 Burn’s *Justice of the Peace* (29<sup>th</sup> Ed., 1848-49)). Best J. refused to admit the confession, stating that it had been “very improperly obtained” (*Supra* note 65 at 51).

We must also not forget the influence that the pervasiveness of capital punishment must have played in the minds of the judges. It isn’t necessarily that the judges of nineteenth century England were particularly generous in comparison to their modern day peers, though the reported cases often make it seem so (see for example, cases such as *R. v. Mills*, 6 Car. & P. 146, Gurney B., wherein it was held that the words “it is of no use for you to deny it, for there is a man and a boy will swear they saw you do it,” rendered the prisoner’s statement inadmissible; similarly, in

“Prior to *Jervis’s Act*,”<sup>102</sup> the reasons given by judges for prohibiting the police questioning of suspects was that doing so would infringe on the powers of judges;<sup>103</sup> however, after the passage of the *Act*, which did away with magisterial examination,<sup>104</sup> the justification switched to one which said, since judges and magistrates were not permitted to examine an accused, it was unacceptable that the police, who were perceived to be inferior to them, were permitted to examine suspects.<sup>105</sup> There were other reasons offered by the judges as well, including unfairness to the accused,<sup>106</sup> faulty recollection might cause the officer to inaccurately record the statement,<sup>107</sup> or the officer’s bias may lead him to inadvertently mistake a suspect’s words.<sup>108</sup>

Professor Steven Penney notes the importance of whether or not police were permitted to engage a suspect in interrogation or whether that was to remain the sole purview of the

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*R. v. Warringham* 15, Jur. 318, the words “it would be best for him if he would tell how it was transacted,” was held to exclude a confession; Rather there were a vast number of capital offences on the books right up until the early 1800s (see: Black Act, 9 Geo. 1 c. 22. The Act introduced the death penalty for over 50 criminal offences). It was not until 1861 that Parliament reduced the number of capital crimes to five: murder, treason, espionage, arson in royal dockyards and piracy with violence (see: 24 & 25 Vict; c. 94 to c. 100). It is perhaps the case that the judges did not want the often poor and indigent defendants to face the gallows for crimes having causes related to their poverty.

<sup>102</sup> *Supra* note 35 at 230; *Indictable Offences Act* 11 & 12 Vict. c. 42 (1848). John Jervis introduced four Acts in 1848, including the *Indictable Offences Act* (*Supra* note 34. 101).

The Act formally “...empowered justices to conduct public hearings into cases being prepared for trial by the prosecution, and after being satisfied of a *prima facie* case, to commit the accused for trial. Should the prosecution fail to satisfy all the justices, the accused was to be discharged. The statute also imposed a formal duty on justices, following the examination of prosecution witnesses, firstly, to caution the accused that he was not obliged to answer the charge and, secondly, to give the accused to understand “that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt.”” (*Supra* note 34 at 84).

<sup>103</sup> *Bentley, ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*; *R. v. Mick* (1863) 3 F & F 822; *R. v. Gavin* (1885) 15 Cox 656; and *R. v. Male and Cooper* (1893) 17 Cox 689.

<sup>106</sup> *Bentley, ibid.* at 231; *R. v. Stokes* (1853) 17 Jur 192. “We are not always certain it is fairly done.”

<sup>107</sup> *Bentley, ibid.*; *Toole, supra* note 89.

<sup>108</sup> *Bentley, ibid.*

magistrates.<sup>109</sup> As he notes, with the emergence in the late nineteenth century of “large-scale, professional, uniformed police departments”<sup>110</sup> in most major urban centres in England and the United States, “the locus of criminal investigation shifted from preliminary judicial proceedings, where the privilege against self-incrimination was not operative, to police interrogation. The question of the day was whether any of the legal principles limiting the admissibility of confessions in a judicial forum would be applied to police.”<sup>111</sup>

The response of the police to *Baldry* came in 1873,<sup>112</sup> when a directive in the “...Metropolitan Police General Orders”<sup>113</sup> was issued that forbade the officers to obtain a confession from suspects at police stations on felony charges.”<sup>114</sup> This was expanded in 1893 when “...General Orders and Regulations issued by the Commissioner”<sup>115</sup> specifically prohibited the questioning of suspects.<sup>116</sup>

The 1912 Judges Rules were issued to provide guidance to police on when and in what manner it would be acceptable to question suspects.<sup>117</sup> It is important to note that these rules did not have the force of legislation and were not enforceable in court; rather they were guidelines to assist police in their administration of questions.<sup>118</sup> The rules were designed to capture the essence of the common law’s position with regards to the admissibility of statements and they conveyed two important points that the police were permitted to question a suspect before he has

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<sup>109</sup> *Penney, supra* note 42 at 322.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

<sup>112</sup> *Supra* note 35 at 231.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*; PRO, MEP 8/3 Prisoners, para. 8.

<sup>115</sup> *Bentley, ibid.*

<sup>116</sup> *Ibid.*; PRO, MEP 8/4, paras. 203, 203 and 306.

<sup>117</sup> *Supra* note 34 at 127.

<sup>118</sup> *Ibid.* at 128; *R. v. Voisin* (1918) 13 Cr. App. R. 89.

been charged,<sup>119</sup> or arrested,<sup>120</sup> but after arrested, the police were prohibited from questioning the suspect.<sup>121</sup>

Shortly after the Judges Rules were issued, the case of *R. v. Voisin* was decided in 1918, wherein the Judges Rules would not be adopted as having binding legal force.<sup>122</sup> In that case, the accused had been detained in custody and questioned, the The Court of Criminal Appeals failed to scold the police conduct for interrogating and not cautioning the accused, and hence it took the position that the judiciary is prepared to sanction custodial interrogations.<sup>123</sup> It therefore showed the Judges' Rules did not provide an effective limitation on police powers<sup>124</sup> and ushered in the era of custodial interrogation.

In the case-law of the nineteenth century it is possible to discern two competing concepts of voluntariness: one broad and one narrow.<sup>125</sup> “ Under the broad interpretation, consideration was to be given to circumstances beyond the force of threats and promises, which might work to render an extra-judicial confession involuntary.”<sup>126</sup> These include factors such as “... the effect on the accused of the inherently compelling pressures of criminal investigations, the strength of mind of the accused, and the legality of questions inviting incriminatory replies ...”.<sup>127</sup>

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<sup>119</sup> *R. v. Brackenbury* (1893), 17 Cox C.C. 628; and *R. v. Booth and Jones* (1910), 5 Cr. App. R. 177.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Supra* note 34 at 128.

<sup>122</sup> *Voisin*, *Supra* note 118. It was specified in *R. v. Voisin* that the Judges Rules do not carry the force of law: “In 1912 the judges, at the request of the Home Secretary, drew up some rules as guidance for police officers. These rules have not the force of law; they are administrative directions the observance of which the police authorities should enforce upon their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners, contrary to the spirit of these rules, may be rejected as evidence by the judge presiding at the trial.” See also *supra* note 34 at 129.

<sup>123</sup> T.E. St. Johnston, “Judges’ Rules and Police Interrogation in England Today” (1966) 57 *Journal of Criminal Law and Criminology and Police Science* 85 at 87.

<sup>124</sup> *Supra* note 65 at 197.

<sup>125</sup> *Supra* note 34 at 116.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*

In the narrow approach to voluntariness, where only threats and promises are considered, "...is the assumption that a person in a position of authority, such as a police officer, must act in some overt way to induce an involuntary confession."<sup>128</sup> This latter view held that considering factors other than clear threats or promises fall outside of the judicial inquiry on voluntariness of a confession.<sup>129</sup> The courts began to increasingly rule in favour of the narrow interpretation of voluntariness,<sup>130</sup> and this tendency was cemented in the 1914 case of *R. v. Ibrahim*.<sup>131</sup>

Since *Warickshall* the confessions rule has not been without controversy. In the 1809 case of *R. v. Row*,<sup>132</sup> to cite another example, Chambre J. was critical of the "obscurity and discordance" of confessions admissibility in criminal matters. This criticism was again echoed by Lord Sumner in the seminal 1914 English case of *R. v. Ibrahim*, when he stated that: "The English law is still unsettled, strange as it may seem, since the point is one that constantly occurs in criminal trials," and he then went on to try to settle the law in that same judgment.<sup>133</sup> Lord Sumner stated the basic confessions rule as follows:

It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.<sup>134</sup>

Lord Sumner's rule in *Ibrahim* has become known as the "*Ibrahim Rule*".<sup>135</sup> According to the original formulation of the *Ibrahim Rule* "voluntary" simply means the absence of fear or

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<sup>128</sup> *Ibid.* at 117.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> *Supra* note 56 at 614.

<sup>132</sup> *R. v. Row* (1809), 168 E.R. 733 at 734.

<sup>133</sup> *Supra* note 56 at 614.

<sup>134</sup> *Ibid.* at 609.

<sup>135</sup> Rene. J. Marin, *Admissibility of Statements*, 9<sup>th</sup> ed. (Aurora: Canada Law Book INC., 2002) at 1-4, para.110.

inducement caused by a person in authority.<sup>136</sup> The simple absence of these two elements would, according to this formulation, suffice to qualify a confession as voluntary. The language of the *Ibrahim* decision suggests that the voluntariness of a statement depends upon whether there was some overt act by a person in authority rather than upon any subjective considerations that may have compelled a suspect or accused person to make the statement.

The lack of subjective considerations given in the *Ibrahim* ruling is particularly disturbing when one considers the factual background of the case. In *Ibrahim*, the accused, was a low-ranking Afghani soldier, serving in the British army, when he was approached by Major Barrett, his British commanding officer, and was asked “why have you done such a senseless act?” (referring to the commission of a murder of a native officer).

It is doubtful that anything the accused may have said in response to the specific question put to him by his commanding officer could be considered as “voluntary”. The considerations that might have come into play in a hypothetical court’s determination of whether or not Ibrahim voluntarily confessed might have included: the peculiarities of the relationship between the soldier and his commanding officer as a function of the prevailing culture of British imperialism at the time; the relative levels of sophistication between an English-born British officer with the educational resources of the empire accessible to him and a soldier from the comparatively undeveloped and feudal Afghanistan; and the influence of the dominant military culture which says that a foot-soldier is to obey the orders (and answer the questions) of his commanding officer, and that to do otherwise could be construed as insubordination.

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<sup>136</sup> V.D. Buono, “Voluntariness and Confession: A Question of Fact or A Question of Law?” (1976-77) 19 Crim. L. Q. 100 at 100.

The *Ibrahim* court did not take the matter in any of these directions, and thus, rather than any nuanced consideration of how a power imbalance between a suspect and a person in authority might influence the voluntariness of the former person's statements, we are left with a test that contemplates only the perceived intent of the person in authority. Did the person in authority mean to threaten or induce the suspect or accused person? The conspicuous absence of any consideration of the questioned individual's subjective circumstances in *Ibrahim* makes this important ruling, highly objectionable, in my view. The British judiciary was clearly capable of appreciating the intimidating nature of the interaction between a superior and an inferior in a feudal setting by the time *Ibrahim* was considered, but elected not to address it in any meaningful way.

The failure of the House of Lords to take into account the mental impact of a British major confronting an unsophisticated Afghani foot soldier was inexcusable. Beyond the distastefulness of the decision (perhaps as a creature of its historical epoch), we are additionally left with a test that inadequately addresses the complexity that is at play in relations between detained suspects and the persons who have authority over them in the context of the voluntariness of statements.

The response by Lord Sumner to criticism of his decision in *Ibrahim* may be found in this passage:

In truth, except that Major Barrett's words were formally a question they appear to have been indistinguishable from an exclamation of dismay on the part of a humane officer, alike concerned for the position of the accused, the fate of the deceased, and the credit of the regiment and the service<sup>137</sup>

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<sup>137</sup> *Supra* note 56 at 608.

On Lord Sumner's view, shocked and aghast in disbelief, Major Barrett blurted out the nearly rhetorical question "why have you done such a senseless act", without having had any investigative motivation in doing so; but rather motivated by his humanity and concern for everyone involved. To which Ibrahim would have offered his response: the incriminating statement. Whether Ibrahim was motivated by duty or shame, or because he felt threatened or thought he would receive favourable consideration – whatever the reason he responded to Major Barrett with a confession -- is not relevant in Lord Sumner's eyes. What counts are Major Barrett's "humanitarian" motivations in asking the question and, specifically the absence of a threat or promise.

But the subjective reasons of the "good faith" of Major Barrett ought to be irrelevant to the inquiry; rather Lord Sumner should have been more concerned with the subjective reasons of the accused for making the statement. For how can it be known whether an interrogated person confessed something voluntarily by way of an investigation of the mind of the interrogating party? What Major Barrett had in his heart and mind when he asked the question has very little, if anything at all, to do with what Ibrahim had in his when he confessed. The House of Lords seems to have applied a subjective test to the wrong person.

Despite the problematic nature of the ruling in *Ibrahim*, the flawed reasoning in this case was adopted by the Supreme Court of Canada in *R. v. Prosko*. However, although the *Ibrahim* case came to lay the foundation for the treatment of voluntariness in the common law of Canada, there was a considerable lack of definitive clarity in the reported cases throughout the twentieth-



century.<sup>138</sup> Some of the developments, and the complications, in the post-*Ibrahim* criminal law of Canada are what we shall come to explore later in this chapter, beginning with *Prosko*.<sup>139</sup>

However before we proceed to the discussion of voluntariness in Canada, let us explore Herbert Packer's models of Crime Control and Due Process in order to set out a theoretical framework for our examination of the doctrine of voluntariness. Packer's models are a heuristic tool to analyze features of a criminal process relative to the possibilities that might have been. Using these models, we can characterize judicial rulings and legislation as moving closer to a due process orientation, on the one hand, or alternatively closer to a crime control orientation. Packer's models may be used as a road map to put in perspective the shifting judicial orientation between the broad and narrow interpretations of voluntariness, throughout the process of refinement of this doctrine in Canada.

### **Packer's Models of Crime Control and Due Process:**

In analyzing the law of voluntariness in Canada in the twentieth and twenty-first centuries, it is useful to place the developments that occurred within the theoretical framework developed by Herbert Packer.<sup>140</sup> Packer advanced a theory that envisioned the system as being populated by ideological commitments as between "...two poles, and the continuum that exists between them."<sup>141</sup> "The continuum"<sup>142</sup> consists of a "spectrum of choices,"<sup>143</sup> "value

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<sup>138</sup> *R. v. Sileski* (1921), 35 C.C.C. 368 at 369 (Que. C.A.), *per* Greenshields J.:

Perhaps no part of the criminal law, during the last century, has received more attention from members of the Bench and Bar than that dealing with the admissibility or inadmissibility of so-called confessions, statements or declarations made by a suspected accused person.

<sup>139</sup> *R. v. Prosko* (1922), 63 S.C.R. 226.

<sup>140</sup> Herbert L. Packer, "Two Models of the Criminal Process" (1964) 113(1) U. Penn. L. Rev. 1; and Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968).

<sup>141</sup> Ian Bryan, "The Histories and Structures of Custodial Interrogation" (PhD Thesis in Law, The University of Warwick School of Law, 1994) [published] at 145.

systems”<sup>144</sup> and assumptions<sup>145</sup> that make up the criminal justice system.<sup>146</sup> The two poles of the theoretical construct represent “...two separate”<sup>147</sup> and distinct sides of that continuum.<sup>148</sup> The two models were developed to represent the two extremes of the continuum:<sup>149</sup> the crime control model, and the due process model.<sup>150</sup> He stressed that the two models were “normative”<sup>151</sup> and “...not intended to be prescriptive.”<sup>152</sup> The crime control and due process models are, therefore, ideal types representing “...the opposing ends of the continuum of values and ideologies that are subsumed within”<sup>153</sup> and impact upon “the complexes of activity that operate to bring the substantive law of crime to bear (or to avoid bringing it to bear) on persons who are suspected of having committed crimes”.<sup>154</sup>

The crime control model is centered around the notion<sup>155</sup> “that the repression of criminal conduct is by far the most important function to be performed by the criminal process.”<sup>156</sup> A fundamental concern in this model is “...the efficiency with which the criminal process operates.”<sup>157</sup> And “in order to operate successfully, [the system] must produce a high rate of apprehension and conviction,”<sup>158</sup> and it therefore places<sup>159</sup> “a premium on speed and finality.”<sup>160</sup> “Speed is promoted by maximizing the informal and routine elements of the process while

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<sup>142</sup> *Ibid.*

<sup>143</sup> *Packer, Two Models of the Criminal Process*” *supra* note 140 at 2; See also *supra* note 141.

<sup>144</sup> *Packer, ibid.* at 5. See also *Bryan, Ibid.*

<sup>145</sup> *Packer, ibid.* at 7. See also *Bryan, Ibid.*

<sup>146</sup> *Bryan, ibid.*

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*

<sup>150</sup> *Packer, “Two Models of the Criminal Process,” supra* note 140 at 5.

<sup>151</sup> *Supra* note 141.

<sup>152</sup> *Ibid.* See also *Packer, “Two Models of the Criminal Process,” supra* note 140 at 2.

<sup>153</sup> *Bryan, ibid.*

<sup>154</sup> *Ibid.*; See also *Packer, “Two Models of the Criminal Process,” supra* note 140 at 2.

<sup>155</sup> *Bryan, ibid.* at 146.

<sup>156</sup> *Bryan, ibid.*; See also *Packer, “Two Models of the Criminal Process,” supra* note 140 at 9.

<sup>157</sup> *Bryan, ibid.*

<sup>158</sup> *Bryan, ibid.*; *Packer, “Two Models of the Criminal Process,” supra* note 140 at 10.

<sup>159</sup> *Bryan, ibid.*

<sup>160</sup> *Packer, “Two Models of the Criminal Process,” supra* note 140 at 10.; See also *Ibid.*;

finality is fostered by minimizing the occasions upon which the process may be subject to challenge.”<sup>161</sup>

According to this model, the system can be likened<sup>162</sup> to “an assembly line or a conveyor belt”,<sup>163</sup> “with each successive stage of the process performing routinized functions, the success of which is gauged by its ability”<sup>164</sup> to quickly move the case along to a guilty plea.<sup>165</sup>

The presumption of guilt plays a central role in this model.<sup>166</sup> The crime control model needs to rely on the presumption of guilt in order to efficiently process a large number of criminals<sup>167</sup> and as a result, the most important feature of this model is the early determination of guilt.<sup>168</sup> The thinking is that the police and prosecutors can be trusted to ferret out the innocent from the guilty. Once someone is charged, the screening by police and prosecutors, who have no interest in wasting resources on prosecuting the innocent, virtually guarantees that they are indeed guilty of the offence charged.<sup>169</sup> With a presumption of guilt in place, the “guilty” can be moved quickly through<sup>170</sup> “...the remaining stages of the process.”<sup>171</sup>

“The presumption of guilt allows the non-adjudicative, preliminary and informal stages of the criminal justice process to achieve the “dominant goal” of the crime control model, the repression of crime through highly efficient and summary procedures.”<sup>172</sup> The other parts of the

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<sup>161</sup> *Packer, ibid.*; See also *Bryan, ibid.*

<sup>162</sup> *Bryan, ibid.*

<sup>163</sup> *Packer, ibid.* at 11.

<sup>164</sup> *Supra* note 141 at 146.

<sup>165</sup> *Ibid.*; See also *Packer, “Two Models of the Criminal Process,” supra* note 140 at 11.

<sup>166</sup> *Bryan, Ibid.*; See also *Packer, ibid.*

<sup>167</sup> *Packer, ibid.*; *Bryan, ibid.*

<sup>168</sup> *Bryan, ibid.*

<sup>169</sup> *Packer, “Two Models of the Criminal Process,” supra* note 140 at 11.

<sup>170</sup> *Supra* note 141 at 146.

<sup>171</sup> *Packer, “Two Models of the Criminal Process,” supra* note 140 at 11.; *Ibid.*

<sup>172</sup> *Packer, ibid.* at 13; *Bryan, ibid.*

system are viewed as<sup>173</sup> “unlikely to produce as reliable fact-finding as the expert administrative process that precedes them.”<sup>174</sup> It is a goal of the model,<sup>175</sup> “to place as few restrictions as possible on the character of the administrative fact-finding processes and to limit restrictions to those that enhance reliability.”<sup>176</sup>

Hence, the guilty plea is a key factor for the smooth operation of this this model.<sup>177</sup> With an early presumption of guilt,<sup>178</sup> “...the subsequent stages of the process are left to perform the largely ceremonial role of endorsing the presumption of guilt and legitimating it as legal guilt. Therefore, the extent to which the successive stages of the process permit challenges to the informal and efficient fact-finding process”<sup>179</sup> is small, and it is believed that they are “relatively unimportant and should be truncated as much as possible”.<sup>180</sup>

Contrary to the crime control model, the due process model, is described as an “...obstacle course.”<sup>181</sup> Under this model, the stages of the criminal justice process are “designed to present formidable impediments to carrying the accused any further along in the process”.<sup>182</sup>

Given the coercive potential of the criminal law, “the criminal process must ... be subjected to controls and safeguards that prevent it from operating with maximal efficiency.”<sup>183</sup>

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<sup>173</sup> *Bryan, ibid.*

<sup>174</sup> *Packer, “Two Models of the Criminal Process,” supra note 140, at 11.*

<sup>175</sup> *Supra note 141 at 147.*

<sup>176</sup> *Packer, “Two Models of the Criminal Process,” supra note 140, at 13.*

<sup>177</sup> *Supra note 141 at 147.*

<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.*

<sup>180</sup> *Packer, “Two Models of the Criminal Process,” supra note 140, at 13.*

<sup>181</sup> *Supra note 141 at 147.; See also ibid.*

<sup>182</sup> *Packer, ibid.*

<sup>183</sup> *Ibid. at 16. See also Supra note 141 at 147.*

In contrast to the crime control model, the due process model draws a distinction between the concept of “legal guilt”, as opposed to “factual guilt”, and emphasizes the importance of the presumption of innocence.<sup>184</sup> An individual is presumed innocent until he has been found guilty by a court of competent jurisdiction.<sup>185</sup> The presumption of innocence, is designed to protect the innocent “...since the courts and not the informal and non-adjudicative organs of the criminal process (like the police) have the responsibility of determining”<sup>186</sup> a person’s legal guilt.<sup>187</sup>

A finding of guilt must therefore be proved beyond a reasonable doubt and only by admissible evidence in the context of trial process.<sup>188</sup> Such principle, therefore puts<sup>189</sup> “into play all the qualifying and disabling doctrines that limit the use of the criminal sanction against the individual.”<sup>190</sup>

The primary goal of the due process model is to restrict the ability of the state to move against individuals<sup>191</sup> with “maximal efficiency”.<sup>192</sup> It should not be thought, however that the due process model rejects the importance of “repressing crime.”<sup>193</sup> However, contrary to its rival, it takes the position that there should be a “...formal adjudicative fact-finding processes which accept the possibility of error and allow the case constructed against the accused to be publicly evaluated by an impartial tribunal”<sup>194</sup>

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<sup>184</sup> *Bryan, ibid.*

<sup>185</sup> *Ibid.*

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.*

<sup>188</sup> *Packer, Two Models of the Criminal Process,* *supra* note 140, at 17; *Bryan, ibid.* at 147 -148.

<sup>189</sup> *Bryan, ibid.* at 148.

<sup>190</sup> *Packer, ibid.; Bryan, Ibid.*

<sup>191</sup> *Bryan, ibid.*

<sup>192</sup> *Packer, Two Models of the Criminal Process,* *supra* note 140 at 16. See also *ibid.*

<sup>193</sup> *Packer, ibid.* at 13.; See also *Bryan, ibid.*

<sup>194</sup> *Supra* note 141 at 148.

The models proposed by Packer are useful in seeing the changes in judicial approach to the doctrine of voluntariness.<sup>195</sup> Applying Packer's models to the existing case law on voluntariness, it becomes apparent that what is referred to as the narrow view of the voluntariness test rests closer<sup>196</sup> to the "...crime-control end of the spectrum of value choices."<sup>197</sup> On the other hand, the broad view seems to share more in common with due process values.<sup>198</sup>

### **Confessions Rules under the Crime - Control Model**

According to this model the best possible evidence is an admission of guilt coming directly from the mouth of the accused.<sup>199</sup> The opportunity to hear the admission of guilt directly from the accused is too important to pass-up.<sup>200</sup> The significance of such evidence becomes more evident, when one considers the fact that under this model, the police can detain individuals and hold them for questioning on mere suspicion and hearsay evidence.<sup>201</sup> Hence the police should be allowed to strike while the iron is hot. The ability of the police to extract statements from accused persons would save considerable state resources and in all likelihood it would lead to quick guilty pleas. The best time to get a statement is when the accused person is in the clutches of the state and totally isolated from his lawyer and his family.<sup>202</sup> This is based on the proposition that any contact between the accused and his lawyer or even his family would undermine the ability of the police to get a statement from the accused.<sup>203</sup> The undesirable effect

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<sup>195</sup> *Ibid.*

<sup>196</sup> *Ibid.*

<sup>197</sup> *Ibid.*: see *R. v. Baldry* (1852); *R. v. Johnston* (1864) 15 ICLR 60; *R. v. Miller* (1895) 18 Cox C.C. 54; *R. v. Booth and Jones*, *supra* note 119.

<sup>198</sup> *Bryan*, *ibid.*; *R. v. Swatkins* (1834) 4 Car. & P 548; *Berriman*, *Supra* note 98; *R. v. Mick* (1836) 3 F & F 322; and the minority decisions in *R. v. Johnston* (1864) 15 ICLR 60; *R. v. Bodkin* (1863) 9 Cox C.C. 511; *R. v. Gavin* (1885) 15 Cox C.C. 656; *R. v. Male and Cooper* (1893) 17 Cox C.C. 689; *R. v. Histed* (1898) 19 Cox C.C. 16.

<sup>199</sup> Packer, "The Limits of the Criminal Sanction", *supra* note 140 at 187.

<sup>200</sup> *Ibid.* at 188.

<sup>201</sup> *Ibid.* at 176-177.

<sup>202</sup> *Ibid.* at 188.

<sup>203</sup> *Ibid.*

of counsel's advice to the accused, which is to "say nothing,"<sup>204</sup> would only frustrate the efforts of the police to hear the "truth" from the most useful source, which is the accused himself.<sup>205</sup>

Although the police should not be allowed to hold a suspect indefinitely,<sup>206</sup> considerable latitude should be given to the police to continue their interrogation, until they can overcome the resistance of the accused person.<sup>207</sup> The amount of time that an accused can be held at the station, before he is taken to court should be reasonable.<sup>208</sup> The determination of the reasonableness of this time period cannot be subject to "hard and fast rules."<sup>209</sup> Rather it should vary from case to case depending on the character of the accused, the seriousness of the charges and the complexity of the case.<sup>210</sup>

The time spent by the accused in police custody is considered to be a part of investigative detention<sup>211</sup> and therefore the accused is not entitled to any of the procedural protections that may be available to him during the judicial phase of the proceedings against him.<sup>212</sup> Should the accused wish to challenge the legality of his arrest, his lawyer can always bring a *habeas corpus* motion before a court.<sup>213</sup> However, for the time that the accused is in police custody, he belongs to the police and he is at their disposal.<sup>214</sup>

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<sup>204</sup> *Ibid.*

<sup>205</sup> *Ibid.*

<sup>206</sup> *Ibid.*

<sup>207</sup> *Ibid.*

<sup>208</sup> *Ibid.*

<sup>209</sup> *Ibid.*

<sup>210</sup> *Ibid.*

<sup>211</sup> *Ibid.* at 202.

<sup>212</sup> *Ibid.*

<sup>213</sup> *Ibid.*

<sup>214</sup> *Ibid.*

According to crime-control model counsel has no business in interfering with the investigative stage of the process, and his/her proper place is in the courtroom.<sup>215</sup> This is important, because the unwelcomed intrusion of defence counsel, invariably by telling his/her client to keep quiet will effectively foreclose the prospects of bringing the case to a speedy resolution and that would obviously defeat the goals of the crime-control model.<sup>216</sup> The end result being that the guilty party may ultimately “get away” with his crime and that would compromise the safety of society.<sup>217</sup>

The rules governing interrogations should be sufficiently flexible, so that they do not impair the ability of the police to discover the “truth”.<sup>218</sup> Any violations of the rules should either be perceived as “good faith”<sup>219</sup> on the part of the officers or they should be dealt with internally by imposing administrative sanctions on officers who are guilty of flagrant violations of the rules.<sup>220</sup> For example, if an accused person is held for a very long time at the police station, then the officers responsible for this violation should only be disciplined internally to ensure that such incidents do not happen often. However the accused person who has suffered from the violation of his rights is not entitled to any procedural relief.<sup>221</sup>

The crime-control model does not condone coerced confessions.<sup>222</sup> The fears of unreliability associated with coerced confessions puts this type of evidence at odds with the principle aim of this model, which is the discovery of the “truth”.<sup>223</sup> The possibility of a wrongful conviction compels this model to approach the problem of coerced confessions with

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<sup>215</sup> *Ibid.* at 203

<sup>216</sup> *Ibid.* at 202

<sup>217</sup> *Ibid.* at 202-203

<sup>218</sup> *Ibid.* at 188.

<sup>219</sup> *Ibid.*

<sup>220</sup> *Ibid.* at 188-189.

<sup>221</sup> *Ibid.* at 189.

<sup>222</sup> *Ibid.*

<sup>223</sup> *Ibid.*



some degree of caution.<sup>224</sup> The crime-control model does not advocate the use of formal legal rules to test the reliability of statements. The desirable method for this model is to conduct a factual inquiry at the judicial level, on a case-by-case basis, to determine whether or not the conduct of the officers was so abusive that it effectively forced a false confession from the accused person.<sup>225</sup> For example, the severe beatings and the indignity that the accused persons experienced in the notorious case of the Birmingham Six, before the coerced confessions were obtained,<sup>226</sup> may just be enough to raise reliability concerns under this model. Hence, the challenge for the accused person in such a case would be to convince the jury that their allegations of torture at the hands of the police are credible.<sup>227</sup> This is due to the fact “...the use of force is not itself determinative of the reliability of a confession and should therefore not be conclusive against the admissibility of a confession.”<sup>228</sup> Rather:

A defendant against whom a confession is introduced into evidence should have to convince the Jury that the circumstances under which it was elicited were so coercive that more probably than not the confession was untrue. In reaching a determination on that issue, the trier of fact should of course be entitled to consider the other evidence in the case, and if it points towards guilt and tends to corroborate the confession, should be entitled to take that into account in determining whether, more likely than not, the confession was untrue.<sup>229</sup>

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<sup>224</sup> *Ibid.*

<sup>225</sup> *Ibid.*

<sup>226</sup> In 1975 the Birmingham Six were convicted of murder arising from the 1974 pub bombings that killed 21 people. Six individuals were arrested and were convicted on the basis of confessions and circumstantial evidence linking them to other IRA members. The six men – Patrick Hill, Gerry Hunter, Richard McIlkenny, Billy Power, Johnny Walker, and Hughie Callaghan claimed that they were beaten by the police to falsely confess to their involvement in the bombing. There was evidence that the six men were assaulted at the jail, however given the uncertainty about the timing of the assaults, the trial judge determined that their confessions were voluntary and hence they were admitted into evidence. The jury convicted all six of them of 21 counts of murder. The six men were eventually exonerated when the Home Secretary referred their case for the second time to the Court of Appeal. The Court of Appeal then decided that the convictions were unsafe and they were all released in 1991. (Kent Roach and Gary Trotter, “*Miscarriages of Justice in the War Against Terrorism*”, (Toronto: University of Toronto, 2005) at p. 9-10).

<sup>227</sup> Packer, *The Limits of the Criminal Sanction*, *supra* note 140 at 189.

<sup>228</sup> *Ibid.*

<sup>229</sup> *Ibid.*

Hence, it follows that for the proponents of the crime-control model, extended periods of detention without access to counsel, coupled with limited physical abuse of the accused in the hands of the police, may still not be a good enough reason to exclude a statement.

### **Confessions Rules under the Due-Process Model**

The proper standard of arrest under the due-process model is reasonable and probable grounds.<sup>230</sup> This model has no tolerance for arrests based on mere suspicion, or on flimsy grounds. The police should already have a viable case against an accused person, before they proceed to place him under arrest.<sup>231</sup> Therefore, under such circumstances, the police do not need to rely on the confession of an accused person in order to develop a case against him.<sup>232</sup>

Upon arrest, the accused person should be taken without unreasonable delay before a court of competent jurisdiction for a show-cause hearing.<sup>233</sup> At his first court appearance and the subsequent appearances the accused should also be allowed to challenge the legality of his arrest<sup>234</sup>.

At this stage of the proceedings, as in all stages of the proceedings the accused is entitled to the presumption of innocence<sup>235</sup> and therefore he should be granted bail while he awaits the disposition of his charges.<sup>236</sup> On this view, the only purpose of a bail hearing is to negotiate the terms and the conditions of release.<sup>237</sup>

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<sup>230</sup> *Ibid.* at 190.

<sup>231</sup> *Ibid.*

<sup>232</sup> *Ibid.*

<sup>233</sup> *Ibid.*

<sup>234</sup> *Ibid.*

<sup>235</sup> *Ibid.* at 161.

<sup>236</sup> *Ibid.* at 215.

<sup>237</sup> *Ibid.* at 216.

The accused is also entitled to the effective assistance of counsel from the moment of his arrest, right through to the end of the proceedings against him.<sup>238</sup> The assistance of counsel at the moment of arrest however is absolutely crucial. This is based on the fact that at this point in time the gross disparities in resources between the accused and the state are at their greatest.<sup>239</sup> The time of the arrest is an important stage in the proceedings because the accused has not had the chance to rally his forces and he is isolated from everyone, and hence the state has full control over him. Under such circumstances an accused person should not be interrogated, before a proper warning has been administered to him.<sup>240</sup>

Despite such a warning if the accused nevertheless makes an inculpatory statement to the police, the admissibility of such a statement can still be challenged under the following criteria:

1. Should the police interrogate the accused do not warn or if the warning was not understood by the accused;<sup>241</sup>
2. If he was questioned right after the warning and before he had a chance to decide whether he wishes to contact counsel or explicitly waive his right to counsel;<sup>242</sup>
3. If the statement was extracted from the accused, after the failure of the police to bring the accused to court as soon as practicable;<sup>243</sup>
4. If the statement was obtained as a result of threats.<sup>244</sup>

Should the accused be able to show any of these violations the statement should not be admitted against him.<sup>245</sup> This is necessary in order to discourage the police from extracting statements that violate the rights of an accused person.<sup>246</sup>

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<sup>238</sup> *Ibid.* at 203.

<sup>239</sup> *Ibid.*

<sup>240</sup> *Ibid.*

<sup>241</sup> *Ibid.* at 191.

<sup>242</sup> *Ibid.*

<sup>243</sup> *Ibid.*

<sup>244</sup> *Ibid.*

<sup>245</sup> *Ibid.*

The policy grounds for excluding statements in the due process model is not restricted to the fear of unreliability, but also this model takes the view that even truthful statements should be excluded, if it can be shown that the admission of such statement would be fundamentally unfair to an accused person.<sup>247</sup> According to the principles that govern this model, taking advantage of a suspect's lack of sophistication, his ignorance or even his timid character is unfair and therefore the admission of such statements into evidence should be banned on grounds of fairness.<sup>248</sup>

This model also takes the position that, unlike the crime-control model, the hearing to determine admissibility should be held in the absence of the jury.<sup>249</sup> And should the statement be ruled inadmissible, the jury should never be made aware of the content of the excluded statement.<sup>250</sup>

Having conducted a brief review of Packer's models, we can now draw on these models in explaining Canadian developments in the area of the voluntariness doctrine, in the 20<sup>th</sup> and 21<sup>st</sup> centuries. These models help by providing us with an theoretical framework to evaluate the changing orientation of the Canadian judiciary with regards to the admissibility of statements over successive generations.

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<sup>246</sup> *Ibid.*

H. L. Packer describes proper Police warning under due-process model in the following fashion: "As soon as a suspect is arrested, he should be told by the Police that he is under no obligation to answer questions, that he will suffer no detriment by refusing to answer questions that he may answer questions in his own interest to clear himself of suspicion but that anything he says may be used in evidence, and, above all, that he is entitled to see a lawyer if he wants to do so." *Packer, The Limits of the Criminal Sanction*, *supra* note 140 at 192.

<sup>247</sup> *Ibid.* at 192.

<sup>248</sup> *Ibid.*

<sup>249</sup> *Ibid.*

<sup>250</sup> *Ibid.*

## **The Development of Voluntariness in Canada:**

### **The Narrow Approach to Voluntariness:**

Modern day voluntariness in Canada has become more refined than the law as it was stated in *Ibrahim*. Recall in *Ibrahim* the three components of the inquiry. No statement by an accused is admissible in evidence against him unless the prosecution can show it not to have been obtained by a threat or a promise held out by a person in authority.<sup>251</sup> These principles were adopted by the Supreme Court of Canada and applied in the 1922 case of *R. v. Prosko*,<sup>252</sup> wherein the accused had been taken into custody in the United States and was told he was going to be deported back to Canada. Upon hearing this he said “I am as good as dead if you send me over there.”<sup>253</sup> Prosko was wanted in Canada on the capital offence of murder. When the authorities asked Prosko why he would be “as good as dead”<sup>254</sup> he made an incriminating statement implicating himself in the murder.

The significance of *R. v. Prosko* is that it introduced the narrow definition of voluntariness into Canadian law. Prosko was operating under the apprehension of a threat – namely that his deportation might result in his execution if he were convicted of murder. However the court did not entertain this objective circumstance, and limited its analysis, as in *Ibrahim*, to the actions of the persons in authority and whether those actions created any inducements. The Court found that there was not “the slightest evidence that Prosko’s statements or confessions were induced or obtained from him either by fear of prejudice or hope

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<sup>251</sup> *Supra* note 56 at 609.

<sup>252</sup> *Supra* note 139.; *Supra* note 17 at 281.

<sup>253</sup> *Prosko, Ibid.* at 4 (Q.L.).

<sup>254</sup> *Ibid.*

of advantage exercised or held out,”<sup>255</sup> by either of the officers who received his confession, and that the statements were voluntary.<sup>256</sup>

The Supreme Court’s adoption of the narrow definition of voluntariness shows its embrace of a crime control agenda where the totality of the circumstances and subjective factors are dismissed in favour of looking to whether a state agent provided any direct promises or threats.

In *R. v. Boudreau*<sup>257</sup> the Supreme Court restated its commitment to the narrow interpretation of the rule<sup>258</sup> and to the crime control agenda.<sup>259</sup> Although the Court’s ruling touched on subjective factors<sup>260</sup> by suggesting that the aura of authority created by the presence of state agents may cause apprehension in the minds of the accused, this concern was not meaningfully elaborated upon. Rather, the Supreme Court chose to make the presence of some overt act calculated to induce fear or hope the linchpin for exclusion.

The Supreme Court, by stating the basic principles of the admissibility of statements in their narrow form in *Boudreau*,<sup>261</sup> paved the way for a “mechanistic application of the rule of absence of hope and fear.”<sup>262</sup> The narrow definition of the rule places the focus of the inquiry on the state agents<sup>263</sup>, rather than on accused persons. The application of the narrow definition

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<sup>255</sup> *Ibid.*

<sup>256</sup> *Ibid.*

<sup>257</sup> *R. v. Boudreau*, [1949] S.C.R. 262.

<sup>258</sup> *Supra* note 136 at 102.

<sup>259</sup> *Ibid.*

<sup>260</sup> “No doubt arrest and the presence of officers tend to arouse apprehension which a warning may or may not suffice to remove, and the rule is directed against the danger of improperly instigated or induced or coerced admissions” *Supra* note 257 at 6 (Q.L.).

<sup>261</sup> *Supra* note 135 at 1-4.

<sup>262</sup> *Supra* note 136 at 123.

<sup>263</sup> *Ibid.* at 126.

presumes the voluntariness of a statement<sup>264</sup>; unless it is shown that the state agents through some overt acts have raised the hopes of an accused or they have caused him fear. The narrow definition results in courts limiting their focus in reviewing the actions of state agents.<sup>265</sup>

In *R. v. Fitton*<sup>266</sup>, the Supreme Court issued a strong crime control ruling by refraining to address standards of police conduct as part of the voluntariness inquiry. The judges refused to consider the impact that the oppressive circumstances created by the police would have had on the mind of the accused and his propensity to make an incriminating statement as being a ground for exclusion, and therefore reiterated the narrow definition of voluntariness. Rather it was to be left to the discretion of the trial judge. Fataux J. writes:

Assuming that it could be said that the conduct of the police in the circumstances of this case was not in accordance with the [English] Judges' Rules, it was, particularly . . . within the discretion of the trial Judge, if otherwise satisfied that the test of voluntariness . . . had been met, to admit these statements in evidence . . . And, if on the view of the trial Judge formed on the voir dire, the occasion arose for him to exercise this discretionary power, I find it impossible to say that he failed to do so judicially in admitting them in evidence.<sup>267</sup>

The fact that the accused may have a subjective belief about the coercive nature of his ordeal, was not a sufficient ground to exclude a statement; rather the subjective factor had to be “...attributed to some conduct on the part of the”<sup>268</sup> state agents.<sup>269</sup> It appears that the conduct of the officers to keep the accused detained at the police station all day, without any formal charges,

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<sup>264</sup> *Ibid.*

<sup>265</sup> *Ibid.* at 127.

<sup>266</sup> *R. v. Fitton* [1956] S.C.R. 958 (Q.L.). In *Fitton*, the accused was picked up, without being formally charged, for the murder of a thirteen year old girl. Detained at the station, the accused was asked what his movements had been on the previous day, and he made an exculpatory statement. He was kept at the police station all day, and then in the evening, at 5 p.m., the officers returned and told the accused that they had discovered facts that showed his earlier statement was false. There was some more conversation and the accused then made a highly damaging remark. After this remark he was formally arrested for murder and cautioned. He then made a statement, in the form of questions and answers, which was taken down in writing and signed by him. At the trial both the oral and the written statements were admitted in evidence, without objection from the defence, but on appeal it was contended that they should not have been admitted.

<sup>267</sup> *Ibid.* at 21.

<sup>268</sup> E.J. Ratushny, *Self-Incrimination in the Canadian Criminal Process* (Toronto: Carswell, 1979) at 104.

<sup>269</sup> *Ibid.*

was not sufficiently egregious, according to the Supreme Court of Canada. It may be argued that the Supreme Court is guilty of ignoring the impact on the mind of the accused, of the officer's decision to detain the accused all day, and how such a lengthy detention may have influenced the accused to make an inculpatory statement. The Crown is not required to go further and show affirmatively that the statement was not otherwise influenced by the course of conduct adopted by the police. In other words, there needs to be a causal link<sup>270</sup> between the actions of the police and the subjective state of involuntariness.<sup>271</sup>

### **The Burden of the Prosecution**

Three due process rulings, *R. v. Sankey*,<sup>272</sup> *R. v. Thiffault*<sup>273</sup> and *R. v. Dick*<sup>274</sup> were made between *R. v. Proske* and *R. v. Boudreau*.

*Sankey* stands for the proposition "...that while, on the one hand, questioning of the accused by the police ... will not *per se* render his statement inadmissible, on the other hand, the burden of establishing to the satisfaction of the Court that anything in the nature of a confession

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<sup>270</sup> E.J. Ratushny, "Unraveling Confessions" (1971) 13 Crim. Law Q. 453 at 458.

<sup>271</sup> The Court was critical of the Ontario Court of Appeal's position that the accused's subjective mind should be considered, independent of police action (*Ibid*). The Court held that the majority of the Court of Appeal has treated the expression 'freely and voluntarily', used in *Boudreau v. The King* as if it (*Ibid*.) "...connoted only a spontaneous statement, one unrelated to anything as cause or occasion in the conduct of the police officers; but with the greatest of respect that is an erroneous interpretation of what was there said. The language quoted must be read primarily in the light of matters that were being considered. As the opening words show, there was no intention of departing from the rule as laid down in the authorities mentioned; the phrase 'free in volition from the compulsions or inducements of authority' means free from the compulsion of apprehension of prejudice and the inducement of hope for advantage, if an admission is or is not made. That fear or hope could be instigated, induced or coerced, all these terms referring to the element in the mind of the confessor which actuated or drew out the admission. It might be called the induced motive of the statement i.e. to avoid prejudice or reap benefit." *Supra* note 266 at 5; Also see *Ibid*.

<sup>272</sup> *Sankey v. The King*, [1927] S.C.R. 436, [1927] 48 Can. C.C. 97 (Q.L.).

<sup>273</sup> *Thiffault v. The King*, [1933] S.C.R. 509, (1930) 60 Can. C.C. 97.

<sup>274</sup> *R. v. Dick* (1947), 87 C.C.C. 101 (Ont. C.A.).



or statement procured from the accused while under arrest was voluntary always rests with the Crown.”<sup>275</sup>

The significance of the case, however, is that it provided some additional clarity about what would be required for the Crown to discharge this burden by indicating that it cannot be done “merely by proof that the giving of the statement was preceded by the customary warning and an expression of the opinion oath by the police officer, who obtained it, that it was made freely and voluntarily.”<sup>276</sup> The Court, however, does not provide any specifics, in this case, of what will be required of the Crown to establish voluntariness, given that the officer’s sworn testimony that he administered the caution and that the statement was free and voluntary is insufficient.

*Thiffault v. The King*, a murder case, decided in 1933, came to the Supreme Court of Canada on appeal from Quebec, where the question as to the admissibility of a statement alleged to have been made by the accused to Quebec Provincial Police officers was considered.<sup>277</sup> The Court however took great umbrage to how the written statement was procured in this case, noting that it had been “plainly calculated to incriminate” Thiffault.<sup>278</sup> The Court took issue with the fact that there was no *verbatim* record of what transpired during the interrogation (notwithstanding that the document produced by the clerk was read back to the accused, and he signed it), because “it is not a correct statement of what the accused said and intended to say.”<sup>279</sup> The signed statement disregarded any explanation that Thiffault may have provided to his

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<sup>275</sup> *Supra* note 272 at 5.

<sup>276</sup> *Ibid.*

<sup>277</sup> *Supra* note 273 at 97. Mr. Thiffault was indicted for setting his house on fire and killing his wife and son. They were sleeping upstairs at the time of the fire. After the fire, Thiffault was picked up and detained as a “material witness”. Subsequently he gave a written statement to the police, and that statement contained a false account about the origin of the fire.

<sup>278</sup> *Ibid.* at 98.

<sup>279</sup> *Ibid.* at 101.

interrogators and simply converted his response into an admission in support of the Crown's theory.<sup>280</sup> Thus, the Court found that the signed statement should not have been introduced into evidence in the absence of an explanation from the clerk who prepared it.<sup>281</sup>

The Court went on to insist that the persons administering the interrogation must be made available as witnesses during the *voir dire* on admissibility. "Where such a statement is elicited in the presence of several officers, the statement ought, as a rule, not to be admitted unless (in the absence of some adequate explanation of their absence) those who were present are produced by the Crown as witnesses, at least for cross-examination on behalf of the accused." Thus, the court required by this rule, that the officers present and the clerk who wrote down the statement, be made available to the defence for cross-examination as a necessary pre-condition to admissibility.<sup>282</sup>

A third ruling for due process was *R. v. Dick*.<sup>283</sup> The Court in *Dick* also stated that it is "an abuse of the process of Criminal Law to use the purely formal charge of a trifling offence, upon which there is no real intention to proceed, as a cover for putting the person charged under arrest, and obtaining from that person incriminating statements...it is trifling with the long-established maxim *nemo tenetur seipsum accusare*, and has more than the mere appearance-but, in the intended result, it has at times the effect-of a trial by the police in camera before even the charge has been laid".<sup>284</sup>

The judgment of the Ontario Court of Appeal in *Dick* is a clear indication that the original charge against an accused person should be a real charge, and not merely a pretext for detaining

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<sup>280</sup> *Ibid.*

<sup>281</sup> *Ibid.*

<sup>282</sup> *Ibid.* at 103.

<sup>283</sup> *Supra* note 274.

<sup>284</sup> *Ibid* at 110-11.

a suspect in order to extract a confession for a much more serious offence<sup>285</sup>, or for “an entirely different offence”.<sup>286</sup>

These three rulings imposed additional requirements on the state in the voluntariness inquiry. *Sankey* imposed the burden on the Crown for demonstrating that the statement was voluntarily given; *Thiffault* created the requirement that the interrogating officers and the clerk writing down the statement be made compellable as witnesses for the voluntariness inquiry and highlighted the problems that the Crown would have if it tried to introduce statements into evidence that were not taken *verbatim*; and *Dick* condemned the practice of picking up someone on a minor charge to go on a fishing-expedition for serious, incriminating information.

#### **Reliability as the Ultimate Criterion for Admissibility:**

According to Wigmore “the principle upon which a confession is treated as sometimes inadmissible is that under certain circumstances it becomes untrustworthy as testimony”.<sup>287</sup> The exclusive reliance of Wigmore on untrustworthiness for excluding statements, begs the question as to what is the real issue is determining voluntariness; are the confessions rule really just about establishing the reliability of statements?

The judicial response to that question came in the case of *R. v. Hammond*.<sup>288</sup> This was an English murder case and on the *voir dire*, the accused was cross-examined as to the truth of his inculpatory statement and the accused openly admitted to its truth.<sup>289</sup> The statement, despite the

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<sup>285</sup> In *Dick* the accused, while in custody, had made seven statements to the police over a period of 25 days. The police had deliberately prevented her from seeing her counsel, before she had signed one of her statements. Originally the police had charged the accused with vagrancy. The real intention of the police, however was to use the charge of vagrancy to keep her in jail, in order to extract confessions with regards to the murder of her husband.

<sup>286</sup> *Supra* note 274 at 113.

<sup>287</sup> Stuart Ryan, “Involuntary Confessions” (1960) 2 Crim. L.Q. 389 at 391.

<sup>288</sup> *R. v. Hammond* (1941), 28 Cr. App. R. 84 (C.C.A.).

<sup>289</sup> The cross-examination of *Hammond* proceeded as follows:

trial judge's reservations about the appropriateness of the question<sup>290</sup>, was admitted and the accused was convicted of murder.

The Court of Criminal Appeal, however, did not share the apprehension of the trial judge and it held that the question as to the truth of the statement "...was a perfectly natural question."<sup>291</sup> The Court of Criminal Appeal was of the view that the question was relevant to the collateral issue of credibility.<sup>292</sup> Hence rendering "...nugatory the ancient and honourable maxim *nemo tenetur seipsam accusare*...."<sup>293</sup>

The immediate impact of *Hammond* was to turn the question of voluntariness on its head, and the rules governing the admissibility of confessions were inverted, as reliability became the ultimate criteria. The truth became the overriding factor in determining the admissibility of a statement<sup>294</sup> and not the vicious beatings that *Hammond* allegedly suffered at the hands of the

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Q: Your case is that this statement was not made voluntarily?

A: Yes

Q: What you are now saying is that you were forced into saying what was true by something that was done. Is that right?

A: Yes sir.

Q: So you did kill Mr. Roberts?

A: Yes, sir.

See: *Kaufman*, *supra* note 41 at 46.

<sup>290</sup> *Kaufman*, *ibid.* The trial judge admitted the statement for other evidence that were elicited from the accused, rather than his admission of guilt.

<sup>291</sup> *Supra* note 288 at 86; *Ibid.*; *Supra* note 270 at 281.

<sup>292</sup> *Hammond*, *ibid.*; *Kaufman*, *ibid.* *Ratushny*, *ibid.*

<sup>293</sup> Austin M. Cooper, "Admissibility of Confessions" (1958-59) 1 Crim. L.Q. 46.

<sup>294</sup> The notion that truth is the determining factor did not begin with *Hammond*. In fact, as discussed above, the origins of the doctrine of confirmation by subsequent facts can be traced all way back to *Warickshall* (*Supra*, note 42). A more explicit confirmation of that doctrine was stated in *R. v. St. Lawrence* (1949), 93 C.C.C., where the Supreme Court of Ontario stated at 391:

Where the discovery of the fact confirms the confession – that is, where the confession must be taken to be true by reason of the discovery of the fact – then that part of the confession that is confirmed by the discovery of the fact is admissible, but further than that no part of the confession is admissible.

police.<sup>295</sup> In other words truth dictated admissibility. Hence the use of violence, threats, promises, etc. may no longer lead to the exclusion of statements, due to the fact that the adoption of dishonourable or illegal methods by state agents in obtaining statements would not necessarily affect their admissibility.

### **A Short-Lived Boost to Due-Process Values**

The immediate Canadian response to the reactionary ruling in *Hammond* was the re-affirmation of the governing rules of confession. The British Columbia Court of Appeal in *Weighill*<sup>296</sup> held that the purpose of *voir dire* is "...to discover not whether the confession is true (which is for the jury alone) but whether it is voluntary and hence admissible as evidence".<sup>297</sup> The ruling in *Weighill* clearly rejected *Hammond* and that left some room for optimism that in Canada the courts could be poised to introduce concerns about fairness (not just reliability) into the confessions' rules.

### **The Forces of Crime Control Strike Back**

These hopes were short lived, however, as the issue was raised again in *R. v. LaPlante*.<sup>298</sup> In that case, the Ontario Court of Appeal took the holding in *Hammond*<sup>299</sup> one step further. It concluded that *Hammond* permitted not simply the accused to be questioned as to whether or not the statement was true, but also to be asked whether or not he is guilty of the crime charged. In the Court's view, the answer would be relevant to the accused's credibility. This was starkly at

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<sup>295</sup> *Hammond* had said that he had given a statement to the police as a result of a vicious beating.

<sup>296</sup> *R. v. Weighill* (1945), 83 C.C.C. 387 (B.C.C.A.).

<sup>297</sup> *Ibid.* at para 12.

<sup>298</sup> *R. v. LaPlante* [1958] O.W.N. 80 (C.A.).

<sup>299</sup> "In respect of the second ground, we can add nothing to the reasons given by Mr. Justice Humphreys in *R. v. Hammond*. The evidence given by the accused in cross-examination on the *voir dire* that the statements made by him were true, touches the issue of credibility...and his answers in respect of both matters to the questions put by counsel for the crown were relevant to the issue as to whether or not the statements made by him were voluntary" *Ibid.* at 81 (C.A.).

odds with *Weighill*,<sup>300</sup> which had held that the *voir dire* on the admissibility of a statement is about voluntariness and not an inquiry about the truth of the statement.

The issue at stake here requires some further elaboration. If the Crown asks the accused at the *voir dire* whether or not his incriminating statement is true or asks him whether he is guilty of the crime charged, the accused is immediately put in a no-win situation. No matter what he says, his credibility will be affected. If he admits to being the killer, then he would seem more likely to be a liar, because killing is generally seen as a more serious moral violation than lying, and if someone was willing to kill, they would be willing to lie. If he denies that the statement he made is true, he admits to being a liar, and his credibility is likewise affected. It follows from this that the question cannot provide much insight into the accused's credibility, it can really only harm it.

What the Court is really concerned with here is assessing the reliability of the statement; it is motivated by a desire to get the guilty. If the accused admits that the confession is true, then the judge will be tempted to find a reason to let the statement into evidence; and why not? Although fairness may be technically at issue, the bottom line is that the accused just admitted to committing the crime.

A *voir dire* on the voluntariness of a confession is not meant to be an inquiry into the truth of the confession; it is an inquiry into whether it was voluntarily made. Whatever limited probity on the issue of credibility is substantially outweighed by the potential prejudice of permitting this sort of inquiry into a question that is ultimately peripheral to the question of voluntariness.

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<sup>300</sup> *Supra* note 296.

One year later the same Court, in the case of *R. v. McAloon*<sup>301</sup>, approved the trial judge's charge to the jury, which was inconsistent with its earlier position in *LaPlante*. This is based on the fact that in *McAloon* the trial judge had invited the jury to act upon a true and yet an involuntary statement. The trial judge charged the jury in the following fashion: "Even if you think the statement was not voluntary, yet, if you think it was true, you may act upon it".<sup>302</sup> According to L.K. Graburn the trial judge in *McAloon* was telling the:

...jury in plain, unmistakable and unambiguous language that in the final analysis it is the truth of the statement that matters, and not the question of adherence to the niceties of the law. The Court of Appeal held His Honour's direction to be unimpeachable.<sup>303</sup>

Although the Ontario Court of Appeal in *LaPlante* paid lip service to the priority of voluntariness over truth, in *McAloon* the same Court re-asserted the view that "...it is the truth and not the voluntariness of the statement which is the paramount question of fact for the jury".<sup>304</sup> Hence the trend that had begun with *Hammond* was quite forcefully followed by the Ontario Court of Appeal in *LaPlante* and *McAloon* and also by the Supreme Court of Ontario in *St. Lawrence*.<sup>305</sup>

These rulings have been seen, by some at least, as indirect nods of approval for the use of dishonourable methods by state agents to extract confessions, in any which way possible.<sup>306</sup> The

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<sup>301</sup> *R. v. McAloon*, [1959] 124 C.C.C. 182 (Ont. C.A.).

<sup>302</sup> L. K. Graburn, "Truth as the Criterion of the Admissibility of Confessions" (1963) 5 Crim L.Q. 1960 415 at 423.

<sup>303</sup> *Ibid.*

<sup>304</sup> *Ibid.* at 424. The Court held that once a statement is admitted the question of its voluntary character goes only to its weight.

<sup>305</sup> *R. v. St. Lawrence* [1949] 7 C.R. 464, [1949] O.R. 215 (S.C.O.); *Ibid.* "It is submitted that the *Hammond*, *LaPlante*, *St. Lawrence* and *McAloon* cases indicated a trend toward a discretion on the part of a trial judge to admit the truthful but involuntary statement." - *Supra* note 302 at 424.

<sup>306</sup> "It is submitted that the result of the decision in the *Hammond* case goes far beyond mere permission to Crown counsel to test the credibility of the accused and gives police officers carte blanche to treat an accused as roughly as they wish in order to obtain an incriminating statement from him for evidence in criminal proceedings." - *Supra* note 293 at 47.

use of such methods to obtain even truthful statements, offends democratic values<sup>307</sup> and hence they should be resisted. Fortunately, judges in other provinces were not keen to follow the lead of the Ontario Court of Appeal in *LaPlante*. In *R. v. Hnedish*<sup>308</sup>, Mr. Justice Hall, of the Saskatchewan Superior Court, explained:

Accordingly while giving the *LaPlante* judgment the respect it commands as a judgment of the Ontario Court of Appeal, I am left with the conviction that because its foundation is on so unsure a footing as the obiter dicta of *Hammond*'s case, I cannot follow it<sup>309</sup> or accept it as good law in Saskatchewan.<sup>310</sup>

### **The Supreme Court Upholds Crime-Control Values**

Ultimately the question came before the Supreme Court of Canada in *R. v. DeClercq*.<sup>311</sup> In *DeClercq* the accused, while testifying on the *voir dire*, was questioned by the presiding judge about the truth of his statement.<sup>312</sup> The accused, in response to questions posed by the presiding

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<sup>307</sup> "To admit even fully corroborated confessions obtained by such methods would, it is submitted with utmost respect, be repugnant to what the writer believes to be still and what he hopes will continue to be our accepted standard and principles of justice". *Supra* note 287 at 399. Ryan was referring to the effects of the rulings in *St. Lawrence*, *LaPlante* and *McAloon*.

<sup>308</sup> *R. v. Hnedish* [1958], 29 C.R. 347 (Sask. S.C.).

<sup>309</sup> In *Hnedish*, *ibid.* Hall J. also suggested that "...it is not permissible for crown counsel to ask questions concerning the truth of the facts recorded in the statement. The issue being tried is not the truth or otherwise of the so-called statement (which is for the jury alone), but whether it is voluntary and so admissible. It would be repugnant to the accepted standards and principles of justice to transmute what was initially an inquiry as to 'admissibility' of a confession into an inquisition of an accused under the guise of credibility". - C.C. Savage, "Admissions in Criminal Cases" (1962-63) 5 Crim. L. Q. 49 at 111.

<sup>310</sup> *Kaufman*, *supra* note 41 at 48.

<sup>311</sup> *R. v. DeClercq*, [1968] S.C.R. 902.

<sup>312</sup> The trial judge himself asked the accused:

Q: Give the witness the exhibit. Is that the statement you signed?

A: Yes, sir.

Q: Is it true?

Defence Counsel: Now, in addition to that, the question of whether the statement is true or is not true is not material here.

The Court: I think it is.

Defence Counsel: It is purely whether the statement is voluntary or not. (Eventually the proper statement was put to the witness).

The Court: I think it is very important whether it is true or not. I note your objection and I think it is a proper question taken at this time.

Defence Counsel: There are all sorts of cases.

The Court: Yes. I have read them all. I am quite familiar with them and I am satisfied with my ruling.

Accused: Yes, Your Honour.

The Court: All right.



judge, confirmed the truth of his statement. The statement was admitted and the accused was convicted. On appeal, a majority at the Ontario Court of Appeal held that they were bound by *LaPlante*. However, Mr. Justice Laskin's dissented, sending the case to the Supreme Court.

The question before the Supreme Court was, again, whether the trial judge had erred in law when he asked DeClercq, who was giving evidence on a *voir dire* into the admissibility of his statement, whether or not the statement was true. The trial judge had insisted on an answer despite an objection from defence counsel.<sup>313</sup> The question that arose was, if the accused says at *voir dire* that the statement he gave was true, does this have any impact upon the determination of whether it was voluntary, and thus admissible?

For the majority, Martland J. wrote:

I am in agreement with the conclusions stated in the *Hammond* case. While it is settled law that an inculpatory statement by an accused is not admissible against him unless it is voluntary, and while the inquiry on a *voir dire* is directed to that issue, and not to the truth of the statement, it does not follow that the truth or falsity of the statement must be irrelevant to such an inquiry. An accused person, who alleged that he had been forced to admit responsibility for a crime committed by another, could properly testify that the statement obtained from him was false. Similarly, where the judge conducting the *voir dire* was in some doubt on the evidence as to whether the accused had willingly made a statement, or whether, as he contended, he had done so because of pressure exerted by a person in authority, the admitted truth or the alleged falsity of the statement could be a relevant factor in deciding whether or not he would accept the evidence of the accused regarding such pressure.<sup>314</sup>

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Accused: ...except for a few details, I would say the statement is correct.

Reproduced from Hon. Fred Kaufman, *supra* note 41 at 48 & 49.

<sup>313</sup> *Supra* note 311.

<sup>314</sup> *Ibid.* at 912.

Thus, according to the majority in *DeClercq*, such an inquiry by the judge would be permissible so long as that inquiry was related “solely to the weight to be given to the evidence on the issue as to whether or not it was voluntary.”<sup>315</sup>

*DeClercq* provided another opportunity for Mr. Justice Hall who had become a judge of the Supreme Court, since giving his ruling in *Hnedish*, to re-visit the question and give a more refined set of reasons for his opposition to the issue. Hall J. took the position that the question is wrong in law, because it offends the rule against self-incrimination. Moreover Hall J. held that the question removes an important safeguard against improper pressures by state agents against an accused.<sup>316</sup>

Hall J. was joined in dissent by Spence J. and Pigeon J. For Spence J. the question was irrelevant and had no probative value in determining the issue of voluntariness.<sup>317</sup> And Pigeon J. was of the view that permitting the question would lead to the erosion of confession rules, and this might weaken a necessary safeguard against potential police abuses.<sup>318</sup>

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<sup>315</sup> *Ibid.*

<sup>316</sup> Hall J. explained:

The problem is whether the truth of the statement is relevant to this inquiry. It is obvious that it is not directly relevant because fundamentally it is relevant only to the main issue, namely the guilt or the innocence of the accused. However, it is contended that it is indirectly relevant as bearing on the credibility of the accused testifying on the voir dire. But is it not rather a petition principal, trying to find out from the accused whether he is guilty in order to decide whether to admit his confession as evidence of his guilt?

Whenever the statement or confession amounts to an admission by the accused that he has committed the offence of which he is charged, the truth of the incriminating statement is but theoretically distinguishable from his guilt. If the statements is totally incriminating, asking the accused testifying on the voir dire: “Is the statement true?” is tantamount to asking him: “Are you guilty of the offence?” But that is precisely what an accused may not be asked unless he chooses to testify at the trial”. - *Supra* note 311 at 18-19 (Q.L.).

<sup>317</sup> *Kaufman, supra* note 41 at 52.

<sup>318</sup> *Ibid.* at 54.

The majority of the Supreme Court, however, through its process of reasoning, concluded that the question was somehow relevant to the credibility of the accused. The position of the Supreme Court is partly based on the assumption that a trial judge is presumably able to disabuse his/her mind from the evidence that he/she has heard at the *voir dire*. This means that the question becomes permissible because the trial judge is presumed to have the capacity to disabuse him/herself of the potential influence of this information in discharging his/her other functions. This seems like an especially optimistic presumption in cases where a trial judge presides without a jury and is charged with responsibility for not only making the required legal rulings but also required to make the key factual findings about guilt or innocence.<sup>319</sup>

The interesting aspect of the ruling in *DeClercq* was that all the nine judges unanimously agreed that the question to be decided on a *voir dire* is voluntariness and not the truth of the statement.<sup>320</sup> However the majority seems to have allowed the question on the truth of the statement, in an indirect attempt to “purify”<sup>321</sup> or establish the reliability of an accused’s statement. It is quite obvious that such an approach stands in sharp contrast with the legitimate purpose of a *voir dire*.<sup>322</sup>

Transformation of the *voir dire* into “an inquisition of an accused, under the guise of credibility”<sup>323</sup> leaves much to be desired. The conventional wisdom seems to suggest that, the admission of an accused to the truth of his inculpatory statement helps to boost his credibility. Therefore, his evidence on the involuntary features of his statement should be more believable. However, despite the remarkable show of honesty by the accused persons in *Hammond*,

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<sup>319</sup> *Supra* note 287 at 396.

<sup>320</sup> *Kaufman, supra* note 41 at 54.

<sup>321</sup> *Supra* note 309 at 57.

<sup>322</sup> *Ibid.*

<sup>323</sup> *Ibid.* at 111; *Supra* note 308 at para 10.

*LaPlante*, *DeClercq*, etc. the courts still disbelieved their respective claims that their statements were involuntarily given and each confession was ultimately ruled admissible.

It would be safe to suggest that *DeClercq* is a massive encroachment upon the already narrow scope of voluntariness rules. When one adds *DeClercq* to the restrictive approach of *Ibrahim*, *Boudreau*, *Fitton*, etc. one is left with considerable doubts about the protective abilities of the confessions rule. It is difficult not to see the *DeClercq* question as little more than a direct attack on the integrity of the confessions rule, and it should therefore be eliminated. The fallacy of the argument that the question is somehow relevant to the issue of credibility has already been exposed by the Privy Council in *R. v. Wong Kam-ming*.<sup>324</sup>

I contend that the *DeClercq* question simply amounts to asking the accused if he is guilty.<sup>325</sup> Pushing such a question to the pre-trial stage where admissibility is being decided does little more than "...put the cart before the horse".<sup>326</sup>

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<sup>324</sup> Ratushny points out that Supreme Court too readily adopted *Hammond* for its ruling in *DeClercq*, and yet, interestingly the Privy Council in *R. v. Wong Kam - ming* [1979] 2 W.L.R. 81, completely overruled *Hammond* and as a result *Hammond* is no longer a good Law in England. Hence our Supreme Court seems to be behind the times. (*Kaufman*, *Supra* note 41 at 56). It should also be stated that the factual background in *DeClercq* is even more disturbing than *Hammond*. This is so because *DeClercq* was a judge alone trial, and it was the trial judge himself who asked the question "is it true", rather than the prosecutor.

<sup>325</sup> The issue of admissibility of the question "Is it true" in Australia was dealt differently. In *R. v. Toomey* [1969] Tas. S.R. 99 (S.C.) the Court's position on this question has been described as follows:

...to allow the question would strongly discourage the accused from testifying, thereby depriving the Court of his version of the interrogation, and thus undermining the policy ground of controlling improper police conduct. Furthermore, the knowledge of the confession's truth would tend to predispose the trial judge when addressing his mind to voluntariness.

See: Mark Schruger, "Recent Developments in the Law Relating to Confessions: England, Canada and Australia" (1981) 26 McGill L.J. 435 at 479.

<sup>326</sup> *Ibid.* at 480.

## **The Judicial Discretion to Exclude and the Greater Erosion of the Confessions Rule**

The case of *R. v. Wray*<sup>327</sup> represented another attempt by the Supreme Court to restrict the ambit of the confession rules to the narrow construction of *Ibrahim rule*. The Supreme Court in *Wray* recognized the narrowest possible judicial discretion to exclude evidence, which is not technically contrary to the *Ibrahim rule*. The Supreme Court held that judicial discretion is only designed to ensure that the accused receives a fair trial. However, a trial judge has no business extending his/her discretionary powers beyond the courtroom. In other words, the investigation and the interrogation stages fall outside of judicial discretion.<sup>328</sup> *Wray* thus eliminated the judicial discretion to exclude evidence that has been unfairly obtained, except in limited circumstances.

The effect of the majority's ruling in *Wray* was to make illegally obtained confessions admissible into evidence on the basis of relevance (notwithstanding other considerations relating to reliability), provided that it: is not gravely prejudicial to the accused, its admissibility is not tenuous, and its probative value is not slight.<sup>329</sup> Moreover, in relation to the question of reliability, derivative evidence that has been discovered due to an involuntary confession (including one which has been illegally obtained) may be used to confirm the truth of the portions of that confession that relate to the discovered evidence.

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<sup>327</sup> *R. v. Wray*, [1970] 4 C.C.C. 1 (S.C.C.): The accused was charged with murder, as a result of a shooting which had occurred during the robbery of a gas station. Upon the arrest of the accused, the police used trickery, duress and inducements to compel the accused to make certain incriminating statements and lead them to the place where they could recover the gun. While the police were working on the accused, his lawyer was being kept at bay. At the trial the Crown argued that, even though the statements were involuntary, nevertheless, based on the doctrine of confirmation by subsequent facts, the evidence of him leading the police to where the gun was recovered was admissible. However the trial judge disagreed and used his discretion to exclude this evidence and he entered a directed verdict. The Ontario Court of Appeal affirmed the ruling of the trial judge and the matter was appealed to the Supreme Court.

<sup>328</sup> A.F. Sheppard, "Restricting the Discretion to Exclude Admissible Evidence" (1972) 14 Crim. L.Q. 334 at 336.

<sup>329</sup> *Supra* note 327 at para. 54.

The *Wray* decision was consistent with the Supreme Court's commitment, until that point, of making "truth" seeking the primary value of the Canadian criminal justice system. The cases of *St. Lawrence*, *McAloon*, *DeClercq*, *Wray*, etc. all seem to form a pattern which indicates that the principles of fairness and the desire to control abusive conduct by state agents would take a secondary and subservient role to the preeminent objective of discovering the "truth". These judgments implicitly assume that the rationale of the confessions rule is reliability alone.

### **The Broadening of the *Ibrahim* Rule: Operating Mind and Oppression**

Since the adoption of the *Ibrahim* rule the Supreme Court has faithfully been applying it in determining the admissibility of statements by accused persons. The narrow construction of the *Ibrahim* rule, along with the effective elimination of judicial discretion, created a legal culture that would appear to have left little room for the doctrine of oppression. This was particularly true in light of a ruling such as *R. v. Fitton*,<sup>330</sup> where the accused had been detained all day without charge and had been told, when the police returned to confront him, that they had found evidence that showed his earlier exculpatory statement (made without receiving a caution of any kind) was false. Hence, it was unexpected that there should have been a recognition of psychological oppression in *R. v. Horvath*<sup>331</sup> and *R. v. Ward*<sup>332</sup> following rulings such as that.

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<sup>330</sup> *Supra* note 266.

<sup>331</sup> *R. v. Horvath* (1979), 44 C.C.C. (2d) 385 (S.C.C.): In this case the accused was a seventeen-year-old youth, who was charged with the murder of his mother. Shortly after his arrest he was subjected to a grueling interrogation that lasted for more than three hours. Within a few hours of the first session, he was taken for a polygraph test that lasted for four hours. During the second phase of his interrogation the accused confessed to the murder of his mother. At his trial a psychiatrist testified that the polygraph specialist had by his voice and his methods unwittingly induced a mild state of hypnosis. The trial judge agreed with the expert evidence and excluded the statement. The acquittal of the accused was appealed and eventually the case reached the Supreme Court. A divided Court (split 4:3) upheld the trial judge's ruling.

<sup>332</sup> *R. v. Ward* (1979) 44 C.C.C. (2d) (S.C.C.) 498: *Ward* was appealing from an Alberta Court of Appeal's reversal of his acquittal from a charge of criminal negligence in the operation of a motor vehicle causing death. At trial he was acquitted after the trial judge held his statement inadmissible. The accused in this case was injured in the

The Supreme Court in *Horvath* and *Ward* for the first time recognized the doctrines of operating mind, and oppression as grounds for the exclusion of statements. The Supreme Court's fresh look at the rules governing the voluntariness test seemed to have broken the previous stranglehold that the *Ibrahim* rule had on the admissibility rules. The cases of *Horvath* and *Ward* were significant, because they marked a willingness by the Supreme Court to consider the impact of other factors on the issue of voluntariness<sup>333</sup> beyond *Ibrahim*'s narrow fear/inducement formula.<sup>334</sup> Thus the fear/inducement formula was no longer exclusive<sup>335</sup>; rather oppressive conduct by state agents also became a subject of consideration by the judiciary.<sup>336</sup> The Supreme Court in these two rulings once again confirmed that reliability was not the sole concern of the confessions rule.<sup>337</sup>

The Court in *Ward* took the position that while the voluntariness analysis requires a determination of whether statements were "freely and voluntarily" made, the analysis may go beyond the narrow questions of whether there was the presence of a "hope of advantage" or a "fear of prejudice" flowing from a promise or threat "in consideration of the mental condition of the accused" at the time of the statements.<sup>338</sup> Spence J., indicated that he viewed the trial judge's voluntariness analysis to have been the correct approach. The trial judge had "engaged in a consideration of both the mental and physical condition of the accused, first, to determine whether a person in his condition would be subject to hope of advantage or fear of prejudice in

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accident and was unconscious for a while. He was described by independent witnesses to have been in the "state of shock", when he spoke to the police.

<sup>333</sup> David Tanovich, "The *Charter* Right to Silence and The Uncharted Waters of a New Voluntary Confession Rule" (1992) 9 C.R. (4<sup>th</sup>) 24 at 37.

<sup>334</sup> Beverly M. McLachlin & Andrea. Miller, "Rothman: Police Trickery: Is The Game Worth The Candle" (1982) 16 U.B.C. Law Rev. 115 at 119.

<sup>335</sup> Edmund Thomas, "Lowering the Standard: *R. v. Oickle* and the Confessions Rule in Canada" (2005) 10 Can. Crim. L. Rev. 69 at 78.

<sup>336</sup> *Supra* note 334 at 123.

<sup>337</sup> *Ibid.*

<sup>338</sup> *Supra* note 332 at 506.

making the statements, when perhaps a normal person would not, and, secondly, to determine whether due to the mental and physical condition, the words could really be found to be the utterances of an operating mind.”<sup>339</sup> A reasonable doubt on either of these issues would be sufficient to exclude a statement following a *voir dire*; the fact that the trial judge had a reasonable doubt on both of these issues ensured that he was justified in his refusal to admit the evidence, on the view of the Supreme Court.<sup>340</sup>

The Court bolsters the ruling in *Ward* by referring to it as a consistent application of the principles drawn from *Boudreau v. The King*,<sup>341</sup> wherein Rand J. wrote:

The cases of *Ibrahim v. The King* [1914] A.C. 599, *R. v. Voisin*, [1918] 1 K.B. 531, and *Prosko v. the King*, 66 D.L.R. 340, 37 Can. C.C. 199, 63 S.C.R. 226, lay it down that the fundamental question is whether the statement is voluntary. No doubt arrest and the presence of officers tend to arouse apprehension which a warning may or may not suffice to remove, and the rule is directed against the danger of improperly instigated or induced or coerced admissions. It is the doubt cast on the truth of the statement arising from the circumstances in which it is made that gives rise to the rule. What the statement should be is that of a man free in volition from the compulsions or inducements of authority and what is sought is assurance that that is the case. The underlying and controlling question then remains: Is the statement freely and voluntarily made?<sup>342</sup>

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<sup>339</sup> *Ibid.*

<sup>340</sup> *Ibid.*

<sup>341</sup> *Supra* note 257.

<sup>342</sup> *Supra* note 332 at 505-06. This presents an incredibly expansive view of the scope of the voluntariness analysis, which has undoubtedly been significantly scaled back in more recent rulings. In particular, with respect to the issue of “operating mind”, in *R. v. Whittle* the Supreme Court ruled that to have an operating mind the accused need only have “sufficient cognitive capacity to understand what he or she is saying and what was said,” including, “the ability to understand that the evidence can be used against the accused.” (*R. v. Whittle*, [1994] 2 S.C.R. 914.)

This went against earlier suggestions in *Clarkson* that voluntariness might require the accused to have a more thorough understanding of the consequences of speech. (*R. v. Clarkson* [1986] 1 S.C.R. 393 at 393-395). Moreover, it was ruled that suspects need not be capable of exercising “analytical reasoning,” or making “a good or wise choice or one that is in her interest.” (*R. v. Whittle*, [1994] 2 S.C.R. 914 at 933, 939, 941-42.) The effect of the view articulated in *Whittle* is that courts have held that suspects affected by intoxicating substances, mental illness, intellectual disabilities, or biochemical imbalances may still be capable of making legally “voluntary” statements. (See: *R. v. McKenna*, [1961] S.C.R. 660; *R. v. McPherson*, 2000 MBCA 157 at para. 2; *R. v. Richard* (1980), 56 C.C.C. (2d) 129 (B.C.C.A.); and *R. v. Hartridge*, [1967] 1 C.C.C. 346 (Sask. C.A.); *R. v. Whittle*; *R. v. Nagotcha*, [1980] 1 S.C.R. 714, 109 D.L.R. (3d) 1, 32 N.R. 204, 51 C.C.C. (2d) 353; *R. v. Santinon* (1973), 11 C.C.C. (2d) 121 (B.C.C.A.). *R. v. Otis* (2000), 151 C.C.C. (3d) 416 at para. 41 (Que. C.A.), leave to appeal to S.C.C., [2001] 1 S.C.R. xvii; *R. v. Sabeau* (1979), 35 N.S.R. (2d) 35 (C.A.); *R. v. Arkell* (1980), 54 C.C.C. (2d) 266 (B.C.C.A.); *R. v.*



The Supreme Court in *Horvath* departed from the narrow reading of the *Ibrahim* rule that the meaning of “free and voluntary” in the test only refers to statements that have not been induced by any hope of advantage or fear of prejudice, and holds that a statement “may well be held not to be voluntary, at any rate, if it has been induced by some other motive or for some other reason than hope or fear.”<sup>343</sup>

Beetz J. (with Pratte J. concurring) agreed with the majority in that *Horvath*’s statements were inadmissible, but reached this conclusion “on narrower grounds confined to the matter of hypnosis.”<sup>344</sup> On the point of oppression, Beetz J. indicates that he takes the view (along with Martland J. and the dissenting judges) that *Horvath* was not a case appropriate for considering whether “oppression” within the meaning of the English Judges’ Rules ought to be recognized as a ground for excluding a confession, because the trial judge had made a specific finding that there was no oppression on the facts of *Horvath*; the issue was the hypnosis.<sup>345</sup> Importantly, Beetz J. does not conclude that the circumstances did not constitute “oppression”. Rather, he simply explains that he would not pronounce upon the meaning of that concept on the basis of the facts in *Horvath*.<sup>346</sup>

### **The Effects of *Ward* and *Horvath*: Operating Mind and Oppression**

*Ward* and *Horvath* did not produce a clear definition of the test governing voluntariness.<sup>347</sup> Spence J. and Estey J., in *Horvath*, held that the *Ibrahim* rule is not exhaustive,

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*Hayes*, 2002 NBCA 80 at para. 29 (diabetic condition); *R. v. Bedard*, [2000] O.J. No. 3992 (hypoglycemia); *R. v. Taylor*, 2008 ABCA 253, 433 A.R. 1 (hypoglycemia)).

We return to a more detailed discussion of *Whittle* and *Clarkson* in Chapter 2.

<sup>343</sup> *Supra* note 331 at 405.

<sup>344</sup> *Ibid* at 412.

<sup>345</sup> *Ibid* at 429.

<sup>346</sup> *Ibid*.

<sup>347</sup> *Supra* note 334 at 123.

and the way the confession was extracted in that case, rendered the statement involuntary.

Spence J. used the oppressive conduct of state agents as a ground to question the voluntary nature of the accused's statement.<sup>348</sup> Spence J. described the oppressive conduct of the police in that case this way:

...this boy is hammered in cross-examination by two most impressive police officers and then taken by a skilled and proved interrogation specialist and, with what the psychiatrist described as the most suggestive of questions, taken through a three-phase examination so that the learned trial judge characterized his condition at that time as one of "complete emotional disintegration". It is my strong view that no statement made by that accused under those circumstances can be imagined to be voluntary, and I do not find anything in the authorities which I have analyzed which would show me that the law is otherwise.<sup>349</sup>

Beetz J. and Pratte J. also called for the expansion of the *Ibrahim* rule<sup>350</sup> to capture the unique circumstances of this case, which included a statement made under hypnosis. As well as the latter statements, which were tainted by the earlier circumstances.<sup>351</sup>

The dissenting judgment representing the views of Martland J., Ritchie J. and Pigeon J. stated that the circumstances in *Horvath* did not fall within the boundaries of the *Ibrahim* rule, and therefore, the statements were admissible. The minority did not wish to expand the *Ibrahim* rule, however, the dissenting judgment did refer to "oppression."<sup>352</sup>

The expansion of the *Ibrahim* rule in *Horvath* was further extended in *Ward*. The Supreme Court in *Ward* concluded that the state of the mind of an accused is an important

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<sup>348</sup> Spence J. and Estey J. also held that the word "voluntary" should be given its ordinary English meaning.

<sup>349</sup> *Supra* note 331 at 410.

<sup>350</sup> Beetz J. (and Pratte J. concurring) stated that:

The principle which inspires the rule remains a positive one; it is the principle of voluntariness. The principle always governs, and may justify an extension of the rule to situations where involuntariness has been caused otherwise than by promises, threats, hope or fear, if it is felt other causes are as coercive as promises or threats, hope or fear, and serious enough to bring the principle into play." Extract taken from McLachlin & Miller, *supra* note 334 at 125.

<sup>351</sup> Alan Gold, "Confessions – Meaning of "voluntary"" (1982) 21 Crim. L.Q. 441 at 441.

<sup>352</sup> *Kaufman*, *supra* note 41 at 234.

consideration in establishing voluntariness. Thus *Ward* effectively added the need for an “operating mind”<sup>353</sup> to the *Ibrahim* rule. The Supreme Court held that the confession of the accused was made while he was in a state of shock, and therefore, it was properly excluded. The Supreme Court unanimously held that exclusion is an appropriate remedy when the capacity of an accused to freely make a statement is in doubt.<sup>354</sup>

### **The Re-affirmation of *Ibrahim* Rule in *Rothman*: The triumph of crime-control values**

The cases of *Horvath* and *Ward* may have given proponents of due process a ray of hope that the Supreme Court was on the road to reforming the confessions rule to place greater emphasis on concerns about fairness for criminal suspects and accused persons. However the decision of the majority of the Supreme Court in *R. v. Rothman*<sup>355</sup> marked a clear return by the Supreme Court to its pre-*Horvath* stand of treating reliability as the most important goal of the confessions rule.<sup>356</sup>

In *Rothman*, the accused was charged with possession of narcotics for the purpose of trafficking.<sup>357</sup> Upon his arrest, he declined to make a statement.<sup>358</sup> The following day, an undercover officer, posing as a truck driver, was placed in his cell.<sup>359</sup> The undercover officer successfully engaged the accused in conversation and during the conversation the accused made an incriminating statement.<sup>360</sup> At his trial, the statement was ruled inadmissible<sup>361</sup> and the accused was subsequently acquitted. The majority decision of the Ontario Court of Appeal set

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<sup>353</sup> S. Schiff, *Evidence in the Litigation Process*, Vol. 2 (Barrie: Thomson Canada Ltd., 1993) at 967.

<sup>354</sup> *Supra* note 135 at 8-14.3.

<sup>355</sup> *R. v. Rothman* [1981] 1 S.C.R. 640, 35 N.R. 485, [1981], 59 C.C.C. (2d) 30 (Q.L.). This case will also be reviewed in some detail in Chapter 3.

<sup>356</sup> *Schruger*, *supra* note 325 at 505.

<sup>357</sup> *Supra* note 355 at 2.

<sup>358</sup> *Ibid.*

<sup>359</sup> *Ibid.*

<sup>360</sup> *Ibid.*

<sup>361</sup> *Ibid.*

aside the acquittal and ordered a new trial.<sup>362</sup> The forceful dissent of Dubin J., however, sent the matter to the Supreme Court of Canada.

The majority decision in *Rothman* sent a clear message that the Supreme Court is not prepared to acknowledge a wider policy basis for the confessions rule than the issue of reliability.<sup>363</sup> The majority also rejected a rationale based on the privilege against self-incrimination, as that doctrine was only applicable to in-court testimony.<sup>364</sup> Furthermore the majority made it quite clear that it "...rejects any rationale based on concerns for the controlling of police conduct or for bringing the administration of justice into disrepute".<sup>365</sup> For the Supreme Court the issue in *Rothman* was whether the undercover officer was, in the mind of the accused, a person in authority. The majority concluded that since *Rothman*'s ignorance of the officer's true identity did not affect the voluntary nature of his statement, the confessions rule is not engaged. The majority also stated that "...*Alward*<sup>366</sup>, *Horvath*, *Ward*, and *Nagotcha*<sup>367</sup> did not change the confessions rule."<sup>368</sup>

Martland J., writing for the majority, reasoned that a preliminary question raised by the facts was whether the undercover police officer was a "person in authority". If it were otherwise, the voluntariness rules would not apply and the confession would be admissible under the conventional hearsay exception for statements against interest. In other words, voluntariness was

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<sup>362</sup> *Ibid.*

<sup>363</sup> Rosalind Conway, "No Man's Land: Confessions Not Induced by Fear of Prejudice or Hope of Advantage" (1984) 42 U. Toronto L. Rev. 26 at 38. Note: The author states that "an officer dressed as a fisherman entered his cell" (pg. 27). However, it appears that the author made a factual error. The undercover told the accused that he was a truck driver who was coming from a fishing trip. — See McLachlin and Miller, *supra* note 334 at 120.

<sup>364</sup> Alan Whitten, "The Privilege Against Self-Incrimination" (1986-1987) 29 Crim. L.Q. 66 at 78.

<sup>365</sup> *Schruger*, *supra* note 306 at 504.

<sup>366</sup> *R. v. Alward & Mooney*, [1979], 1 S.C.R. 559.

<sup>367</sup> *R. v. Nagotcha*, [1980] 1 S.C.R. 714

<sup>368</sup> *Schruger*, *supra* note 325 at 504.

only in issue if the undercover police officer was a “person in authority”.<sup>369</sup> Martland J. concluded that in deciding whether or not the person receiving the statement is a “person in authority” a subjective test should govern. Since Rothman did not regard the undercover officer as a person in authority, he was not, and therefore voluntariness was not a precondition to admissibility.<sup>370</sup> Thus, it was an error in law for the trial judge to exclude the statement on this basis.<sup>371</sup>

The Court went on to express disagreement with the dissenting opinion from the Court of Appeal, insofar as it had been argued that the privilege against self-incrimination was relevant on these facts.<sup>372</sup> The Court cited the decision of Dickson J. in *Marcoux and Solomon v. The Queen*,<sup>373</sup> wherein he states: “In short, the privilege extends to the accused *qua* witness and not *qua* accused, it is concerned with testimonial compulsion specifically and not with compulsion generally.”<sup>374</sup> Thus, for the Supreme Court the privilege only applies when a tribunal or authority is seeking to compel an accused to disclose something he does not want to disclose.

It has been suggested that the “...confession rule is the primary battlefield between the opposing forces of police powers on the one hand and the accused’s rights on the other”.<sup>375</sup> If one agrees with this description then they would surely find *Rothman* a disappointing development. This is based on the fact that confessions rule has always been focused on the conduct of state agents. The obvious examples of confessions induced by violence, fear or

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<sup>369</sup> *Supra* note 355 at 35.

<sup>370</sup> *Ibid.* at 36.

<sup>371</sup> *Ibid.* at 37.

<sup>372</sup> *Ibid.*

<sup>373</sup> *Marcoux and Solomon v. The Queen* (1975), 24 C.C.C. (2d) 1 at 4-5, 60 D.L.R. (3d) 119 at 122-3, [1976] 1 S.C.R. 763 at pp. 768-9.

<sup>374</sup> *Supra* note 337 at 37.

<sup>375</sup> *Supra* note 351 at 443.

inducement have led to their exclusion.<sup>376</sup> Entrapment has also been perceived by the judiciary as an undesirable method to extract confessions. The judicial abhorrence of entrapment was echoed by Lord Denman's declaration that "no prisoner ought to be entrapped into making a statement".<sup>377</sup>

In *Rothman*, however, the Court showed no apparent concern with the police entrapment of the accused. The ethical problems associated with condoning confessions induced by trickery are very serious. The use of trickery is generally more successful with weak minded or unsophisticated criminals. The dominant cultural norms in a prison environment may compel an inexperienced criminal to falsely boast or exaggerate his criminal activities in order to gain respect. The use of trickery raises the issue of fairness in the pre-trial environment.<sup>378</sup> Furthermore the judicial approval of police trickery may lead to the erosion of public trust and support for the criminal justice system.<sup>379</sup>

Moreover it may be argued that *Rothman* marked the end of the progress made in *Horvath* and *Ward* in the widening of the confession rule to take better account of concerns about fairness.<sup>380</sup> The cases of *Horvath* and *Ward* were seen by many as representing a shift in emphasis,<sup>381</sup> from the narrow concept of fear/inducement to a much wider issue of whether a statement, flowed from an operating mind that was free from psychological oppression. The case of *Rothman* presented the Supreme Court with an opportunity to further expand the confessions rule. Instead, the Supreme Court seized the chance to "...elevate once again to the

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<sup>376</sup> *Supra* note 334 at 116

<sup>377</sup> *R. v. Arnold* (1838), 173 E.R.

<sup>378</sup> *Supra* note 334 at 130.

<sup>379</sup> *Ibid.*

<sup>380</sup> *Supra* note 135 at 8-11.

<sup>381</sup> *Ibid.*

front rank of importance the elements of fear of prejudice or hope of advantage in determining whether a confession is admissible or not.”<sup>382</sup>

### **The Advent of the Charter:**

The *Charter* had an enormous impact on criminal procedure. Formally the *Charter*’s legal rights provisions impose constitutional restraints on the investigative powers of police, including their power to interrogate suspects.<sup>383</sup> In the late 1980s and early 1990s many *Charter* rulings appeared which moved the system further towards the due process end of Packer’s spectrum, and these judgements brought about changes in the investigative and the adjudicative stages of the criminal process.<sup>384</sup> Professor James Stribopoulos explains:

The generous readings of sections 10(a) and 10(b), when combined with the Supreme Court’s decision to read section 7 as including an unenumerated ‘right’ to silence by recognizing a form of that right as a ‘principle of fundamental justice,’ ultimately created a web of prophylactic rules that, at least in theory, serve to protect suspects under state control from being *unfairly* conscripted into furnishing evidence against themselves.<sup>385</sup>

With respect to the *Charter*’s effect on police interrogation practices specifically, prior to 1982 the only way to exclude a statement made by an accused person to police was by relying on the voluntariness rule.<sup>386</sup> Specific guarantees found in the section 7 and 10(b) rights of the *Charter* put positive requirements on the police that relate to the admissibility of statements. In the 1990 case, *R. v. Hebert*, the right to silence enshrined in section 7 was made relevant when the Court read that section as requiring that the “principles of fundamental justice” be respected whenever “liberty” or “security of the person” are in jeopardy, including a right to choose

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<sup>382</sup> *R. v. Owen* (1983), 4 C.C.C. (3d) 538 at 547 (N.S.C.A.).

<sup>383</sup> James Stribopoulos, “Has the *Charter* Been for Crime Control? Reflecting on 25 Years of Constitutional Criminal Procedure in Canada” in Margaret E. Beare ed., *Honouring Social Justice: Honouring Dianne Martin* (Toronto: University of Toronto Press, 2008) at 352.

<sup>384</sup> *Ibid.* at 353.

<sup>385</sup> *Ibid.* at 356.

<sup>386</sup> *Supra* note 56.

whether to speak to the authorities or remain silent.<sup>387</sup> It was found that the right to silence will be violated when a police officer uses trickery to elicit a statement from a suspect in custody after they have asserted their right to silence.<sup>388</sup>

The impact of the *Charter* on the judiciary's changing course is perhaps most pronounced in the differing approaches employed by the Supreme Court of Canada as between *Hebert* and *Rothman*. The facts of the two cases are strikingly similar and yet the outcomes of these cases are completely different. *Hebert* was one of the first major statement cases before the Supreme Court of Canada since the introduction of the *Charter*. Hence, we need to review this case in some detail and contrast it with *Rothman* in order to appreciate the immediate impact of the *Charter* in the area of the admissibility of statements.

**Hebert: The resurrection of due-process values:**

The case of *R. v. Hebert*<sup>389</sup> provided the Supreme Court with another opportunity to revisit the issue of police trickery, and hence to, "...significantly change the state of law regarding cell conversations with undercover police officers."<sup>390</sup> The Supreme Court changed the law by overturning its own previous ruling in *Rothman*,<sup>391</sup> and introduced the concept of informed choice into the Canadian law of voluntariness.

The factual background in *Hebert* was similar to *Rothman*. In *Hebert*, the accused, like *Rothman*, makes an inculpatory statement to an undercover officer who was posing as a cellmate. Like *Rothman*, the accused in *Hebert* had asserted his right to silence. However, unlike

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<sup>387</sup> *Supra* note 383 at 355.

<sup>388</sup> *Hebert*, *supra* note 11.

<sup>389</sup> *Ibid.* This case is also reviewed in Chapter 3.

<sup>390</sup> Michael Brown, "The American Approach to Cell Statements Make Good Sense" (1990) 77 C.R. (3d) 194.

<sup>391</sup> *Ibid.*



*Rothman*, the majority of the Supreme Court in *Hebert* took issue with the deliberate subversion of the accused's desire to maintain his silence.<sup>392</sup>

In *Hebert*, the accused had consulted with counsel and advised the police that he did not want to make a statement to them. An undercover police officer was placed in his cell and tricked him into making a statement.<sup>393</sup> During the course of his conversation with the disguised officer, Hebert made statements which implicated him in the robbery for which he was under arrest at the time.<sup>394</sup>

The Court conducted a *Charter* analysis to determine whether Hebert's rights to counsel and silence had been infringed.<sup>395</sup> The positions of the Crown and the defence were not at odds over whether a right to silence existed in Canadian law, but rather, they disagreed on the ambit of that right. The Crown took the view that the right to silence is captured in its entirety by the confessions rule as it stood at the time that the *Charter* was adopted, which would permit statements obtained by tricks to be admitted, as per *Rothman*.<sup>396</sup> Hebert's defence argued that the right to silence guaranteed by section 7 of the *Charter* is broader than the confessions rule as it stood in 1982, and that the use of tricks to obtain a confession after a suspect in custody has chosen not to give a statement violates the *Charter*.<sup>397</sup> On the issue of the right to counsel, the disagreement was over whether the right to counsel is confined to the 10(b) right or if there is a

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<sup>392</sup> This was achieved through police trickery. And police trickery has been defined as: "... police elicitation of a confession by deliberate distortion of material fact, by failure to disclose to the defendant a material fact, or by playing on a defendant's emotions or scruples. Police trickery should be viewed as a type of fraud, the uses of which as an interrogation tool is inconsistent with our adversarial system of criminal justice because it allows the prosecution an unfair, indeed an unconstitutional, advantage at trial." Daniel W. Sasaki, "Guarding the Guardians: Police Trickery and Confessions" (1988) 40 Stan. L. Rev. 1593 at 1595.

<sup>393</sup> *Hebert*, *supra* note 11 at 2.

<sup>394</sup> *Ibid.* at 3.

<sup>395</sup> *Ibid.* at 5.

<sup>396</sup> *Ibid.* at 6.

<sup>397</sup> *Ibid.*

broader right to counsel given by the guarantee found in section 7 of the *Charter* not to be deprived of liberty except in accordance with the “principles of fundamental justice”.<sup>398</sup>

The Court indicates that it is correct to view the principle of fundamental justice contemplated by section 7 of the *Charter* as being broader in scope than the particular rules which exemplify it.<sup>399</sup> With respect to the right to silence in particular, the Court says that it is rooted in two specific common law concepts: the confessions rule and the privilege against self-incrimination.<sup>400</sup> The common theme that unites the two rules is “the idea that a person in the power of the state in the course of the criminal process has the right to choose whether to speak to the police or remain silent.”<sup>401</sup>

The court cited with approval the decision of Lord Reid in *Commissioners of Customs & Excise v. Harz* where he stated that he viewed the confessions rule as being rooted in both the principle that a statement made in response to a threat or promise may be untrue or untrustworthy; and that *nemo tenetur seipsum prodere*.<sup>402</sup> The court states that both versions of the confessions rule have voluntariness as a basic requirement, but differ in the way they “define voluntariness and choice”.<sup>403</sup>

Thus the majority of Supreme Court used *Hebert* to reinvigorate and expand the rules of confessions in two important ways. First, by adding the requirement of the need for an “informed choice”. And, secondly, by rejecting the rule from *Wray*. The majority held that the

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<sup>398</sup> *Ibid.*

<sup>399</sup> *Ibid.* at 8.

<sup>400</sup> *Ibid.* at 9. The Court specifies that the confessions rule makes a confession which authorities improperly obtain from a detained person inadmissible as evidence; and the privilege against self-incrimination precludes a person from being required to testify against himself at trial.

<sup>401</sup> *Ibid.* at 10.

<sup>402</sup> *Ibid.* *Nemo tenetur seipsum prodere* means “no one is bound to betray himself” Patrick Granfield, O.S.B., “The Right to Silence” (1965) 26 Theological Studies 280-98.

<sup>403</sup> *Hebert, Ibid.*

inquiry into voluntariness should also involve a consideration as to whether or not the decision by the accused to speak to the authorities was as a result of an “informed and meaningful”<sup>404</sup> choice. Therefore, the deliberate subversion of an accused’s decision not to speak to the authorities could lead to a finding that the resulting statement was involuntarily given.<sup>405</sup>

Hence the narrow formulation of *Ibrahim*’s test of fear/inducement, which was marginally expanded with the concepts of oppression<sup>406</sup> and operating mind,<sup>407</sup> was further enlarged in *Hebert* by adding the need for an informed choice.<sup>408</sup>

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<sup>404</sup> *Supra* note 333 at 38.

<sup>405</sup> In *Hebert*, McLachlin J. stated that “...the act of choosing whether to remain silent or to speak to the police necessarily comprehends the mental act of selecting one alternative over another. The absence of violence, threats and promises by the authorities does not necessarily mean that the resulting statement is voluntary, if the necessary mental element of deciding between alternatives is absent. On this view, the fact that the accused may not have realized he had a right to silence (e.g. where he has not been given the standard warning) or has been tricked into making a statement is relevant to the question of whether the statement is voluntary” (at 23-24). It should be noted that McLachlin J. comments are hardly surprising. Prior to her appointment to the Supreme Court, while still a law professor at U.B.C., she wrote an article critical of *Rothman* (*McLachlin and Miller, supra* note 334). In that paper, she stated that:

...courts in more recent times have shown little concern with police trickery as a means of securing confessions even though deceptive tactics may be equally or more coercive than the less subtle devices of violence, threats or promises. (at 116).

<sup>406</sup> *Supra* note 331.

<sup>407</sup> *Supra* note 332.

<sup>408</sup> *Supra* note 17 at 328-29. However, Professor Steven Penney is of the view that “the *Hebert* Court got it backwards” (*Supra* note 17 at 329) when they said that detained suspects “deserve greater protection from undercover elicitation than [non-]detained ones” (*Supra* note 17 at 329). The rule in *Hebert*, he says, “does little to protect suspects from wrongful conviction or abuse” (*Supra* note 17 at 328), and that its primary result is to safeguard “criminals from their own stupidity” (*Penney, supra* note 17 at 328). According to Professor Penney, “It is not reasonable for detained suspects to expect that police will refrain from using undercover agents to attempt to trick them into confessing” (*Supra* note 17 at 328).

But contrary to Professor Penney’s view of the *Hebert* ruling, it should be stated that the rule in *Hebert* does provide a useful protection. It discourages the scenario where a suspect of a serious offence is arrested on minor charges and put into custody so that an undercover operation can be used against them. The undercover officers in this situation would then be able to try to elicit statements about the more serious charges while posing as the cellmate of the detained suspect. This particular investigative technique is still used by police, however the *Hebert* ruling has placed certain important constraints on its use. The undercover officers, as a result of the *Hebert* ruling, can only act as listening posts, and they can no longer actively elicit information from their targets. Moreover, as a result of *Hebert*, the Supreme Court in *Duarte* (*R. v. Duarte* [1990] 1 S.C.R. 30) held that judicial authorization is required for these types of undercover operations and that requirement is now codified under section 184.2 (1) and (3) of the *Criminal Code of Canada*. It is argued that these were positive developments that emerged from the *Hebert* ruling.

## The Reinstatement of Judicial Discretion

As noted, *Hebert* was also significant for its rejection of *Wray*.<sup>409</sup> It reasserted that "...there is once again a discretion to exclude a confession if improperly obtained"<sup>410</sup>. The rejection of *Wray* in *Hebert* represented a fundamental departure from the Supreme Court's earlier position in *Rothman*.<sup>411</sup> The return of judicial discretion to exclude unfairly obtained confessions has significant implications for the rules governing the admissibility of confessions. As a result of this important development the scope of confession rules were expanded from reliability to further incorporate the issues of fairness. As a result of this expansion, the confessions rules came to include the consideration of important factors such as police trickery, concealing the identity of state agents, and active elicitation of accused persons. These factors have become subject to judicial scrutiny.

However the Supreme Court in *Hebert* rejected the notion of an absolute right to silence, preferring instead, to allow state agents to persuade detainees to speak, short of depriving them of the choice to do otherwise. The Supreme Court failed to identify any bright line rule for demarcating the point at which the police would run afoul of the right to silence in their efforts to persuade a person to speak who has expressed a desire not to do so. In other words, when would police persuasion have the effect of depriving the detained suspect of their choice? The lack of a clear demarcating line in *Hebert* is highly problematic. This is based on the fact that the absence of any limits in police persuasion will allow the use of questionable techniques, such as the

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<sup>409</sup> *Supra* note 327.

<sup>410</sup> *Supra* note 333 at 41.

<sup>411</sup> In *Hebert*, McLachlin J. stated that:

The logic upon which *Wray*, *supra*, was based and which led the majority in *Rothman*, *supra*, to conclude that a confession obtained by police trick could not be excluded, finds no place in the *Charter*. To say there is no discretion to exclude a statement on grounds of unfairness to the suspect and the integrity of the judicial system, as did the majority in *Rothman*, runs counter to the fundamental philosophy of the *Charter*. *Hebert*, *supra* note 11 at 31.

“Reid Technique”<sup>412</sup> of interrogation. Furthermore, the unlimited use of police persuasion to overcome the resistance of a detainee may produce false confessions.

### **Oickle: A Due Process Setback**

The troubling case of *R. v. Oickle*<sup>413</sup> represented a crude test for the protective abilities of confessions’ rules. A quick review of some of the facts in this case will highlight the disturbing nature of the Supreme Court of Canada’s approach in that decision. During nine hours of interrogation the accused broke down in tears; he had little sleep; the police made promises with regards to his fiancée and psychiatric counselling; the police administered a polygraph test and the results were misrepresented; police made promises to the accused to deal with his charges as a “package”, while downplaying the moral culpability of the offences, and yet the resulting statements were still admitted.

The Supreme Court in *Oickle* seized the opportunity to revisit the common law rules governing the admissibility of confessions, with particular emphasis on what will constitute improper police tactics and served to create an atmosphere of oppression or constitute an improper inducement. Very few limits were placed on the use of abusive tactics by the police.<sup>414</sup> The totality of the circumstances approach endorsed by the Court does “...very little to deter overreaching”<sup>415</sup> by the police.<sup>416</sup> The voluntariness test is partly dependant “...on the suspect’s capacity for self-determination.”<sup>417</sup> It permits courts to conclude that notwithstanding the unfairness of the tactics used by police, “...the suspect was able to make an autonomous decision

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<sup>412</sup> The Reid Technique is the most pervasive method of police interrogation used in North America. This method will be examined in-depth in Chapter 4 of this dissertation.

<sup>413</sup> *Supra* note 14.

<sup>414</sup> *Supra* note 17 at 302.

<sup>415</sup> *Ibid.* at 303.

<sup>416</sup> *Supra* note 14 at paras 68 and 71.

<sup>417</sup> *Supra* note 17 at 303.

confess.”<sup>418</sup> The ability of a suspect to withstand police pressure might be on account of “...intelligence, education, personality or experience.”<sup>419</sup> However, suspects with less resilience may receive greater protection from the courts.<sup>420</sup> But it is difficult to see, what, if anything, supports such a distinction being upheld.<sup>421</sup> As Penney notes “[s]uspects should not be required to endure abusive, degrading and dehumanizing treatment simply because they have unusual powers of resistance.”<sup>422</sup>

At the time, the Supreme Court was faced with a long history of jurisprudence on the rules of confession. That history reflected what are essentially two contradictory philosophies. The first can be characterized as the conservative strand, reflected in a narrow interpretation of voluntariness, with its focus on reliability over fairness, had found ample support in cases like *Ibrahim, Boudreau, Fitton, Declercq, Wray* and *Rothman*. The second, a more due process oriented thread, was equally preoccupied with concerns about fairness, evidenced by cases like *Horvath, Ward* and *Hebert*. The Supreme Court in *Oickle* chose to use this case as an opportunity to finally resolve this long standing tension and choose as between these long competing philosophies: reliability versus fairness.

The Supreme Court was keenly aware of this contradictory history, and in *Oickle* it discussed the opposing forces that had shaped the existing rules of confession. Iacobucci J. quoted Wigmore with approval, describing voluntariness as a “shorthand for a complex of values”.<sup>423</sup> According to Iacobucci J., these values are expressed in the twin goals of the confessions rules which are reliability and fairness, and that means the protection of the rights of

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<sup>418</sup> *Ibid.*

<sup>419</sup> *Ibid.*

<sup>420</sup> *Ibid.*

<sup>421</sup> *Ibid.*

<sup>422</sup> *Ibid.*

<sup>423</sup> *Supra* note 14 at para. 70.

an accused<sup>424</sup> without unduly limiting society's need to investigate and solve crimes<sup>425</sup>.

Iacobucci J. also stated that an analysis of confession rules must be contextual.<sup>426</sup>

Moreover Iacobucci J compared and contrasted the negative right of an accused against torture or coercion through the use of threats or promises, captured by the *Ibrahim rule*, as opposed to the broader approach taken in *Hebert* to include the requirement of informed choice to speak to the authorities.<sup>427</sup> Iacobucci J. further extended this broader approach by discussing the scenarios in *Horvath*, *Ward*, and *Hobbins*<sup>428</sup>, and he concluded that the "...confession rules embraces more than the narrow *Ibrahim* formulation; instead, it is concerned with voluntariness, broadly understood."<sup>429</sup> Iacobucci J also touched on the dangers of false confessions, induced by improper interrogation techniques<sup>430</sup>. However, he advanced the position that "only under the rarest of circumstances do an interrogator's ploys persuade an innocent suspect that he is in fact guilty and has been caught".<sup>431</sup>

Furthermore Iacobucci J. held that "moral inducements" do not necessarily lead to the exclusion of a statement.<sup>432</sup> The issue of moral inducements was particularly important in the context of this case. This is because the interrogators, on several occasions, told the accused that a confession would be good for his soul and would help him to win the respect of his family and

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<sup>424</sup> *Ibid.* at para. 69.

<sup>425</sup> *Ibid.* at para. 33.

<sup>426</sup> *Ibid.* at para. 47.

<sup>427</sup> *Ibid.* at para. 25.

<sup>428</sup> *R. v. Hobbins*, [1982] 1 S.C.R. 553.

<sup>429</sup> *Supra* note 14 at para. 27.

<sup>430</sup> *Ibid.* at paras 34-46. At para. 37 Iacobucci J refers to four basic kinds of false confessions: 1) stress-compliant; 2) coerced-compliant; 3) non-coerced-persuaded; and 4) coerced-persuaded. And according to Iacobucci J "...most cases of false confessions that come before the courts are of the compliant-coerced type."

<sup>431</sup> *Ibid.* at para. 35, Iacobucci J approvingly quotes from a sociological study done by R.A. Leo & R. J. Ofshe, "The Consequences of False Confession: Deprivations of liberty and Miscarriages of Justice in the Age of Psychological Interrogation" (1998) 88 J. Crim. L. of Criminology 429.

<sup>432</sup> "A final threat or promise relevant to this appeal is the use of moral or spiritual inducements. These inducements will generally not produce an involuntary confession, for the very simple reason that the inducement offered is not in the control of the police officers." *Oickle*, *Ibid.* at para. 56.

friends. Iacobucci J. was of the view that none of these suggestions by the interrogators amounted to threats or promises.<sup>433</sup> He also rejected the argument that the suggestions of the interrogators regarding the possible questioning of the accused's fiancée about the arsons had an adverse impact on the voluntary character of the accused's statement.<sup>434</sup> This was based on the conclusion that the inducements "...regarding the respondent's fiancée lacked both the strength and causal connection necessary to warrant exclusion".<sup>435</sup> As well, Iacobucci J discounted the concerns that the "mild inducements"<sup>436</sup> by interrogators had an adverse effect on voluntariness of the accused's statement. He also went on to suggest that the deliberate exaggerations about the infallibility of the polygraph test was not determinative, as the accused showed some resistance against such suggestions.<sup>437</sup> It should also be pointed out that Iacobucci J concluded that, although during his lengthy interrogation the accused was crying at different times, he did not appear to cry hard enough to support the proposition that there was a "complete emotional disintegration".<sup>438</sup> There were other arguments against the admissibility of the statements, which were rejected by the majority as capable of undermining voluntariness. These arguments included concerns about interrogators misleading the accused during the interrogation;<sup>439</sup> the fact that the accused had very little sleep before participating in the re-enactment; the deliberate

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<sup>433</sup> "To hold that the police officers' frequent suggestions that things would be better if the respondent confessed amounted to an improper threat or inducement would be to engage in empty formalism. The tapes of the transcript clearly reveal that there could be no implied threat in these words. The respondent was never mistreated. Nor was there any implied promise. The police may have suggested possible benefits of confession, but there was never any insinuation of a quid pro quo. I therefore respectfully disagree with the Court of Appeal that these comments undermined the confessions voluntariness." *Oickle, Ibid.* at para. 80.

<sup>434</sup> *Oickle, ibid.* at paras. 82-84.

<sup>435</sup> *Ibid.* at para. 84.

<sup>436</sup> *Ibid.* at para. 87.

<sup>437</sup> *Ibid.* at paras. 94-100.

<sup>438</sup> *Ibid.* at para. 98 & 99.

<sup>439</sup> *Ibid.* at para. 101.



downplaying of the moral culpability of the offences; and the tactic of gaining the trust of the accused, only to abuse that trust, in an effort to extract an incriminating confession.<sup>440</sup>

The majority of the Supreme Court essentially devised a two-part test.<sup>441</sup> The first part said that a statement could be excluded if the reviewing court decided that the tactics employed would shock the community;<sup>442</sup> failing that, the police deception should only be considered as one factor in the overall contextual analysis of voluntariness.<sup>443</sup> In conclusion, the majority held that nothing about the circumstances, even when taken in combination, was sufficiently shocking to the community; nor did the over-all analysis of their impact on the second part of the two-step process warrant a finding of involuntariness in this case.<sup>444</sup>

The dissenting judgment of Justice Arbour, however, showed a greater degree of sensitivity to the shocking nature of the facts in *Oickle*<sup>445</sup>. She pointed to a very important procedural problem in admitting the statement of the accused. That being the inadmissibility of the polygraph test, which would make it virtually impossible for the accused to fully repudiate

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<sup>440</sup> *Ibid.* at para. 74.

<sup>441</sup> *Ibid.* at paras. 66 & 67.

<sup>442</sup> The Court specifies at paras. 66 & 67 that a police officer pretending to be a chaplain or a legal aid lawyer or injecting a diabetic with truth serum disguised as insulin would shock the community. Similarly, there may be situations that do not violate the right to silence or undermine voluntariness may nevertheless be so appalling as to shock the community.

<sup>443</sup> *Supra* note 14 at paras. 66 & 67.

<sup>444</sup> *Supra* note 14.

<sup>445</sup> Madam Justice Arbour, after reviewing the problematic factors in this case, summed up in her dissenting reasons, her conclusion by stating at paragraph 137 that: "...it is my opinion that the foregoing representations constituted threats, promises, and inducements, within the meaning of the confession rule and, when combined with the prevalent ambiguity concerning just what was and was not admissible in court against the respondent, as well as the oppressive atmosphere created by the 'infallible' polygraph test, they are sufficient to raise a reasonable doubt as to voluntariness of the respondent's confessions, first, to the car fire, and, later, to the rest. The combination of the lies and misrepresentations, which are not impermissible, with the inducements, which are, in my view caused the respondent to make involuntary admissions. The few instances in which he appeared to reject the representations made to him by the police officers were little more than desperate bravado and vain attempts to delay what he seemed to view as the inevitable fact that he would have to confess." *Ibid.* at para. 137.

his confession at his trial.<sup>446</sup> This is based on the fact that "...the accused's confession is intertwined with a 'failed' polygraph test."<sup>447</sup> However the prejudicial implications of this problem did not seem to trouble the majority.

The Supreme Court in *Oickle* was at a historical crossroads between two competing philosophical strands of the confession rules. However, the majority chose to assign greater value to reliability as opposed to fairness to an accused person. The shocking judicial tolerance of the uncomfortable facts in *Oickle*, only serves to undermine the valuable gains that were made in *Horvath*, *Ward*, *Hebert*, etc. It is quite clear that the Supreme Court decided to "...set out the proper scope of the confessions rule"<sup>448</sup> along the narrow lines of *Ibrahim rule*.

One way of understanding *Oickle* is to see it as an effort to get away from categorical rules either way. The Court seems to say that not every threat or promise, no matter how slight, will be construed as vitiating free choice. Much would depend on context. For example, telling someone "we'll get you a sandwich when we are done here, okay" is clearly an "inducement", but *Oickle* says that it should not be seen as undermining voluntariness in every instance. It would if the detainee had not eaten for days,<sup>449</sup> for example, but it would not if he had just finished eating a large breakfast before coming down to the station for his interrogation.<sup>450</sup> The determination of whether his confession resulted from a free choice or his will was overborne by

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<sup>446</sup> The response by the majority of Supreme Court was quite troubling. According to the majority's ruling this problem only created a tactical disadvantage to the defence which is irrelevant to the issue of voluntariness!!! The Supreme Court held that such "tactical disadvantage" "...if anything, it simply suggests prejudicial effect. However, given the immense probative value of a voluntary confession, I cannot agree that exclusion is appropriate" *Supra* note 14 at para. 102.

<sup>447</sup> *Ibid.* at para. 140.

<sup>448</sup> *Ibid.* at para. 23.

<sup>449</sup> James Stribopoulos, "*Spencer*: Has the Confessions Rule Changed ... Again?" Case Comment, on *R. v. Spencer*, 2007 SCC 11, online: The Court < <http://www.thecourt.ca/2007/04/19/spencer-has-the-confessions-rule-changedagain/> >

<sup>450</sup> *Ibid.*

oppressive circumstances depends on the nature and context of the totality of the circumstances under consideration.<sup>451</sup>

However, taking the totality of the circumstances into account is a dangerous approach to voluntariness. It means that no single factor can necessarily cause the exclusion of a statement, even a *quid pro quo* inducement. If a person in authority makes a threat or promise to a detained accused then personal and subjective factors may intervene in the analysis to determine that the accused was not swayed by this and did not have his will overborne by the inducement. But for a different person, the very same inducement might precipitate an involuntary confession because the will was overborne. Assessing the personal characteristics of accused persons at a *voir dire* may entail looking to a person's criminal record, or their demeanour. But it is very difficult for a judge to make accurate determinations on what a particular person's reaction to an inducement was with such limited information at his/her disposal.

The Supreme Court's "overriding concern for reliability has the potential to provide considerable derivative protection against abuse."<sup>452</sup> But only if lower courts perceive *Oickle* as forbidding the use of those tactics which may lead to false confessions.<sup>453</sup> However, if courts interpret *Oickle* as stating that only unreliable statements should be excluded, then the *Oickle* decision will fail to serve as a deterrent to police abuse.<sup>454</sup> By indirectly suggesting that the exclusion of statements should only be restricted to those instances where interrogation techniques may lead to false confessions or "shock the community, the Court gave police

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<sup>451</sup> *Supra* note 14 at paras. 58-62.

<sup>452</sup> *Supra* note 17 at 303.

<sup>453</sup> *Ibid.*

<sup>454</sup> *Ibid.* at 304. "By finding that the defendant confessed voluntarily, the Court concluded that police acted properly in questioning him for six hours, offering him psychiatric assistance, threatening to interrogate his fiancée, disingenuously minimizing the seriousness of his conduct, suggesting that 'it would be better' if he confessed, duplicitously cultivating his trust and exaggerating the accuracy of his polygraph results."

permission to use considerable psychological manipulation.”<sup>455</sup> Upon reflecting on the *Oickle* decision, Professor Penney poses a question for us to consider. He says that we must ask ourselves whether “... the need for confessions is so great that we should countenance tactics that subject innocent people to prolonged isolation, badgering, intimidation, manipulation and deception.”<sup>456</sup> It is my position that the answer to Penney’s question is as follows: As members of a democratic society, the abuse and the humiliation that *Oickle* suffered was not worth the price of the admission for his confession, whether he was guilty or not.

It has been suggested that *Oickle* was the first major re-examination of the confession rules since the advent of the *Charter*.<sup>457</sup> Although the Supreme Court’s interpretation of confession rules may not have been problematic, the way in which it proceeded to apply those rules to the facts in *Oickle* was a major victory for the crime control forces.

The Supreme Court’s ruling in *Oickle* grants considerable latitude to state agents in extracting confessions from detainees, and hence, it represents a shift away from due process values. According to the ruling, the competing values of reliability and fairness dictate that only the clearest of *quid pro quos* will result in a confession being excluded. While a confession obtained through fraud and deceit will be admitted, provided the deceit is not too shocking.

### **Spencer and Singh: Further fortifying crime-control values**

Spencer was charged with 18 robberies.<sup>458</sup> The last robbery was committed by four men, one of whom fired a handgun as they made their escape.<sup>459</sup> He was arrested late in the evening

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<sup>455</sup> *Ibid.* at. 303-304.

<sup>456</sup> *Ibid.* at 304.

<sup>457</sup> Lisa Dufraimont, “The Common Law Confessions Rule in the Charter Era: Current Law and Future Directions” (2008) 40 S.C.L.R. (2d) 249 at 249 and 254.

<sup>458</sup> *R. v. Spencer*, 2007 SCC 11, [2007] 1 S.C.R. 500.

<sup>459</sup> *Ibid.* at para 2.

while driving a vehicle associated with three of the robberies.<sup>460</sup> The vehicle was registered to his co-accused, his girlfriend, who was also arrested in relation to one of the robberies.<sup>461</sup> The execution of a search warrant later that evening at their shared residence led to the discovery of the handgun, watches and jewellery from one of the robberies.<sup>462</sup> While Spencer was in custody after his arrest, a police officer was returning him to his cell when Spencer asked about his girlfriend and the officer told him that he intended to recommend that both of them be charged with the possession of the handgun and the jewellery found in their residence. The police officer testified at trial that Spencer “then insisted on making statements”.<sup>463</sup>

On the *voir dire* into the admissibility of these statements conducted at trial, Spencer advanced the argument that his statements should be inadmissible, first, because he was induced to confess by a hope of leniency for his girlfriend; and second that he was induced by a promise that he could visit with her.<sup>464</sup> McKinnon J., the trial judge, following an 8 day *voir dire*, concluded that he was satisfied beyond a reasonable doubt that Spencer’s statements to the police were voluntary.<sup>465</sup>

At the Supreme Court of Canada, Deschamps J. wrote for the majority. She concluded that the issue for the Court was whether the trial judge had applied the correct test, given that the British Columbia Court of Appeal had concluded that he had not.<sup>466</sup> Deschamps J. restated the test from *Oickle*, thereby confirming it as good law.<sup>467</sup> The *Oickle* factors to be considered under

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<sup>460</sup> *Ibid.* at para 3.

<sup>461</sup> *Ibid.* at para 6.

<sup>462</sup> *Ibid.*

<sup>463</sup> *Ibid.* at para 7.

<sup>464</sup> *Ibid.* at para 8.

<sup>465</sup> *Ibid.*

<sup>466</sup> *Ibid.* at para 10.

<sup>467</sup> *Ibid.* In that judgment, Deschamps J. tells us that in *Oickle* Iacobucci J. had emphasized the applicability of a contextual approach: “The application of the rule will by necessity be contextual. Hard and fast rules simply cannot account for the variety of circumstances that vitiate the voluntariness of a confession, and would inevitably result in

a voluntariness analysis include: the making of threats or promises, oppression, the operating mind doctrine and police trickery.<sup>468</sup> Threats or promises, oppression and the operating mind doctrine are to be considered together and “should not be understood as a discrete inquiry completely divorced from the rest of the confessions rule.”<sup>469</sup> On the other hand, the use of police trickery to obtain a confession is to be treated as “a distinct inquiry ... [given that] its more specific objective is maintaining the integrity of the criminal justice system.”<sup>470</sup>

Deschamps J. reemphasized the *Oickle* Court’s consideration of promises – namely, that they “need not be aimed directly at the suspect ... to have a coercive effect,” but that the existence of a *quid pro quo* is the “most important consideration” when an inducement is alleged to have been offered by a person in authority.<sup>471</sup> Crucially, the existence of a *quid pro quo* is not to be taken as an exclusive factor, or one that is determinative of voluntariness.<sup>472</sup>

But then Deschamps turns to the other side of the equation, stating *Oickle* requires sensitivity to the particularities of the individual suspect and an application that is necessarily contextual, and moreover that: “*Oickle* does not state that any *quid pro quo* held out by a person in authority, regardless of its significance, will necessarily render a statement by an accused involuntary.”<sup>473</sup> Inducements become improper only when, “standing alone or in combination with other factors, [they] are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne.”<sup>474</sup> Deschamps J states:

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a rule that would be both over – and under – inclusive. A trial judge should therefore consider all the relevant factors when reviewing a confession.” – *Ibid.* at para 11.

<sup>468</sup> *Ibid.*

<sup>469</sup> *Ibid.* at para 12.

<sup>470</sup> *Ibid.*

<sup>471</sup> *Ibid.*

<sup>472</sup> *Ibid.*

<sup>473</sup> *Ibid.*

<sup>474</sup> *Ibid.*

Therefore, while a *quid pro quo* is an important factor in establishing the existence of a threat or promise, it is the strength of the inducement, having regard to the particular individual and his or her circumstances, that is to be considered in the overall contextual analysis into the voluntariness of the accused's statement.<sup>475</sup>

Deschamps J. explains that the trial Judge, in the view of the majority, did not misapprehended (or misapply) the voluntariness test that had been laid down in *Oickle*.<sup>476</sup>

While the Supreme Court in *Oickle* had stated a *quid pro quo* promise should generally lead to a finding of involuntariness, in *Spencer* it seemed to add another hurdle for the exclusion of statements. The Court in *Spencer* was confronted with a situation where a *quid pro quo* was indeed offered<sup>477</sup> to the accused (that is, a visit with his girlfriend), and therefore, based on the reasoning in *Oickle*, the statement should have been ruled involuntary. However, the Court's solution to this problem was to add another caveat to the *Oickle* test by stating that the contextual analysis of the strength of the *quid pro quo* inducement is the controlling factor.

The contextual analysis in *Spencer* meant that, since the accused was a veteran savvy criminal, the promise to visit his girlfriend was not sufficient to overwhelm his freedom to choose to remain silent. Hence, in another context, for example, one can imagine an interrogator promising a single mother with no prior criminal history an opportunity to see her children only after she gives a statement, then perhaps such a *quid pro quo* promise would be strong enough to overbear the accused's free will.

Although the Supreme Court's contextual approach in *Spencer* may be defended in some broad sense, nevertheless, this ruling is still in keeping with crime-control values, as it gives the

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<sup>475</sup> *Ibid.* at para 15.

<sup>476</sup> *Ibid.* at paras 20, 22 and 23.

<sup>477</sup> *Supra* note 449.

police “... considerable leeway to offer inducements without rendering a statement involuntary.”<sup>478</sup>

Professor James Stribopoulos argues that although the Supreme Court’s ruling in *Spencer* does not overrule any “...existing cases,”<sup>479</sup> however, “...there is a real danger”<sup>480</sup> that it will be interpreted in that way.<sup>481</sup> He argues that “...the case should be read as reflecting no more than the SCC showing deference”<sup>482</sup> to the trial judge on the factual issue of a confession’s admissibility,<sup>483</sup> which is exactly what the Court says it is doing in the judgment.<sup>484</sup> But the risk is that because it was decided that the officer’s promise to let Spencer see his girlfriend did not vitiate his free choice, the bar for whether or not an inducement vitiates choice is being set increasingly high.<sup>485</sup> In *Spencer*, we have a situation where a *quid pro quo* is not sufficient to render a statement involuntary because it is not a strong enough inducement in light of other factors, whereas the Court in *Oickle* stated that “The most important considerations in all cases is to look for a *quid pro quo* offer from interrogators, whether it comes in the form of a threat or a promise”.<sup>486</sup> The Supreme Court noted that the trial judge described Spencer as “aggressive and a ‘mature and savvy participant’, and that he unsuccessfully attempted many times to secure ‘deals’ with the police.”<sup>487</sup> This indicates that the trial judge correctly interpreted the test from *Oickle* by taking the entire context into consideration without recognizing the presence of a *quid pro quo* as determinative in this case.

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<sup>478</sup> Don Stuart, case comment, CarswellBC 2588 at 5.

<sup>479</sup> *Supra* note 449.

<sup>480</sup> *Ibid.*

<sup>481</sup> *Ibid.*

<sup>482</sup> *Ibid.*

<sup>483</sup> *Ibid.*

<sup>484</sup> *Supra* note 332 at para. 23.

<sup>485</sup> *Supra* note 449.

<sup>486</sup> *Supra* note 14 at para. 57.

<sup>487</sup> *Supra* note 449.



Professor Hamish Stewart points to another important aspect of *Spencer*, which is the confusing nature of the Court's ruling. The *Spencer* ruling is confusing because the Court confirmed the trial judge's original finding, notwithstanding the fact that the trial judge used the wrong test for voluntariness.<sup>488</sup> "Since the majority's reasons are not very clear about the proper test, *Spencer* can be read either as endorsing the trial judge's statement of the test or as merely deferring to the factual findings."<sup>489</sup> Stewart also says that on the former reading, "all four traditional branches of the confessions rule now reduce to one question: when the accused made the statement at issue, was his will overborne?"<sup>490</sup> On the latter reading the question of whether the accused's will is overborne may be part of the inquiry, particularly on the operating mind branch of the test, but it is not determinative.<sup>491</sup> The later reading of *Spencer* is more desirable, because "...equating voluntariness with "overborne will""<sup>492</sup> permits a ruling of inadmissibility when a court finds the decision of an accused to speak was motivated by a threat or a promise or the oppressive environment.<sup>493</sup>

Moreover, the *Spencer* ruling creates an interpretive problem insofar as it opens the door for the lower courts to raise the bar as to what qualifies as a *quid pro quo* promise. According to Professor James Stribopoulos, *Spencer* changes nothing in terms of the law, but because the Supreme Court of Canada once again reaffirmed the admission of a statement, the message received might be that only egregious circumstances will warrant exclusion.<sup>494</sup> He explained that, "it is hard not to be pessimistic about how the Supreme Court's judgment in *Spencer* will

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<sup>488</sup> Hamish Stewart, "Confessions Rule and the *Charter*" (2009) 54 McGill L.J. 517 at 529.

<sup>489</sup> *Ibid.*

<sup>490</sup> *Ibid.*

<sup>491</sup> *Ibid.*

<sup>492</sup> *Ibid.*

<sup>493</sup> *Ibid.*

<sup>494</sup> *Supra* note 495.

likely be received in the trial courts.”<sup>495</sup> I agree with professor Stribopoulos that Spencer does not change the laws of confession. However, I wish to go so far as to suggest that the laws of confession cannot be changed. It is my position that no court in this country can take the position that threats and inducements in exchange for confessions is an acceptable practice; nor any court can say that creating an oppressive environment in order to extract a confession from an accused person should be tolerated. The courts, at least for the sake of keeping up the appearance of fairness, have to continue to condemn such practices. However, what the courts can do is to raise the bar so high that statements are only excluded under extremely egregious circumstances. This is precisely what the Supreme Court has done in *Oickle, Spencer* and *Singh*. The Court, without officially changing the law, has raised the threshold for exclusion so high that lower courts can now take extreme liberty in admitting many statements that should normally be excluded.

Professor Lisa Dufraimont notes that under classical formulations of the confessions rule, “confessions elicited by threats and promises were involuntary by definition, and there was language in *Oickle* to suggest that *quid pro quo* offers by interrogators were *per se* improper, warranting the exclusion of any resulting statement.”<sup>496</sup> *Spencer* puts an end to that interpretation of *Oickle*,<sup>497</sup> because *Spencer* “...stands for the proposition that offering a *quid pro quo* does not necessarily render a resulting confession involuntary.”<sup>498</sup>

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<sup>495</sup> *Ibid.*

<sup>496</sup> *Supra* note 457 at 259. And see *supra* note 14 at paras. 57, and 78.

<sup>497</sup> *Dufraimont, ibid.*

<sup>498</sup> *Ibid.* And see *supra* note 14 at paras. 13-14.

### **Singh: No Means Keep Trying**

The accused, Jagrup Singh was charged with second-degree murder for the shooting “...death of an innocent bystander who was killed by a stray bullet while standing just inside the doorway of a pub.”<sup>499</sup> After being arrested, Singh was advised of his 10(b) *Charter* rights, and consulted with counsel, following which there were two interviews with Sergeant Attew, his interrogator.<sup>500</sup> Sergeant Attew’s technique was to listen to Singh state that he did not want to say anything, and then state that it was nevertheless” his duty or his desire to place the evidence”<sup>501</sup> he had before Singh, or else “...to deflect Singh’s assertion”<sup>502</sup> of his right to silence and engage him in “limited conversation.”<sup>503</sup> During the first interview, “Singh did not confess to the crime”<sup>504</sup> but identified himself on surveillance videos.<sup>505</sup>

During the interviews Singh was forthcoming about his family, his background and his religious beliefs and employment, however he was not forthcoming about the incident; he affirmed his presence at the location on the night of the shooting, however he repeatedly denied being involved and asserted his right to silence.<sup>506</sup> He expressed his intention not to talk to police in numerous different ways: “he said he did not want to talk to police;”<sup>507</sup> he told them “he had nothing to say;”<sup>508</sup> he said “he knew nothing about the shooting;”<sup>509</sup> and he indicated that “he wanted to return to his cell.”<sup>510</sup> Before giving an inculpatory statement which placed him at

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<sup>499</sup> *R. v. Singh*, 2007 SCC 48, [2007] 3 S.C.R. 405, at para. 2.

<sup>500</sup> *Ibid.*

<sup>501</sup> *Ibid.*

<sup>502</sup> *Ibid.*

<sup>503</sup> *Ibid.*

<sup>504</sup> *Ibid.*

<sup>505</sup> *Ibid.*

<sup>506</sup> *Ibid.* at para. 13.

<sup>507</sup> *Ibid.*

<sup>508</sup> *Ibid.*

<sup>509</sup> *Ibid.*

<sup>510</sup> *Ibid.*

the scene of the crime, and after being shown potentially incriminating photographs, Mr. Singh had already asserted his right to silence 18 times.<sup>511</sup>

On the *voir dire* the trial judge made a finding that Singh's statements were voluntary.<sup>512</sup> The trial judge also concluded that there had been no breach of Mr. Singh's section 7 *Charter* right to silence, and that he ought not to use his residual discretion to exclude the statements as the probative value of them (once edited) outweighed any prejudicial effect.<sup>513</sup>

The case eventually reached the Supreme Court of Canada and the argument Singh made at that Court was that the courts below misinterpreted *Hebert* as permitting police to "ignore a detainee's expressed wish to remain silent and to use 'legitimate means of persuasion' to break that silence."<sup>514</sup> Moreover, he argued that "the British Columbia Court of Appeal in the case at bar went even further and effectively extinguished the s. 7 right to silence when it questioned the utility of conducting 'a double-barrelled test of admissibility', stating that '[i]n the contest of an investigatory interview with an obvious person in authority' the expansive view of the common law confessions rule adopted in *Oickle* 'may leave little additional room' for a separate s. 7 *Charter* inquiry".<sup>515</sup>

Singh's counsel also argued before the Supreme Court that the protection under section 7 should be expanded to require police officers to inform those detained of their right to silence<sup>516</sup>

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<sup>511</sup> *Ibid.*

<sup>512</sup> *Ibid.* at para. 3.

<sup>513</sup> *Ibid.*

<sup>514</sup> *Ibid.* at para. 5.

<sup>515</sup> *Ibid.*

<sup>516</sup> *Ibid.* at para 6.

“...and absent a signed waiver, to refrain from questioning any detainee who states that he or she does not wish to speak to the police.”<sup>517</sup> The majority decisively rejected this argument.

At the Supreme Court of Canada the majority held, consistent with the B.C. Court of Appeal, that there is indeed no double-barreled test for admissibility, and that “in the context of a police interrogation of a person in detention, where the detainee knows he or she is speaking to a person in authority, the two tests for determining whether the suspect’s right to silence was respected are functionally equivalent.”<sup>518</sup> At common law the State has to prove a statement’s voluntariness beyond a reasonable doubt as a precondition for admissibility, and it offers greater protection than the section 7 test,<sup>519</sup> so “...there is no point in conducting a distinct section 7 inquiry.”<sup>520</sup> If voluntariness is proven beyond a reasonable doubt, there can be no finding that the right to silence guaranteed by s. 7 of the *Charter* was violated in the making of that same statement.<sup>521</sup> The section 7 protection, however applies as a “residual protection,” that, “will be of added value to the accused in other contexts.”<sup>522</sup> The converse is true also; if “...an accused is able to show on a balance of probabilities a breach of his or her right to silence, the Crown will not be in a position to meet the voluntariness test.”<sup>523</sup>

With respect to the scope of the applicable confessions rule, the Court stated that:

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<sup>517</sup> *Ibid.*

<sup>518</sup> *Ibid.* at para. 25. The Court says:

The symmetry between the confession rule and related *Charter* rights in so far as the requisite mental capacity is concerned was previously recognized in *R. v. Whittle*, [1994] 2 S.C.R. 914, where the Court held that the operating mind test at common law fully answers the mental capacity requirement for an effective waiver of the right to silence.

<sup>519</sup> *Ibid.*

<sup>520</sup> *Ibid.*

<sup>521</sup> *Ibid.* at para. 37.

<sup>522</sup> *Ibid.* at para. 25.

<sup>523</sup> *Ibid.* at para. 37.

| ...the common law recognizes an individual's right to *remain* silent. This does not mean, however, that a person has the right *not to be spoken to* by state authorities. The importance of police questioning in the fulfillment of their investigative role cannot be doubted. One can readily appreciate that the police could hardly investigate crime without putting questions to persons from whom it is thought that useful information may be obtained. The person suspected of having committed the crime being investigated is no exception. Indeed, if the suspect in fact committed the crime, he or she is likely the person who has the most information to offer about the incident. Therefore, the common law also recognizes the importance of police interrogation in the investigation of crime.<sup>524</sup>

The Court firmly acknowledges that the notion of voluntariness contemplates the principle that a person is not obliged to give information to the police or answer questions and that a detainee must have a meaningful choice whether or not to speak to state authorities.<sup>525</sup> The test focuses "on the conduct of the police"<sup>526</sup> and the effect of that conduct "...on the suspect's ability to exercise his or her free will,"<sup>527</sup> and is an objective one which takes into account the characteristics of the accused.<sup>528</sup>

The most significant part of the decision was the majority's use of Iacobucci J.'s reasons in *Oickle*, wherein he indicated that "...the *Charter* is not an exhaustive catalogue of rights. Instead it represents a bare minimum below which the law must not fall. A necessary corollary of this statement is that the law, whether by statute or common law can offer protections beyond those guaranteed by the *Charter*. The common law confessions rule is one such doctrine, and it would be a mistake to confuse it with the protections given by the *Charter*."<sup>529</sup> Singh argued that the police officers should be required to inform the detainee of his or her right to silence, and in the absence of a signed waiver, refrain from questioning any detainee who states that he or she does not wish to speak to the police.<sup>530</sup> The majority looked at this proposition and rejected it on

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<sup>524</sup> *Ibid.* at para. 28.

<sup>525</sup> *Ibid.* at para. 35.

<sup>526</sup> *Ibid.* para 36.

<sup>527</sup> *Ibid.*

<sup>528</sup> *Ibid.*

<sup>529</sup> *Ibid.* at para. 38.

<sup>530</sup> *Ibid.* at para. 42.

the ground that it “not only ignores the state interests at stake ... it overshoots the protection afforded to the individual’s freedom of choice both at common law and under the *Charter*.”<sup>531</sup> More importantly, says the Court, the waiver argument “ignores the state interest in the effective investigation of crime,”<sup>532</sup> and in light of the view that “the suspect may be the most fruitful source of information,” it is “in society’s interest that the police attempt to tap this valuable source.”<sup>533</sup> The Court refers to *Hebert* in support of the notion that there must be a critical balance struck between the rights of the individual and the interests of the state.<sup>534</sup> But the sleight of hand that the majority seems to engage in here is to conflate the interests of society (i.e. the societal interest in crime control) referred to in *Singh*, with the interests of the state, referred to in *Hebert*. Clearly, no consideration is paid to the notion that the interests of society might be served by emboldening the rights of the individual vis-à-vis state agents in the context of a custodial detention.

In any case, the Court goes on to say that “legitimate means of persuasion”<sup>535</sup> are permitted according to *Hebert*,<sup>536</sup> and that while the law “does not permit the police to *ignore* the detainee’s freedom to choose whether to speak or not,”<sup>537</sup> and “police persistence in continuing the interview, despite repeated assertions by the detainee that he wishes to remain silent, may well raise a strong argument that any subsequently obtained statement was not the product of a free will to speak to the authorities,”<sup>538</sup> this was not such a case.<sup>539</sup> In light of the fact that 18

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<sup>531</sup> *Ibid.* at para. 43. The Court elaborates upon this by saying that unlike with the 10(b) right to counsel, which includes an “informational and implementation component” expressly, no such provision appears in respect of the right to silence.

<sup>532</sup> *Ibid.* at para 45.

<sup>533</sup> *Ibid.*

<sup>534</sup> *Ibid.*

<sup>535</sup> *Ibid.* at para 47.

<sup>536</sup> *Ibid.*

<sup>537</sup> *Ibid.*

<sup>538</sup> *Ibid.*; Rebecca Ross, “*R. v. Singh: Addressing the Divide between the Section 7 Right to Silence and the Common Law Confessions Rule*”, Case Comment (November 1<sup>st</sup>, 2007) at 3.Osgoode, online: The Court <

assertions by Singh of the right to silence were ignored by the police interrogator, one cannot help but wonder what *would* constitute such a case?

Samuel Walker points out that while the majority in *Singh* "...stipulated that the test is an objective one"<sup>540</sup>, the question that they eventually insisted was determinative was subjective:<sup>541</sup> "The ultimate question is whether the accused exercised free will by choosing to make a statement."<sup>542</sup> A truly objective test would ask "...whether the conduct of the police would deprive a reasonable accused in similar circumstances of his free will to make a statement."<sup>543</sup> It therefore appears that the Supreme Court majority reduced the entire voluntariness inquiry to a subjective question.<sup>544</sup> This may be one of the reasons why the majority does not "... sketch rough guidelines or rules that police can adhere to"<sup>545</sup> If the Court had used an objective line of reasoning, they would have been concerned with creating guidelines to direct the police during interrogation.<sup>546</sup>

The majority's decision in *Singh* subsumes the section 7 right to silence under the doctrine of voluntariness.<sup>547</sup> "*Singh* forecloses resort to section 7 analysis as unnecessary: the confessions rule already protects the right to silence"<sup>548</sup> where an individual is in police custody

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<http://www.thecourt.ca/2007/11/01/r-v-singh-addressing-the-divide-between-the-section-7-right-to-silence-and-the-common-law-confessions-rule/>>.

<sup>539</sup> *Supra* note 499 at para. 48.

<sup>540</sup> *Ibid.* at para. 8; also see Samuel G. Walker, "The Subjective-Objective Dimension in *R. v. Singh*: Rethinking the Distinction between the Common Law Confessions Rule and the *Charter* Right to Silence" (2009-2010) 55 *Crim. L. Q.* 405 at 416.

<sup>541</sup> *Walker, ibid.* at 417.

<sup>542</sup> *Supra* note 499 at para. 53. Also see *ibid.* at 418.

<sup>543</sup> *Walker, ibid.*

<sup>544</sup> *Ibid.*

<sup>545</sup> *Ibid.*

<sup>546</sup> *Ibid.*

<sup>547</sup> Charron J. held that, when a detainee is interrogated by known police, the section 7 pre-trial right to silence provides no protection to the accused beyond the protection offered by the confessions rule. In such circumstances, "the confessions rule effectively subsumes the constitutional right to silence." (*Supra* note 499 at para. 39). See also *supra* note 457 at 255-256.

<sup>548</sup> *Dufraimont, ibid.* at 256.



and knows that he or she is being questioned by the police.<sup>549</sup> The limitation of this right has been achieved at the expense of undermining the constitutional protections of detained suspects. The case of *Singh* provided an opportunity for the Supreme Court to regulate police interrogation, and yet, the Court chose to jealously guard and even expand police powers by condoning the police efforts to ignore a suspect's choice to remain silent,<sup>550</sup> even if the suspect asserts his right to silence 18 times. The ruling in *Singh* calls into question the concept of "free choice", as relentless interrogation, in the face of repeated assertions of the right to silence, shows complete disregard for the wishes of the detained suspect by the police who are in total control of him.

The important question that *Singh* raises is as follows "... what amount of police persistence will signal an accused's descent into involuntary territory?"<sup>551</sup> Clearly, saying "no" 18 times simply means try harder for the Supreme Court and the police. Therefore, at what point police interrogation becomes so abusive that it would be impossible to defend it?<sup>552</sup> Perhaps that can only happen in "...cases involving exceptionally long interrogations or obviously vulnerable suspects."<sup>553</sup>

The other disturbing aspect of the *Singh* decision is the majority's unwillingness to forcefully show its disapproval of interrogators' efforts to urge *Singh* to ignore his lawyer's

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<sup>549</sup> *Supra* note 499 at para. 37. See *supra* note 457 at 256.

<sup>550</sup> *Supra* note 538.

<sup>551</sup> *Ibid.*

<sup>552</sup> Yale Kamisar, *Police Interrogation and Confessions* (Ann Arbor: University of Michigan Press, 1980).

According to Professor Kamisar, the pressures of persistent police interrogation will lead defendants to believe that the police are legally entitled to answers and that there will be an "extralegal sanction for contumacy".

<sup>553</sup> Dale Ives and Christopher Sherrin, "*R. v. Singh* – A Meaningless Right to Silence with Dangerous Consequences" (2007) 51 C.R. (6<sup>th</sup>) 250 (WLeC) at 3.

advice.<sup>554</sup> The Court's failure to take a firm stand on this issue clearly undermines the importance of the lawyer's advice to the detained suspect.<sup>555</sup>

"*Singh* largely strips the right to silence of any real meaning."<sup>556</sup> The *Singh* court seized on part of the *obiter* in *Hebert*:<sup>557</sup> "that within certain limits, continued police questioning after an assertion of the right to silence was permissible."<sup>558</sup> As a result of *Singh*, "...suspects have no right to be formally informed of their right to remain silent,"<sup>559</sup> and there is "no obligation on the police"<sup>560</sup> to desist questioning except in the most seemingly "extreme circumstances."<sup>561</sup>

For our purposes, "the most important question that is raised by *Singh* is whether the majority's refusal to recognize an effective right to silence creates a greater risk of false confessions."<sup>562</sup> *Singh* may be a bad ruling for the innocent who waive the right to silence;<sup>563</sup> Charon J. closed the possibility that the right to silence would be "...interpreted in such a way as to supplement the protection against false confessions afforded by the common law voluntariness rule."<sup>564</sup> There was the possibility that the right to silence would be used to regulate the kinds of practices that police could engage in when trying to elicit an incriminating statement.<sup>565</sup> Rather than use the right to silence to add to the regulation and of the police power to question and

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<sup>554</sup> *Ibid.*

<sup>555</sup> *Ibid.*

<sup>556</sup> *Ibid.*

<sup>557</sup> *Ibid.* at 1.

<sup>558</sup> *Ibid.*

<sup>559</sup> *Ibid.* at 3.

<sup>560</sup> *Ibid.*

<sup>561</sup> *Ibid.*

<sup>562</sup> *Ibid.*

<sup>563</sup> *Ibid.* at 4.

<sup>564</sup> *Ibid.*

<sup>565</sup> *Ibid.*

thereby add protections against false confessions, the *Singh* decision makes it very clear<sup>566</sup> that “the right to silence adds nothing to voluntariness”<sup>567</sup> in the way of protections.

Singh had asked for a *Miranda*-like rule, where the police would have to stop questioning a detainee after that detainee had asserted his or her right to silence. Fish J., who wrote for the minority, would have adopted such an approach, where the detainee could effectively cut-off questioning by invoking the right. He noted, for instance, that the existence of *Miranda* had not “paralyzed investigations in the United States” as the majority had supposed an emboldened right to silence would.<sup>568</sup> He also viewed “the right to silence”<sup>569</sup> as “a constitutional promise that must be kept.”<sup>570</sup>

The dissent argued for a rule that would say that “...a confession may well be considered voluntary under the common law rule and yet be obtained by state action that infringes section 7.”<sup>571</sup> This should happen where “... a police interrogator has undermined a detainee’s freedom to choose.”<sup>572</sup> But even if the confession meets the common law standards of admissibility, it does not necessarily represent a free choice to speak, for the purposes of the *Charter*.<sup>573</sup> A choice that is “...frustrated by relentless interrogation is neither free nor meaningful.”<sup>574</sup> The dissent pointed out that the two rules, the confession rule and the right to silence,<sup>575</sup> “... have different purposes and thus, should remain distinct doctrines.”<sup>576</sup>

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<sup>566</sup> *Ibid.*

<sup>567</sup> *Ibid.*

<sup>568</sup> *Supra* note 499 at para. 48.

<sup>569</sup> *Ibid.* at para 97.

<sup>570</sup> *Ibid.* at para 97.

<sup>571</sup> *Supra* note 538.

<sup>572</sup> *Ibid.*

<sup>573</sup> *Ibid.*

<sup>574</sup> *Ibid.*

<sup>575</sup> *Ibid.*

<sup>576</sup> *Ibid.*

*Singh* may yet have a silver lining. “[T]he Supreme Court recognized for the first time that unrelenting interrogation of a suspect who repeatedly asserts the right to silence may result in the exclusion of a confession”<sup>577</sup> under the confessions rule (and not under section 7).<sup>578</sup> Moreover, although the majority in *Singh* had “...declined to hold that persistent police questioning rendered the statements involuntary in that case, that holding was largely based upon deference to the trial judge, who had fully considered the effect of the persistent questioning during the voluntariness *voir dire*.”<sup>579</sup> “In different circumstances, such police persistence might have raised a reasonable doubt about voluntariness.”<sup>580</sup> “This recognition of a right to silence existing within the voluntariness inquiry may in future ground further protection for interrogated suspects.”<sup>581</sup>

Despite the possibility of such a silver lining, the ruling in *Singh* should be interpreted as another major victory for the supporters of crime control values. This is based on the fact that *Singh* essentially makes the right to silence irrelevant and it succeeds in expanding the permissible boundaries of police interrogation. The wide gap between the majority decision and “...the strong dissent”<sup>582</sup> reveals a tension that exists between “...the rights of the accused”<sup>583</sup> and the agenda of crime control advanced “...through investigative techniques.”<sup>584</sup>

## **Conclusion**

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<sup>577</sup> *Supra* note 457 at 266.

<sup>578</sup> *Supra* note 499 at para. 47. Also see *ibid*.

<sup>579</sup> *Dufraimont, ibid*.

<sup>580</sup> *Ibid.* at 266-267.

<sup>581</sup> *Ibid.* at 267.

<sup>582</sup> *Supra* note 538.

<sup>583</sup> *Ibid*.

<sup>584</sup> *Ibid*.

I have traced the development of the confessions rule, first in 19<sup>th</sup> century England where the basic components were introduced, and then in Canada where new contours were added and a contextual approach to the question of voluntariness evolved. The case law in this area was discussed in view of Herbert Packer's models of due process and crime control, and it was shown that the courts are leaning increasingly in recent years towards a crime control orientation in the area of interrogation and confessions. It is apparent from this review that the protections provided by the modern confessions rule, at least in the way it is currently applied by the courts, is insufficiently protective of suspects in the interrogation room.

With this in mind we now turn to the *Charter of Rights and Freedoms*, and in particular section 10(b) which guarantees the right to counsel. We will explore this section for the purposes of discovering what protections in addition to the doctrine of voluntariness are provided to a suspect under interrogation, and we will discuss whether these protections create a web of prophylactic rules that are adequate to protect suspects from unfair state conduct.

## **Chapter 2: The Charter and the Right to Counsel**

### **Introduction**

Perhaps the most obvious manifestation of the awesome power of the state is when a person is trapped in the “interview room.” Typically in that situation, the state agent and the accused begin the process of engaging in a psychological chess match. However, this is a “game” played by two unequal players. The inherent power imbalance between the interrogator and the accused creates a very unfair situation which could lead to the inducing of false or involuntary confessions.

The advent of the *Charter* and certain developments in the common law have, for the most part, moved the practice of interrogation from the use of brute force or explicit threats to the use of more sophisticated interrogation techniques to extract confessions from the detained individuals. these techniques, according to the experts in the field of interrogation, are indispensable for state agents to extract confessions from unwilling accused persons.<sup>1</sup>

In the previous chapter we discussed the existing shortcomings in the common law doctrine of voluntariness in protecting detained individuals from giving false or involuntary confessions. We now need to turn our attention to the discussion of the right to counsel in order to determine whether or not this right provides significant additional protection to detained individuals.

Upon examining and analyzing the right to counsel, it will be shown that this right does not significantly alter the coercive nature of police interrogations. It is hoped that at the

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<sup>1</sup> See discussion in chapter 4.

conclusion of this chapter it becomes clear that the right to counsel does not provide sufficient protection against false or involuntary confessions.

### **The Nature of the Right to Counsel**

The adversarial nature of our system causes the right to counsel to be perceived as one of the most important rights in the Canadian *Charter of Rights and Freedoms* (hereinafter referred to as “the *Charter*”). This is due to the fact that defence counsel are expected to act as equalizers. It is presumed that a defence lawyer will ensure that all other constitutional rights of the accused are respected and his or her presence will help to bring balance and serve as a counterweight to the massive resources of the state which would otherwise overbear the accused individual.

The right to counsel is designed to ensure the fundamental rights, such as the right to a fair trial, the presumption of innocence, the rights against arbitrary detention and unreasonable searches, and others, are not trampled upon by state agents. The purpose of the right to counsel and its companion right under section 10(a) is to protect individual defendants from conviction resulting from their ignorance of legal rights and procedures or not knowing the gravity of the situation they are in.

Moreover, the right to counsel is designed to serve the important function of giving the appearance of fairness to the system. By strategically placing a defence counsel by the side of a defendant<sup>2</sup> the state is then fully justified in marshalling their resources against the accused, under the pretext that the presence of a defence counsel will ensure the defendant is not forced to respond to state allegations from the position of disadvantage.

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<sup>2</sup> Michael Mandel, *The Charter of Rights & the Legalization of Politics in Canada* (Toronto: Thompson Educational Publishing, 1994) at 200.

## **Section 10(a)**

Section 10(a) is often referred to as section 10(b)'s companion right. Section 10(a) is the right of any person who has been detained to be informed promptly of the reasons for their detention.<sup>3</sup> The Supreme Court has ruled that this section imposes a duty upon police to tell suspects in "clear and simple language"<sup>4</sup> "... about every offence they are under investigation for, and about any significant change in the nature of the investigation."<sup>5</sup> The reasons given "...need not be lengthy or technically precise;"<sup>6</sup> rather, "it is sufficient if they convey the general extent of the suspect's legal jeopardy."<sup>7</sup> "...Changes in interrogation strategy do not trigger a significant change in legal jeopardy."<sup>8</sup> Moreover, "...there is no requirement that police inform the accused of the specific allegations,"<sup>9</sup> or, the strength of the state's case "...or even the exact charges against them."<sup>10</sup>

The section 10(a) right requires that suspects be told of the reasons for detention in order to help them make informed decisions about whether to talk to police or consult with counsel and ensure that those who contact lawyers obtain the appropriate advice.<sup>11</sup>

## **Section 10(b):**

A regulatory<sup>12</sup> regime has emerged in Canada as a result of our Supreme Court of Canada's interpretation of 10(b) of the *Charter*. This provision gives everyone "the right on

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<sup>3</sup> Steven Penney, Vincenzo Rondinelli, & James Stribopoulos, *Criminal Procedure in Canada*, 1<sup>st</sup> ed. (Markham: LexisNexis, 2011) at 300.

<sup>4</sup> *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59 at para. 21.

<sup>5</sup> *Supra* note 3.

<sup>6</sup> *Ibid.* at 308.

<sup>7</sup> *Ibid.* at 300.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *R. v. Evans*, [1991] 1 S.C.R. 869 at 886-87; *R. v. Black*, [1989] S.C.J. No. 81, [1989] 2 S.C.R. 138 at 152-53; *R. v. Smith*, [1991] 1 S.C.R. 714 at 728; *R. v. Borden*, [1994] S.C.J. No. 82, [1994] 3 S.C.R. 145 at 166; *R. v. Latimer*, [1997] S.C.J. No. 11, [1997] 1 S.C.R. 217 at para. 28.



arrest or detention to retain and instruct counsel without delay and to be informed of that right.”<sup>13</sup>

As in the case of other *Charter* rights, section 24(2) of the *Charter* provides for the exclusion at trial of statements and other evidence obtained through a violation of these guarantees.

To fulfill the “purpose” behind section 10(b) of the *Charter*, the Supreme Court has imposed obligations on police that move beyond the express language of the section.<sup>14</sup> The underlying purpose of the section, according to the Supreme Court, is to assist suspects to make informed, voluntary choices in their interactions with police.<sup>15</sup> The right to talk to counsel, as well as the right to be informed of that right, are attempts to ensure that suspects are aware of their legal situation.<sup>16</sup> The Court has recognized that the rights in section 10 are particularly important in preventing suspects from unwittingly making inculpatory statements,<sup>17</sup> or to make them aware that they are not required to speak to police.<sup>18</sup>

The Court has not read section 10 of the *Charter* as forbidding police from using pressure tactics to provoke suspects to make self-incriminating statements; rather it has tried to strike a balance between the interest of suspects in avoiding self-incrimination and the need of the state to obtain confession evidence to prosecute criminal behaviour. A clear example of the courts' intention to strike a balance between the competing interests of the suspects and the state is the

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<sup>12</sup> Steven Penney, “Triggering the Right to Counsel: “Detention” and Section 10 of the Charter” (2008) 40 S.C.L.R. (2d) 271 at para 1.

<sup>13</sup> *Charter of Rights and Freedoms*, s. 10(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>14</sup> *R. v. Brydges*, [1990] S.C.J. No. 8, [1990] 1 S.C.R. 190 at 202; *Black*, *supra* note 11 at 152.

<sup>15</sup> *R. v. Bartle*, [1994] S.C.J. No. 74, [1994] 3 S.C.R. 173 at 193-94; *R. v. Sinclair*, [2010] S.C.J. No. 35, [2010] 2 S.C.R. 310 at paras. 24-26. According to Professor Penney, the main purpose of section 10(b) “...is to help deter abusive interrogation practices, including those apt to produce false confessions. *Supra* note 12 at para 4.

<sup>16</sup> *R. v. Manninen*, [1987] S.C.J. No. 41, [1987] 1 S.C.R. 1233 at 1242-43.

<sup>17</sup> *Ibid.*; *Brydges*, *supra* note 14 at 203, 206, 215; *R. v. Prosper*, [1994] S.C.J. No. 72 [1994] 3 S.C.R. 236 at 271 (S.C.C.); *R. v. S.(R.J.)*, [1995] S.C.J. No. 10, [1995] 1 S.C.R. 451 at para. 85; *R. v. Jones*, [1994] S.C.J. No. 42, [1994] 2 S.C.R. 229 at 254-55 *per* Lamer C.J.C., dissenting.

<sup>18</sup> Richard A. Leo, “The Impact of Miranda Revised” (1996) 86(3) J. Crim. L. & Criminology 621.

case of *R. v. Sinclair*.<sup>19</sup> This is a case where the Supreme Court ruled that the right to counsel is “a one-time-only opportunity,”<sup>20</sup> and “...that the essential purpose of the right is informational rather than protective.”<sup>21</sup> Sinclair was arrested for murder. He was advised of his right to counsel.<sup>22</sup> Subsequently, he briefly spoke to his lawyer for 2-3 minutes.<sup>23</sup> This was followed by a 5 hour interrogation, and during that time he was denied the right to speak with his lawyer again, repeatedly.<sup>24</sup>

Timothy Moore and Andras Schreck, argue that *Sinclair* creates a dangerous situation for detained suspects. The Court decided that “...while the police can try to persuade a detainee to give up his right to silence,”<sup>25</sup> the detainee must make the decision to capitulate in the face of that persuasion<sup>26</sup> “...entirely on his own”<sup>27</sup> and without consulting counsel an additional time.

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<sup>19</sup> *Sinclair*, *supra* note 15.

<sup>20</sup> Timothy Moore & Andras Schreck, “Canada Right to Counsel: Confessions of Dangerously Unrepresented Minds” online at jurist.org <<http://jurist.org/forum/2010/11/canada-right-to-counsel-confessions-of-dangerously-unrepresented-minds.php>> at 1 (PDF version).

However, the Supreme Court in *Sinclair* held at paragraph 48 that “reconsultation is necessary in order for the detainee to have the information relevant to choosing whether to cooperate with the police investigation or not.” Also see *supra* note 3 at 314.

The Court in *Sinclair* also held at paragraph 52 “...that, a second opportunity is warranted when police”(Supra note 3 at 315). decide to apply to detained persons “[n]on routine procedures, like participation in a line-up or submitting to a polygraph.” “In addition, the Court concluded that police who become aware that a detainee may not have understood “initial s. 10(b) advice of his right to counsel” must provide another opportunity for consultation. Lastly, the Court held that an additional opportunity must be given if “police undermine the legal advice that the detainee has received.” (*Supra* note 3 at 315).

The Court was open to other possible circumstances to permit a right to reconsult counsel. However, the circumstances, as the Court put it, “...must be “objectively observable”” (*Sinclair*, *supra* note 15 at paragraph 55; See also *supra* note 3 at 315). The Court held, however, that lengthy interrogations do not give rise to a right for reconsultation (*Sinclair*, *Supra* note 15 at paras. 61-63; See also *supra* note 3 at 316). The Court took the position that the police tactics of gradually confronting an accused with real or false evidence does not give rise to a right to a second consultation with a lawyer (*Sinclair*, *supra* note 11 at paragraph 60; see also: *Supra* note 3 at 316).

<sup>21</sup> *Moore & Schreck, ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.* at 3

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

*Sinclair* is problematic because, while the police will provide information on "...the advantages of giving up the right to silence, the detainee has no corresponding source of information on the disadvantages."<sup>28</sup> In light of the risk of false confessions, the *Sinclair* ruling is troubling. As Moore and Schreck state: "the suspect's resolve may crumble in the face of evidence (real or fabricated) and his possible confusion regarding legal advice to remain silent is juxtaposed with the police's unremitting questions."<sup>29</sup>

In further discussing the section 10(b) jurisprudence, it will become apparent that attention must be paid to the need to deter abusive interrogation practices, including those that have a likelihood of producing false confessions.

### **The Current State of the Law:**

In contrast to the doctrine of voluntariness, which applies to any statement made to authorities, s. 10 rights arise only upon detention or arrest.<sup>30</sup> "Detention occurs when police physically or psychologically restrain suspects."<sup>31</sup> Physical restraint arises when the police use force incidental to an investigative detention.<sup>32</sup> "Psychological restraint arises when suspects either face legal liability for refusing to comply with police directives or reasonably believe that compliance is mandatory."<sup>33</sup> The case law defines arrest to consist of the "actual seizure or touching of a person's body with a view to his detention,"<sup>34</sup> or alternatively, the pronouncing of "words of arrest" if "the person sought to be arrested submits to the process and goes with the

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<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.* at 1-2.

<sup>30</sup> Steven Penney, "What's Wrong with Self-Incrimination? The Wayward Path of Self-Incrimination Law in the Post-Charter Era – Part II: Self-Incrimination in Police Investigations" (2003-2004) 48 *Crim. L.Q.* 280 at 307.

<sup>31</sup> *Ibid.*; *R. v. Therens*, [1985] 1 S.C.R. 613 at 641-42, *per* Le Dain J., dissenting, 18 C.C.C. (3d) 481, 45 C.R. (3d) 97; *R. v. Thomsen*, [1988] 1 S.C.R. 640 at 648-49, 40 C.C.C. (3d) 411, 63 C.R. (3d) 1.

<sup>32</sup> Section 25(1) of the *Criminal Code* R.S.C. 1985, c. C-46 provides that police officers may use "as much force as necessary" when "authorized by law to do anything" if the officer "acts on reasonable grounds"

<sup>33</sup> *Penney, Ibid., Therens, supra* note 27 at 642-44, *per* Le Dain J., dissenting, 18 C.C.C. (3d) 481, 45 C.R. (3d) 97; *Thomsen, supra* note 18 at 649.

<sup>34</sup> *Supra* note 3 at 124.

arresting officer.”<sup>35</sup> A failure by police officers “...to use the word “arrest” is not determinative.”<sup>36</sup> It is “...the substance of the encounter,”<sup>37</sup> as indicated by “...the use of language that reasonably leads an individual to conclude that he or she is in police custody, and not free to leave,”<sup>38</sup> that will matter the most.<sup>39</sup>

Section 10(b) imposes a number of obligations on the police. Most of these obligations have been created by the Supreme Court “as a consequence of its “purposive” interpretation”<sup>40</sup> of the section.<sup>41</sup> The right to talk to a lawyer, and the right to be informed of that right, are meant “...to ensure that suspects are aware of their legal situation.”<sup>42</sup> The Court has also emphasized that these rights assist “...to prevent suspects from unwittingly making inculpatory statements.”<sup>43</sup>

The police have two types of duties imposed upon them to meet the objectives of section 10(b):<sup>44</sup> informational duties, and implementational duties.<sup>45</sup> The informational duties require the police to advise detained suspects “...that they have the right to consult with a lawyer without delay.”<sup>46</sup> Police must also inform suspects of the existing legal aid or duty counsel

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<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *Supra* note 30 at 307.

<sup>41</sup> *Brydges, supra* note 14 at 202; *Black, supra* note 11 at 152. To help suspects make informed, voluntary choices in their interactions with police.

<sup>42</sup> *Supra* note 30 at 307-308; *Supra* note 16 at 1242-43.

<sup>43</sup> *Penney, ibid.* at 308; *Ibid.*; *Brydges, supra* note 14 at 203, 206 and 215; *R. v. Pozniak*, [1994] 3 S.C.R. 173 at 191, 92 C.C.C. (3d) 289, 33 C.R. (4<sup>th</sup>) 1; *Prosper, supra* note 17 at 271.

<sup>44</sup> *Penney, ibid.*

<sup>45</sup> *Ibid.* at 315.

<sup>46</sup> *Ibid.* at 308; *R. v. Debot*, [1989] 2 S.C.R. 1140 at 1146, 52 C.C.C. (3d) 193, 73 C.R. (3d) 129. “Without delay” means that the police must inform suspects of their right to counsel “immediately upon detention”. The only exception to this may be in urgent circumstances where “the police for their own safety have to act in the heat of the moment to subdue the suspect ...” For a more recent illustration of this requirement, we may look at the case of *R. v. Mian*, [2014] S.C.J. No. 54. The Court held that the 22 minute delay in administering the right to counsel was unacceptable as the Court was of the view that the underlying facts of this case did not constitute “exceptional circumstances” (paragraph 74). See also paragraph 75.

services.<sup>47</sup> Moreover, police must facilitate and make arrangements for detainees to contact duty counsel should they wish to do so.<sup>48</sup>

The “implementational duties arise”<sup>49</sup> once the required information has been conveyed.<sup>50</sup> The police can start the interrogation, once the suspect states he/she understands the caution and he/she does not ask to speak to a lawyer.<sup>51</sup> Should there be uncertainty about the suspect’s ability to understand the caution, the police cannot start the questioning until he/she understands the caution.<sup>52</sup> The police should also provide suspects with “reasonable opportunity” to speak to a lawyer should he/she ask for a lawyer.<sup>53</sup> This involves providing access to a private telephone conversation with counsel.<sup>54</sup> The questioning cannot commence until the suspect has had a reasonable opportunity to contact counsel.<sup>55</sup> Suspects should exercise due diligence in contacting counsel. The lack of due diligence may amount to the waiver of the right to speak to counsel.<sup>56</sup>

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<sup>47</sup> *Brydges*, *supra* note 14 at 209-10; *R. v. Pozniak*, *supra* note 43; See also *supra* note 30 at 335.

<sup>48</sup> *Pozniak*, *ibid.* at 197.

<sup>49</sup> *Supra* note 30 at 310.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.* I should also point out that the Supreme Court in *R. v. Taylor*, 2014 SCC 50, [2014] 2 S.C.R. 495, held that the accused’s right to counsel was violated when he was denied the opportunity to consult counsel while at the hospital. This is a case where the accused was involved in an accident while “under the influence.” He was taken to the hospital and blood samples were taken from him before he was given the opportunity to speak to counsel. At the scene of the accident, Taylor requested to speak to counsel. However, he was not, at any point, afforded the opportunity to do so. The Court found that officers had ample time to make a telephone available to the accused (para. 31) and yet they failed to do so. This was attributed to lack of experience by the newly recruited officers (para. 15). Moreover, the Court found that there were no underlying urgent circumstances to justify the denial of providing the accused with an opportunity to speak to counsel in this case (para. 31). Also see case commentary – Jordan Casey, “A Case About Complete Denial of Access to Counsel”, Case Comment, on *R. v. Taylor*, (September 19, 2014) The Court, Osgoode.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.* at 310-311.

<sup>56</sup> *Ibid.* at 311.

After a suspect has spoken with his or her lawyer, the police can commence the interrogation.<sup>57</sup> Police are not permitted to attack the integrity or the competence of the suspect's counsel.<sup>58</sup> Moreover, the police cannot negotiate the resolution of the charges with detainees who asserted their right to counsel, in the absence of their counsel.<sup>59</sup>

### **A Critique of Section 10(a):**

The language of section 10(a) is simple. It states that: "Everyone has the right on arrest or detention to be informed promptly of the reasons therefore." However, when the Supreme Court of Canada in *Evans* set out to create an "...interpretive framework"<sup>60</sup> for s. 10(a), the result was very disappointing.<sup>61</sup> The Supreme Court in its earlier decisions in *R. v. Black* and *R. v. Smith* had considered the connection between 10(a) and 10(b) rights<sup>62</sup>, but in *Evans*, the S.C.C. for the first time considered what constitutes a breach of s. 10(a).<sup>63</sup>

The compliance with section 10(a) only requires the police to provide enough information "... to allow the accused to reasonably infer the substantive nature of the charges".<sup>64</sup> The troubling nature of the "reasonable inference" test was defined by McLachlan J. in the following fashion:

[w]hen considering whether there has been a breach of s. 10(a) of the *Charter*, it is the substance of what the accused can reasonably be supposed to have understood, rather than the formalism of the precise words used, which must govern ... The question is whether what the accused was told, viewed reasonably in all the circumstances of the case, was sufficient to permit him to make a

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<sup>57</sup> *Ibid.*; *R. v. Hebert*, [1990] 2 S.C.R. 151 at 184, 57 C.C.C. (3d) 1, 77 C.R. (3d) 145.

<sup>58</sup> *Supra* note 30 at 311.

<sup>59</sup> *Ibid.*

<sup>60</sup> David Tanovich, Annotation of *R. v. Evans* (1991), 4 C.R. (4th) at 146.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.* at 147.

reasonable decision to decline to submit to arrest, or alternatively, to undermine his right to counsel.<sup>65</sup>

As Professor Tanovich reminds us, the main issue with the Court's formulation of the reasonable inference test is that under this test the "... onus of ensuring that the accused is informed has now shifted from the police onto the accused. The accused must now deduce, in a situation of high stress and anxiety, the nature of his/her jeopardy before deciding whether to exercise his/her fundamental right to counsel or right to silence."<sup>66</sup>

I contend that the dissent judgement in *Evans*, by Sopinka J., makes more sense. Sopinka J. pointed out the need for police to explicitly convey to the accused the true nature and the reasons for his/her arrest.<sup>67</sup> Sopinka J. used the following analogy to illustrate his point: "when an arrest is made pursuant to a warrant, this (the reason for the warrant) is set out in writing in the warrant . An arrest without a warrant is only lawful if the type of information which would have been contained in the warrant is conveyed orally."<sup>68</sup>

### **A Critique of Section 10(b):**

Section 10(b) has been interpreted through the lens of free choice theory.<sup>69</sup> What the *Charter's* framer's understood<sup>70</sup> was "...that custodial interrogation is inherently coercive."<sup>71</sup> It has already been argued in this thesis that the doctrine of voluntariness provides little protection against such coercion.<sup>72</sup> The solution to this problem was to give detainees the right to contact

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<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.* at 148.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.* at 146.

<sup>69</sup> *Supra* note 30 at 312.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> See also *ibid.*

counsel without delay<sup>73</sup> and to “...require police to inform them of that right.”<sup>74</sup> The free choice theory is premised on the principle that once detainees know about the extent of their jeopardy, then they can make a free and informed decision as to whether they wish to answer police questions or not.<sup>75</sup>

But there are flaws with section 10.<sup>76</sup> Most troublingly, it gives the responsibility for dispelling the coercive atmosphere of the police interrogation to the police themselves -- the very people who will be conducting the interrogation.<sup>77</sup> “Requiring police to issue warnings puts them in a troubling conflict of interest,”<sup>78</sup> because it is their job to collect confession evidence from the suspect.<sup>79</sup> Police in this situation may feel incentivized to cut corners in their administration of an accused’s section 10 *Charter* rights.<sup>80</sup> The contradictions that this obligation creates for the police was described by Mr. Justice McClung in *Brydges*, when that case was dealt with at the Alberta Court of Appeal, before it made its way to the Supreme Court of Canada. McClung J. noted that: “A peace officer pursuing the investigation of a serious crime cannot rationally be expected to double as a legal advisor to his suspect. In an adversary system the police headquarters should not be confused with the legal aid office.”<sup>81</sup> Moreover P.B. Michalyshyn states that “...police officers in an adversary system of justice cannot and should not be expected to fill the role of legal aid lawyers. One wonders if they should even have the

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<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> Don Stuart, *Charter Justice in Canadian Criminal Law*, 3d ed. (Scarborough: Carswell, 2001) at 276.

<sup>80</sup> As Jerome H. Skolnick puts it “...the policeman feels that most trials are a waste of taxpayers’ money since, as one law enforcement spokesman put it, ‘We do not charge innocent men.’” and further he says that “The policeman, in short, is primarily interested in *factual* guilt, indeed, the idea of *legal* guilt leaves him cold and hostile” Jerome H. Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society* (New York: John Wiley & Sons Inc., 1966) at 197 and 203. See also *supra* note 30.

<sup>81</sup> *Supra* note 14 at para 9.



task of informing the detained or arrested person of the right.<sup>82</sup> Section 10 (b) of the Charter guarantees the right “to be informed” of the right to counsel. It does not say that the police must be the “informers”<sup>83</sup>

Moreover the lack of a requirement for video-recorded statements<sup>84</sup> leaves the door open for the police to lie about complying with section 10. In a hypothetical courtroom situation, when asked why they elected not to video record the interrogation of the accused, officers may say that they asked the accused whether he minded being recorded and that he indicated that he did. When they are asked why they left this decision to the accused, they may indicate that they wanted to make the accused feel more comfortable with the situation so that he would open-up and start talking. The point is that without a video-recording itself, the police can say anything happened with respect to the administration of 10(b) or the failure to properly administer it.<sup>85</sup>

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<sup>82</sup> Caplan argues that even the American Supreme Court in *Miranda* understood that “...government’s obligation was not to counsel the accused, but to question him.” Gerald M. Caplan, “Questioning Miranda” (1985) 38 Vanderbilt Law Review 1417 at 1423.

<sup>83</sup> P.B. Michalyshyn, “Brydges: Should the Police Be Advising Of The Right to Counsel” (1990) 74 C.R. (3d) at 152. Moreover K. Jull offers another alternative. He points out that a well-publicized “legal emergency line” with an easy to remember code would considerably reduce the informational obligations of state agents and hence “... the burden on police officers of demonstrating an informed waiver of rights would be easier to satisfy than at present. An accused person who waives rights or services that are easily accessible will have difficulty arguing later that the waiver was not an informed one”. Kenneth Jull, “Clarkson v. R.: Do We Need a Legal Emergency Department?” (1987) 32 McGill L.J. 356 at 385.

<sup>84</sup> *R. v. Oickle*, [2000] 2 S.C.R. 3 at para. 46. In *Oickle* the Supreme Court stopped short of mandating recording as a prerequisite to admissibility. Instead, it was held that non-recorded interrogations are not to be considered inherently suspect, though recordings are useful to courts in assessing confessions.

<sup>85</sup> At this point it may be appropriate to comment at some length on the videotape recording of statements. Although we may view the practice of tape recording interrogations as a positive step forward and this view is supported by commissions of inquiry on wrongful convictions of Sophonow (The Inquiry Regarding Thomas Sophonow (The Investigation, Prosecution and Consideration of Entitlement to Compensation), Police Interviews with Thomas Sophonow in Vancouver, Recommendation 1), Guy Paul Morin (Fred Kaufman, The Commission on proceedings involving Guy Paul Morin, published by Ontario Ministry of Attorney General, 1998, volume II, p. 1201, Recommendation # 96 (b)), and the Martin Committee Report (Report of the Attorney General’s Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions Published by Ontario Ministry of the Attorney General, 1993) however it would be naïve to assume that videotaping interrogations is the final solution to the problem of police abuse. It is true that a camera “...may never blink”, but that does not mean that what it “sees” can be considered an unadulterated view of reality. As Marshall McLuhan wrote, the information that media conveys is not entirely independent of the method used (Alan D. Gold, “Videotaping Interrogations” June 16, 2003, A.D. Gold Collection of Criminal Law Articles, ADGN/2003-668 at 2). It is my position that it would be wrong to place too much faith in tape recording interrogations as the ultimate tool to ensure the preservation of the truth. The

Hence, in situations where the right to counsel has allegedly been waived, it is also difficult to determine whether the suspect freely or voluntarily made this waiver.<sup>86</sup> The Courts have recourse to the “reasonable person” approach,<sup>87</sup> which permits suspects to waive their section 10 rights and submit to questioning only if they are capable of making fully informed, self-interested decisions. But it is difficult to assess whether suspects have been affected by police pressure, particularly since informing suspects of their right to talk to a lawyer does little to alleviate such pressures.<sup>88</sup> Simply informing suspects of their right to retain and instruct

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painful fact remains that “... where there is the will to circumvent the rules, ways will be found” to distort the reality that the seeing eye of a camera projects (Fred Kaufman, *The Admissibility of Confessions*, 3<sup>rd</sup> Supplement to 3<sup>rd</sup> Ed. (Toronto: Carswell, 1986). According to Michael McConville and Phillip Morrell, the Scottish research which was conducted by the Social Research Branch of the Scottish Home Office and Health Department in 1983 supports the proposition that the police tend to circumvent the use of tapes intended to record interrogations. The conclusions of the authors in this regard are quite alarming: “what is recorded, therefore, is what is acceptable to courts and what would pass public scrutiny. The rigid, stereotyped and formal questioning procedures they have adopted have produced acceptable, if shell-like, products. The police have been able to do this only because they have conducted their usual questioning outside the reach of the tape recorder. Interviews have been taped: interrogations have continued to take place in secret.” (Michael McConville & Phillip Morrell, “Recording the Interrogation: Have the Police Got it Taped?” (1983) *Crim. L.R.* 158).

The authors go on to expose other police tactics: “One tactic used has been to engage in preliminary interviewing elsewhere. In both Dundee and Falkirk there has been a gradual but steady increase since the experiment began in the proportion of suspects who made relevant statements prior to their arrival in the police station. This was particularly marked in Falkirk where the incidence of statements prior to arrival at the police station rose from 14 percent before tape-recording to 44 percent after. The rise in Dundee was less dramatic (from 34 to 43 percent) but nevertheless steady. The S.H.H.D. Report also reveals that there was considerable (and, in Dundee increasing) delay between the suspect’s arrival at the police station and the commencement of the interrogation and that at least part of this was attributable to the fact that officers were in the habit of questioning suspects upon their arrival at the police station often for lengthy periods of time before the tape-recorder was used to record the encounter. When the tape-recorder was activated, the police abandoned their usual interrogation techniques and instead utilized a formal, rather rigid style of questioning.” (Michael McConville & Phillip Morrell, “Recording the Interrogation: Have the Police Got it Taped?” (1983) *Crim. L.R.* 158 at 161).

Furthermore the Scottish experience has also shown that when videotaping was first introduced in that country, there was a “dramatic increase in “oral” utterances on arrest and in transit to the station.” (D. Martin and J. Gemmell, *Police Beat*, October 1984, *Newsletter* vol. 6, No. 2 at 24.)

<sup>86</sup> Alan Young, “Not Waving but Drowning: A Look at Waiver and Collective Constitutional Rights in the Criminal Process” (1988) 53 *Sask L. Rev.* 47 at 112.

<sup>87</sup> *Supra* note 30 at 313.

<sup>88</sup> Timothy Moore & Karina Gagnier, “You can talk if you want to”: Is the Police Caution on the ‘Right to Silence’ Understandable?” 51 *C.R.* (6th) 1; Timothy E. Moore & Cindy R. Wasser, “Social Science and Witness Reliability: Reliable Science Begets Reliable Evidence”, (2006) 33 *C.R.* (6<sup>th</sup>) 1.

Moore & Gagnier point out that even in situations where an arrestee has properly understood the right to silence caution (p. 13), “...the subsequent actions and statements” of police could “easily cause a suspect to doubt their initial interpretation of it.” Moore & Wasser’s research also supports the research of Saul M. Kassin that innocent

counsel does not fully ensure that they are aware of the consequences of speaking, nor does it guarantee that they will make a rational choice.<sup>89</sup>

Professor Steven Penney suggests that "...protecting free choice"<sup>90</sup> in the way it is intended by the Court may require "...that defence counsel be present during any interrogation."<sup>91</sup> But, he says, this is "politically untenable,"<sup>92</sup> as it would cause a dwindling in the number of confessions procured from questioning.<sup>93</sup> The Supreme Court has been unwilling to go so far as to permit counsel to attend at police interrogations,<sup>94</sup> yet they continue to cling to the free choice rationale as the underpinning for section 10(b).<sup>95</sup> This is highlighted in the case of *Sinclair*.<sup>96</sup> This "doctrinal indeterminacy"<sup>97</sup> has made it "more difficult to craft reasonable

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suspects are "...more likely to waive their right to silence" (Moore and Gagnier p. 5) than guilty ones, because many innocent suspects were of the opinion that they could not say anything that would be self-incriminating (Moore and Gagnier p. 5). Many in the Moore & Gagnier study disclosed that they waived their right to silence "...because they wanted to appear cooperative" (Moore & Gagnier p. 11) and because "...they believed that their statements could later be used in their defence (Moore & Gagnier p. 11). See also: S.M. Kassin & R.J. Norwick, "Why suspects waive their *Miranda* rights: The power of innocence" (2004) 28 L. & Hum Behav 211-221.

<sup>89</sup> The manner of the delivery of the right to counsel could be very important as well. As Skolnick and Leo argue "However police routinely deliver the *Miranda* warnings in a flat, perfunctory tone of voice to communicate that the warnings are merely a bureaucratic ritual. Although it might be inevitable that police would deliver *Miranda* warnings unenthusiastically, investigators whom we have interviewed say that they *consciously* recite the warnings in a manner intended to heighten the likelihood of eliciting a waiver. It is thus not surprising that police are so generally successful in obtaining waivers." Jerome H. Skolnick and Richard A. Leo, (1992) "The Ethics of Deceptive Interrogation" 11 Crim. Just. Ethics 3 at 5. Also see Otis H. Stephens, JR., *The Supreme Court and Confessions of Guilt* (Tennessee: University of Tennessee Press, 1973).

<sup>90</sup> *Supra* note 30 at 313.

<sup>91</sup> *Ibid.* See also Rosenberg and Rosenberg's views about presence of counsel at custodial interrogations. The authors claim that "[t]he presence of counsel is often considered an ironclad guarantee against police elicitation of any confession, voluntary or coerced. Yet, like other warranties, it is only as good as its maker. To put not too fine a point on the matter, the question of ineffective assistance of counsel, even in the interrogation context, cannot be easily dismissed. While it may be true that any lawyer worth his salt will tell the suspect...to make no statement to police under any circumstances, the problem is that some lawyers are not. Indeed, given the stress and time pressures of stationhouse questioning, mistakes in judgment, such as erroneous advice to give an exonerating statement, are more likely to occur. Affording the right to counsel also would not obviate inquiries with respect to waiver once counsel has left the stationhouse. Thus, such a proposal, while extremely helpful, does not eliminate litigation of issues, such as ineffective assistance of counsel, that may be peripheral to the question of coercion." Irene Rosenberg and Yale Rosenberg, "A Modest Proposal for the Abolition of Custodial Confessions" (1988) 63 N.Y.U.L. Rev. 955 at 104-105.

<sup>92</sup> *Supra* note 30 at 313.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.* at 314

<sup>96</sup> *Sinclair*, *supra* note 15.

compromises between competing interests raised in s. 10 cases”.<sup>98</sup> In some cases, he argues, it has “unduly thwarted the state’s interest in convicting the guilty”<sup>99</sup> and “[i]n others, it has inhibited the development of needed protections against abuse and false confessions”.<sup>100</sup>

It may be argued that the American approach of allowing counsel to attend at interrogations makes more sense.<sup>101</sup> “Suspects who invoke their right to silence and counsel”<sup>102</sup> find themselves vulnerable.<sup>103</sup> Under pressure to solve serious crimes, the police may find themselves tempted to browbeat, manipulate or deceive recalcitrant suspects “...into making inculpatory statements.”<sup>104</sup> This pressure exists both before and after suspects have consulted counsel.<sup>105</sup> A preventative “...bright-line”<sup>106</sup> rule that prohibits the questioning of suspects in the absence of counsel, once the right to counsel had been invoked, may reduce the incentive for abuse.<sup>107</sup> It would also avoid the need to inquire into the murky question of whether suspects were “diligent”<sup>108</sup> “...in exercising their right to counsel.”<sup>109</sup> Although the inevitable loss of confession evidence available to the state<sup>110</sup> may be lamentable from a crime control perspective, I agree with professor Penney’s position that the gain in abuse prevention justifies this loss.<sup>111</sup>

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<sup>97</sup> *Supra* note 30 at 314.

<sup>98</sup> *Ibid.* at 313.

<sup>99</sup> *Ibid.* at 314.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.* at. 319

<sup>102</sup> *Ibid.*

<sup>103</sup> S. Cohen, “Police Interrogation of the Wavering Suspect” (1989) 71 C.R. (3d) 148; Patrick Healy, “The Value of Silence” (1990) 74 C.R. (3d) 176.

<sup>104</sup> *Supra* note 30 at 319.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.* See also: Ian Bryan, *Interrogation and Confession: A Study of Progress, Process and Practice* (Aldershot: Ashgate Publishing Limited, 1997) at 291. On the other hand there may be no loss of confession evidence at all. There is data from England that shows that allowing counsel to attend at a police interrogation may not be as beneficial to accused persons as might be thought. Ian Bryan reports that many “...legal advisers may be

Whatever one thinks of the political tenability of allowing counsel to attend at interrogations, the problem is laid bare. If the free choice rationale for the right to counsel is compromised by the crime control considerations of police the jurisprudence will be fraught with problems. Problems *do* arise with the jurisprudence on the waiver of the right to counsel.

One issue has been deciding "...what level of comprehension"<sup>112</sup> of the police caution on section 10(b) rights is required of the suspect in order for him or her to forego consultation.<sup>113</sup> In *R. v. Clarkson*,<sup>114</sup> "the court employed a definition of waiver close to the reasonable person standard."<sup>115</sup> In that case, "...an intoxicated murder suspect confessed after police warned her of her right to counsel."<sup>116</sup> She stated that "...she had understood the warning."<sup>117</sup> Her sister, who was accompanying her,<sup>118</sup> "...repeatedly advised her to remain silent until a lawyer was present."<sup>119</sup> But Clarkson took the position<sup>120</sup> that "...there was no point and she did not need a lawyer's help."<sup>121</sup> The Court held that this did not amount to a valid waiver<sup>122</sup> because a waiver requires<sup>123</sup> "a true appreciation of the consequences of giving up the right."<sup>124</sup>

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marginalized by the police during interrogations" (p. 291) and "...others may be inclined to adopt a non-interventionist or non-adversarial stance" (p. 291) or may encourage their clients "...to answer all reasonable questions put to them by the police" (p. 291). Despite the allowance of the presence of a legal advisor at interrogations under the *Police and Criminal Evidence Act (PACE)*, Bryan notes that the percentage of confessions or damaging admissions in the pre-*PACE* era was roughly the same as it is in the post-*PACE* era. "Out of the pre-*PACE* sample of 400 cases, 342 (88.1%) of the detainees who were formally interrogated by the police made either partial or full confessions of guilt. The number from the research sample of 283 post-*PACE* cases is 248 (87%)." (p. 291)

<sup>112</sup> *Supra* note 30 at 319.

<sup>113</sup> *Ibid.*

<sup>114</sup> *R. v. Clarkson*, [1986] 1 S.C.R. 383, 25 C.C.C. (3d) 207, 50 C.R. (3d) 289.

<sup>115</sup> *Supra* 30 at 314; *Clarkson, Ibid.* According to Skolnick and Leo, "An interrogation is presumed to be coercive unless a waiver is obtained." The authors go on to argue that "In practice, once a waiver is obtained, most of the deceptive tactics deplored by the majority become available to the police." *Skolnick, and Leo, Supra* note 89 at 4.

<sup>116</sup> *Supra* note 30 at 314.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*; According to Professor Young the practice of waiver has its roots in the market-based mentality of trading goals for a specific price. Professor Young is of the view that the constitutional rights are the collective property of

In *R. v. Whittle*,<sup>125</sup> the court moved away from such a charitable interpretation<sup>126</sup> and found on similar facts that the accused understood the caution well enough to have waived his 10(b) right.<sup>127</sup> In *Whittle*, the accused was a "...schizophrenic murder suspect"<sup>128</sup> when questioned by police, after he was informed of his section 10 rights.<sup>129</sup> He stated that he understood the caution declined to speak to a lawyer.<sup>130</sup> After making a number of incriminating utterances,<sup>131</sup> he requested to consult with counsel.<sup>132</sup> At trial, testimony from an expert witness indicated that<sup>133</sup> the "...accused was driven to confess by auditory hallucinations that he was experiencing. The Court, based on *Clarkson*, recognized that "...the waiver of the right to

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all members of society, and therefore, individuals should not be allowed to make personal decisions in either exercising or waiving constitutional rights. (See *Supra* note 86 at 77).

<sup>123</sup> *Supra* note 30 at 314.

<sup>124</sup> *Supra* note 114 at para 20. According to Rick Libman, the Supreme Court in *Clarkson*, in deciding whether or not to admit an "intoxicated confession", was caught between two competing views. The Supreme Court had to decide whether under the state of drunkenness, the accused had sufficient cognitive capacity to simply understand the meaning of her utterances; or the higher standard of requiring the accused to have awareness of the consequences of her statement. The Supreme Court chose to apply the latter test to examine Clarkson's waiver of her right to counsel. Subsequently on the basis of the test of awareness of the consequences, the Supreme Court ruled to exclude the "intoxicated confession". However, the separate judgment delivered by McIntyre and Chovinard JJ. took the position that "...a non-operating mind would not only be unaware of its utterances but also of the consequences thereof. For either of these reasons, the accused's statement would be inadmissible". R. Libman, "Waiver of the Right to Retain Counsel While Intoxicated", at 122. Also, Libman had the following comments about the importance of the Supreme Court's ruling in *Clarkson*:

"The significance of the Supreme Court of Canada's judgment in *R. v. Clarkson* is unmistakable: it clearly signals the Courts to closely scrutinize and be ever vigilant at any purported waiver by an intoxicated person of his constitutional rights to retain counsel. As Madam Justice Wilson commented at 17 [at 505 D.L.R.] a valid and effective waiver of s. 10(b) right "must be premised on a true appreciation of the consequences of giving up the right" R. Libman, "Waiver of the Right to Retain Counsel While Intoxicated", at 125. However it should be noted that "a true appreciation of the consequences" according to K. Jull requires specific knowledge of complex legal concepts on the part of the accused person, particularly in relation to the requirement of *mens rea*. (Jull, *Supra* note 83). Moreover, the Supreme Court in the latter case of *R. v. Prosper* (*Supra* note 17) at paragraph 43, stated that "...the courts must ensure that the right to counsel is not "too easily waived." R. Libman "Holding Off" or "Holding Out", Who Really Prospers From Prosper? (1994) 7 Journal of Motor Vehicle Law Vol. 7 at 44. Libman also went on to assert that the cases of *Prosper* and *Bartle* ([1994], 92 C.C.C. (3d) 289) raised the threshold for waiver of section 10(b) by setting the standard of valid waiver even "more exacting", then the one set in *Clarkson*, R. Libman, "Holding Off" or "Holding Out", Who Really Prospers From Prosper?" at 55.

<sup>125</sup> *R. v. Whittle*, [1994] 2 S.C.R. 914, 92 C.C.C. (3d) 11, 32 C.R. (4<sup>th</sup>) 1. See also *Supra* note 30 at 314.

<sup>126</sup> *Penney*, *ibid*.

<sup>127</sup> *Ibid*.

<sup>128</sup> *Ibid*.

<sup>129</sup> *Ibid*.

<sup>130</sup> *Ibid*.

<sup>131</sup> *Ibid*. at 315

<sup>132</sup> *Ibid*. at 314-315.

<sup>133</sup> *Ibid*. at 315.

counsel required some awareness of the consequences,”<sup>134</sup> and the degree of the accused’s understanding was diminished.<sup>135</sup> The Court held that a suspect only needs to<sup>136</sup> “understand what he or she is saying and to comprehend that the evidence may be used in the proceedings against [him or her]”.<sup>137</sup> This requires only<sup>138</sup> the “limited cognitive capacity to understand the process and communicate with counsel.”<sup>139</sup> Suspects do not necessarily have to be able to engage in “analytical reasoning”<sup>140</sup> or to be able to choose a course of action that<sup>141</sup> “best serves [their] interests”.<sup>142</sup> The inner voices that may have motivated the accused to make damaging admissions, did not invalidate his waiver,<sup>143</sup> the Court held.

In both cases, “...cognitive impairments prevented the defendants from making rational judgements”<sup>144</sup> about whether or not it was wise to speak to police.<sup>145</sup> They were unable to make the decisions that a similarly situated reasonable person would have made.<sup>146</sup> But the court treated the taking of statements differently in each case.

Based on the preceding discussion, it would seem that without a safeguard in place, problems of whether an accused was exercising free choice in a specific case are bound to arise<sup>147</sup> and these problems are further aggravated by the fact that allowing counsel to attend<sup>148</sup> is not a possibility.

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<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

<sup>137</sup> *Supra* note 125 at para 45. See also *Supra* note 30 at 315.

<sup>138</sup> *Penney, Ibid.*

<sup>139</sup> *Supra* note 125 at para 32. See also *Ibid.*

<sup>140</sup> *Penney, Ibid.*

<sup>141</sup> *Ibid.*

<sup>142</sup> *Supra* note 125 at para 32. See also *Ibid.*

<sup>143</sup> *Penney, Ibid.*

<sup>144</sup> *Ibid.* at 316.

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*

<sup>147</sup> It appears that failure to specifically request to speak to counsel would result in losing that right by default. This proposition is supported by the Ontario Court of Appeal’s ruling in *R. v. Anderson* (1984), 45 O.R. (2d) 225. The Court in *Anderson*, at paragraph 42 held: “I am of the view that, absent proof of circumstances indicating that the

Moreover, the fact that the right to counsel is only available upon being positively invoked by an accused person also raises important issues. It is submitted that such approach tends to treat this right as a privilege.<sup>149</sup> The right to counsel as a constitutional right should be viewed as an obligation that the state is forced to honour regardless of whether or not the detained person claims it. However to make its exercise conditional upon request would limit the application of this right, especially in cases involving the "...inexperience, the poor, the frightened"<sup>150</sup>, because these are the ones who "...are likely to be the people who will not positively assert the right to counsel".<sup>151</sup> Instead of reaching out for a lawyer's support these people may essentially lose their right to counsel by their inability to assert it. Hence creating a problem in the criminal process in terms of fairness which "...dictates that an individual be presumed to have claimed his right to counsel barring evidence that he has chosen to waive it".<sup>152</sup>

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accused did not understand his right to retain counsel when he was informed of it, the onus has to be on him to prove that he asked for the right but it was denied or he was denied any opportunity to even ask for it." The Court of Appeal in *Anderson*, at paragraph 14, also held that compliance with right to counsel involves the following requirements:

"1) Upon arrest or detention there is an obligation upon a peace officer to communicate clearly to the accused that he has a right to retain and instruct counsel. In many circumstances, a question as to whether the accused understands that right ends the officer's obligation.

"2) A Peace officer has to go further in explaining the right if there is something in the circumstances which suggests that the accused does not understand, such as a state of shock or drunkenness.

"3) If the accused in any manner chooses to invoke or exercise his right to retain and instruct counsel, the peace officer has two obligations: a) to provide the opportunity without delay, and b) to cease any questioning of the accused until after that opportunity has been provided.

"4) If the accused or arrested individual exercises the choice of not requesting an opportunity to retain and instruct counsel and speaks to the peace officer, the statement obtained is not inconsistent with the *Charter*"

Also, the Supreme Court in *R. v. Baig*, [1987] 2 S.C.R. 537 at paragraph 6, held that: "In the present case, the accused did not put forward, nor does the record reveal, any evidence suggesting that he was denied an opportunity to ask for counsel. Absent such circumstances as that referred to by Tornopolsky J.A., once the police have complied with s.10 (b) by advising the accused without delay of his right to counsel, there are no correlative duties triggered and cast upon them until the accused, if he so chooses, has indicated his desire to exercise his right to counsel". Also see *R. v. Shannon* (1987), 82 C.R.R. 207 (N.W.T.C.A.).

<sup>148</sup> See discussion regarding the decision *R. v. Sinclair* [2010], (*Supra* note 15) in an earlier part of this chapter.

<sup>149</sup> *R. v. Menzies* (1986), 24 C.R.R. 144 (Ont. C.A.).

<sup>150</sup> R.S.M. Woods, *Police Interrogation* (Agin Court: Carswell, 1990) at 105.

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*



Another problem associated with the requirement of claiming the right to counsel is that it could encourage the practice of police trickery, as was illustrated in the case of Greffe.<sup>153</sup> In this case the defendant was suspected of importing narcotics into the country. Upon his arrival at the airport he was sent for routing custom check, however no contraband was found in his belongings, promoting the police to strangely resort to the arrest of the defendant for outstanding warrants on traffic violations and then proceed against him by subjecting him to a degrading body cavity search. "One can only assume that this strange and strained arrest was made to thwart the accused's exercise of his s.10 (b) rights, in the sense that most individuals arrested for traffic violations would not consider consulting with a lawyer, even after being informed of this right, due to the trivial nature of the charge."<sup>154</sup>

I should also point out that the requirement that a detainee should be given a reasonable opportunity to exercise his/her right to counsel is also problematic. As I stated before, upon the assertion of right to counsel the police are then obligated to allow the detained or the accused person with a reasonable opportunity to retain and instruct counsel without delay. This obligation involves both providing access to telephone and adequate time to retain counsel<sup>155</sup>, provided the situation does not call for emergency action.<sup>156</sup> For examples of urgent situations we could cite the breathalyzer cases where time is crucial in determining guilt.<sup>157</sup> However the

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<sup>153</sup> *R. v. Greefe* [1990] 3 W.W.R. 577, 73 Alta. L.R. (2d) 97

<sup>154</sup> Alan Young "Greefe: A Section 8 Triumph?" (1991) C.R. 75 (3d) 293 at 297.

<sup>155</sup> *R. v. Barbon* (1986), 55 C.R. (3d) 89 (B.C.C.A.)

<sup>156</sup> Urgent situations should not be loosely defined, even in the context of drinking and driving cases. For example "... the 2-hour evidentiary presumption available to the crown pursuant to section 258(1)(c)(ii) of the *Criminal Code* does not, by itself, constitute such a compelling or urgent circumstance. Urgency is not created by mere investigatory and evidentiary expediency; the detainee's section 10(b) right take precedence over the statutory right of the crown to rely on an evidentiary presumption". (*Libman, Who Really Prospers from Prosper, Supra* note 124 at 44).

<sup>157</sup> *Therens, Supra* note 31.

Supreme Court has also added the qualification of “reasonable diligence”<sup>158</sup> in order to compel an accused person to either invoke his right to call counsel or be denied the use of that right.<sup>159</sup> Although one could argue that this restriction on the use of s.10 (b) right is necessary in the context of breathalyzer cases, since after a two-hour period the breathalyzer tests become less useful, however there can hardly be any credible rational for inverting the process by shifting the obligation from the police<sup>160</sup> to the accused person when dealing with cases that do not call for emergency measures. Based on this assertion we can be critical of Supreme Court's ruling in *Smith*<sup>161</sup>, in which the court placed the onus on the accused to use his right to counsel with reasonable diligence. In this case the defendant, a robbery suspect, was arrested late at night. He stated his wish to consult with counsel, but only in the morning when his lawyer would not have to be disturbed. However four and a half hours after his arrest the police refusing to respect the defendant's wish badgered him into giving an incriminating statement. The Supreme Court by stating the need for not constraining police investigation treated this case like the breathalyzer cases, however the Supreme Court did not in any way attempt to identify the need for emergency measures in the factual context of this case.<sup>162</sup> In other words in *Smith* the Supreme Court dealt with the defendant's confession in this case in the same manner that the highest Court in the country traditionally deals with alcohol.<sup>163</sup> The problem with this approach, however, is that “A confession, if truly characterized by voluntariness, unlike alcohol in the bloodstream, does not

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<sup>158</sup> David Tanovich took a more critical approach towards this requirement in his critic of Supreme Court's ruling in *R. v. Evans*, (*Supra* note 60). See discussion on critique of section 10 (a).

<sup>159</sup> *R. v. Tremblay* [1987] 2 S.C.R. 435, 60 C.R. (3d) 59.

<sup>160</sup> *Supra* note 16.

<sup>161</sup> *Smith*, *supra* note 11, affirming 29 B.C.L.R. (2d) 180, 43 C.C.C. (3d) 379.

<sup>162</sup> *R. v. Ross*, [1989] 1 S.C.R. 3: For example in this case the results of a line-up was excluded because the S.10 (b) had been invoked and there was no urgency involved to justify precipitous line-up.

<sup>163</sup> *R. v. Black* (1987), 70 C.R. (3d) 97, 50 C.C.C. (3d) 1 (S.C.C.) [N.S.] In this case the accused was charged with 1<sup>st</sup> degree murder and he was also denied contact with his lawyer because the contact would have required several hours of waiting. The Supreme Court however in this case held that there was a constitutional violation of S.10 (b)

disappear or dissipate”.<sup>164</sup> Based on this fact we should then ask ourselves this question: what is the rationale behind the Supreme Court’s decision in *Smith*? Could it be that the Supreme Court is attempting to send out a message to the police that, “...notwithstanding the obligation to advise detained suspects of their right to counsel, the police may nevertheless attempt to induce them to waive their rights. If this is actually the Court’s message, then its strong attempts to deter the flagrant and willful disregard of constitutional rights in such cases as *Manninen*, *Therens*, *Collins*, have been seriously undermined”.<sup>165</sup>

Such an approach by the Supreme Court to the use of right to counsel “with reasonable diligence” creates a problem for the adequate use of this right, in a sense that it forces the defendants to opt for the first available counsel, rather than utilizing the services of the counsel of their choice.

When one examines the issues associated with the exercise of section 10(b), one wonders if doing away with custodial interrogations altogether and replacing them, perhaps, with something else<sup>166</sup> seems like the most reasonable way to rectify the contradictions that are built into the nature of police interrogation in the *Charter* era.<sup>167</sup>

Given the shortcomings of s. 10(b) that have already been discussed I hold that this section is incapable of providing considerable protection to detained suspects in addition to the doctrine of voluntariness. Section 10(b) of the *Charter* leaves much to be desired in the way of providing protections to suspects taken into custody for interrogation. With this in mind, we

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<sup>164</sup> *Cohen*, *supra* note 103 at 153.

<sup>165</sup> *Ibid.* at 155.

<sup>166</sup> This thesis argues for a revival of a modified pre-trial magisterial examination procedure.

<sup>167</sup> On this point Professor Hogg raises a question to the effect that, would it not be “...more logical to simply prohibit all statements to the police. Such a rule would be honest and straightforward, and would ensure that all suspects, whether or not represented by counsel, were treated equally.” Peter Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell Legal Publications, 1992) at 47-13.

now turn to an examination of the principles underlying each of the right to silence and the confessions rule: the principle against self-incrimination (or privilege against self-incrimination). Much of our criminal law is organized around this ancient right. By discussing its ambiguous nature, briefly tracing its history and assessing the rationales for its existence, we can familiarize ourselves with its fundamental importance in the criminal law and how it is a foundation upon which other rights may be built. We will also discuss how it is under attack, and we will see the reasons why many would do away with the privilege.

## Chapter 3: The Privilege Against Self-Incrimination

### Introduction

It was recognized and clearly articulated by the Supreme Court of Canada in *R. v. Singh* that both the right to silence and the confessions rule are considered in the post-*Charter* era to be particular manifestations of a deeper principle: the privilege against self-incrimination.<sup>1</sup> Therefore, to reach an accurate understanding of each of the right to silence and the confessions rule, and in particular to ensure their correct interpretation, it is necessary to first properly understand the privilege. An understanding of where and why it originated, what issues it arose to address, and how it has been interpreted by courts throughout the history of the common law, is required. It is only after understanding the rationale for the privilege that we can begin to have an informed discussion of whether contemporary jurisprudence has built a foundation of protections through the right to silence and the confessions rule, which can be expected to have lasting integrity.

The principle against self-incrimination merits our consideration at this stage, since this doctrine engages the confessions rule and the right to silence. This Chapter begins by examining the link between the privilege and human dignity. It will then move onto explore the ambiguous nature of the privilege and the controversy surrounding its existence as a principle of the law. The opinions of thinkers on both sides of the debate over the continued existence of a privilege against self incrimination are canvassed, and support or criticism of their ideas are provided.

Following this, a recounting of a brief history of the privilege in early modern England, and in Canada in the pre-*Charter* and post-*Charter* environments is provided. From this discussion we can see how the concept grew and took root in England, and was then transported

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<sup>1</sup> *R. v. Singh*, 2007 SCC 48, [2007] 3. S.C.R. 405 at para. 21. See also Hamish Stewart, “The Confessions Rule and the *Charter*” (2009) 53 McGill L.J. 517 at 519.

to Canada by rulings of our judiciary. We then see the concept augmented after the introduction of the *Charter* and in light of the cases that follow.

We finally turn to the underlying rationales for the privilege against self-incrimination. Again, the insights of both pro- and anti- privilege thinkers are explored and the sufficiency of explanations for why there must be a privilege (or why it should be eliminated) are examined. It is the position of the author that the privilege against self-incrimination must be preserved. The discussion of the rationales will shed light on the underlying reasoning for the existence of a privilege against self-incrimination and should demonstrate how important it is to the entire criminal process that this right, and its manifestations, like the confessions rule, should be preserved.

The discussion in this chapter will help us understand one of the claims of this thesis: that the privilege against self-incrimination defines the nature of the relationship between the state and the individual in common law states. As a result, the protections built into this privilege should be preserved in order to protect the integrity of our criminal justice system.

### **The Privilege and Human Dignity**

The principle against self-incrimination is a well-recognized principle of fundamental justice under section 7,<sup>2</sup> and is a vehicle for the promotion of human dignity in our constitutional order. According to Professor Hamish Stewart, "...respect for human dignity has been an important organizing principle of constitutional law since the *Charter* came into force."<sup>3</sup> But there is no universal consensus as to the exact definition or the extent to which the state is required to respect human dignity.<sup>4</sup>

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<sup>2</sup> Robert Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 3d ed. (Toronto: Irwin Law, 2005) c. 13.

<sup>3</sup> Stewart, *supra* note 1 at 520; See also Lorraine E. Weinrib, "Human Dignity as a Rights-Protecting Principle" (2005) 17 N.J.C.L. 325 at 520.

<sup>4</sup> Stewart, *ibid.*

The Ouimet Report, issued by the Canadian Committee on Corrections, states “[T]he privilege against self-incrimination is deeply involved in the feeling of justice or fairness with which contemporary Canadian society reacts to our criminal process.”<sup>5</sup> The essence of the privilege is the notion that when the state prosecutes an individual, it should do its own homework and it should not look to the individual for help in its investigation.<sup>6</sup>

The Supreme Court of Canada has called the principle against self-incrimination<sup>7</sup> “[p]erhaps the single most important organizing principle in criminal law.”<sup>8</sup> The principle has been linked to many aspects of criminal procedure, and rules of evidence<sup>9</sup>, including: “...the express protection against self-incrimination in section 13 of the *Charter*,”<sup>10</sup> “...the rule against the Crown splitting its case;”<sup>11</sup> “the common law confessions rule;”<sup>12</sup> “the *Charter* right to silence;”<sup>13</sup> “...derivative-use immunity under section 7;”<sup>14</sup> “...and the line between permissible and impermissible uses of the state’s power to compel the production of information.”<sup>15</sup> “This constellation of common law and constitutional rules provides powerful protection against the state’s use of the testimony of suspects and accused persons against their will in the investigation and prosecution of criminal offences.”<sup>16</sup> The privilege against self-incrimination is engaged by the common law confessions rule.<sup>17</sup>

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<sup>5</sup> *Report of the Canadian Committee on Corrections* (Ouimet J. Chairman 1969) at 54.

<sup>6</sup> *Stewart, supra* note 1 at 520-521.

<sup>7</sup> *Ibid.* at 521.

<sup>8</sup> *Ibid.* See also *R. v. P.(M.B.)*, [1994] 1 S.C.R. 555 at 577, 17 O.R. (3d) 782.

<sup>9</sup> *Stewart, ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Stewart, supra* note 1 at 521. See also *P.(M.B.)*, *supra* note 8.

<sup>12</sup> *Stewart, ibid.*

<sup>13</sup> *Stewart, ibid.*; See also *R. v. Hebert*, [1990] 2 S.C.R. 151, [1990] S.C.J. No. 64.

<sup>14</sup> *Stewart, ibid.*; See also *R. v. S.(R.J.)*, [1995] 1 S.C.R. 451, 96 C.C.C. (3d) 1.

<sup>15</sup> *Stewart, ibid.*; See also *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757, 317 A.R. 1.

<sup>16</sup> *Stewart, ibid.*

<sup>17</sup> For an in-depth discussion on the confessions rule, see chapter 1.

## The Ambiguous Nature of the Privilege

It is not surprising that the strange features of the privilege against self-incrimination have generated scholarly debates both in courts and within academic circles. It is fair to say that the substance of these debates have centered on the peculiar nature of this privilege. After all, it is much easier to appeal to the society's sense of fair-play and to argue that rights such as the right to a jury trial, the right to a trial within a reasonable time, the right to counsel, the right against unreasonable search or the right against arbitrary detention are necessary requirements for a "...decent civic existence."<sup>18</sup> However, to persuasively argue that one should have the right not to respond to *prima facie* credible state allegations, without suffering any prejudice, is indeed very challenging.<sup>19</sup> This supposition is based on the fact that there is a qualitative difference between the nature of the privilege against self-incrimination and the other fundamental rights that are available to criminal suspects. There is a "natural quality"<sup>20</sup> about other fundamental rights<sup>21</sup> that one can immediately relate to; the same cannot be said about the privilege against self-incrimination.<sup>22</sup> This privilege is a different animal and the unusual nature of this right is such that it requires special effort to understand it.

As stated by Amar and Lettow, addressing the privilege in the American context:

Small wonder... that the self-incrimination clause – virtually alone among the provisions of the bill of rights – has been the target of repeated analytic assault over the course of the twentieth century from thoughtful commentators urging constitutional amendment to narrow it or repeal it altogether.<sup>23</sup>

Since the inception of the privilege against self-incrimination the proponents of crime-control values and the supporters of the due-process camp have been engaged in an intense fight

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<sup>18</sup> Alfred H. Knight, *The Life of the Law* (New York: Crown Publishers Inc., 1996) at 90.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> Akhil Reed Amar & Renee Lettow, "Fifth Amendment First Principles: The Self-Incrimination clause" (1995) 93 Mich. L. Rev. 857 at 895.



over its moral and intellectual justification. The battle lines in this debate appear to be drawn according to the political orientations of individual scholars. The privilege is constantly under attack by conservative commentators, and therefore we need to review the main arguments both for and against its continued operation.

The controversy about the intellectual justifications of the privilege<sup>24</sup> against self-incrimination seems to revolve around its very conceptual foundation. Does the privilege represent a “complex of values”<sup>25</sup> which defines the nature of the relationship between the state and the individual in a liberal democracy?<sup>26</sup> Or is the privilege instead a misguided and a misunderstood principle that has outlived its historical usefulness?<sup>27</sup>

The review of the historical role of the privilege reveals that at some point it “...became a rallying cry in the history of the protection of human liberty, an established feature of the Anglo-American law, and a point of departure for developing legal systems”<sup>28</sup>. It also became a symbolic tool in the hands of the free-thinking individuals for standing up to religious and political tyranny, and as a symbol, this privilege continues to represent “...our best aspirations and our deepest sense of justice.”<sup>29</sup> Hence, the history of the privilege against self-incrimination may justify the claim that, this privilege represents “... man’s struggle to make himself civilized”<sup>30</sup> or that it “reflects many of our fundamental values and most noble aspirations.”<sup>31</sup> It might also be added that these values prevent us from making “...even the most hardened

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<sup>24</sup> John Wigmore, “Nemo Tenetur Seipsum Prodere” (1891-92) 5 Harv. L. Rev. 71 at 71.

<sup>25</sup> C.T. McGormick, “Some Problems and Developments in the Admissibility of Confessions” (1946) 24 Tex. L. Rev. 239 at 277.

<sup>26</sup> Steven Penney, “Theories of Confession Admissibility: A Historical View” (1997-1998) 25 Am. J. Crim. L. 309.  
<sup>27</sup> *Ibid.*

<sup>28</sup> R. H. Helmholz, “Introduction” in R.H. Helmholz et al., eds., *The Privilege against Self-Incrimination: Its Origins and Development* (Chicago & London: The University of Chicago Press, 1997) at 1.

<sup>29</sup> E.N. Griswold, *The 5<sup>th</sup> Amendment Today* (Cambridge: Harvard University Press: Cambridge, 1955) at 53.

<sup>30</sup> This quotation came from Justice Goldberg in *Murphy v. Waterfront Commission*, 378 U.S. 52, 522 (1964), *Infra* note 31. (Quoting Griswold, *ibid.* at 7). The actual quotation refers to the privilege against self-incrimination as “one of the great landmarks in man’s struggle to make himself civilized”

<sup>31</sup> *Murphy v. Waterfront Commission*, 378 U.S. 52, 522 (1964).

criminal to sign his own death warrant, or dig his own grave, or pull the lever that springs the trap on which he stands.”<sup>32</sup>

The operation of this privilege in the modern context also helps define the scope of the relationship between the state and the individual in common law states, at least in the criminal law setting. The nature of this privilege has a built in military logic<sup>33</sup> of “non-cooperation”<sup>34</sup> with your captors.<sup>35</sup> The suspected criminals who are caught in the clutches of the state can take comfort in the fact that they do not need to assist their “enemy”. They can, instead take the following position that; all you’ll get from me is my “name, rank and serial number”<sup>36</sup> and no more.<sup>37</sup> This logic of warfare has been articulated by Justice Fortas in the following passage:

[The Englishman] himself was a sovereign. He had the sovereign right to refuse to cooperate; to meet the state on terms as equal as their respective strength would permit...  
... Equals, meeting in battle, owe no [duty to furnish ammunition to the other side], regardless of the obligations that they may be under prior to battle....[The government] has no right to compel the sovereign individual to surrender or impair his right of self-defense.”<sup>38</sup>

However this privilege has sustained intense attacks by many important critics. It seems that as long as the privilege against self-incrimination remained a noble idea, but with no practical use, it did not attract too much intellectual opposition. But when it finally became an effective part of the common law, critics from all quarters rushed to launch fierce attacks on its perceived evils. The opponents of the privilege are often inspired by the classic statement of Jeremy Bentham:

If all criminals of every class had assembled and framed a system after their own wishes, is not this rule the very first they would have established for their security? Innocence never takes advantage of it. Innocence claims the right of speaking, as guilt invokes the privilege of silence.<sup>39</sup>

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<sup>32</sup> *Supra* note 29 at 7.

<sup>33</sup> *Supra* note 18 at 97.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.* The law requires that the detainee give his name, his date of birth and his address.

<sup>37</sup> *Ibid.*

<sup>38</sup> A. Fortas, “The Fifth Amendment: Nemo Tenetur Prodere Seipsum” (1954) 25 Clev. B.A.J. 91. at 98-99.

<sup>39</sup> A.D.E. Lewis, “Bentham and the Right to Silence” (1988) 12 Bentham Newsletter 37 at 37.

Detractors of the privilege invariably rely on Bentham's attack. It was in the early stages of the 19<sup>th</sup> century that Bentham, an intellectual giant of his milieu, established himself as the most respected opponent of the privilege. His status as a major philosopher continues to lend instant credibility to arguments advanced by the trenchant critics of the privilege.

### **Post-Benthamite Criticism of the Privilege**

Since Bentham's scathing criticism of the privilege, the opposition to this principle has continued to grow. For example, Justice Benjamin Cardozo stated that: "Justice ... would not perish if the accused were subject to a duty to respond to orderly inquiry."<sup>40</sup>

The state of constant attack on the privilege has been summarized by the skeptical view of Dripps in the following fashion:

The Privilege against self-incrimination stands in need of convincing justification. To be sure, there is no shortage of eloquent testimonials to the hallowed place of the right to remain silent in the pantheon of Anglo-American liberties. But defenders of the privilege have yet to substantiate the misty rhetoric that cloaks the privilege in a haze of verbal words."<sup>41</sup>

Stephen Schulhofer takes the attack on the privilege to the next level by suggesting that the privilege has been so utterly discredited, that no one is left to defend it. He states that, "it is hard to find anyone these days who is willing to justify and defend the privilege against self-incrimination."<sup>42</sup>

Despite the relentless attacks on the privilege by thoughtful commentators, I intend to pierce the "misty rhetoric that cloaks the privilege", by explaining the important role that the privilege plays in the criminal justice system. I wish to defend the privilege and argue that it is an indispensable part of our criminal justice system. The privilege fits in perfectly with the inner

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<sup>40</sup> *Palko v. Connecticut*, 302 U.S. 319, 326 (1937).

<sup>41</sup> Donald A. Dripps, "Self-Incrimination and Self-preservation: A skeptical view" (1991) 2 Univ. Ill. L. Rev. 329 at 329.

<sup>42</sup> S. J. Schulhofer, "Some Kind Words for the Privilege Against Self-Incrimination" (1991) 26 Valparaiso L. Rev. 311 at 311.

“logic”<sup>43</sup> of the criminal justice system<sup>44</sup> and it should indeed be protected. It is directly tied to the presumption of innocence and the burden on the state<sup>45</sup> to prove “...guilt beyond a reasonable doubt.”<sup>46</sup> This position is predicated on the assumption that we must take these two closely related principles seriously,<sup>47</sup> and, as a result, we are justified to argue that an individual should be allowed to sit back and through his silence, challenge the state to prove his guilt beyond reasonable doubt.<sup>48</sup> However, if we go to the extent of arguing that the silence of an accused person should be interpreted as a sign of guilt, then we cannot legitimately claim that the innocence of an accused person is presumed.<sup>49</sup>

Hence, any attempt to narrow the scope of the privilege against self-incrimination or to repeal it all together would do violence to other defining and cherished features of our criminal justice system, which includes both the presumption of innocence and the burden of proof being placed on the state. John McNaughton offers a useful example to illustrate this point:

One does not, when he performs the surgery on the part of the body, do it without regard for the impact on other parts of the body. The same is true of surgery on an institution integral to the legal organism.<sup>50</sup>

### **The Privilege as an abstract Idea**

The privilege against self-incrimination was first conceived as an abstract idea - a remarkable idea, which has played an important role in the development of our criminal justice system. The Latin phrase *Nemo Tenetur Prodere Seipsum* consists of merely a few words, but

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<sup>43</sup> *Supra* note 18 at 98.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> J. McNaughton, “The Privilege Against Self-Incrimination: Its Constitutional Affection, Raison d’Etre and Miscellaneous Implications” (1960) 51 J. Crim. L. & Criminology & Police Sci. 138 at 153.

these simple words have made immense contributions to the "...long course of events through which we have sought to make ourselves civilized."<sup>51</sup>

The "long course of events" represents a torturous historical<sup>52</sup> journey, through which the privilege has managed to grow into its existing form, and prosper.<sup>53</sup> The privilege possesses the power of fairness and because of this power it has been able to show a remarkable resilience. In the face of every challenge to its continued application the privilege has survived, and it has resumed its march forward, transformed by the experience so as to be a more effective shield, mitigating the power of the state over individual.

The privilege does not eliminate the awesome advantage of the state, however. Rather, it makes the contest between the two actors a more balanced one. It should never be forgotten that the main contours of the privilege against self-incrimination emerged through centuries of tragic clashes between religious authorities and free-thinking individuals in courtroom settings. The heroic sacrifices of these individuals should be honored by protecting this privilege from politically motivated attacks.<sup>54</sup> The privilege has managed to withstand the acid test of intense opposition for many years and it has become the connecting link between the admirable defiance of the innocent martyrs of the criminal justice system and the liberties we enjoy in free, democratic societies.

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<sup>51</sup> *Supra* note 29 at 32.

<sup>52</sup> *Supra* note.

<sup>53</sup> Please see *supra* note 5.

The kind sentiments expressed by the Ouimet Committee about the privilege should be contrasted with another Canadian reaction shown by Mr. Justice Haines of the Supreme Court of Ontario in 1970:

I submit that the greatest obstacle to efficient criminal law enforcement in Anglo-American Jurisdictions is the right of the accused to remain silent. It is a luxury society can no longer afford. It contributes to the high success ratio of crime. It frustrates the police, comforts criminals, and encourages disrespect for the law. And with great deference to the legal profession, the abolition of the right to remain silent is necessary to save an honourable profession from its own dishonour. (Edson Haines, *Studies in Canadian Criminal Evidence*, R. Salhany and R. Carter ed. (Toronto: Butterworths, 1972), at 322).

<sup>54</sup> R.S. Gerstein, "The Demise of Boyd: Self-Incrimination and Private Papers in the Burger Court" (1979-1980) 27 UCLA L. Rev. 343 at 346.

It is suggested that the privilege is one of the defining features of the relationship between the individual and the state in common law countries that trace their legal systems to the Anglo-American tradition. The critics however maintain that this privilege rests on shaky conceptual foundation, and whereas historically it may have served a useful function, in modern times "...It has out lived the context that gave it meaning"<sup>55</sup>

It appears that the justifications for the privilege are intertwined with its colourful history. The ultimate point of reference and justification for its existence seems to always come back to its historical development. The critics of the privilege maintain that the privilege, in its existing form, no longer serves its historical purpose and it should therefore be limited or abolished altogether. The supporters of the privilege, however, use the history of the privilege as a source of pride and one of the justifications for its continued operation.

There can rarely be an adequate understanding of an idea or invention without first having some understanding of the human necessity it was devised to address. This requires an engagement with history. Given the ongoing controversy about the relevance of the privilege, we need to conduct a limited review of its historical origin and development, before we can examine the rationales for its existence. Therefore, I will examine the genesis of the privilege.

### **History of the Privilege Against Self Incrimination**

#### **Origins Of The Privilege Against Self-Incrimination**

England is the origin of our political institutions. In fact, the common law is still the origin of most of Canadian criminal law in spite of the *Criminal Code*. Although the current law in Canada relating to the privilege against self-incrimination is rooted in English common law, the privilege against self-incrimination has taken on a far different character today than what was

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<sup>55</sup> *Supra* note 25.

defined by Lord Goddard in 1942, in the case of *Blunt v. Park Lane Hotel*.<sup>56</sup> According to Goddard, the privilege against self-incrimination lays down “that no one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the deponent to any criminal charge, penalty, or forfeiture which the judge regards as reasonably likely to be preferred or sued for.”<sup>57</sup>

According to Chief Justice Warren of the United States Supreme Court, “we sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervor with which it was defended. Its roots go back into ancient times.”<sup>58</sup>

The maxim *nemo tenetur prodere seipsum*, which means “no one should be required to accuse himself,”<sup>59</sup> was first recognized in England in the ecclesiastical courts.<sup>60</sup> “The “accusation” and a form of “trial” appear together as the first model of criminal procedure in England to replace vengeance as a means of dealing with crimes.”<sup>61</sup>

The accusation involved a specific charge publicly declared by the offending party to the alleged offender.<sup>62</sup> It was a firmly established principle in the early history of English criminal law that a public accusation of a specific wrong was necessary before any person could be found guilty of an offence.<sup>63</sup> This was the only way in which the criminal process could be set in motion.<sup>64</sup> Following the accusation, there was a two stage process.<sup>65</sup> “The first stage involved a

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<sup>56</sup> *Blunt v Park Lane Hotel*, [1942] 2 K.B. 253 (C.A.) at 257.

<sup>57</sup> G. Mazabow, “The Origin Of The Privilege Against Self-Incrimination: Jewish Law” (1987) 104 S. African L.J. 680 at 710.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Supra* note 29 at 2.

<sup>60</sup> E.M. Morgan, “The Privilege Against Self-Incrimination” (1949) 34 Minn L.R. 1 at 2-8.

<sup>61</sup> Ed Ratushny, *Self Incrimination in the Canadian Criminal Process* (Toronto: Carswell Company Limited, 1979) at 159.

<sup>62</sup> *Ibid.* at 159-160.

<sup>63</sup> *Supra* note 60 at 9.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Supra* note 61 at 160.

consideration of the character of the accused”<sup>66</sup> and the second stage consisted of an assessment of the accused’s guilt or innocence.<sup>67</sup> Whether or not the accused proceeded to the second stage of the process depended on the outcome of the first stage.<sup>68</sup>

At the first stage, the good character of the accused was established by a number of oath helpers summoned by the accused<sup>69</sup> to swear to it under oath.<sup>70</sup> If it was determined that the accused was of good character, meaning that “...the accused was considered trustworthy and free of previous accusations,”<sup>71</sup> he could then prove his innocence by swearing to it under oath and/or through others who would also swear under oath to the belief in the accused’s innocence.<sup>72</sup> This was known as “the defence of compurgation.”<sup>73</sup> Simply put, if the accused could establish that he was of good character, he could clear himself of all charges by a swearing an oath that he is of good character.<sup>74</sup> Failing that, he would be ordered to stand trial .<sup>75</sup>

The Defence of compurgation was eventually abolished, primarily because it was an unsatisfactory method of proof and resulted in too simple and certain a method of an acquittal.<sup>76</sup> The trial by Ordeal was abolished in 1215<sup>77</sup> and the determination of guilt or innocence was

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<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> Sanjeev Anand, “The Origins, Early History and Evolution of the English Criminal Trial Jury” (2005-2006) 43 *Alta. L. Rev.* 407. at p. 409

<sup>70</sup> *Supra* note 61 at 160.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Supra* note 69 and *Ibid.* There appears to be a slight disagreement between Ratushny and Anand about the procedure that governed the defence of compurgation. Ratushny describes the first stage of the procedure in the following manner”

“At the first stage, the character of the accused was established by persons swearing to it on oath.” – Ratushny p. 160

Whereas Anand states that the first stage required “the accused to swear an oath that he did not commit the offence charged.” Anand p. 409 According to Anand, the swearing of the others only occurred in the second stage:

“Second, he was required to produce a certain number of oath-helpers or compurgators to back his denial by their oaths” – (Anand p. 409)

<sup>73</sup> *Anand, ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *Supra* note 61 at 160.

<sup>76</sup> *Supra* note 69 at 410.

<sup>77</sup> *Ibid.* at 411.



primarily left in the discretion of the justices.<sup>78</sup> Upon the abolition of ordeals we see jury trials being put in place, which resulted from a search for viable methods of proving an accused's guilt. This led the way for the establishment of the adversarial process.<sup>79</sup>

#### The Ecclesiastical Courts: Inquisitorial Procedure

Ecclesiastical tribunals differ substantially from those of the adversarial system.<sup>80</sup> One of the most significant features of the ecclesiastical courts was the inquisitorial system.<sup>81</sup> In the inquisitorial procedure, the judges were responsible for leading the investigation.<sup>82</sup> The judges also had the power to administer an oath *ex officio* and compel any person to testify.<sup>83</sup> An accusation could be made to a judge, even privately and if satisfied that an inquisition was required, a judge could grant it.<sup>84</sup> Similar to our adversarial process today, even post-*Stinchcombe*,<sup>85</sup> judges were to disclose to the accused person<sup>86</sup> the ““articles”” containing the charge against him.”<sup>87</sup>

In the early 1300's, the church was becoming preoccupied in dealing with the problem of heresy and received the support of the state in their fervent mission of punishing all actions that were considered contrary to Catholic teaching.<sup>88</sup> In 1401, the Statute *de Haeretico Comburendo* was enacted by Parliament under King Henry IV of England<sup>89</sup> which granted “the ecclesiastical

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<sup>78</sup> *Ibid.* at 415.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Supra* note 60 at 2-11.

<sup>81</sup> *Supra* note 61 at 161.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.* at 162.

<sup>85</sup> *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

<sup>86</sup> *Supra* note 61 at 162.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

courts the authority to burn heretics at the stake.”<sup>90</sup> This law was one of the strictest religious censorship statutes ever enacted in England.<sup>91</sup>

“As the inquisition gained momentum”<sup>92</sup> and the impetus for punishing heretical belief grew substantially, the initiating process of the accusation, sufficient to notify the accused of the specific charges against him, began to disappear.<sup>93</sup> Many trials became nothing more than “...secret examinations of the accused under oath”<sup>94</sup> where he was confronted with an array of “...surmises and rumors and hearsay against him.”<sup>95</sup> The inquisitors often demanded the accused person’s confession.<sup>96</sup> The charges were largely fabricated “...from testimony of secret informers, malicious gossipers, self-confessed victims and frightened witnesses”<sup>97</sup> who would dream up imaginative accounts of whatever they believed the inquisitors wanted to hear.<sup>98</sup>

There were many ways of committing the “...vague offence”<sup>99</sup> of heresy, yet those accused of committing such an offence were not given the specific details of the offence for which to answer the charges.<sup>100</sup>

Morgan has stated that the problematic nature of this new inquisitorial procedure was that the accused “...person who had not been charged by a formal presentment or accusation answer under oath all questions put to him by the proper ecclesiastical official.”<sup>101</sup> There were essentially no limits placed on judges under this process which afforded them arbitrary power.<sup>102</sup>

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<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.* at 162 -164

<sup>92</sup> *Ibid.* at 162.

<sup>93</sup> *Ibid.*

<sup>94</sup> Leonard W. Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* (New York: Oxford University Press, 1968) at 28; also *supra* note 61 at 162.

<sup>95</sup> *Levy, ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.* also see *supra* note 61 at 162.

<sup>99</sup> *Ratushny, ibid* at 163.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Supra* note 60 at 1. See also *ibid.*

<sup>102</sup> *Ratushny, ibid.*

This arbitrary power was used as an instrumental “...weapon for religious and political suppression.”<sup>103</sup>

According to Levy, John Lambert’s case in 1532 represents the first recorded case of “...a person charged with heresy objecting to the oath procedure.”<sup>104</sup> At his trial, Lambert made the following statement:

[T]o make true relation of all that they shall demand him, he not knowing what they will demand, neither whether it will be lawful to show them the truth of their demands, or no: for such things, there be that are not lawful to be showed... Yea, moreover, if such judges sometimes, not knowing by any due proof that such as have to do before them are culpable, will enforce them, by an oath, to detect themselves, in opening before them their hearts; in this so doing, I cannot see that men need to condescend to their requests. For it is in the law... So that, to conclude, I think it is lawful, at commandment of a judge, to make an oath to say the truth, especially if the judge requireth an oath duly, an in lawful wise... and that also for purgation of infamy, when an infamy is lawfully laid against him.<sup>105</sup>

Lambert did not object to being compelled to testify.<sup>106</sup> His issue was that he should only be forced to testify if there was already a proper accusation before being compelled to testify.<sup>107</sup> If the accusation did not disclose a specific offence, then it would not be lawful to require a person to answer.<sup>108</sup> As Ratushny states:

[J]udges were not entitled to go on a “fishing expedition” for the purpose of uncovering an appropriate accusation. There had to be some proper evidence of guilt *before* a citizen could be called to account. He could not be required to provide the accusation against himself.<sup>109</sup>

The very first rationale for the privilege against self-incrimination is nowhere near as wide-sweeping as it is today. The privilege against self-incrimination was not used as a means of protecting an accused’s right *per se*, but was meant to prevent fishing expeditions by the inquisitors from arbitrarily inquiring into potential offences by forcing accused persons to answer all questions put to them in an attempt that they may discover an offence out of the accused’s

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<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> *Supra* note 94 at 4. See also *supra* note 61 at 163.

<sup>106</sup> Ratushny, *ibid.*

<sup>107</sup> *Ibid.* at 164.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

own testimony.<sup>110</sup> This rationale still holds true today, however, the reasons for the privilege extend far beyond this limited principle.

At these early stages, lawyer Christopher Saint-German publicly voiced his objection to the procedure in which an accused person could stand trial in the absence of a proper accusation.<sup>111</sup> He was also in opposition to the fact that an informer could remain anonymous,<sup>112</sup> since there were many cases in which informers initially planted “...the suspicion of heresy with the judge.”<sup>113</sup>

Significant changes occurred in 1533 as a result of great public opposition to the compelled oath.<sup>114</sup> A new law was passed which provided that the interrogation for heresy must be conducted in open court and after the accusation of at least two lawful witnesses.<sup>115</sup> This same “...statute also repealed the *Statute de Haeretico Comburendo*.”<sup>116</sup> The strict laws against Heresy in England also began to soften.<sup>117</sup>

In 1554, Mary became Queen and reinstated the harsh laws against heresy that existed prior to 1533;<sup>118</sup> however, this legacy was short-lived as Queen Elizabeth took the throne in 1558, passing the *Act of Supremacy*<sup>119</sup> which repealed Queen Mary’s legislation.<sup>120</sup> This act also transferred the control of the inquisition from the ecclesiastical authorities to the state.<sup>121</sup>

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<sup>110</sup> *Supra* note 60 at 10-11.

<sup>111</sup> *Supra* note 61 at 164.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.* See also M. Maquire, “Attack on the Common Lawyers on the Oath *Ex Officio* as administered in Ecclesiastical Courts in England” in *Essays in History and Political Theory in Honour of Charles Howard McIlwain* (Cambridge: Russell & Russell, 1964) 199.

<sup>114</sup> *Ratushny, ibid.*

<sup>115</sup> *Ibid.* at 164-165.

<sup>116</sup> *Ibid.* at 165.

<sup>117</sup> *Statute de Haeretico Comburendo* 25 Hen.8, c. 14. *Ibid.*

<sup>118</sup> *Ratushny, ibid.*

<sup>119</sup> *Act of Supremacy* 1 Eliz., c. 1.

<sup>120</sup> *Supra* note 61 at 165.

<sup>121</sup> *Ibid.*

In 1559, Queen Elizabeth established what is known as the Court of High Commission which was composed of clerical and lay members.<sup>122</sup> Just like the ecclesiastical courts, the Court of High Commission also had wide powers and was also authorized to administer the oath *ex officio*.<sup>123</sup> Again, strong objections to this procedure were raised;<sup>124</sup> however, Queen Elizabeth was able to resist all calls for parliamentary reform.<sup>125</sup>

### The Common Law Courts and the Star Chamber

The Star Chamber was an English court of law that sat at the royal Palace of Westminster<sup>126</sup> until 1641.<sup>127</sup> It was made up of Privy Counsellors, as well as common-law judges and supplemented the activities of the common-law and equity courts in both civil and criminal matters.<sup>128</sup> The court was set up to ensure the fair enforcement of laws against prominent people, those so powerful that ordinary courts could never convict them of their crimes.<sup>129</sup> Court sessions were held in secret, with no indictments, no right of appeal, no juries, and no witnesses.<sup>130</sup> Evidence was presented in writing.<sup>131</sup> Over time it evolved into a political weapon, a symbol of the misuse and abuse of power by the English monarchy and courts.<sup>132</sup> The Star Chamber was abolished in 1641.<sup>133</sup>

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<sup>122</sup> *Ibid.*

<sup>123</sup> Frederick G. Lee, *The Church Under Queen Elizabeth An Historical Sketch Part One* (Waterloo Place: Kessinger Publishing, 1880). See also *ibid.*

<sup>124</sup> *Ratushny, ibid.*

<sup>125</sup> *Ratushny, ibid.* at 166.

<sup>126</sup> Ian Bryan, *Interrogation and Confession: A study of Progress, Process and Practice* (Aldershot: Ashgate Publishing Company Limited, 1997) at 29.

<sup>127</sup> *Ibid.* at 34.

<sup>128</sup> Mark Berger, *Taking the Fifth: The Supreme Court and the Privilege Against Self-incrimination* (Massachusetts: Lexington Books, 1980) at 1.

<sup>129</sup> G.R. Elton, *The Tudor Constitution Documents and Commentary* 161 (1960); See also Stephen Landsman, "Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England" (1989-1990) 75 *Cornell L. Rev.* 496 at 507.

<sup>130</sup> Frank Riebli, "The Spectre of the Star Chamber: The Role of an Ancient English Tribunal in the Supreme Court's Self-Incrimination Jurisprudence" (2001-2002) 29 *Hastings Const. L.Q.* 807 at 814-815

<sup>131</sup> *Ibid.* at 813-814.

<sup>132</sup> *Ibid.* at 826.

<sup>133</sup> 16 Car. 1, c. 10 (July 5, 1641) (Eng.). See also *ibid.*

As in the trial of John Lambert, John Lilburn also objected to the practice of being compelled to answer questions.<sup>134</sup> In 1637, Lilburn was arrested for shipping seditious books into England.<sup>135</sup> The Star Chamber Court heard his case.<sup>136</sup> In this case, Lilburn refused to take the “Star Chamber Oath,”<sup>137</sup> which was an oath administered by the Star Chamber Court which bound all accused persons to answer all questions put to them on any subject.<sup>138</sup> The questions did not even have to pertain to the charges themselves and there were no checks and balances in place to prevent the Court from asking unnecessary and arbitrary questions. Lilburn refused to swear the oath because he did not receive a proper accusation.<sup>139</sup> He was not presented with specific charges to which to answer.<sup>140</sup>

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<sup>134</sup> *Supra* note 60 at 16. Lilburn was put on trial for the second time on the charges of treason in 1641 (*Supra* note 60 at 10). At the second trial, Lilburn said:

“then sir, thus, by the laws of England, I am not to answer to questions against or concerning myself.”  
Lord Keble replied:

“you shall not be compelled” – (*Supra* note 60 at 10).

<sup>135</sup> Lawrence Herman, “The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confessions Rule (Part I)” (1992) 53 Ohio St. L.J. 101 at 135.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Supra* note 130 at 823.

<sup>138</sup> *Supra* note 60 at 4.

<sup>139</sup> *Supra* note 130 at 823.

<sup>140</sup> The Trial of John Lilburne And John Wharton, for Printing and Publishing Seditious Books (1637), 3 How. State Tr. 1316 at 1318, 1320 and 1332. See also *Supra* note 61 at 171.

Lilburne’s objection was as follows:

I am not willing to answer you to any more of these questions because I see you go about by this Examination to ensnare me: for seeing the things for which I am imprisoned cannot be proved against me you will get other matter out of my examination.

[T]hey went about to make me betray my own innocence, that so they might ground the bill upon my own words...

...[I]f I had been proceeded against by a Bill, I would have answered...

Ratushny states that:

It is absolutely clear that Lilburn had no objection, whatsoever simply to being compelled to testify. His objection was to being subjected to an interrogation in the absence of a specific bill of presentment. He specifically states that if he had been presented with a proper accusation, he “would have answered.” (*Supra* note 61 at 171).

Lilburne also stated in his defence at trial:

There was no repugnance to the proposition that one was forced to testify in their own defence.<sup>141</sup> “The repugnance was found in the procedure whereby a person could be called before judges without any specific allegation of wrongdoing on his part and subjected to a broad range of questions.”<sup>142</sup>

Throughout the inquisitorial process and common law courts, there was never any objection to the idea of an accused being compelled to testify at trial, rather, the primary objection to the inquisitorial procedure was the absence of a specific charge to which the accused could give an answer.<sup>143</sup>

What exacerbated the public’s abhorrence to the inquisitorial procedure was the fact that those who refused to be sworn were subject to very stiff penalties.<sup>144</sup> Lilburn was held in prison for contempt of court because he refused to take the oath; however, this punishment only seemed to make him a martyr.<sup>145</sup> “In 1641, after Parliament had gained supremacy,”<sup>146</sup> it abolished the Star Chamber and the ecclesiastical courts<sup>147</sup> and from this point forward, no accused person was

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Sir, I know you are not able to prove, and to make that good which you have said. I have testimony of it, said he. Then, said I, produce them in the face of the open court, that we may see what they have to accuse me of; and I am ready here to answer for myself, and to make my just defense.-With this he was silent; and said not one more word to me. (*Supra* note 130 at 823).

Riebli states that Lilburn’s objection can easily be misunderstood as an objection to giving oral testimony; however, this is not the case. According to Riebli, Lilburn’s objection was clearly not to speaking in his own defence, but rather to defending himself prematurely:

[I]t was a refusal by Lilburn to assume the burden of defence without first being properly accused. The accusation was the critical first step in any case, and a proper accusation functioned to shift the burden of the defendant to exonerate himself of the offences charged. By refusing to take the oath, Lilburn was refusing to permit the Star Chamber to proceed as it that burden had shifted to him when in fact it had not. (*Supra* note 130 at 823).

<sup>141</sup> *Supra* note 30 at 822; See also *supra* note 61 at 172.

<sup>142</sup> *Ratushny, ibid.*; See also *Riebli, ibid.*

<sup>143</sup> *Riebli, ibid.*

<sup>144</sup> *Supra* note 135 at 136.

<sup>145</sup> *Supra* note 61 at 171.

<sup>146</sup> *Ibid.*

<sup>147</sup> *Supra* note 135 at 136.

to be put to answer questions unless a specific accusation was made according to the “old law of the land.”<sup>148</sup>

“...In the second half of the 17<sup>th</sup> century, the rule came to be established,”<sup>149</sup> by way of judicial decisions,<sup>150</sup> “...that a person could not be compelled to be a witness in his trial even where a proper accusation was present.”<sup>151</sup> In the common law courts, an accused was not competent as a witness in England until 1898,<sup>152</sup> so the protection against being compelled to testify had little practical consequence to an accused person at this time, since the accused could not even testify if he wanted to.<sup>153</sup>

Hostility towards compelling the accused to say something in relation to his charges is a relatively modern concept.<sup>154</sup> A defendant was not entitled to the benefit of the presumption of innocence until the 19<sup>th</sup> Century.<sup>155</sup> It was not until the ideas of the presumption of innocence and burden of proof developed,<sup>156</sup> “...and the number of lawyers increased did the idea of silence in the face of accusation evolve.”<sup>157</sup>

During the inquisitorial process, if a proper accusation was in place against an accused person, then the burden of proof was on the accused to establish his innocence.<sup>158</sup> “...A proper accusation was in itself considered to be proof of guilt”<sup>159</sup> and the onus was on the defendant to convince the Court that he was innocent.<sup>160</sup> Thus, in the presence of a proper accusation and in

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<sup>148</sup> *Supra* note 61 at 171.

<sup>149</sup> *Ibid.* at 173.

<sup>150</sup> *Ibid.*

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.*

<sup>154</sup> *Supra* note 130 at 824.

<sup>155</sup> *Ibid.* at 822.

<sup>156</sup> *Ibid.* at 824.

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.* at 821.

<sup>159</sup> *Ibid.* at 822.

<sup>160</sup> *Ibid.*



the absence of evidence to the contrary, an accused's conviction was certain.<sup>161</sup> For this very reason, "...the accused naturally spoke in his own defence."<sup>162</sup> Simply put, an accused person had no choice.

When the criminal defence bar began to take an active role in the trial process in the 19<sup>th</sup> century, certain strategic imperatives became apparent within a few decades and, consequently, a clear logic of adversarial system began to develop.<sup>163</sup> One of the most important imperatives from amongst these was the value to be gained by electing as a matter of general practice to silence the criminal defendant unless and until such time as there was something to be gained by having him speak.<sup>164</sup> Defence lawyers managed to take over the task of defending individual accused persons. By assuming a speaking role on their client's behalf, and by advocating "...within the structure of the adversary criminal trial, counsel largely suppressed the defendant's testimonial role."<sup>165</sup> With a trained advocate, the accused was simply no longer compelled by circumstances to speak.

In putting their strategy into practice, the defence lawyers opportunistically seized upon the Latin maxim, *nemo tenetur seipsum prodere* to get around the requirement that the client answer in his own defence.<sup>166</sup>

After defence counsel began to enter the courtroom in significant numbers, the expectation that an accused person would speak in his own defence in response to any pressure to do so emanating from the bench appears, within the span of a few decades, to have vanished.<sup>167</sup> With respect to exactly how the transition occurred from the "accused speaks" model to the new

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<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*

<sup>163</sup> John H. Langbein, "The Historical Origins of the Privilege Against Self-Incrimination at Common Law" (1994) 92 Mich. L. Rev. 1047 at 1071.

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*: See also *Landsman*, *supra* note 129.

<sup>166</sup> *Langbein, Ibid.*

<sup>167</sup> Robert P. Burns, "The Rule of Law in the Trial Court" (2006-2007) 56 DePaul L. Rev. 307 at 324 – 325.

theory of the trial, where the case of the prosecution is tested<sup>168</sup> (thereby opening the door to the elaboration of the privilege by counsels' vigorous advocacy), scholars on of this subject have not discovered the exact steps. Nevertheless, a basic sketch is available.<sup>169</sup>

In the milieu of 19<sup>th</sup> century London, prosecutions would sometimes rely upon the use of "reward seekers"<sup>170</sup> or "Crown witnesses,"<sup>171</sup> who the authorities would employ "...to compensate for the English reluctance to institute professional policing."<sup>172</sup> In response to the Crown's reliance upon these persons of questionable integrity<sup>173</sup> in pursuit of the proof of its cases, the focus of defence counsel began to shift toward "...casting doubt on the validity of the factual case being presented against the defendant, so that the prosecution came increasingly under the necessity of proving its assertions."<sup>174</sup> Certain procedural changes, and in some cases, procedural burdens incumbent upon either the Crown or the defence began to evolve.<sup>175</sup>

These changes were as follows: First, "party production burdens"<sup>176</sup> began "to be articulated,"<sup>177</sup> where the prosecution would present its entire case, and then the defence would respond to every piece of evidence by the prosecution,<sup>178</sup> and that, subject to a "directed verdict,"<sup>179</sup> the defence would reserve its right to present rebuttal evidence<sup>180</sup> only at the end of the prosecution's case.<sup>181</sup> "Second, towards the end of the eighteenth century, the presumption

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<sup>168</sup> *Supra* note 163 at 1048.

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.* at 1069.

<sup>171</sup> *Ibid.*

<sup>172</sup> *Ibid.*; see also J.M. Beattie, *The First English Detectives: The Bow Street Runners and the Policing of London 1750-1840* (Oxford: Oxford University Press, 2012).

<sup>173</sup> *Supra* note 163 at 1069.

<sup>174</sup> *Beattie, ibid.* at 375. For an in-depth study on this point, Landsman expands in great detail on the "Bow Street thief catchers problem" and how this played a vital role in reforming the defence lawyers role.

<sup>175</sup> *Landsman, supra* note 129 at 579.

<sup>176</sup> *Supra* note 163 at 1069.

<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.* at 1070.

<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid.*

of innocence”<sup>182</sup> was crystalized.<sup>183</sup> This factor, “coupled with the prosecutor’s production burden,”<sup>184</sup> “...motivated defense counsel to silence the defendant and hence to insist that the prosecution case be built from other proofs.”<sup>185</sup> “Third, the law of criminal evidence formed in the late eighteenth and early nineteenth centuries,”<sup>186</sup> and the development of the concept of admissibility led defence counsel to object to the admission of some types of evidence, and to narrow the scope of the case their clients would have to respond to, by their conduct of cross-examination of witnesses.<sup>187</sup> Fourth, the increasing involvement of defence counsel inspired more frequent use of counsel on behalf of the prosecution.<sup>188</sup> “Private associations for the prosecution of felons formed in great numbers from the 1770s and 1780s.”<sup>189</sup> The main purpose of these associations was to “defray the victim’s costs of investigation and prosecution in certain classes of property offenses.”<sup>190</sup> It has been suggested that these organizations came into existence in response to the increased advocacy by defence counsel and the development of the “testing the prosecution”<sup>191</sup> theory of the trial.<sup>192</sup> “Fifth, the judge declined in importance as counsel for the prosecution and defence each took over the job of examining and cross-examining witnesses.”<sup>193</sup> A French observer noted in 1820<sup>194</sup> that “the judge ... remains almost a stranger to what is going on, contenting himself to take notes and summarize them for the jury

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<sup>182</sup> *Ibid.*

<sup>183</sup> Barbara J. Shapiro, “Beyond Reasonable Doubt” and “Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence 1-41 (1991).

<sup>184</sup> *Supra* note 163 at 1070.

<sup>185</sup> *Ibid.*

<sup>186</sup> *Ibid.*

<sup>187</sup> John M. Beattie, “Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries” (1991) 9 *Law & Hist. Rev.* 221 at 235.

<sup>188</sup> *Supra* note 163 at 1070.

<sup>189</sup> *Ibid.*

<sup>190</sup> John H. Langbein, Book Review, (1991) 9 *Law & Hist.* 398 at 402.

<sup>191</sup> *Supra* note 163 at 1070.

<sup>192</sup> *Supra* note 167.

<sup>193</sup> *Supra* note 163 at 1070-1071.

<sup>194</sup> *Ibid.* at 1071.

at the end of the trial.”<sup>195</sup> “Finally, changes in the practice of jury control in this period, highlighted by Fox’s Libel Act of 1792, reflect the decline of judicial influence over the trial jury.”<sup>196</sup>

Each of these factors are symptoms, that when considered together, indicate a more fundamental shift that occurred in 19<sup>th</sup> century criminal procedure: that is, the abandonment of the “accused speaks” theory of the criminal trial in favour of the “testing of the prosecution” model.<sup>197</sup> It was not until the defence’s role had switched from accommodating a trial model where the accused was asked to explain himself, to one where his counsel was permitted to raise and potentially exploit weaknesses in the case of the prosecution, that the use of the right to silence went from being merely notional to being a legal tool of practical use during proceedings.<sup>198</sup> Once the philosophy of the role of the defence had changed, committed advocates were empowered to effectuate enormous and far-reaching procedural changes, including the encouraging of the privilege against self-incrimination.<sup>199</sup>

The privilege against self-incrimination is premised on the fact that evidence collected by the state through its own investigation is inherently more reliable than evidence arising out of an accused’s own admissions. As Fred E. Inbau puts it:

The privilege against self-incrimination exists mainly in order to stimulate the police and prosecution into a search for the most dependable evidence procurable by their own efforts. Otherwise there probably would be an incentive to rely solely upon the less dependable admissions that might be obtained during the course of a compulsory interrogation.<sup>200</sup>

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<sup>195</sup> M. Cottu, *On the Administration of Criminal Justice in England* (London, Printed for R. Stevens, 1822) (translating *De l’Administration de la Justice Criminelle en Angleterre* (Paris 1820)) at 88. Also *ibid.* at 1071.

<sup>196</sup> *Langbein, ibid.*; See also 32 Geo. 3, ch. 60.

<sup>197</sup> *Supra* note 163 at 1066.

<sup>198</sup> *Ibid.* at 1054. Langbein makes a very bold claim about the relationship between defence lawyers and the privilege. He states that “the privilege against self-incrimination is the creature of defence counsel” (p. 1054)

<sup>199</sup> *Ibid.* at 1066 – 1085.

<sup>200</sup> Fred E. Inbau, “Should We Abolish the Constitutional Privilege Against Self-Incrimination” (1954-1955) 45 J. Crim. L. Criminology & Police Sci. 180 at 181.

Having discussed the development of the privilege and the way it became a fundamental component of the trial process in England we may now turn our attention to the expansion of the privilege on Canadian soil, where it grew from a protection that was applicable in formal proceedings to encompass a right to silence available to accused persons at the investigative stage of the criminal process.

### **The Law of Self-Incrimination: The Pre-Charter Era**

The privilege against self-incrimination has undergone some dramatic changes since the patriation of the *Canadian Charter of Rights and Freedoms*. David M. Paciocco identifies three key differences that are incumbent in the law of self-incrimination which did not exist prior to the *Charter*. First, it only applied only to the option of taking the stand by the accused;<sup>201</sup> secondly, its protective mandate was restricted to the evidence provided by witnesses on the stand;<sup>202</sup> and thirdly, no exclusionary remedy existed when a suspect had wrongfully been forced to self-incriminate.<sup>203</sup>

#### **1. Formal Proceedings**

On March 28, 1980 Chief Justice Lamer was appointed to the Supreme Court of Canada.<sup>204</sup> During this time, the privilege against self-incrimination was limited to the accused not having to take the stand which meant that the extent of the privilege simply entitled the accused the choice as to whether or not to testify at his or her own trial.<sup>205</sup>

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<sup>201</sup> David M. Paciocco, "Self-Incrimination And The Case To Meet: The Legacy Of Chief Justice Lamer" (2000) 5 Can. Crim. L. Rev. 63. (W.L.) at 1-2.

<sup>202</sup> *Ibid.*

<sup>203</sup> *Ibid.*

<sup>204</sup> *Ibid.* at 1.

<sup>205</sup> *Ibid.* at 2-3; see also *R. v. Marcoux*, [1976] 1 S.C.R. 763.

Shortly after his appointment, Justice Lamer was presented with an opportunity to reshape the law of self-incrimination in *R. v. Rothman*.<sup>206</sup> *Rothman* afforded Lamer his first opportunity to have an impact on the law of self-incrimination.<sup>207</sup> Lamer J stated that:<sup>208</sup>

In Canada the right of a suspect not to say anything to the police is not the result of a right of no self crimination but is merely the exercise by him of the general right enjoyed in this country by anyone to do whatever one pleases, saying what one pleases or choosing not to say certain things, unless obliged to do otherwise by law. It is because no law says that a suspect, save in certain circumstances, must say anything to the police that we say that he has the right to remain silent: which is the positive way of explaining that there is on his part no legal obligation to do otherwise. His right to silence rests on the same principle as his right to free speech, but not on a right to no self-crimination.<sup>209</sup>

Essentially, there was no protection against self-incrimination outside of formal proceedings.<sup>210</sup>

Although it may appear so superficially, the right to remain silent, and the privilege against self-incrimination were not synonymous.<sup>211</sup> As Lamer J had stated above, the law does not grant individuals a positive right to remain silent.<sup>212</sup> Because there is no positive obligation, save in certain circumstances, for a suspect to say anything to the police, a person has a *de facto* right to remain silent.<sup>213</sup>

## 2. Testimonial Information

Although the law provided protection against self-incrimination in “formal proceedings,”<sup>214</sup> this protection was limited exclusively to testimony.<sup>215</sup> Prior to *Rothman*, the Supreme Court had addressed the limits of the pre-*Charter* protection against self-incrimination

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<sup>206</sup> *Paciocco, ibid.* at 2.

<sup>207</sup> *Ibid.*

<sup>208</sup> *Ibid.*

<sup>209</sup> *R. v. Rothman*, [1981] 1 S.C.R. 640 at para. 96; See also *Ibid.*

<sup>210</sup> *Paciocco, ibid.*

<sup>211</sup> *Ibid.*

<sup>212</sup> *Ibid.*

<sup>213</sup> *Ibid.*

<sup>214</sup> *Ibid.*

<sup>215</sup> *Ibid.*

in *R. v. Marcoux*.<sup>216</sup> The Court had summed up the law regarding the limits on the privilege of self-incrimination,<sup>217</sup> and that this doctrine is "...concerned with testimonial compulsion specifically and not with compulsion generally."<sup>218</sup>

Prior to the *Charter*, the privilege against self-incrimination was strictly limited to evidence provided by "...witnesses while testifying"<sup>219</sup> and had no applicability to other types of "self-conscripting evidence."<sup>220</sup> For example, Paciocco notes that this privilege "...did not apply to breath samples,"<sup>221</sup> "...blood samples"<sup>222</sup> and "...compelled participation in police line-ups."<sup>223</sup>

### 3. Unfair Self-Incrimination

The pre-*Charter* law pertaining to self-incrimination did not deal with unfair investigative practices<sup>224</sup> which resulted in accused persons taking part (involuntarily) in investigations against themselves.<sup>225</sup> Although involuntary statements were still subject to exclusionary remedy, the predominant notion at the time was that involuntary confessions and self-incrimination were two separate and distinct concepts.<sup>226</sup>

In *R. v. Wray*,<sup>227</sup> the suspect was accused of murdering a service station attendant.<sup>228</sup> The police used questionable means to obtain the gun used in committing the crime.<sup>229</sup> They had

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<sup>216</sup> *Marcoux*, *supra* note 205; See *supra* note 201 at 2-3.

<sup>217</sup> *Paciocco*, *ibid.* at 2.

<sup>218</sup> *Supra* note 209.

<sup>219</sup> *Supra* note 201 at 3.

<sup>220</sup> *Ibid.*

<sup>221</sup> *Ibid.*

<sup>222</sup> *Ibid.*

<sup>223</sup> *Ibid.*

<sup>224</sup> *Ibid.*

<sup>225</sup> *Ibid.*

<sup>226</sup> *Ibid.*

<sup>227</sup> *R. v. Wray*, [1971] S.C.R. 272 (Q.L.).

<sup>228</sup> *Ibid.* at 3.

<sup>229</sup> *Ibid.* at 4.

questioned Wray for about nine hours. The Law Reform Commission of Canada, in its 1973 report, made reference to the Court's decisions in *Wray*, stating that the *Wray* decision has:<sup>230</sup>

...denied any discretion in the trial judge to reject any involuntary confession the truth of which was confirmed by the finding of subsequent facts; the decision thereby preserved as a single rationale for the confession rule the promotion of trustworthiness.<sup>231</sup>

There had been a few references to the connection between voluntariness and the privilege against self-incrimination in some of the pre-*Charter* decisions,<sup>232</sup> particularly in the dissenting judgements.<sup>233</sup> The references, however, were "...rather tenuous in nature"<sup>234</sup> and provided "...little authority for the proposition that the voluntariness requirements for the admissibility of confessions are [were] based on any policy against self-incrimination."<sup>235</sup> In *Attorney-General for Quebec v. Begin*, Mr. Justice Fauteux "...recognized the separation of the policy basis for the voluntariness rule from the scope of the privilege against self-incrimination."<sup>236</sup>

It is clear that, pre-*Charter*, the privilege against self-incrimination was "...an extremely narrow concept."<sup>237</sup> The privilege was restricted to<sup>238</sup> "...the non-compellability of the accused as a witness at his own trial and the section 5(2) protection of a witness not to have testimony used in future proceedings."<sup>239</sup>

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<sup>230</sup> *Supra* note 201 at 3.

<sup>231</sup> The Law Reform Commission of Canada, *Evidence — 5. Compellability of the Accused and the Admissibility of His Statements: A study paper prepared by the Law of Evidence Project* (Ottawa: Law Reform Commission of Canada, 1973) at 6. Cited in *supra* note 201 at 3.

<sup>232</sup> *Supra* note 61 at 60.

<sup>233</sup> See: Spence J. and Cartwright C.J. in *R. v. Wray* (1970), 11 C.R.N.S. 235; Cartwright C.J. (Spence J. concurring) in *Piche v. The Queen*, [1971] S.C.R. 23 (1970); and Hall and Pigeon JJ. in *DeClercq v. The Queen* [1968] S.C.R. 902. See also *ibid.*

<sup>234</sup> *Ratushny, ibid.*

<sup>235</sup> *Ibid.*

<sup>236</sup> *Ibid.* at 61; See also *Attorney-General v. Begin*, [1955] S.C.R. 593 at 600.

<sup>237</sup> *Ratushny, ibid.* at 92.

<sup>238</sup> *Ibid.*

<sup>239</sup> *Ibid.*



This conclusion is obvious from an analysis of situations “...where one would have expected an overriding principle to manifest itself in concrete results if such a principle existed.”<sup>240</sup> Attempts to breathe life into the privilege like *Marcoux and Solomon*<sup>241</sup> “...met with negative results,”<sup>242</sup> and in fact, there were judicial pronouncements “...expressly adopting the view that there is no such thing as a general privilege against self-incrimination.”<sup>243</sup> In *Marcoux and Solomon*, the Court held that the privilege<sup>244</sup> was “often incorrectly advanced in favour of a much broader proposition”<sup>245</sup> than the two protections already mentioned.<sup>246</sup> The Ontario Court of Appeal was even more bold in its assertion in *R. v. Sweeney*<sup>247</sup> that “there does not exist in this country a general privilege against self-incrimination.”<sup>248</sup>

### **Self-Incrimination: Post-Charter**

Today the privilege against self-incrimination no longer suffers from these limitations.<sup>249</sup> There is now a recognized right to silence encompassed in Canadian law,<sup>250</sup> and furthermore, the principles that apply to self-incrimination are applicable<sup>251</sup> “...outside of formal proceedings.”<sup>252</sup>

At common law, the privilege against self-incrimination entitled a witness “...to refuse to answer questions that might incriminate them.”<sup>253</sup> However, Parliament revoked this

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<sup>240</sup> *Ibid.*

<sup>241</sup> *Ibid.*

<sup>242</sup> *Ibid.*

<sup>243</sup> *Ibid.*

<sup>244</sup> *Ibid.*

<sup>245</sup> *Ibid.*

<sup>246</sup> *Ibid.*

<sup>247</sup> *Ibid.*

<sup>248</sup> *R. v. Sweeney (No. 2)* (1977), 35 C.C.C. (2d) 245 at 250. See also *ibid.*

<sup>249</sup> *Supra* note 201 at 3.

<sup>250</sup> *Ibid.*

<sup>251</sup> *Ibid.*

<sup>252</sup> *Ibid.*

<sup>253</sup> Steven Penney, What’s Wrong With Self-Incrimination? The Wayward Path of Self-Incrimination Law In The Post-Charter Era – Part III: Compelled Communications, The Admissibility of Defendant’s Previous Testimony, and Inferences From Defendants’ Silence “(2003-2004) 48 *Crim. L.Q.* 475 at 475.

“...privilege by enacting section 5(1) of the *Canada Evidence Act*<sup>254</sup> which requires witnesses to answer”<sup>255</sup> any questions, even if the answers to those questions may be self-incriminating.<sup>256</sup> However, Section 5(2) offers protection for the witness against self-incrimination by preventing those very answers from being used against the witness at subsequent proceedings.<sup>257</sup>

According to David M. Paciocco, “...through the principle of a “case to meet,” “self-incrimination” has undergone the metamorphosis into a broad notion of “self-conscription” that is not confined to testimony.”<sup>258</sup> Paciocco states that the law pertaining to “...self-incrimination in 1980 was a mere shadow of what it now is.”<sup>259</sup> There is no doubt in Paciocco’s mind that the adoption of the *Canadian Charter of Rights and Freedoms* is responsible for this significant change in the law of self-incrimination,<sup>260</sup> however, Paciocco believes that *Charter* only played

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<sup>254</sup> **CANADA EVIDENCE ACT** (*Canada Evidence Act*, R.S.C. 1985, c. C-5, ss. 4-5)

**Incriminating questions**

4. (6) The failure of the person charged, or of the wife or husband of that person, to testify shall not be made the subject of comment by the judge or by counsel for the prosecution.
5. (1) No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

**Answer not admissible against witness**

- (2) Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence.

<sup>255</sup> *Ibid.*

<sup>256</sup> *Ibid.*

<sup>257</sup> *Ibid.*

<sup>258</sup> *Supra* note 201 at 3.

<sup>259</sup> *Ibid.* Paciocco wrote this article in 2000 – 9 years prior to the Supreme Court of Canada’s decision in *Grant*.

<sup>260</sup> *Ibid.*

an indirect role in influencing the pivotal changes to the law of self-incrimination.<sup>261</sup> It is his view that although it may have been the *Charter* that enabled such change, the true cause of the change in the law of self-incrimination occurred as a result<sup>262</sup> of “the great imagination of the judiciary, led primarily by the vision of Antonio Lamer.”<sup>263</sup> Paciocco goes on to point out that *Charter* was simply an instrument used to breathe life into the law of self-incrimination<sup>264</sup> which prior to the *Charter* was merely an “empty vessel.”<sup>265</sup>

According to Steven Penny, “...Canadian courts have only recently become engaged in significant normative theorizing on the nature of self-incrimination. Most of this work has been performed by the Supreme Court of Canada (the Court) in the context of its interpretation of the *Canadian Charter of Rights and Freedoms* and has resulted in a distinctly Canadian approach to self-incrimination theory.”<sup>266</sup>

At face value, the *Charter*<sup>267</sup> “...says very little about self-incrimination,”<sup>268</sup> so it is “...judicial interpretation”<sup>269</sup> which gives the law of self-incrimination meaning.<sup>270</sup> Although the *Charter* was the tool<sup>271</sup> by which to breathe life into the law of self-incrimination, the actual breath came from the judiciary itself.<sup>272</sup> Paciocco points to Antonio Lamer as being instrumental in bringing about the changes that exist to the law of self-incrimination today<sup>273</sup> and

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<sup>261</sup> *Ibid.*

<sup>262</sup> *Ibid.*

<sup>263</sup> *Ibid.*

<sup>264</sup> *Ibid.*

<sup>265</sup> *Ibid.*

<sup>266</sup> Steven Penny “What’s Wrong with Self-Incrimination? The Wayward Path of Self-Incrimination Law in the Post-Charter Era - Part I: Justifications for Rules Preventing Self-Incrimination” (2003-2004) 48 *Crim L.Q.* 249 at 249.

<sup>267</sup> *Supra* note 201 at 1.

<sup>268</sup> *Ibid.*

<sup>269</sup> *Ibid.*

<sup>270</sup> *Ibid.* at 1 and 3-4.

<sup>271</sup> *Ibid.* at 3.

<sup>272</sup> *Ibid.* at 3-4.

<sup>273</sup> *Ibid.* at 4.

has conducted an extensive review of the case law pertaining to the law of self-incrimination during Lamer's 20 year term in the Supreme Court of Canada from 1980 – 2000.<sup>274</sup>

The *Charter* does not explicitly grant a right to silence, however the courts have determined that the right to silence has been derived from Sections 4 & 5 of the *Canada Evidence Act* as well as sections 11 & 13 of the *Charter* and through the voluntary confession rule.<sup>275</sup> The right to silence is constitutionally supported by Canada's *Charter* principles, as developed in our Supreme Court jurisprudence, with *R. v. Hebert* being a particularly important case.<sup>276</sup>

Even prior to the Supreme Court of Canada's decision in *Hebert*, the Ontario Court of Appeal recognized in *R. v. Esposito*,<sup>277</sup> that the right to silence does not simply apply at the trial stage, but also at the investigative stage, however, the law pertaining to self-incrimination is separate from the law pertaining to a right to silence. Just as the Court in *Rothman* had held, the Ontario Court of Appeal similarly confirmed that:

The right of a suspect or an accused to remain silent is deeply rooted in our legal tradition. The right operates both at the investigative stage of the criminal process and at the trial stage. In Canada, save in certain circumstances, a suspect is free to answer or not to answer questions by the police. We say that he has a right to remain silent because there is no legal obligation upon him to speak...<sup>278</sup>

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<sup>274</sup> *Ibid.* at 3-5.

<sup>275</sup> **CHARTER** (*Charter of Rights and Freedoms*, R.S.C. 1985 Appendix II, No. 44, ss. 11 & 13).

11. Any person charged with an offence has the right

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

See also Penney III p. 475-478

<sup>276</sup> *Supra* note 13.

<sup>277</sup> *R. v. Esposito* (1985), 24 C.C.C. (3d) 88, 53 O.R. (2d) 356 (C.A.).

<sup>278</sup> *Ibid.* at para. 14.

I am of the view that s. 11(c) of the Charter has no application to the admissibility of the appellant's answers in response to police questioning.<sup>279</sup>

In 1985, while the Ontario Court of Appeal had heard the case of *Esposito*, the *Charter* was still in its infancy. Only sections 11(c) and 13 explicitly deal with the privilege against self-incrimination and both of these provisions "...relate solely to testimonial evidence at formal proceedings."<sup>280</sup> Thus, as Paciocco articulates it, "[o]n their face, these sections constitutionalize no more than the miserly conception of self-incrimination described in *Marcoux*."<sup>281</sup> Paciocco's chief argument is that "...it was primarily Justice Lamer using purposive and principled interpretation"<sup>282</sup> who broadened the inert provisions of the *Charter* pertaining to self-incrimination into one encompassing a lively<sup>283</sup> "...affirmative right to remain silent, the principle of a case to meet and the conception of "choice""<sup>284</sup> which is now incumbent<sup>285</sup> in the law of self-incrimination.<sup>286</sup>

In *Rothman*, the accused had made it clear to the police that he was not interested in talking to them.<sup>287</sup> While detained, the police had subsequently placed an undercover officer into his cell who had gained the accused's trust.<sup>288</sup> The accused had made a number of inculpatory statements.<sup>289</sup>

When *Rothman* was decided, the law stated<sup>290</sup> "that self-incrimination protection exists "qua witness"<sup>291</sup> and "not qua accused.""<sup>292</sup> Since Rothman spoke to an undercover police

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<sup>279</sup> *Ibid.* at para. 24.

<sup>280</sup> *Supra* note 201 at 3.

<sup>281</sup> *Ibid.* at 3-4.

<sup>282</sup> *Ibid.* at 4.

<sup>283</sup> *Ibid.*

<sup>284</sup> *Ibid.*

<sup>285</sup> *Ibid.*

<sup>286</sup> *Ibid.*

<sup>287</sup> *Ibid.*

<sup>288</sup> *Ibid.*

<sup>289</sup> *Ibid.*

<sup>290</sup> *Ibid.*

<sup>291</sup> *Ibid.*

officer, he had no right against self-incrimination.<sup>293</sup> Paciocco states that Justice Lamer nevertheless “...found a way”<sup>294</sup> to circumvent this limitation on the right<sup>295</sup> “...by weaving “conscriptio” theory and self-incrimination principles indirectly into the fabric of the law relating to pretrial statements, in the process recognizing a principle of “choice” that has come to guide the development of the law of self-incrimination.”<sup>296</sup>

When *Rothman* was decided, the *Charter* did not exist, however Lamer’s reasons, which emphasized the importance of the accused’s choice to speak to authorities,<sup>297</sup> paved the way for the Supreme Court’s ruling in *R. v. Hebert*. The facts in this case were very “...similar to *Rothman*”<sup>298</sup> pertaining to how the police obtained inculpatory admissions from the accused.<sup>299</sup> The Supreme Court’s decision reversed the former case of *Rothman* which allowed for the police to use trickery on people in order to obtain confessions.<sup>300</sup> The ruling in *Hebert* may have put a temporary halt to this.

The issue in *Hebert* was whether or not the statements the accused made to the undercover officer should be admissible. The Crown relied on *Rothman* in seeking to admit the statements of the accused.

It was held that the Hebert’s statement was obtained in violation of the right to silence under section 7 of the *Charter*. The Supreme Court held that there was a real right to silence in the *Charter*.

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<sup>292</sup> *Ibid.*

<sup>293</sup> *Ibid.*

<sup>294</sup> *Ibid.*

<sup>295</sup> *Ibid.*

<sup>296</sup> *Ibid.*

<sup>297</sup> *Ibid.* at 6.

<sup>298</sup> *Ibid.*

<sup>299</sup> *Ibid.*

<sup>300</sup> *Ibid.*

In *Hebert*, the Supreme Court held that the combination of sections 7 and 13 along with common law dictates that there is a pre-trial right to silence which arises upon detention. A person is entitled to silence in the face of questioning. If the accused voluntarily chose to confess to the undercover officer without being questioned by him, the admission would be allowed, but since the undercover police elicited the confession from accused, the admission was void.<sup>301</sup>

According to Paciocco, Lamer became influential in forming the privilege against self-incrimination "...by employing two techniques:"

1. By creating "...a rule to prevent the Crown from indirectly accomplishing what it could not do directly;"<sup>302</sup> and
2. By utilizing "...the Court's responsibility to protect fundamental values to justify excluding evidence, as the way to give a measure of protection to the freedom of accused persons to choose whether to provide self-incriminatory information."<sup>303</sup>

### **Choice Theory**

As Paciocco notes, the Court's ruling in *Hebert* acknowledged "...the importance of the accused's "choice" whether to speak to authorities."<sup>304</sup> He also notes that this right is not based<sup>305</sup> on "...any principles about self-incrimination,"<sup>306</sup> rather, they are based "...on the principle of free speech"<sup>307</sup> and the principle that a person has no positive obligation in law<sup>308</sup> "...to cooperate with the authorities."<sup>309</sup> This enabled the Court "...to accomplish what was tantamount to self-incrimination protection."<sup>310</sup> Although "...self-incrimination principles are not engaged prior to

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<sup>301</sup> See also the discussion of *Rothman* and *Hebert* in Chapter 1.

<sup>302</sup> *Supra* note 201 at 4.

<sup>303</sup> *Ibid.*

<sup>304</sup> *Ibid.* at 5.

<sup>305</sup> *Ibid.*

<sup>306</sup> *Ibid.*

<sup>307</sup> *Ibid.*

<sup>308</sup> *Ibid.*

<sup>309</sup> *Ibid.*

<sup>310</sup> *Ibid.*

trial,”<sup>311</sup> this in no way vitiates<sup>312</sup> “...an arrested person’s choice to remain silent”<sup>313</sup> in the face of questioning by authorities.<sup>314</sup>

*Hebert* also stated how police conduct can,<sup>315</sup> “...as a practical matter, indirectly defeat the right of the accused to exercise a real choice about whether to testify at his trial.”<sup>316</sup>

Paciooco notes that what is significant about this ruling is that Justice Lamer’s basis for excluding the statements was absent of any notion pertaining to pre-trial right to silence.<sup>317</sup> In fact, “...there was no right to silence”<sup>318</sup> by operation of the law at that time *Rothman* was decided. “Rather, the out of court statements were excluded”<sup>319</sup> to prevent the Crown from accomplishing indirectly<sup>320</sup> what it could not do directly.<sup>321</sup> By excluding the out of court statements in *Hebert*, the Court had prevented<sup>322</sup> “...an indirect breach of the accused’s right not to be compelled to testify *at his trial*.”<sup>323</sup> This line of reasoning was presented by Lamer in *Rothman* prior to the enactment of the *Charter*, which paved the way for the Court’s decision in *Hebert*. Hence, in *Rothman*, Lamer J stated:

The first *rationale* for the confession rule is the repression of conduct on the part of the authorities that indirectly frustrates an accused’s right not to testify; the test that corresponds to this first rationale is whether the authorities did anything in eliciting those statements that might affect its reliability.<sup>324</sup>

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<sup>311</sup> *Ibid.*

<sup>312</sup> *Ibid.*

<sup>313</sup> *Ibid.*

<sup>314</sup> *Ibid.*

<sup>315</sup> *Ibid.*

<sup>316</sup> *Ibid.*

<sup>317</sup> *Ibid.*

<sup>318</sup> *Ibid.*

<sup>319</sup> *Ibid.*

<sup>320</sup> *Ibid.*

<sup>321</sup> *Ibid.*

<sup>322</sup> *Ibid.*

<sup>323</sup> *Ibid.*

<sup>324</sup> *Supra* note 209; See also *ibid.* at 5.



According to Steven Penney, the free choice rationale is inadequate and the courts have failed to explain why the right against self-incrimination “...should exist”<sup>325</sup> based on this rationale and have failed to answer the question “What is wrong with self-incrimination?”<sup>326</sup> Penny argues that “there is in fact nothing inherently wrong with compelling self-incrimination and that the Court’s preoccupation with preserving free choice has produced a self-incrimination jurisprudence that too often elides the legitimate interests at stake in the criminal justice process.”<sup>327</sup>

Penny’s position is that “...there is nothing wrong with denying criminal suspects the right to choose whether to respond to criminal accusations,”<sup>328</sup> provided that three pre-conditions are met:<sup>329</sup>

1. “the state has sufficient grounds for suspicion;”<sup>330</sup>
2. the state “avoids cruel methods of inducing cooperation; and”<sup>331</sup>
3. “ensures that compelled evidence is reasonably reliable”<sup>332</sup>

Penny agrees that there are valid reasons which justify the legal protections against self-incrimination, such as the “reliability” and “abuse prevention” rationales.<sup>333</sup> According to Penny, these rationales make good sense and are non-controversial, however, “...the “free choice” rationale”<sup>334</sup> is “controversial and perplexing.”<sup>335</sup> The crux of Penny’s position is that the “free choice” rationale for providing a protection against self-incrimination is circular in that it basically reasons that an accused should not be compelled to testify simply because the

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<sup>325</sup> *Supra* note 266 at 250.

<sup>326</sup> *Ibid.*

<sup>327</sup> *Ibid.* at 249.

<sup>328</sup> *Ibid.* at 250.

<sup>329</sup> *Ibid.*

<sup>330</sup> *Ibid.*

<sup>331</sup> *Ibid.*

<sup>332</sup> *Ibid.*

<sup>333</sup> *Ibid.*

<sup>334</sup> *Ibid.* at 251.

<sup>335</sup> *Ibid.*

accused should not be compelled to testify. Penny states that in some cases, “the Court’s devotion to preserving free choice has denied courts access to reliable evidence in defiance of sound criminal justice policy.”<sup>336</sup>

### **The Section 7<sup>337</sup> Right to Silence:**

The Supreme Court of Canada has held that the principle against self-incrimination is contained in section 7 of the *Charter*.<sup>338</sup> This provides a measure of protection to those people who are questioned by the police.<sup>339</sup> The “...Court has interpreted section 7 to protect a “right to silence”<sup>340</sup> giving detainees a right to choose whether to speak to authorities.”<sup>341</sup>

According to Penney, Rondinelli, and Stribopolous, the right to silence is contained in the confessions rule and its only engaged when “...a detainee makes a statement to a person in authority.”<sup>342</sup> However, if the Court finds that a statement was voluntary, and the circumstances surrounding the obtaining of the statement would not shock the community, then the Court will find that there has been no section 7 violation.<sup>343</sup> Penney, Rondinelli and Stribopoulos explain the Rationale for this. Essentially, “...any protection that section 7 provides is already provided for by the confessions rule.”<sup>344</sup> Moreover, Penney, Rondinelli and Stribopolous also point out that it is far less onerous<sup>345</sup> “...for the defence to raise a reasonable doubt on the voluntariness”<sup>346</sup> of an accused’s statement than to prove that the statement was obtained in violation of the

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<sup>336</sup> *Ibid.* at 250.

<sup>337</sup> **CHARTER** (*Charter of Rights and Freedoms*, R.S.C. 1985 Appendix II, No. 44, ss. 7).

Section 7 of the *Charter* provides that “everyone has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

<sup>338</sup> Steven Penney, Vincenzo Rondinelli, & James Stribopoulos. *Criminal Procedure in Canada*, 1<sup>st</sup>. ed. (Markham: LexisNexis, 2011) at 324.

<sup>339</sup> *Ibid.* The authors cite *R. v. Jarvis*, [2002] 3 S.C.R. 757 (S.C.C.) as one example from the Supreme Court of Canada.

<sup>340</sup> *Ibid.* citing *Hebert*, *supra* note 13 at para. 77.

<sup>341</sup> *Ibid.* citing *Hebert*, *ibid.* at para. 78; *Singh*, *supra* note 1 at para. 35.

<sup>342</sup> *Ibid.* citing *Singh*, *supra* note 1 at paras. 37-41.

<sup>343</sup> *Ibid.*

<sup>344</sup> *Ibid.*

<sup>345</sup> *Ibid.*

<sup>346</sup> *Ibid.*

*Charter*,<sup>347</sup> and then subsequently show that any “...evidence obtained as a result should be excluded under section 24(2).”<sup>348</sup> For these reasons, the authors state that “an independent section 7 application will rarely be warranted in these circumstances.”<sup>349</sup>

### **Conclusion:**

The privilege against self-incrimination has a long history within the Canadian law. Historically, there was nothing distasteful about being compelled to provide evidence against oneself.<sup>350</sup> The privilege against self-incrimination historically existed to prevent the state from engaging in fishing expeditions and bringing charges against individuals without cause.<sup>351</sup>

Before the enactment of the *Canadian Charter of Rights and Freedoms*, the common law privilege against self-incrimination was very narrow.<sup>352</sup> However, after the advent of *the Charter*, the Supreme Court, led by the guidance of Antonio Lamer, managed to breathe life into the law of self-incrimination<sup>353</sup> by recognizing and intertwining the important principles of free choice, a case to meet and the right to silence.<sup>354</sup>

During the same year of Lamer’s departure, the substantive principles pertaining to the law of self-incrimination has begun to somewhat wither. Under the guidance of Lamer, the law of self-incrimination was given a vibrant application that was not merely superficial. Beginning in 2000 with *Oickle*, and continuing throughout the decade with *Singh* and *Sinclair*, the Supreme Court seems to have undermined some of the recognized principles pertaining to the law of self-incrimination, particularly the principles of the case to meet and free choice. Only time will tell

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<sup>347</sup> *Ibid.*

<sup>348</sup> *Ibid.*

<sup>349</sup> *Ibid.*

<sup>350</sup> *Supra* note 130 at 822; See also *supra* note 61 at 172.

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<sup>351</sup> *Supra* note 60 at 10-11.

<sup>352</sup> *Supra* note 61 at 92.

<sup>353</sup> *Supra* note 201 at 3.

<sup>354</sup> *Ibid.* at 4.

whether the direction the Court took in *Oickle, Singh, and Sinclair* will take a turn for the better, or for the worse.

### **The Rationales for the Privilege against Self-Incrimination**

Having reviewed the treatment of the privilege against self-incrimination in Canadian law, we should conduct a brief examination of its underlying rationales. A critical analysis of the justifications for the privilege will assist in shedding light on its contemporary relevance by showing the many reasons why this privilege is beneficial to our system of justice and how the justice system would suffer in the absence of such a rule. The privilege has been made central to the common law confessions rule and the right to silence by the courts, such that an attack against the privilege is an attack against the protections afforded by these rules.

### **An Overview of the Rationales for the Privilege against Self-Incrimination**

We may break down the rationales for the privilege into two main categories.<sup>355</sup> “Systemic rationales”<sup>356</sup> that justify the operation of the privilege in relation to other aspects of the criminal justice system; and “individual rationales”<sup>357</sup> that attempt to frame the importance of the privilege in terms of respect for individuals.<sup>358</sup>

The arguments for systematic rationales highlight the need for allowing witnesses to safely testify without the danger of incriminating themselves.<sup>359</sup> Moreover, these rationales suggest that this privilege also preserves the integrity of the criminal justice system by forcing the state to meet its burden of proof, without using the accused as a testimonial source.<sup>360</sup>

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<sup>355</sup> D. Dolinko, “Is there a Rationale for the Privilege Against Self-Incrimination” (1985-86) 33 UCLA L. Rev. 1063 at 1065.

<sup>356</sup> *Ibid.*

<sup>357</sup> *Ibid.*

<sup>358</sup> See *ibid.*

<sup>359</sup> *Supra* note 50 at 143; also see *ibid.* at 1066.

<sup>360</sup> Robert B. McKay, “Self-Incrimination and the New Privacy” (1967) Sup. Ct. Rev. 193 at 209.

On the other hand individual rationales tend to focus on the inherent cruelty of compelling an individual to incriminate himself, the need to combat the invasion of privacy that this entails and the need to show respect for the individual and their autonomy.<sup>361</sup>

The underlying rationales for the privilege are tied to a normative question and the resolution of this question involves the balancing of the requirement of fairness to an accused person against the state's need to investigate crimes.

According to Justice Goldberg in the American case *Murphy v. Waterfront Commission*, the privilege represents our fundamental values and most noble aspirations. Mr. Justice Goldberg articulates these values in the following fashion:

Our unwillingness to subject those suspected of crime to the cruel dilemma of self-accusation, perjury or contempt; Our preference for an accusatorial rather than an inquisitorial system of criminal justice; Our fear that self-incrimination statements will be elicited by inhumane treatment and abuses; Our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load"; Our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life"; Our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty" is often "a protection to the innocent"<sup>362</sup>

The above articulation by Justice Goldberg reveals that the privilege protects both systemic and individual values. The reference to a cruel dilemma contained in the first principle provides an example of the prejudicial dilemma involved in testimonial compulsion. The second principle refers to the norms that are part of the adversarial system and these norms are intertwined with individual values, which are meant to be protected by the privilege. The third principle raises concerns about potential unreliability of self-incriminating confessions. Principle number four is a declaration of the need to strike a fair balance between the state and the individual, by placing the requirements of probable cause and the burden of proof on the state. The fifth principle is a

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<sup>361</sup> R. Kent Greenawalt, "Silence as a Moral and Constitutional Right" (1981-82) 23 Wm. & Mary L. Rev. 71; Also see *supra* note 355 at 1066.

<sup>362</sup> *Supra* note 31.

protective shield for human dignity, moral autonomy and the privacy of the individual. The sixth principle highlights the suspicious nature of the self-incriminating statements. And the last principle is about the need to protect the innocent against the excessive abuse of power by the state.

### **The Core Values of the Privilege**

The focus on the core values of the privilege seems to suggest that testimonial compulsion is highly problematic because it takes away the individual's ability to have control over his own private thoughts; instead testimonial compulsion forces the individual to relinquish such control to the state, and therefore allows the state access to potentially incriminating information that can be used to convict him.

The arguments in favour of these core values involve broad appeals to the goals of the criminal justice system<sup>363</sup> and the basic notions of individual rights. The dispute over the legitimacy of the privilege largely stems from the differing interpretations of these ideals.

Mr. Justice Friendly argued that the privilege defies our sense of ordinary morality<sup>364</sup> and it runs counter to how relationships between individuals are structured. He takes aim at the absurdity of the notion that one should be permitted to exercise silence, in the face of the state accusation, when in society an individual is constantly being held accountable for his actions to his employer, teacher, parent, etc.

While the other [evidentiary] privileges accord with notions of decent conduct generally accepted in life outside of the courtroom, the privilege against self-incrimination defies them. No parent would teach such a doctrine to his children; the lesson parents preach is that while a misdeed, even a serious one, will generally be forgiven, a failure to make a clear breast of it will not be. Every hour of the day people are being asked to explain their conduct to parents, employers and

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<sup>363</sup> *Supra* note 355 at 1147.

<sup>364</sup> W. Schaefer, *The Suspect and Society* (Evanston: Northwestern University Press, 1967) at 59; See also *ibid.* at 1068.

teachers. Those who are questioned consider themselves to be morally bound to respond, and the questioners believe it proper to take action if they do not.<sup>365</sup>

What seems to have fallen outside of Justice Friendly's field of vision is the simple fact that in a liberal democracy one cannot equate social interactions between private individuals with the relationship between the state and the individual. The relationship between an individual and his teacher or parent is often close and personal; or in the case of an employer the relationship may be based on need. But the state's machinery is huge and is represented by many different layers of bureaucracy. It does not relate to an individual in the same way that a teacher, a parent or even an employer does. The state is an impersonal entity which stands separate and apart from an individual.<sup>366</sup>

The state is devoid of emotions and interacts with individuals in accordance with certain pre-defined standards, and therefore it lacks the personal and emotional dimensions that are usually contained in private relationships. It is imperative for the state in a liberal democracy to behave in a routine and an impersonal manner<sup>367</sup> towards individuals in order to enforce equality and ensure similar treatment.

The notion that one could compare the relationship between the individual and the state with that of a parent, a teacher or an employer has no place in liberal democracy. Such analogy may only find support in totalitarian societies<sup>368</sup> where dictatorial states are identified as the one and the same with individual. The claim by communist states that they have created classless societies invokes the organic image<sup>369</sup> which demands total subservience on the part of the

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<sup>365</sup> Henry J. Friendly, "The Fifth Amendment Tomorrow: The Case for Constitutional Change" (1968) 37 U. Cinn. L. REV. 671 at 680.

<sup>366</sup> *Supra* note 355 at 1070.

<sup>367</sup> *Ibid.*

<sup>368</sup> *Ibid.*

<sup>369</sup> C. Cohen, *Communism, Fascism and DEMOCRACY: The Theoretical Foundation* (New York: Random House, 1962) at 404; See also *ibid.*

individual towards the all powerful state.<sup>370</sup> And as such this privilege "...would never be allowed by communists, and thus it may well be regarded as one of the signs which sets us off from communism."<sup>371</sup>

It is only in these states that the needs of individuals are traded for the greater good of the community.

The totalitarian mind accepts all the means which promise the achievement of its ends. A political democrat is ready to compromise some of his ideal ends for the sake of renouncing means which would involve the sacrifice of human lives or freedom. This is the major moral issue dividing any totalitarian be he communist or fascist, from a genuine democrat.<sup>372</sup>

The other difficulty with Justice Friendly's argument lies in the fact that "in close adult relationships, trust is a characteristic and central element"<sup>373</sup> However, in a liberal democracy, there is no expectation that the relationship between the individual and the state should be predicated on that kind of trust. Contractual obligations or personal relationships between private citizens involve voluntary undertakings and a certain amount of trust. However in the context of criminal law the relationship between individual and state is strictly involuntary. The state decides to invoke the machinery of the criminal justice system against an individual, without his consent or any input from the individual.

The involuntary nature of the criminal law process creates an ideological dilemma for anyone who wishes to characterize the relationship between the individual and the state as a close personal one. This notion is further reinforced by the five basic tenets of liberal ideology. The principles of "...free-trade, individualism, rule of law, freedom of contract and *laissez-faire*"<sup>374</sup> are the cornerstones of the ideological foundation of a liberal state.<sup>375</sup> These principles

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<sup>370</sup> Dolinko, *ibid.*

<sup>371</sup> *Supra* note 29 at 81.

<sup>372</sup> W.W. Kulski, *The Soviet Regime* (Syracuse: Syracuse University Press, 1954).

<sup>373</sup> *Supra* note 361 at 20.

<sup>374</sup> Robert Albritton, *A Japanese Approach to Stages of Capitalist Development* (MacMillan: London, 1991) at 174.

<sup>375</sup> *Ibid.*



clearly recognize an individual as an independent entity from the state;<sup>376</sup> in fact the most basic element of the liberal ideology is a sharp separation between the state and individual.<sup>377</sup>

### **The Aims of Criminal Law and the Privilege**

The criminal law as a child of political and moral philosophy is constantly pre-occupied with the question of<sup>378</sup> “...justifying the use of state’s coercive power against”<sup>379</sup> individuals.<sup>380</sup>

This question assumes central importance, when one considers the massive implications that flow from criminal prosecutions. The loss of liberty, the stigma of criminal conviction, the compromised ability of a convicted person to earn a living because of a prior conviction, to name only a few of the implications, may be listed as some of these consequences. Hence, given the potentially severe consequences of criminal sanctions, procedural fairness to an accused person should be a moral imperative in the operation of the criminal law.

The question that we face is the following: in what way does the privilege against self-incrimination help to promote procedural fairness? In other words, does the protective mandate of this privilege have any application in achieving the goals of protecting the innocent, restraining the abuse of power by state and ensuring the fairness of the criminal process? We shall examine each of these goals separately, by reviewing the systemic and individual rationales for the privilege.

### **Systemic Rationales**

#### **Accusatorial System v. Inquisitorial System**

The debate about the superiority of one of the two systems, accusatorial or inquisitorial, over the other is very large and it falls outside of the scope of this project. However, the issue at

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<sup>376</sup> *Ibid.* at 39.

<sup>377</sup> *Ibid.*

<sup>378</sup> G. Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown & Company, 1978) preface XIX.

<sup>379</sup> *Ibid.*

<sup>380</sup> *Ibid.*

hand is whether the privilege against self-incrimination is a necessary element of the adversarial system of justice.

The adversarial system, which is part of the common law, operates on the assumption that the parties in criminal proceedings are contestants. The emphasis in this system is for each party to assert its respective position, while the judiciary acts as a disinterested arbitrator, refereeing the dispute between the two parties.

The inquisitorial system, however, follows a different path to the discovery of the “truth”. The judge in this system becomes directly involved in the trial process by questioning witnesses, reviewing evidence and demanding explanations from the accused person. Hence, the judge assumes both investigative and adjudicative roles and the context between the two opposing parties is much more limited.

Justice Goldberg, in the case of *Murphy v. Waterfront Commission*<sup>381</sup> seems to suggest that, the privilege against self-incrimination gives expression to the important features of our preferred system of criminal justice, which is the adversarial system.<sup>382</sup> These important features include the presumption of innocence, the burden of proof, various rules of evidence, the adversarial roles of the contesting parties and the fact that the privilege could have a role in safeguarding these features.

The inquisitorial system is viewed as being more efficient<sup>383</sup> for the simple reason that there is a positive obligation on the part of the accused to co-operate with the state.<sup>384</sup> However, such compelled co-operation by necessity involves “...an immediate imposition on the will, intellect

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<sup>381</sup> *Supra* note 31.

<sup>382</sup> *Ibid.*

<sup>383</sup> Law Commission of New Zealand, “The Privilege Against Self-Incrimination” in *Preliminary Paper 25*, (1996) at 21.

<sup>384</sup> R.S. Gerstein, “Punishment and Self-Incrimination” (1971) 16 Am. J. Juris. 84 at 92

and conscience of the individual, pressing them into patterns created by the prosecution,”<sup>385</sup> leaving no room for the individual to freely choose whether or not he wishes to share his guilt or innocence with the rest of the world. The adversarial system, however, provides an accused person with such an option. It therefore may be argued that the privacy and the personal dignity of the individual is better protected in a system where there is no compelled testimony. In other words it is only in the context of the adversarial system that an individual can reaffirm his moral autonomy by relying on the privilege to establish his right to decide whether he will personally participate in the trial process. “Once the freedom to make this choice has been established, the accused is able to assert himself as autonomous and equal adversary, and can decide to mount his defence entirely on the basis of technical considerations.”<sup>386</sup>

The operation of the privilege within the adversarial system allows for the recognition of the accused person as an autonomous agent, capable of making decisions as to the manner in which he wishes to defend himself.<sup>387</sup> The freedom to make such decisions is instrumental in allowing the accused to govern himself according to his own internal moral consciousness, as opposed to being forced by the state to take the stand. The accused person is then permitted to independently come to terms with his guilt, at the time of his own choosing, while avoiding the degrading invasion of the state upon his moral autonomy<sup>388</sup> In other words, in the context of the adversarial system an accused person is able to express remorse in a private setting and the state

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<sup>385</sup> *Ibid.*

<sup>386</sup> *Supra* note 54 at 352.

<sup>387</sup> *Ibid.*

<sup>388</sup> According to Schrock, Welsh and Collins:

The fifth amendment, standing for the high value placed on personal responsibility, rebukes government when, by omission or commission, it inhibits, stultifies, or interrupts the process by which the accused decides what to do about whatever criminal responsibility rests at his doorstep.”

See Thomas S. Schrock, Robert C. Welsh & Ronald Collins, “Interrogational Rights: Reflections on *Miranda v. Arizona*” (1978) 52 S. CAL. L. Rev. 1. at 49.

is not able to force such expression through compelled testimony. Such luxury is not available to an accused person in an inquisitorial system.

### **The Eliciting of Statements by Inhumane Treatment**

The privilege helps to force the state to mount its case independently of the accused. This is due to the fact that the availability of the privilege empowers accused persons and other witnesses to refuse to respond to state questioning, and this fact may encourage officials to conduct a more thorough investigation, rather than taking shortcuts and using abusive techniques to pressure the accused for answers.

Therefore once an accused person invokes his privilege against self-incrimination, the officials, in the U.S. at least, are expected to hold back their pressure tactics which may include oppression, psychological pressure, procedural abuses, and the like. This is also important for safeguarding the integrity of the system. As Wigmore stated:

Any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources.... If there is a right to answers, there soon seems to be a right to the expected answers that is to a confession of guilt thus the legitimate use grows into unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized.<sup>389</sup>

### **Fair Play**

The need for maintaining a fair balance in the contest between the individual and the state raises two important issues that are directly connected to the application of the privilege. The first of these issues is the need to protect the individual from intrusive fishing-expeditions by the state. The privilege provides the necessary means to an individual to resist unjustified

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<sup>389</sup> Wigmore, *Evidence*, Vol. 3 (Chadbourn Rev. 1970) at 296, n. 1.

demands by state agents for incriminating information; unless the state can show good cause for its inquiries.<sup>390</sup>

The second issue, which it has already been raised, pertains to compelling the state to gather their evidence from other sources, rather than getting it from the accused. This is an important consideration in terms of fairness of the proceedings. Given the vastly superior resources of the state, the privilege can serve as an equalizer between the individual and the state. This can be achieved by allowing the accused to keep his cards close to his chest, and challenge the state to obtain its evidence independently of his compelled participation.

### **The Privilege and Abuse of Power by State**

There is a relationship between the abuse of power and the privilege in a sense that one could argue that the privilege is a necessary bulwark against undue state intrusion into the lives of people. The privilege achieves that goal by forcing the state to meet its burden of proof, and by making it more difficult for the state to conduct politically motivated fishing expeditions against certain group of individuals.<sup>391</sup> In other words, the privilege may assist in undermining the effectiveness of laws that infringe freedom of expression and freedom of belief.

The anti-communist McCarthy hearings provides a good example of the need for the protective ability of the privilege against state tyranny.<sup>392</sup> A more recent example is the questioning of individuals for possible links with international terrorism.<sup>393</sup> The privilege could

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<sup>390</sup> The Reflections of an experienced British civil officer in colonial India on the need to use torture by investigators in order to extract information is particularly relevant to our discussion: "It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence." – J.F. Stephen, *A History Of The Criminal Law of England* (London: Macmillan, 1883) at 442.

<sup>391</sup> *Supra* note 355 at 1080.

<sup>392</sup> *Supra* note 61 at 5.

<sup>393</sup> See: *Re: Application Under s. 83.28 of the Criminal Code*, 2004 SCC 42, 184 C.C.C. (3d) 449, 240 D.L.R. (4th) 81. Investigative hearings (section 83.28 of the *Criminal Code*) are aimed at preventing and investigating terrorist offences. In 2004, the Supreme Court of Canada upheld the constitutionality of this provision while stating that investigative hearings should generally be held in open court. However, the power was subject to a sunset clause and expired after the House of Commons voted against extending its application in February 2007. In its decision *Re:*

prove useful in combating the more contemporary form of such possible abuse of power by the state. This is because the existence of the privilege could serve as a shield against the state's efforts for belief-probing. However, the absence of the privilege makes it easier for the state to engage in fishing-expeditions against individuals who are suspected of deviating from political or moral status quo.<sup>394</sup> For example, a person suspected of being a communist or an Islamic fundamentalist could be arrested for security reasons and be brought before a Judge to be compelled to explain his associations. As Ratner puts it:

Without the protection of the privilege a person, simply upon accusation of crime, could be forced to submit to an inquisition, under oath, concerning his actions<sup>395</sup>

This is exactly what section 83.28 of the *Criminal Code* allowed for, and our Supreme Court upheld the constitutionality of the section.

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*Application under s. 83.28 of the Criminal Code*, [2004] S.C.R. 242, the Supreme Court of Canada concluded that the investigative hearing was constitutional.

Pursuant to s. 83.28(5), the judge may (a) order the examination, under oath or not, of the person named in the order (the "named person"); (b) order the named person to attend for the examination and to remain in attendance until excused by the presiding judge; (c) order the named person to bring to the examination anything in their possession or control and produce it to the presiding judge; (d) designate another judge as the judge to preside over the examination; and (e) include any other terms or conditions considered desirable, including those for the protection of the named person, third parties, and an ongoing investigation. Under s. 83.28(7), the terms of the order may be varied.

For a view in support of the authorities' "limited powers to compel testimony from persons believed to have terrorism-related information" – *Supra* note 253 at 488-489 (Footnote #45)

<sup>394</sup> Alan Donagan, "The Right Not to Incriminate Oneself" (1984) 137 Soc. Phil. & Poly 98. Alan Donagan holds that the privilege has a role in frustrating undemocratic laws in the areas of politics and morality. He describes his position in the following manner:

"In most political societies there are movements to impose penalties on propagating unpopular opinions ... When those movements are successful, in order to avoid odium and other non-legal sanctions, some will conceal that they hold the opinions it is forbidden to propagate ... Now, when a defendant has been discreet, the only way in which he can be proved even to sympathize with the opinions in question may be out of his own mouth. [The privilege] will not only be a defense against some of the abuses of laws against the propagation of opinions, it may even blunt the zeal of those who advocate such laws, whose intention is often to harass any who even passively sympathize with opinions they hate. One may generalize: many kinds of legal offence that will often be provable only by compelling self-incriminating evidence ought not, morally speaking, be legal offences at all; and most offences for which there ought to be legal sanctions can be proved, if at all, without recourse to such evidence. This appears to be a moral reason of some weight why it should be illegal to compel self-incrimination." (pg. 143-144).

<sup>395</sup> Leonard G. Ratner, "Consequences of Exercising the Privilege against Self-Incrimination" (1956-57) 24 U. Chi. L. Rev. 472 at 482.

## **Unreliability of Compelled Statements**

An individual who is confronted with potentially self-incriminating questions by state agents has to make some very difficult choices. He may find himself in a situation where he has to perjure himself by telling self-protecting lies or he may choose to tell the truth and hence expose himself to the possibility of self-incrimination. However the privilege against self-incrimination provides a third alternative: that is to remain silent, and therefore avoid making such difficult choices. Hence, in certain circumstances the privilege removes the need to lie to avoid self-incrimination and it also prevents unreliable statements as a result of aggressive interrogation techniques, at least in the American context.<sup>396</sup>

### **The Individual Rationales**

#### **The Cruel Trilemma**

The reference to cruel trilemma provides an example of the prejudicial dilemma involved in testimonial compulsion. This principle highlights the inherent cruelty of compelling an accused person to admit to his own guilt in a public forum. As Mr. Justice Field in his minority decision in *Brown v. Walker*<sup>397</sup> stated: “A sense of personal degradation in being compelled to incriminate one’s self must create a feeling of abhorrence in the community at its attempted enforcement.”<sup>398</sup>

The obviousness of the cruelty in compelled testimony lies in the fact that it creates a lose/lose situation for an accused person. This is because the accused is compelled to either admit his guilt, contrary to his natural sense of self-preservation,<sup>399</sup> or to lie and, hence, expose himself to the possibility of additional prosecution for perjury or to remain silent and face

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<sup>396</sup> The issue of unreliable statements will be explored in greater depth in the next chapter.

<sup>397</sup> *Brown v. Walker*, 161 U.S. 591 (1986).

<sup>398</sup> *Ibid.* at 637.

<sup>399</sup> L. V. Sunderland, “Self-Incrimination and Constitutional Principle; *Miranda v. Arizona* and Beyond” (1979) 15 Wakeforest L. Rev. 171, 179-180.

contempt charges. By any objective standard of measurement, being caught in such situation is simply too cruel and this cruelty has received judicial recognition by the U.S. Court of Appeals in the following manner:

... answer truly and you have given evidence leading to your conviction for a violation of federal law, answer falsely and you will be convicted of perjury; refuse to answer and you will be found guilty of criminal contempt and punished by fine and imprisonment. In our humble judgement, to place a person not even on trial for a specific crime in such predicament is not only a manifestation of fair play, but is in direct violation of the Fifth Amendment to our national Constitution.<sup>400</sup>

The intensity of pressure that the state is capable of bringing on an individual defendant in forcing him to break his will to remain silent or quite possibly expose him to perjury or contempt represents the crushing power of the state for degrading an individual. The state uses the power of law to extort information out of the individual and the “moral justification” for this is the need to combat crime. The context in which the state attempts to acquire information is the “need” to secure a conviction against that individual. Criminal conviction is among the most serious punitive measures the state can invoke against a defendant, and hence this is the most appropriate place to impose limits on the power of the state. A system that compels individuals to seal their own fate is inherently cruel.<sup>401</sup>

### **Protecting the Innocent Against Wrongful Conviction**

The prevention of wrongful convictions should be the ultimate goal of every criminal justice system. Wrongful convictions are an evil that strikes at the heart and the soul of any civilized criminal justice system. The system derives its legitimacy from the argument that it operates fairly against an accused person, and it constantly needs to foster an image of fairness in order to maintain that legitimacy.<sup>402</sup> Therefore, the organizing principle in every legitimate

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<sup>400</sup> *Aiuppa v. United States*, 201 F. 2d 287 at 300 (6<sup>th</sup> Cir. 1952).

<sup>401</sup> According to Knight: “Even short of outright torture, a judicial process that centers its attention on producing confessions has a threatening, authoritarian cast that is alien to our way of justice.” (*Supra* note 18 at 98).

<sup>402</sup> *Supra* note 355 at 1074.



system should be an unwavering commitment to fairness. The absence of such commitment will only lead to "...widespread cynicism,"<sup>403</sup> and that in turn leads to erosion of respect and desire "...to obey criminal laws"<sup>404</sup> by general public. Such a state of affairs will only serve to undermine the social stigma of criminal conviction<sup>405</sup> and its overall effectiveness.<sup>406</sup> The issue of fairness lies at the heart of criminal justice system for the simple reason that criminal law is capable of inflicting massive destruction on the lives of individual suspects. Totalitarian states routinely use the sanctions of criminal law as a convenient tool to eliminate political dissent. The mass executions of political prisoners under the pretext of drug importing, offences against morality, and other crimes are clear proof of the terroristic potential of the criminal law. The brutal use of criminal sanctions by states such as Iran, Syria, China, North Korea is only possible because of total indifference in these states for basic political values of freedom, liberty and justice. These states are content to merely pay symbolic lip-service to important civilizing values. However the situation in democratic societies is different, in the sense that, to some extent we are prepared to commit certain resources to uphold the values that set us apart from dictatorial states. Griswold raises a similar point in relation to the use of the privilege against self-incrimination in democratic states as opposed to totalitarian states in the following fashion:

As such it is [The Fifth Amendment] a clear and eloquent expression of our basic opposition to collectivism, to the unlimited power of the state. It would never be allowed by communists, and thus it may well be regarded as one of the signs which sets us off from communism<sup>407</sup>

The comparative analysis of constitutional guarantees provided in democratic and non-democratic states will reveal the stunning fact that most states have constitutions that are strikingly similar to one another. For example, the constitution of the Islamic Republic of Iran

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<sup>403</sup> *Ibid.* at 1073.

<sup>404</sup> *Ibid.*

<sup>405</sup> *Ibid.*

<sup>406</sup> Peter Arenella, "Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts Competing Ideologies" (1983-1984) 72 Geo. L.J. 185 at 200. Also see *ibid.*

<sup>407</sup> *Supra* note 29 at 81.

contains certain provisions that look shockingly similar to the *Canadian Charter of Rights and Freedoms*. The constitution of the Iranian state specifically prohibits arbitrary detention, the imposition of curfews and the detention of anyone for more than 24 hours without just cause. It also guarantees the right to counsel, a right against unreasonable search and seizure, freedom of expression, freedom of the press, the right against physical abuse, the rejection of involuntary confessions, and other fundamental freedoms that, at least formally reflect due process values.<sup>408</sup>

The difference between the Iranian state and the Canadian state, then, lies in how much practical value each state attaches to the observance of the codified procedural rights. As Mr. Justice Frankfurter states in *McNab v. United States*: “The history of liberty has largely been the history of observance of procedural safeguards”.<sup>409</sup> This is due to the fact that our most cherished fundamental rights find expression in procedural compliance by the state, and these procedural rules “...provide the most perfected inclusive safeguard against oppression available,”<sup>410</sup> and therefore criminal processes should serve as a bulwark against oppression.

It is beyond dispute that the reasonable use of criminal sanctions is necessary in maintaining the operation of the market economy. However, it should also be stated that “criminal procedure must be designed to prevent abuse of power.”<sup>411</sup> Therefore, the most effective method of combating abuses of power by the state authorities is to devise a system that properly and meaningfully administers the procedural rights of individual suspects. This is extremely important because the fair administration of these rights make “...all the difference between a reign of terror and one of law”<sup>412</sup>

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<sup>408</sup> See: *Constitution of the Islamic Republic of Iran*, Articles 19 – 42, The Rights of the People, available online: < <http://www.iranonline.com/iran/iran-info/government/constitution-3.html> >.

<sup>409</sup> *McNab v. United States*, 318 U.S. 332 at 347 (1943).

<sup>410</sup> Jerome Hall, “Objectives of Federal Criminal Procedural Revision” (1942) 51 Yale L.J. 723 at 728.

<sup>411</sup> John Griffiths, “Ideology in Criminal Procedure, or A Third Model of Criminal Process” (1970) 79 Yale L.J. 359 at 380-81 n. 81.

<sup>412</sup> *Shaughnessy v. United States ex. Rel. Mezei*, 345 U.S. 206 at 226 (1953) (Jackson, J. dissenting).

Criminal sanctions in democratic societies represent the highest degree of the coercive power of the state and precisely for that reason, the observance of procedural rights should act as a check on the ability of the state to mobilize its massive resources to convict the innocent. It may be impossible to devise a system that totally eliminates the possibility of wrongful convictions; however, efforts should be made to reduce the occurrence of such phenomenon. The quest to combat wrongful convictions is essential for the preservation of democracy, because the awesome power of criminal sanctions makes occurrences of such mistakes very costly. The terrifying prospects of spending a lifetime behind bars for a crime that one is actually innocent of, is a personal and a social catastrophe, equal in magnitude to a Shakespearean tragedy. It can safely be claimed, without any degree of exaggeration, that every wrongful conviction leaves a dark stain on the soul of the society.

The question before us is whether the privilege against self-incrimination can play a meaningful role in protecting the innocent from wrongful conviction. This question may compel us to go beyond academic papers and to look for answers in the practical realities of courtrooms and police stations.

An innocent person may wish to exercise his right against self-incrimination, because he may be intimidated by his interrogators, or simply because of his ignorance of the underlying circumstances of the investigation against him, he may choose to follow the advice of his counsel to remain silent. The role that the privilege plays in providing this protection is extremely important and it makes the preservation of this privilege indispensable to the administration of justice. It is beyond dispute that the privilege may also assist the guilty to

escape justice.<sup>413</sup> However, the protection of the innocent is a much greater consideration than the possible exploitation of the privilege by the guilty.

It might be argued that we could set up an open and non-threatening system that compels both the guilty and the innocent to speak and thereby maximizes the chances of truthful statements from each and, in so doing, increases the chances of discovering the truth.<sup>414</sup> But it is impossible to introduce compulsion and at the same time have true voluntariness exist. And without voluntariness, we have unreliability. Having an adverse inference that silence indicates guilt, for example, would compel an accused person to speak; however, it would also be a threat to anyone not already wishing to speak. This would make any statement given, an involuntary one. Moreover, compelling the accused to speak would not necessarily increase the proportion of truthful statements. A guilty person compelled to speak might be inclined to lie about his guilt and proclaim innocence; whereas an innocent person compelled to speak, might do such an unconvincing job in his defence that he would be wrongfully convicted. There is no way to ensure the reliability of statements when they are required to be given under compulsion.

Any system of testimonial compulsion also violates the presumption of innocence and reverses the burden of proof. It is a principle of our justice system that the Crown introduce the case to be met, and that unless and until the Crown can show that the accused is guilty beyond a reasonable doubt, the accused will remain legally not guilty. Requiring the accused to explain his innocence upon questioning cannot be done without also presuming guilt and shifting the burden of proving innocence on to the accused. This would create a system of justice that is fundamentally unfair to accused persons, where, up against the enormous resources of the state,

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<sup>413</sup> *Supra* note 31.

<sup>414</sup> According to Wigmore "... any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby" – J. Wigmore, *Evidence in Trials at Common Law* 2281, at 296 n.i.

they have to disprove the evidence presented against them by in some way commenting on it to alleviate the presumption of guilt.

The stresses of contested trial, the overwhelming effects of courtroom settings, the demeanour of trial judges and prosecutors, and the coercive potential of aggressive cross-examination are among some of the practical realities that may not be captured in academic papers. It does not take too much imagination to conceive of a situation where a nervous and frightened but nevertheless innocent defendant<sup>415</sup> may be made to look guilty through the process of a rigorous cross-examination.<sup>416</sup> It is my position that a skillful cross-examiner may be able to make a truthful witness look like a liar. The art of cross-examination,<sup>417</sup> with its well defined techniques can serve as a valuable tool to manipulate the truth for the specific purpose of exposing the “self-serving lies” of a defendant.<sup>418</sup> A confused defendant who is too nervous or ill equipped to cope with the stresses of cross-examination is easy prey for a veteran lawyer. A nervous defendant, due to his/her inexperience on the stand may give off false impressions as to

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<sup>415</sup> E.g. Ellis, “Vax Populi v. Supreme Lex: A comment on the Testimonial Privilege of the fifth Amendment” (1970) 55 Iowa L. Rev. 829 at 846.

<sup>416</sup> *Ibid.*

<sup>417</sup> L. Pozner & R. Dodd, *Cross-Examination: Science and Techniques* (Charlottesville: The Michie Company Law Publishers, 1993) at 3-4. Pozner & Dodd are of the view that cross-examination is a science and not an art.

<sup>418</sup> I make this assertion while I am aware of Wigmore’s claim that cross-examination is “...beyond any doubt the greatest legal engine ever invented for the discovery of truth.” (*Ibid.* at 2.).

See also: Jerome Frank, *Courts on Trial: Myth and Reality in American Justice*, (Princeton: New Jersey, 1949) at 82. Franks writes: “[A]n experienced lawyer uses all sorts of stratagems to minimize the effect on the judge or jury of testimony disadvantageous to his client, even when the lawyer has no doubt of the accuracy and honesty of that testimony. The lawyer considers it his duty to create a false impression, if he can, of any witness who gives such testimony.” He goes on to cite examples, such as how rapid cross-examination may ruin the testimony of a “truthful, honest” but “over-cautious witness.” Lawyers may also “try to prod an irritable but honest ‘adverse’ witness into displaying his undesirable characteristics in their most unpleasant, in order to discredit him with the judge or jury.” (Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton: New Jersey, 1949) at 82). If a witness has an inflated ego, the lawyer “will deftly tempt the witness to indulge in his propensity for exaggeration, so as to make him “hang himself”” (Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (New Jersey: Princeton, 1949) at 82).

See also: Murray Schwartz, “On Making the True look False and the False Look True” (1988) 41 SW. L.J. 1135.

his/her credibility. It is a well-known fact that nervous demeanour reflects on the credibility of a witness.<sup>419</sup> Moreover, the defendants who are uneducated or those who suffer from some form of mental disability may be more prone to perform poorly under cross-examination. They may have a harder time to explain apparent inconsistencies or memory lapses. They may not be sufficiently articulate, or they may show poor demeanour on the stand.<sup>420</sup>

The language difficulties are not restricted to the uneducated but it also extends to first generation immigrants who may not have adequate facility with the English language. The poor quality of interpretation, or when interpreters are not used, and the inability to understand certain questions may increase the exposure of immigrant defendants to damaging responses.<sup>421</sup>

All of these factors<sup>422</sup> may contribute to the wrongful conviction of an innocent defendant.<sup>423</sup> Moreover, an innocent defendant may get convicted by being cross-examined on his prior record.<sup>424</sup> The existence of a criminal record is a poor reflection on the character of a defendant

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<sup>419</sup> E.J. Levy, *Examination of Witnesses in Criminal Cases*, 5<sup>th</sup> ed. (Toronto: Thompson & Carswell, 2004) at 207-27.

<sup>420</sup> *Ibid.*

<sup>421</sup> *Supra* note 128 at 30.

<sup>422</sup> A certain number of defendants may also be motivated by tactical considerations not to testify, in order to reserve the right to have the final closing address to the Jury.

<sup>423</sup> Surprisingly, even an opponent of the privilege like Professor Steven Penney seems to recognize the possibility that some innocent defendant may be wrongfully convicted, if they are forced to testify at their trial.

"Some innocent defendants may elect not to testify because they would make bad witnesses. Many criminal defendants are inarticulate. Some have mental health problems or personality traits that could alienate the trier of fact. Others may have difficulty recalling the details of key events. And defendants whose race, culture or communicative styles differ from those of jurors may be misunderstood or be subjected to negative stereotyping. Prosecutors can exploit any of these characteristics in cross-examination or argument and lead jurors to make improper inferences." (*Supra* note 253 at 520.)

However, Professor Penney quickly qualifies these concerns by suggesting that such dangers only exist in relation to a small number of defendants: "But it is likely that triers of fact will occasionally misuse this testimony and in a small number of cases this could lead to wrongful convictions". (*Supra* note 253 at 520.)

It is my position that even if one innocent defendant can be spared the terrifying prospects of wrongful conviction, than it is worth preserving the privilege. However Penney does not seem to think that is a good enough reason for keeping the privilege. He goes on to say:

"Failing to testify is sometimes probative, reliable evidence of guilt. The law should recognize this and expressly authorize what triers of fact are likely to do in any case- draw an adverse inference against defendants who fail to respond to a prima facie case against them." (*Supra* note 253 at 523.)

<sup>424</sup> *Supra* note 355 at 1075.

and the effective use of one's record on cross-examination may serve to impeach the credibility<sup>425</sup> of the defendant.<sup>426</sup>

The protection against the compulsion to reveal one's character flaws and personal limitations before the trier of fact militates strongly in favour of maintaining the privilege against self-incrimination. As has already been stated, the decision to testify involves tactical considerations such as the general credibility of the accused person and the potential acceptance or rejection of his story by the jury. The combination of poor performance and prior record could create a fatal recipe for wrongful conviction and hence a clear miscarriage of justice. The privilege however provides the only real safeguard against such occurrence. This is because the operation of the privilege will protect an innocent defendant from his own shortcomings, and his prior criminal record.

### **Innocence & Circumstantial Case**

An innocent defendant may expose himself to criminal liability by answering incriminating questions even though he may not be guilty of the specific crime charged. Therefore, it may be argued that, among other factors, there may also be another nexus between innocence and invoking the privilege. The importance of such nexus becomes even more apparent when the state has mounted a circumstantial case against an accused person, as opposed to a time when a person is expected to respond to a case that involves direct evidence. The absence of direct evidence usually forces the state to constantly look for additional pieces of suspicious circumstantial evidence in order to fill in the evidentiary gap in their case. Hence, the compulsion to respond to intrusive questions by state agents could prove to be a valuable tool for adding to the strength of the state's prosecution. Thus responses by an accused person to each

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<sup>425</sup> *Ibid.*

<sup>426</sup> Professor Steven Penney had this to say about the use of the defendant's criminal record: "... defendants may fear that triers of fact will be unduly influenced by their criminal past in determining guilt". (*Supra* note 253 at 521.)

suspicious circumstance may contribute to creating an accumulative effect that would enable the state to persuade the trier of fact to convict the accused on the basis of the “totality of the evidence”.

It is not difficult to conceive of a situation whereby the prosecution may start off with a weak circumstantial case against a defendant, however, by forcing that defendant on the stand they may obtain sufficient incriminating responses that they can then manipulate in order to secure a conviction. In other words, each answer by the defendant could become another evidentiary link in a chain of proof against him. Such important considerations were initially recognized by the U.S. Supreme Court, as far back as in the 19<sup>th</sup> century, in the case of *Wilson*:

It is not everyone who can safely venture on the witness stand though entirely innocent on the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudice against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand.<sup>427</sup>

### **A Private Enclave**

The invoking of this privilege can safeguard privacy and it may serve as a protective shield for human dignity and moral autonomy. This is due to the fact that the privilege prevents the state from obtaining personal information, which the state can then in turn use in an incriminating fashion against an accused person. As Justice Field in his minority decision stated in *Brown v. Walker*: “The common law privilege was intended to reflect the values inherent in individual sovereignty. These values are autonomy, dignity and privacy”.<sup>428</sup>

Compelled self-incrimination impedes the ability of the individuals to prevent state intrusion into certain zones of privacy.<sup>429</sup> It helps to protect, to a limited extent, the invasion of

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<sup>427</sup> *Wilson v. United States*, 149 U.S. 60,600 (1893).

<sup>428</sup> *Supra* note 397 at 637.

<sup>429</sup> W.A. Parent, “Recent Work on the Concept of Privacy” (1983) 20(4) Am. Phil. Qtly. 341 at 346. Privacy is defined by Parent as being “...the condition of a person’s not having undocumented personal information about



state on the sanctity of a defendant's private thoughts. The ability to exercise control over disseminating or withholding information about ourselves involves issues of personal dignity. The privilege empowers the individual in a substantial way to withhold or share information about himself as he chooses, in the critical area of criminal prosecution, and thus the privilege becomes a tool for shielding the dignity of the individual defendant. Wasserstrom captures the essence of this argument in the following fashion:

Because of the significance of exclusive control over our own thoughts and feelings, the privilege against self-incrimination can be seen to rest ultimately, upon a concern that confessions never be coerced or required by the state. The point of the privilege is not primarily that the state must be induced not to torture individuals in order to extract information from them. Nor is the point even essentially that the topics of confession will necessarily (or even typically) be of the type that we are most unwilling to disclose because of the unfavourable nature of what this would reveal about us. Rather, the fundamental point is that required disclosure of one's thoughts by itself diminishes the concept of individual personhood within the society. For this reason, all immunity statutes that require persons to reveal what they think and believe-provided only that they will not be subsequently prosecuted for what they disclose- are beside the point and properly subject to criticism.<sup>430</sup>

Moreover it has been argued that the concept of privacy has "...psychological, social and political dimensions which reach far beyond its analysis in the legal context,"<sup>431</sup> because invasion of privacy involves an "...assault on individual personality and dignity,"<sup>432</sup> and hence compelled testimony is a form of "... injury to individual freedom and dignity."<sup>433</sup> The

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himself known by others": or alternatively Parent says "...privacy is the absence of undocumented personal knowledge about a person."

S.D. Warren & L.D. Brandeis, "The Right to Privacy", (1980) 4 Harv. L. Rev. 193 at 199. Warren and Brandeis in their classic paper on Privacy asserted that "...the individual is entitled to decide whether that which is his shall be given to public."

Peter Arenella refers to compelled self-incrimination as a practice which undermines "...the individual's capacity to control the State's access to his private thoughts, feelings and beliefs". (Peter Arenella, "Schmerber and the Privilege against Self-Incrimination: A Reappraisal" (1982-83) 20 Am. Crim. L. Rev. 31 at 41-42).

<sup>430</sup> R.A. Wasserstrom, "Privacy: Some Arguments and Assumptions" in Richard Brunaugh, ed., *Philosophical Law* (Westport Connecticut: Greenwood Press, 1978) at 322-23.

<sup>431</sup> E.J. Bloustein, *Privacy as an Aspect of Human Dignity* (New York: New York University Law Review, 1964) at 157.

<sup>432</sup> *Ibid.* at 179.

<sup>433</sup> *Ibid.* at 185.

damaging aspect of compelled testimony is not restricted to confessing the details of one's criminal conduct, but rather the "...*mea culpa*, the public admission of the private judgement of self-condemnation, that seems to be of real concern."<sup>434</sup>

The Medieval philosopher Thomas Aquinas describes forced confession as a sin and as the greatest suffering which can be endured.<sup>435</sup> The Catholic Church was clearly sensitive to such suffering, as it devised a system for the "sinful" to secretly confess to priests and thus maintain the private nature of confessions<sup>436</sup>.

Although private and voluntary confession may be good for the soul, the profound sense of personal violation involved in compulsory self-incrimination will produce the opposite effect.<sup>437</sup> The act of forcing an individual to publicly bear his soul will cause him pain, shame and embarrassment.<sup>438</sup>

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<sup>434</sup> *Supra* note 384 at 91.

<sup>435</sup> *Ibid.* at 92.

<sup>436</sup> "...In its origins, confession was indeed the spontaneous act of the individual, and was thought to be valueless unless inspired solely by love of God and the detestation of sin as an offensive to Him. Gradually, and in the face of strong opposition, the desire to open the benefits of confession to greater numbers of people led the Church to make it compulsory, and to regard it as effective even if it inspired by the fear of punishment. The understanding of the Church fathers that this sort of "coerced" confession could not run itself to do the work of regenerating the soul is shown by the fact that Divine Grace is seen as necessary to fill the gap. It is Divine Grace that can transform a confession motivated by mere servile attrition-fear of temporal disgrace—into one motivated by contrition—love of God—and thereby give it the significance for the soul of the sinner that it would otherwise lack". (*Supra* note 384 at 90.).

<sup>437</sup> Thomas Cartwright a prominent Puritan leader in the 16<sup>th</sup> century in attacking compelled testimony wrote:

"Much more is it equall that a mans owne private faults should remayne private to God and him selfe till the lord discover them. (*Supra* note 54 at 347). And in regard of this righte consider howe the lord ordained witnesses whereby magistrate should seeke into the offenses of his subjects and not by oathe to rife the secrets of theare hearts."

The context in which Cartwright was writing was with regards to his imprisonment for refusing to take the ex-officio oath. He was of the view that one's indiscretions are a matter between him and his God. Cartwright maintained that private or even public confession was good for the soul, however, confession has to be voluntary, otherwise to place one's consciences at the command of the court is degrading and unhealthy.

"So that to hold the conscience in such a general suspense and not to rest in itself until it pleased another man... [is] to putt the conscience upon the racke and theare to leave it." (*Supra* note 54 at 348.)

<sup>438</sup> Gerstein says:

It should be pointed out that Gerstein argues that the open admission of one's guilt is the "...first step"<sup>439</sup> towards rehabilitation. He asserts that verbalization of guilt is the first stage in the long process in which the culprit comes to understand the damaging nature of his act,<sup>440</sup> and thus by verbalizing his guilt,<sup>441</sup> he can then begin to take control of himself and start his regeneration.<sup>442</sup> A voluntary confession is indeed good for the soul, precisely because it represents the triumph of the good over the dark side of the offender.<sup>443</sup> However, "A confession brought about by physical compulsion or fear is likelier to falsify or distort this process [rehabilitation] then to form its culmination."<sup>444</sup>

### **Conclusion**

When his Roman interrogators confronted Christ, he refused to answer, and instead through his silence, he demanded his accusers prove the charges against him without his help.<sup>445</sup> However, centuries later his respected follower, Pope Innocent III in 1215 instituted a brutally efficient machinery of death called the Inquisition which ended up claiming many innocent lives.<sup>446</sup> The horrifying prospect of being clutched in the crushing grasp of an inquisition,

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"I would argue that compelled is fundamentally wrong because it interferes with the opportunity for autonomous moral development involved in coming to terms with our own wrongdoing, and denies our right to exclusive control of that development". (*Supra* note 54 at 348-49).

Moreover Dolinko states that compelled self-incrimination may subject an individual to "...community condemnation and ridicule and consequent loss of self-esteem. All of these consequences are likely to inflict a substantial degree of pain, suffering, and unhappiness on most people who experience them. (*Supra* note 349 at 1103.). It should be pointed out that Dolinko argues that such suffering does not justify the preservation of the privilege. His principle argument is that in the interest of the discovering the truth, the privilege against self-incrimination should be abolished.

<sup>439</sup> *Supra* note 384 at 89.

<sup>440</sup> *Ibid.* at 90

<sup>441</sup> *Ibid.*

<sup>442</sup> *Ibid.*

<sup>443</sup> *Ibid.* at 89-90.

<sup>444</sup> *Ibid.* at 90.

<sup>445</sup> *Supra* note 18 at 94.

<sup>446</sup> *Ibid.* at 95.

deprived of the right to challenge your captors or the illegitimacy of your predicament, was indeed the height of injustice.<sup>447</sup>

The victims of the Inquisition were often caught in the deadly situation of having to respond to intense interrogation by a priest.<sup>448</sup> The silence of the accused was equivalent to “...an admission of guilt.”<sup>449</sup> An admission of heresy was subject to grave punishment;<sup>450</sup> yet denial involved a serious risk of perjury followed by a deadly disposition.<sup>451</sup> It was a no-win situation for anyone caught in this unfair predicament. The only recourse of the accused was to submit to the will of the Church and beg for mercy.<sup>452</sup>

There was, however, one ray of hope that could potentially provide some form of psychological relief for a suspect.<sup>453</sup> This was the proposition that no one shall be “...compelled to accuse himself.”<sup>454</sup> This principle did not insulate suspects from aggressive interrogations,<sup>455</sup> but what it meant was that the officials could not simply arrest a person without sufficient grounds on the hope that if they shake the tree for long enough, something useful is bound to fall from it.<sup>456</sup> This proposition compelled the officials to refrain from going on a “...fishing-expedition”<sup>457</sup> in order to force an individual to “originate an accusation against himself.”<sup>458</sup> Thus, the genesis of the privilege against self-incrimination was rooted in imposing an important restriction on the power of the officials.<sup>459</sup>

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<sup>447</sup> *Ibid.*

<sup>448</sup> *Ibid.*

<sup>449</sup> *Ibid.*

<sup>450</sup> *Ibid.*

<sup>451</sup> *Ibid.*

<sup>452</sup> *Ibid.*

<sup>453</sup> *Ibid.*

<sup>454</sup> *Ibid.*

<sup>455</sup> *Ibid.*

<sup>456</sup> *Ibid.*

<sup>457</sup> *Ibid.*

<sup>458</sup> *Ibid.*

<sup>459</sup> *Ibid.*

Fortunately, we live in a different historical era and we have come a long way from those bad old days. Defendants caught up in the criminal process now possess a number of important rights that did not exist during the era of the Inquisition, however, I contend that the substance of the privilege is still relevant.

The cruel trilemma of conviction, perjury or contempt still creates a situation where the accused person is inserted "...in a bottle,"<sup>460</sup> like a bug "...with no place to hide, and no place to go."<sup>461</sup> The inherent cruelty of putting anyone in such a situation justifies the continued existence of the privilege.

It is my position that any criminal justice system that is built around securing confessions contains the potential for abuse and violence, and the privilege can play a meaningful role in containing such threatening potential. This is because a suspect could use the privilege to demand that the state agents do their own homework, rather than look to him for evidence.

Despite the intense attacks upon it, the privilege is "...neither irrational"<sup>462</sup> nor irrelevant.<sup>463</sup> The essence of the privilege is that it allows an accused person to say to the state that: you may have all the resources, you may have the power to tap my phone or to bug my car or my home; you may have the power to investigate almost every detail of my life; but while you may have all those powers, you cannot force me to assist you to convict me; you will not force me to seal my own fate. It is a small concession that seems "reasonable enough,"<sup>464</sup> considering that we live in a civilized society.

Having discussed the history and rationales for the privilege against self-incrimination, as well as why this ancient right should be preserved, we now turn to the methods of interrogation

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<sup>460</sup> *Ibid.*

<sup>461</sup> *Ibid.*

<sup>462</sup> *Ibid.* at 99.

<sup>463</sup> *Ibid.*

<sup>464</sup> *Ibid.*

used by the police to obtain confessions and incriminating statements. This is an important discussion because the review of current police interrogation techniques will graphically show that the police may sometimes procure false confessions and involuntary statements. This reality ties in directly to the central claim of the thesis advanced in this dissertation, that all police interrogations should be abolished in order to protect individual detainees and our criminal justice system from false and involuntary confessions. We begin with a discussion of the Reid Technique, the most widely used method of interrogation in Canada.

## Chapter 4: Introduction: The “Art” of Interrogation

### The Persuasiveness of Confession Evidence and the Risk of False Confessions:

With the exception of DNA evidence, a confession is perhaps the most powerful type of evidence that a prosecutor can adduce in furtherance of securing a conviction. In Madam Justice Arbour’s dissenting opinion in the landmark confessions case *R. v. Oickle*, she referred to confessions as being “the highest and most satisfactory proof of guilt.”<sup>1</sup>

The question of whether or not a confession will be allowed to enter into evidence may be virtually determinative of the outcome of a criminal trial - the exclusion from evidence of a full-confession, or an incriminating statement, may turn a losing case for the defence into one which enjoys brighter prospects. Moreover, confessions, in their own right, not only provide damning evidence of guilt to a jury, but they have also been found to impact upon “...the evaluation of other evidence.”<sup>2</sup> A study conducted by Hasel and Kassin concluded that confession evidence has an effect upon the perception of eyewitness identifications in the context of police line-ups.<sup>3</sup> This finding suggests that convincing confession evidence may taint a jury’s perception of other evidence presented in the courtroom to the detriment of an accused person<sup>4</sup> – a finding which is particularly troubling if we consider the possibility that the confession adduced as evidence was a false one.

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<sup>1</sup> *R. v. Oickle* (2000), 141 C.C.C. (3d) 321 (S.C.C.) at para. 141 (dissent). Furthermore, in *Wigmore on Evidence* (Chadbourn rev. 1970), vol. 3, 820b at 303, Wigmore writes that this is because “[t]he confession of a crime is usually as much against a man’s permanent interests as anything well can be . . . no innocent man can be supposed ordinarily to be willing to risk life, liberty, or property by a false confession. Assuming the confession as an undoubted fact, it carries a persuasion which nothing else does, because a fundamental instinct of human nature teaches each one of us its significance.”

<sup>2</sup> Lisa E. Hasel & Saul M. Kassin, “On the Presumption of Evidentiary Independence: Can Confessions Corrupt Eyewitness Identifications?” (2009) 3(2) *Psychological Science* 1 at 4.

<sup>3</sup> *Ibid.* In that study, the researchers found that 61% of eyewitnesses to a staged crime “...changed their identifications” after having been told that a different member of a police lineup had confessed. 50% of “...participants who had not made an identification,” “...went on to select the confessor when his identity was known.” (*Ibid.* at 1).

<sup>4</sup> *Ibid.* at 1.

In light of the persuasive effect that confessions and incriminating statements may have upon a jury,<sup>5</sup> as well as their utility in assisting further investigative efforts,<sup>6</sup> police scientists have been particularly concerned to develop and refine the art and science of interviewing and interrogation.<sup>7</sup> The principles derived from their research have been mastered and skillfully applied by interrogators in order to achieve the desired result: to provoke suspects to confess to crimes.

A battery of criticisms can be directed against contemporary North American interrogation methods. They're psychologically manipulative through trickery, deceit and coercion;<sup>8</sup> they're inhumanely taxing of a resistant suspect's mental and physical endurance; and they're an affront to human dignity that civilized societies ought not to countenance. Yet these criticisms alone, many find less-than sufficient to compel any serious reform to the law (or lawfulness) of interrogation techniques.

But even those who are tolerant of hard interrogation as a means to elicit truthful statements from accused persons cannot tolerate a situation where a significant proportion of the confessions that are elicited from suspects to support criminal prosecutions are false ones. It is debatable whether the goal of effective crime-control is enough to legitimize harsh methods of interrogation; however it is beyond debate that crime-control does not legitimize sending significant numbers of innocents to prison for crimes that were committed by others. Thus, in evaluating interrogation methods, the principal questions that must be considered are whether the methods under evaluation cause or contribute to false confessions; if they do, then to what extent do they do so; and, finally, what is the effect of any false confession that may have resulted upon

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<sup>5</sup> *Ibid.*

<sup>6</sup> Confessions and incriminating statements procured through interrogation may also be used by investigators to develop leads that will enable them to elicit additional evidence for use against the suspect.

<sup>7</sup> Saul M. Kassin, "The Psychology of Confession Evidence" (1997) 52(3) *American Psychologist* 221 at 221.

<sup>8</sup> *Ibid.*



trial outcomes – that is, do false confessions cause innocent people to go to prison? Setting aside the perennial crime-control versus due-process values debate, most reasonable people can agree that innocent people should not be jailed, and that the jailing of significant numbers of innocent people would be too high a price to pay for catching wrongdoers. If we investigate the relationship between contemporary North American interrogation techniques and false confessions, and we are uncomfortable with the answers that we find to the three broad questions just posed, then it behooves us to consider ways in which to reform our interrogation methods so as to remedy the problem of interrogation-induced false confessions. Any other criticisms in our salvo, such as those regarding the honesty, civility and human dignity of the methodology itself, while worthy of discussion, are ancillary to the primary debate: do the interrogation techniques that our law enforcement agencies use cause or contribute to false confessions?

This thesis claims that the answer to that question is yes. The prevalent present police interrogation techniques have a propensity to produce false confessions. This is not a situation that can be tolerated in a justice system that strives for fairness. The discussion that will follow in this chapter will shed light on how these techniques, as best exemplified by the Reid Technique, can cause false confessions. This will assist us to support one of the central claims of this thesis, that the Reid Technique of interrogation should no longer be used.

### **Contemporary Interrogation Models:**

The high-value of inculpatory evidence coming straight from the suspect has prompted police scientists to design an arsenal of psychological interrogation techniques aimed at extracting confessions from their subjects. Saul M. Kassin, a leading forensic psychologist who works in the area of interrogation and confessions, writes:

Gone are the days when the police would shine a bright light on suspects, grill them for 24 hours at a time, or beat them with a rubber hose, but observational studies have shown that the use of physical force has given way to more psychologically oriented techniques, such as feigned

sympathy and friendship, appeals to God and religion, the use of informants, the presentation of false evidence, and other forms of trickery and deception.<sup>9</sup>

We need not rely solely on “observational studies” like Professor Kassin’s to arrive at the judgment that physical coercion has been replaced by psychological manipulation, either.

Advocates of the Reid Technique, the PEACE model, and other interview and interrogation methods have developed and systematized specific strategies and tactics for getting recalcitrant suspects to make confessions, and these advocates are quite open about their methods.<sup>10</sup>

The most widespread method of interrogation used by North American law enforcement personnel is the Reid Technique. Most police officers in Canada are trained in the Reid technique.<sup>11</sup> The Reid Technique was first introduced in 1962 and has since then been widely disseminated.<sup>12</sup> “Reid consists of two main phases: The behavioural analysis interview (BAI), and the nine-step interrogation.”<sup>13</sup> Reid will be explained in greater depth later in this chapter.

A recently-published study by King and Snook, in which the researchers analyzed 44 video-recorded interrogations of criminal suspects in Canadian interrogation rooms, showed that, “on average, interrogators used 34% of the components composing the nine-step Reid model”<sup>14</sup> in any given interview.<sup>15</sup> The data, therefore, suggest that while the entirety of the Reid Technique<sup>16</sup> is not typically used from start-to-finish, about one-third of its tactics will be used in

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<sup>9</sup> *Ibid.*

<sup>10</sup> See, for example: Brian C. Jayne & Joseph P. Buckley, *The Investigator Anthology: A Compilation of Articles and Essays about The Reid Technique of Interviewing and Interrogation* (Chicago: John E. Reid & Associates, Inc., 2008); and Mary Schollum, *Investigative Interviewing: The Literature* (Wellington: The Office of the Commissioner of Police, 2005).

<sup>11</sup> Brent Snook et al. “Reforming Investigative Interviewing in Canada” (2010) 52 Canadian J. Criminology & Crim. Just. 215 at 217.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.* at 217-218.

<sup>14</sup> Lesley King & Brent Snook, “Peering Inside a Canadian Interrogation Room: An Examination of the Reid Model of Interrogation, Influence Tactics, and Coercive Strategies” (2009) 36 Criminal Justice and Behaviour 674 at 674. See also pg. 690.

<sup>15</sup> *Ibid.*

<sup>16</sup> The Reid Technique consists of nine-steps. These steps will be explained later.

the average Canadian interrogation. The Reid Technique, thus, affects many of the persons who are detained by the state's law enforcement agents. In light of the weight that confession evidence is typically accorded at trial, the rate of success or failure of the Reid tactics to prompt confessions undoubtedly has an appreciable impact upon trial outcomes, and ultimately on rates of conviction.<sup>17</sup> Furthermore, the propensity, or lack thereof, of the Reid tactics to induce false confessions will, likewise, have an appreciable impact upon the percentage of convictions which are wrongful ones. On account of its potential influence upon trial outcomes, the Reid Technique should be given consideration in the discussion that follows. Specific attention will be paid to the ramifications of using modern-day psychological police interrogation.

The Reid Technique and other psychological interrogation methods have been the subject of controversy, mostly around issues of fairness to the accused and because it is unclear to what extent the techniques jeopardize suspects by potentially railroading them into false confessions. Debates surrounding the Reid Technique, and surrounding interrogation generally, are thus focused upon a number of disagreements about what the substance of appropriate police interrogation practices ought to be, with a view to finding the technique that extracts reliable and voluntary confessions and not involuntary false ones. The answer to the question of which is the best tactical approach to interrogation may be motivated by considerations that include: personal political orientation, views about human nature, opinions about the appropriate level of interference by the state with an individual's right to privacy, whether there should be a right to silence and how expansive should it be if there should be one, views about whether or not specific acts in the context of interrogation are humane or inhumane, the extent of tolerable pressure or manipulation of a suspect in the interrogation context, opinions about the sanctity of

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<sup>17</sup> A more in-depth discussion of the apprehension of confession evidence by judges and juries, in their roles as triers of fact, will appear below. In this discussion I will provide thoroughgoing explanation of why trial outcomes are affected by false confession evidence, based on current scientific research.

the presumption of innocence and the Crown's burden of proof, and conclusions about the current evidence of forensic psychology and its effects.

Putting all of these discussions to one side for a moment, we should instead hone in on the most crucial question that ought to instruct which particular practices should comprise part of a legally-sanctioned police interrogation: let us focus upon what the likelihood is that the use of any given interrogation technique or combination of techniques upon a detained suspect will result in that suspect making a false confession.

Unlike the other considerations stated above, the question of the likelihood of inducing false confessions from innocents is not in any significant way coloured by ideological persuasion<sup>18</sup> or individual political proclivities; it is an empirical question.<sup>19</sup> The sole criteria required to accept the relevance of this issue to the interrogation and confessions debate is that we first accept the following premises: (1) that confession evidence carries a great deal of weight at trial;<sup>20</sup> (2) that it is difficult to show that confessions given and later recanted were initially given involuntarily; (3) and that it therefore follows that a confession extracted upon interrogation creates a substantial likelihood of conviction.<sup>21</sup> This conclusion forms the content of the first premise.

The second premise is that regardless of your political or ideological persuasion, you accept the idea that sending an innocent person to jail for a crime he did not commit is abhorrent to the very concept of justice, and instances of this should be minimized to as great an extent as possible without unduly compromising other values that are of equal or greater importance. The

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<sup>18</sup> *Supra* note 7 at 224.

<sup>19</sup> *Ibid.* at 230.

<sup>20</sup> *Ibid.* at 221.

<sup>21</sup> *Ibid.*

idea that innocents should not be incarcerated is as close to the notion of natural justice as a concept can get, and as an axiom, does not require debate.<sup>22</sup>

Ideological considerations are important; however they must only enter into the debate after a satisfactory answer to the empirical question<sup>23</sup> – which interrogation tactics provoke false confessions – is found, and we have the correct information at our disposal.

The ideological considerations, requiring values-judgments as they do, are more-or-less reducible to the struggle between Herbert Packer's crime-control versus due-process models in the political sphere of criminal justice. The answer to the query, how much or how little due-process shall be given to suspects and accused persons, requires the balancing of due-process imperatives with other societal imperatives, and in particular, with crime-control imperatives. Thus, even after the empirical question is answered, the ideological debate will persist on the basis of an optimization problem:<sup>24</sup> there is no self-evidently correct answer to how much due-process or how much crime-control our society should strive for. It depends on what we decide we want.

The optimization problem,<sup>25</sup> as it pertains specifically to the interrogation and confession debate, is this: how many false-confession driven wrongful convictions can society tolerate in

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<sup>22</sup> Re: B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486. The Supreme Court recognized the principle that the innocent should not be punished as a principle of fundamental justice in the Motor Vehicle Reference. "It has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognized as an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law. It is so old that its first enunciation was in Latin *actus non facit reum nisi mens sit rea*." (paragraph 67)

<sup>23</sup> *Supra* note 7 at 222.

<sup>24</sup> Richard J. Ofshe & Richard A. Leo, "The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions" in *Studies in Law Politics & Society* vol. 16 (JAI Press, 1997) at 16. See also Gisli H. Gudjonsson. *The Psychology of Interrogations and Confessions: A Handbook* (West Sussex: John Wiley & Sons Ltd., 2003) at 325 and Richard A. Leo, "False Confessions: Causes, Consequences, and Solutions" in Sandra D. Westervelt & John A. Humphrey, eds. *Wrongly Convicted: Perspectives on Failed Justice* (Piscataway: Rutgers University Press, 2001) 36 at 38.

<sup>25</sup> Ofshe & Leo, *Ibid.* at 10; Gudjonsson, *Ibid.*; Leo, *Ibid.*; Miron Zuckerman, Bella M. DePaulo & Robert Rosenthal, "Verbal and nonverbal communication of deception" (1981) 14 *Advances in Experimental Social Psychology* 1 at 34; Eric Y. Drogin, Mark E. Howard & John Williams, "Restorative Justice: The Influence of Psychology from a

view of the flip-side of the coin, which is that reducing the intensity or degree of manipulation of police interrogations may allow suspects who would otherwise be charged and convicted to escape justice. What is the appropriate balance to be struck between the two values – that we must bring wrongdoers to justice, yet not persecute innocents in doing so, in light of the empirical data?

Unfortunately, while we can make efforts to resolve outstanding empirical questions relating to police interrogation methods, we have not yet had the opportunity to test, in the same society, what the effect of limiting the intensity or manipulative character of interrogations or doing-away with them altogether would be upon crime-control values, and specifically upon bringing culpable persons to justice. As a purely empirical question (again), the question of what the effect of eliminating the interrogation of suspects or accused person would be cannot be answered because it has never been tried.<sup>26</sup>

Furthermore, if we merely reduce the pressure and degree of manipulation of interrogations, we will still be permitting some number of false confessions; if we ratchet-up the pressure and degree of manipulation then the number of false confessions will increase along with the number of involuntary true ones. The debate will then arise whether and to what extent society can tolerate involuntary true confessions. And so on.

Outside the optimization problem and the debate between due-process proponents and crime-control proponents (on the picayune details as well as the big questions), there is a principled position that says that in our adversarial system of criminal procedure, an accused person should never be made to cause harm to his own interests or even be invited to do so voluntarily by the state. If an accused person is truly presumed innocent, and the Crown truly

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Jurisprudent Therapy Perspective” in David Carson & Ray Bull, eds. *Handbook of Psychology in Legal Contexts*, 2nd ed. (Sussex: John Wiley and Sons, 2003) 423 at 424.

<sup>26</sup> *Supra* note 7 at 222.

bears the burden of proof to show guilt beyond a reasonable doubt on the evidence, then a suspect or accused person should never even be asked whether he committed the crime, or requested to explain-away other evidence collected by investigators as though his innocence depended on his ability to do so. The state bears the burden of proof, so let them collect their own evidence showing guilt of their allegation against him without consulting the accused; the accused enjoys the presumption of innocence, so let the accused sit-back and make the state prove its allegation(s) against him, without coaxing, persuading, badgering or browbeating him to say something (which itself may or may not be incriminating) in his defence. Without court-tested proof showing otherwise beyond a reasonable doubt, he is an innocent man and need not utter a word in his defence to the unproven allegations, this view would contend.

Notwithstanding this principled viewpoint, the realization of an outright ban on police interrogation, at least without replacing it with something else to satisfy the proponents of stringent crime-control, is a pipe-dream. Thus, after having canvassed in this chapter the existing body of forensic psychology literature and other research informing this debate, we must develop a defensible position within the context of the optimization problem and the due-process versus crime-control debate that will be an improvement upon the current law of interrogation in that it more adequately minimizes the risk of false confessions, yet does not completely undermine the capability of law enforcement to solve crimes in so doing.

It behooves us, on account of the foregoing discussion, to give the Reid Technique ample consideration in our discussion about the ramifications of using modern-day psychological police interrogation; we must determine whether the Reid Technique and other interview and interrogation models are causing innocent persons to make false confessions, as many detractors

and reformists argue that they are, and then allow the perennial ideological debate to be driven by the best data available.

### **Different Methodological Approaches to the Extraction of Confessions: Interview versus Interrogation**

Within the framework of the optimization debate we will find a distinction made. Proponents of respective interrogation methods have published training manuals for the purpose of disseminating their techniques to law enforcement personnel.<sup>27</sup> The various training programs have been understood to contain many points of agreement.<sup>28</sup> However, there is a basic distinction between the concepts of “interview”, on the one hand, and “interrogation” on the other.<sup>29</sup> Both have as their objective, the extraction from the accused of incriminating evidence; either a confession, or an incriminating statement that falls short of a full confession, or a statement against interest that assists in the investigation and the gathering of evidence. The difference between the two approaches is methodological, and each category may have a significant amount of variety within it, as well: both are ostensibly motivated by a desire to increase voluntary-true confessions while decreasing false confessions, whether voluntary or involuntary, to the greatest extent possible.

If we consider the methods by which confessions can be obtained on a spectrum of coerciveness with truly voluntary ones at the least coercive end of the spectrum, and brutal, protracted torture at the most coercive end, then modern day techniques of interview and psychological interrogation will appear somewhere between these two extremes, with interviews seemingly falling closer to voluntary confessions and interrogations falling closer to the torture

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<sup>27</sup> As discussed, the Reid Technique is the most widely-used interrogation method in North American interrogation rooms.

<sup>28</sup> J.P. Blair, “What do We Know About Interrogation in the United States?” (2006) 20(2) Journal of Police and Criminal Psychology 44 at 44.

<sup>29</sup> *Ibid.* at 45.



end of the spectrum, relative to each other, in terms of the level of coerciveness present. Each type may be distinguished from other possible classifications along the spectrum by the presence or absence of certain tactics (each of which we shall discuss).<sup>30</sup> Thus, a truly voluntary confession is unprompted and does not require the use of any interrogation tactics; an interview will have fewer coercive and overtly manipulative techniques than an interrogation; and an interrogation, while more coercive than an interview, does not enter into the realm of physical brutality.

However, the same distribution of techniques does not necessarily hold true when we consider (as opposed to coercion) the spectrum of deceit and trickery. We can say without controversy that at the essence of it, a truly voluntary confession or one that was coerced by torture, is not deceitful or treacherous. Some deceit may have been at play in any scenario considered, but it was not the deceit that prompted the confession; rather, in the case of a truly voluntary confession, it was the subject's free-will, and in the case of a confession obtained by torture, it was the physical coercion applied. On the other hand, the question of which one, between psychological interrogation, or alternatively, PEACE-inspired investigative interviewing, is the more deceitful, is an open question. It is one that shall be explored below.

Crucially, both coercion and deception are ways in which the free-choice of the suspect to confess or refrain from doing so, whether through invocation of the right to silence where it applies, or by lying, may be defeated by the interrogator. Thus, in order to extract a confession from an unwilling suspect in subversion of his choice not to confess, deception must change his understood perception of the situation he finds himself in, coercion must compel him through pressure to confess, or both strategies must be used together.

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<sup>30</sup> See the discussion in this chapter.

But with this reductionist view in mind of the two principal forces at work in the interrogation room setting, as well as the object that they act upon, the free will of a particular individual, we have surmised an understanding of what any particular tactic may be aimed at achieving. We can make reference to these forces and the relationship between them as we seek to describe in more detail what is actually occurring in the interrogation room, and discuss how it is regulated or ought to be regulated, respectively, through law or policy initiatives.

### **The Dangers of Trying to Coax a Confession from a Suspect - the False Confession:**

Certain scholars have concluded that the criminal justice system provides inadequate protection for persons who have been branded as suspects.<sup>31</sup> Saul M. Kassin has identified three specific problems associated with confession evidence obtained from interrogations. These are that: “(a) the police routinely use deception, trickery, and psychologically coercive methods of interrogation; (b) these methods may, at times, cause innocent people to confess to crimes they did not commit; and (c) when coerced self-incriminating statements are presented in the courtroom, juries do not sufficiently discount such evidence in reaching a verdict.”<sup>32</sup> We can recast Kassin’s three problems somewhat more broadly, as research questions, for they are, in fact his conclusions in relation to the following broad questions. The three problems that Kassin raises are, respectively, answers to the following more general questions: (1) how do police conduct an interrogation<sup>33</sup> and what are their intentions and motivations in making the methodological choices that they make?; (2) in which ways do suspects react to the methods that interrogators confront them with, and why?<sup>34</sup>; and (3) when confessions are introduced as evidence, how does the trier of fact view them and what challenges are associated with

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<sup>31</sup> *Supra* note 7.

<sup>32</sup> *Ibid.* at 221.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

accurately evaluating them?<sup>35</sup> Rather than taking Kassin's conclusions at face value, I shall survey the existing literature and seek both to answer these questions, and to gain a nuanced understanding of the processes that are at play.

In addition to Kassin's three problems, there is a fourth problem that requires exploration. Contemporary jurisprudence allows for the admissibility of confessions obtained through the use of modern psychological interrogation techniques because these techniques are thought not to interfere, under regular circumstances, with the voluntariness of the statement. Recasting this problem as a question, we must ask: (4) how has contemporary jurisprudence created and defined the boundaries of permissible interrogation in Canada, and what changes to law or policy would improve the criminal justice process with respect to this issue? We must understand how the existing legal environment influences the scope of modern-day interrogation techniques and improve accordingly.

To gain a richer understanding of the subject of interrogation and confessions it will be helpful to discuss these four questions in considerable detail. I shall try to provide answers to them.

Additionally, research conducted recently has provided new insights with respect to Kassin's three problems. This research will form an integral component of the analysis that follows. Brandon Garrett published a 2010 article in the *Stanford Law Review* wherein he endeavoured to take an alternative approach to the one taken in earlier studies. Whereas earlier research had been focused principally on discovering the techniques of psychological coercion and manipulation that police use that may tend to promote false confessions, Garrett attacked the problem of false confessions from the perspective of the wrongfully convicted. Garrett's article took "...a different approach by examining the substance of false confessions, including what

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<sup>35</sup> *Ibid.*

was said during interrogations and how confessions were litigated at trial.”<sup>36</sup> He examined the existing record of persons who had been wrongfully convicted of criminal offenses in the United States, and then subsequently exonerated by DNA testing.<sup>37</sup> Of the 252 exonerations in this category, he found that 42 had given false confessions.<sup>38</sup> Of these 42 cases, pretrial and trial transcripts, as well as the confessions themselves, were available for 38 of the cases.<sup>39</sup> He investigated the confessions themselves as well as the post-confession narratives, the court transcripts of the proceedings against the accused confessors, and the post-conviction accounts of the wrongfully-convicted, in an effort to gain a richer understanding of the phenomenon of the false confession.<sup>40</sup> Thus, Garrett’s intended research agenda fit within the framework of Kassir’s second and third problems: that is, what causes interrogated-persons to falsely confess; and how is (the false) confession evidence treated in the courtroom?

Through his research, and by drawing a necessary implication from the post-conviction narratives and trial transcripts, Garrett made a startling discovery. Garrett found that the wrongfully-convicted did not simply capitulate to police-pressure or trickery and provide an unelaborated admission of guilt. He found that they not only confessed; but they provided detailed accounts of the specifics of the alleged crime:

In the cases studied here, innocent people not only falsely confessed, but they also offered surprisingly rich, detailed, and accurate information. Exonerees told police much more than just ‘I did it.’ In all cases but two (ninety-seven percent – or thirty-six of the thirty eight – of the exonerees for whom trial or pretrial records could be obtained), police reported that suspects confessed to a series of specific details concerning how the crime occurred.<sup>41</sup>

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<sup>36</sup> Brandon L. Garrett, “The Substance of False Confessions” (2010) 62 Stan. L. Rev. 1051 at 1053.

<sup>37</sup> This sample totaled 250 individuals. There were 2 individuals who Garrett did not include in his sample because their exonerations came after his work had been submitted for publication, but prior to actual publication.

<sup>38</sup> In other words, 16% of wrongfully convicted persons had provided false confessions. Though Garrett’s research can provide us with no data about the percentage of convicted-persons who have been wrongfully convicted, it *does* tell us that a substantial portion of the wrongful convictions that *do* occur, may be caused by false confessions. This conclusion flies in the face of the assertions of pro-interrogation advocates like the Reid Institute, who claim that false confessions are something that virtually never occurs.

<sup>39</sup> *Supra* note 36 at 1060-61.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.* at 1054.

Of the thirty-six exonerees who had provided details, many<sup>42</sup> provided “nonpublic facts”, that is, facts that had not been made the subject of public knowledge during the course of police investigations, which ostensibly, only the person who had committed the crime<sup>43</sup> and the investigators could possibly know.<sup>44</sup> These facts included ones that matched the crime scene evidence or scientific evidence or the accounts of the victim.<sup>45</sup> Moreover, Garrett informs us, “Detectives sometimes specifically testified that they had assiduously avoided contaminating the confessions by not asking leading questions, but rather allowing the suspects to volunteer crucial facts.”<sup>46</sup> Evidently, someone was lying at trial, and the DNA tests show that that person was not the accused.<sup>47</sup>

As stated in the introduction, according to Garrett, false confessions “...are carefully constructed during an interrogation and then reconstructed during the criminal trial that follows.”<sup>48</sup>

On the basis of this discovery, Garrett has inadvertently made an additional important contribution to providing further clarification on Kassir’s first problem; that of how the police

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<sup>42</sup> In 27 cases of the thirty-eight, or 71 percent. *Ibid.* at 1057.

<sup>43</sup> *Ibid.* at 1078.

<sup>44</sup> *Ibid.* at 1053.

Garrett further tells us that “Only two of the thirty-eight exonerees [for whom pretrial and trial documents were available], Travis Hayes and Freddie Peacock, relayed no specific information concerning the crime. Hayes was still convicted, although DNA testing conducted before trial excluded him and his co-defendant. Peacock was mentally disabled and all he could say to the police about the crime was ‘I did it, I did it.’ The other thirty-six exonerees each reportedly volunteered key details about the crime, including facts that matched the crime scene evidence or scientific evidence or accounts by the victim. Detectives further emphasized in twenty-seven cases – or seventy-one percent of the thirty eight cases with transcripts obtained – that the details confessed were nonpublic or corroborated facts.” (*Ibid.* at 1057).

<sup>45</sup> *Ibid.* at 1057.

<sup>46</sup> *Ibid.*

<sup>47</sup> Police lying at trial may be taken as yet another reason in favour of videotaping confessions. Although it is argued here that videotaping is not a foolproof solution, since it captures only the final product in the sense of “lights, camera, action”, and it does not show the events that preceded the accused being put before the camera and recorded. For further discussion of police perjury, see also the following: Michael Goldsmith, “Reforming the Civil Rights Act of 1871: The Problem of Police Perjury” (2004-2005) 80 Notre Dame L. Rev. 1259; Gabriel Chin and Scott Wells, “Blue Wall of Silence as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury” (1997-1998) 59 U. Pitt. L. Rev. 233.

<sup>48</sup> *Supra* note 36 at 1056.

procure confessions. It appears that it may be proper not only to refer to the “police-induced false confessions”<sup>49</sup> where psychological pressures and leading questions cause an accused to falsely confess to a crime he did not commit; but it may also be accurate to speak of the “police-engineered” false confession.

A. How do Police Conduct Interrogations: The Uses and Abuses of Trickery, Deception and Psychological Coercion in the Interrogation Room

Without physical coercion being legally permissible in the interrogation setting, trickery, deception and psychological coercion have increased to compensate. David Simon, spent a year with the Baltimore homicide detectives,<sup>50</sup> formed strong opinions about the personality traits that police interrogators seem to display. He stated that:

... a salesman, a huckster as thieving and silver-tongued as any man who ever moved used cars or aluminum siding, more so, in fact, when you consider that he’s selling long prison terms to customers who have no genuine need for the product.<sup>51</sup>

A 1996 observational study of interrogations conducted by psychologist Richard Leo indicates that American interrogators used a mean of 5.62 different tactics of psychological manipulation per interrogation with the range from amongst the entire sample of 182 interrogations being from “0 to 15 tactics”<sup>52</sup> used.<sup>53</sup> A similar 2009 Canadian study by King and Snook produced similar data, indicating a mean use of 5.0 tactics per interview across a sample-size of 44-interrogations.<sup>54</sup> As previously noted, approximately one-third of the components of

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<sup>49</sup> *Ibid.* at 1065.

<sup>50</sup> *Supra* note 7.

<sup>51</sup> David Simon, *Homicide: A year on the killing streets* (New York: Ivy Books, 1991) at 213.

<sup>52</sup> *Supra* note 28 at 49.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Supra* note 14 at 691.

the Reid Technique's nine-step model are used in the average Canadian interrogation.<sup>55</sup>

Conversely (and thankfully) neither study reported any significant degree of physical coercion.<sup>56</sup>

### **The Basic Interrogation Tactics:**

Before giving specific consideration to the Reid Technique as an ideal-type (i.e. what the Reid Institute teaches as its method) and before comparing it to the PEACE model<sup>57</sup>, let us look at data indicating what is actually happening and take inventory of the full range of tactics that appear to be used by modern police interrogators in North America.

In his important article "Inside the Interrogation Room",<sup>58</sup> Professor Richard Leo conducted research using a data-set of 182 interrogations<sup>59</sup> (122 live interrogations<sup>60</sup> and 60 video recorded ones).<sup>61</sup> As part of this research, Leo recorded the frequency with which interrogators deployed 25 discrete influence tactics advocated by interrogation training manuals, as well as 10 identifiable coercive strategies in American interrogation rooms. King and Snook's similar 2009 study analyzed, in a contemporary Canadian context, the use of 23 of Leo's 25 influence tactics and 10 coercive strategies;<sup>62</sup> as well, King and Snook made observations on the specific use of Reid model components and Reid guidelines and suggestions.<sup>63</sup> Because the Reid Technique is the most influential interrogation model in North America, King and Snook's

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<sup>55</sup> *Supra* note 14.

<sup>56</sup> *Ibid.*; and Richard A. Leo, "Inside the Interrogation Room" (1996) 86(2) J. Crim. L. & Criminology 266.

<sup>57</sup> The PEACE model is an alternative interrogation model to the Reid Technique. This model, its history, and its implications for false confessions are discussed thoroughly in Chapter 6.

<sup>58</sup> Leo, *supra* note 56.

<sup>59</sup> *Ibid.* at 269.

<sup>60</sup> *Ibid.* at 268.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Supra* note 14 at 679.

<sup>63</sup> *Ibid.* at 680. King and Snook ask the following three additional important questions, which we will turn to elsewhere: First: "Is interrogation outcome related to the proportion of the nine-step model used or the number of additional guidelines and suggestions, influence tactics, or coercive strategies used?"; second: is it true, as the Reid model assumes, that "preventing denials leads to more confessions?"; and third: is it true, as the Reid model assumes, that "providing an alternative question leads to more confessions?"

observational data provides a valued contribution to the current body of research on police uses and abuses of interview and interrogation methods.<sup>64</sup>

Without yet having had regard to the quantitative aspects of the two studies, we may rely upon them as authorities informing us of the *types* of deceptive interrogation techniques and coercive strategies that are potentially available to interrogators. We shall return to the quantitative data later. The 1996 Leo study and the 2009 King and Snook study provide us, at the very least, with a ‘laundry list’ of the tactics and strategies that police interrogators use in the practice of their craft.

The 25 influence tactics that Richard Leo identified through the observation of 182 police interrogations are as follows:<sup>65</sup>

- (1) “appeal to the suspect’s self interest;
- (2) confront the suspect with existing evidence of guilt;
- (3) undermine the suspect’s confidence in denial of guilt;
- (4) identify contradictions in the suspect’s story;
- (5) Any behavioural analysis interview questions;
- (6) appeal to the importance of cooperation;
- (7) offer moral justifications/psychological excuses for the offence;
- (8) confront the suspect with false evidence of guilt;
- (9) use praise or flattery;
- (10) appeal to the detective’s expertise or authority;
- (11) appeal to the suspect’s conscience;
- (12) minimize the moral seriousness of the offence;

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<sup>64</sup> *Ibid.* at 692.

<sup>65</sup> *Leo, supra* note 56 at 278.



- (13) touch the suspect in a friendly manner;
- (14) invoke metaphors of guilt;
- (15) minimize the facts or nature of the offence;
- (16) refer to physical symptoms of guilt;
- (17) exaggerate the facts/ nature of the offence;
- (18) yell at the suspect;
- (19) exaggerate the nature/purpose of the questioning;
- (20) exaggerate the moral seriousness of the offence;
- (21) accuse the suspect of other crimes;
- (22) attempt to confuse the suspect;
- (23) minimize the nature/purpose of the questioning;
- (24) good cop/bad cop routine; and
- (25) touch the suspect in an unfriendly manner.”<sup>66</sup>

The 10 coercive strategies drawn from Leo’s work are as follows:

- (1) “suspect was not read rights to silence and legal counsel;
- (2) interrogator threatened suspect with psychological pain;
- (3) interrogator touched the suspect in an unfriendly manner;<sup>67</sup>
- (4) interrogator’s questioning manner was unrelenting, badgering or hostile;
- (5) interrogator promised the suspect leniency in exchange for an admission of guilt;
- (6) suspect is not permitted to invoke his or her rights to silence or legal counsel;
- (7) suspect was in obvious physical pain;
- (8) interrogator deprived the suspect of an essential necessity;

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<sup>66</sup> *Ibid.*

<sup>67</sup> Same as item 25 of the interrogation tactics.

- (9) suspect was in obvious psychological pain; and  
(10) interrogation lasted longer than 6 hours.”<sup>68</sup>

These coercive strategies are such that if visible in a video-recorded interrogation they will be fertile ground for a defence lawyer to argue, on a *voir dire*, that any confession which resulted should be excluded from evidence as involuntarily given. This makes the coercive strategies distinguishable from the influence tactics<sup>69</sup>, which will not so easily be seen by courts to engage the issue of voluntariness.

The data between the 1996 Leo study and the 2009 King and Snook study on the percentage of interrogations containing the use of a coercive strategy was inconsistent, leading to some difficulty in determining the pervasiveness of psychological coercion in the interrogation room.<sup>70</sup> Whereas the study by Leo identified the use of coercive strategies in only 2% of interrogations,<sup>71</sup> the King and Snook study identified them in 25% of interrogations,<sup>72</sup> if one included the failure to caution suspects on their rights to silence and counsel on camera, and in 9% of interrogations if one assumed that the rights to silence and counsel were administered off-camera prior to the interrogation.<sup>73</sup> There appear to be many possible variations for this explanation. Possibilities that may account for it include: that Leo’s data set was gathered from interrogations conducted in the United States, whereas King and Snook’s data was gathered from interrogations in Canada and Canada’s interrogators are more abusive;<sup>74</sup> that Leo’s data was collected thirteen years prior to King and Snook’s<sup>75</sup> and police interrogations have changed since that time; that Leo’s data-set (i.e. the interrogation videos) was more scrupulously vetted for

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<sup>68</sup> *Supra* note 14 at 689.

<sup>69</sup> Please see footnote 56 at 281; See also *supra* note 14 at 674.

<sup>70</sup> *King and Snook, Ibid.* at 691.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> This reason, if it were to be true, suggests no convincing explanation.

<sup>75</sup> *Supra* note 14 at 679.

abuses by the police before giving him tapes of the data<sup>76</sup> (although about one-third of the interrogations that Leo observed were ‘live’ interrogations); King and Snook’s relatively smaller sample skewed the data<sup>77</sup> and that Leo’s is a more accurate representation; or that there were differences in the perception<sup>78</sup> of the researchers in the respective studies.<sup>79</sup> No doubt, additional studies need to be conducted to discover an average of the data across many sample-sets and to get a more accurate picture of exactly what is transpiring in interrogation rooms.<sup>80</sup>

King and Snook went a step further in their 2009 study than Leo did in his 1996 study, by analyzing the use of both specific Reid techniques in police interrogations, and classifying them according to type of tactic (i.e. maximization or minimization) and type of “theme” (i.e. emotional or non-emotional).<sup>81</sup> Again, for the purpose of ascertaining the entire scope of tactics available to police interrogators, the Reid techniques observed, as well as their characterization by type of tactic and by theme type (as classified by King and Snook) are as follows:<sup>82</sup>

- (1) “Appeal to suspect’s pride with flattery (minimization tactic/emotional theme);
- (2) Play one offender against the other (maximization tactic/non-emotional theme);
- (3) Minimize the moral seriousness of the offence (minimization tactic/emotional theme);
- (4) Point out the futility of resisting telling the truth (maximization tactic/non-emotional theme);
- (5) Sympathize with suspect by condemning others (minimization tactic/emotional theme);
- (6) Use third person theme (minimization tactic/emotional theme);
- (7) Anyone else under similar circumstances might have done the same (minimization tactic/emotional theme);

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<sup>76</sup> *Ibid.* at 692.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.* That is, that King and Snook are far more vigilant against or sensitive to coercive abuses than Richard Leo.

<sup>80</sup> *Ibid.* at 691.

<sup>81</sup> *Ibid.* at 679-680.

<sup>82</sup> *Ibid.* at 686.

- (8) Suggest non-criminal intent for the offense (minimization tactic/non-emotional theme);
- (9) Point out the possibility of exaggeration on the part of the accuser or victim (minimization tactic/emotional theme);
- (10) Point out the consequences and futility of continuation of criminal behaviour (maximization tactic/emotional theme); and
- (11) Exaggerate the nature and seriousness of the offence (maximization tactic/emotional theme).”<sup>83</sup>

The Reid ‘suggestions and guidelines’ that King and Snook observed police interrogators being mindful of are as follows:

- (1) “Did not pace room;
- (2) Suspect not handcuffed/shackled during interrogation;
- (3) Has evidence folder in hand upon entry/beginning of the interrogation;
- (4) No telephone in room;
- (5) No small loose objects within the suspect’s reach;
- (6) No handshake between the suspect and the interrogator upon meeting;
- (7) Suspect alone in interrogation room prior to entry of interrogator;
- (8) Straight-back chairs;
- (9) No decorative ornaments in the room;
- (10) Interrogator and suspect seated to directly face each other;
- (11) Polygraph offer made to suspect;
- (12) Police caution given by someone other than primary interrogator.”<sup>84</sup>

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<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.* at 687.

King and Snook additionally took note of the use of the core components of the Reid Technique in the interrogations they observed.<sup>85</sup> These components are:

- (1) “changed theme if the suspect continued to reject theme;
- (2) Allowed suspect to voice objections
- (3) Returned to the beginning of the crime when the suspect made a partial admission of guilt
- (4) Proposed at least one theme for the crime’s commission
- (5) Gave transition statement
- (6) Looked through evidence folder
- (7) Provided sympathy if the suspected cried
- (8) Used alternative questioning
- (9) Did not allow repetition of denial
- (10) Started the interrogation with direct statement indicating certainty in guilt
- (11) Moved closer to the suspect throughout interrogation
- (12) Used visual aids to procure suspect’s attention
- (13) Reconfirmed belief in guilt after the suspect denials
- (14) reiterated a moral excuse/theme after suspect denials
- (15) Reiterated theme after suspect objection
- (16) Made statement of reinforcement after suspect alternative acceptances
- (17) Behavioural pause after initial direct statement indicating certainty in suspect guilt.”<sup>86</sup>

With a bird’s-eye view of the range of tactics known to be used in North American interrogation rooms, let us now turn to an analysis of the most popular interrogation methodology, the Reid Technique, and discuss its nine-step framework in detail. This discussion

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<sup>85</sup> *Ibid.* at 683.

<sup>86</sup> *Ibid.*

is important for our purposes, because of the prevalent use of the Reid method in North America. We need to undertake an in-depth analysis of it in order to substantiate our claim that it should be prohibited from use.

### **The Reid Technique of Interrogation:**

The 2009 study by King and Snook found that “most interrogations followed the guidelines, suggestions and themes endorsed by Inbau, Reid, Buckley, and Jayne.”<sup>87</sup> These techniques have been “...taught to more than 300,000 investigators around the world.”<sup>88</sup> Furthermore, there is evidence to suggest that these techniques *are* effective at producing incriminating statements<sup>89</sup> (irrespective of the important question of whether they are true or false ones, of course). However, this data necessarily succumbs to the criticism of the measurement problem; there is just no way of knowing what percentage of the confessions wrung out of the suspects were false ones,<sup>90</sup> and therefore there is not an accurate way to measure the success of specific Reid tactics or other interrogation tactics.

The tactics fit into a broader framework of custodial interrogation that consists of three phases. Respectively: (1) factual analysis;<sup>91</sup> (2) behavioural analysis;<sup>92</sup> and (3) the 9-step interrogation.<sup>93</sup> Let us discuss the content of each of the phases, in turn, as well as issues raised by each.

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<sup>87</sup> *Ibid.* at 674.

<sup>88</sup> *Ibid.* at 675.

<sup>89</sup> *Ibid.* at 690.

<sup>90</sup> *Ibid.* at 692.

<sup>91</sup> *Jayne & Buckley, supra* note 10 at 2.

<sup>92</sup> *Ibid.* at 3.

<sup>93</sup> *Ibid.* at 11.

### **Factual Analysis:**

Factual analysis is defined by Reid proponents as “estimating the probability of a suspect’s guilt or innocence based on investigative findings.”<sup>94</sup> Investigators use the factual analysis to cross-off from their list of suspects those whom they deem to be innocent, and to eventually zero-in on the persons they evaluate as most likely to have committed the offence under investigation.<sup>95</sup> Many investigators consider factual analysis to be a “sixth sense”<sup>96</sup> and so it is not typically “...taught in a structured format.”<sup>97</sup>

The key problem with factual analysis is, precisely, the over-reliance on “sixth-sense” intuitions in evaluating key elements of suspect behaviour and other evidence. The Reid technicians appear to be very fond of promulgating so-called investigators’ “rules of thumb”, which consist, broadly speaking, of judgments relating to a suspect’s likely guilt or innocence, based on common indications of the various types of evidence that an investigator may encounter. While there is probably some merit to these rules of thumb, they undoubtedly require investigators to rely on certain tacit assumptions about human behaviour<sup>98</sup> or about the way the world operates, which may or may not apply, in actual fact, to the case under investigation. The danger, naturally, with an over-reliance on these rules of thumb, is that the investigators will fail to give consideration to the full range of possibilities, and will fail to perform the proper due-diligence in respect of the available evidence before arriving at the conclusion at the *prima facie* determination of a suspect’s guilt. This presumptive-guilt<sup>99</sup> prejudices the suspect in every

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<sup>94</sup> *Ibid.* at 23.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> Timothy E. Moore & Cindy R. Wasser, “Social Science and Witness Reliability: Reliable Science Begets Reliable Evidence” (2006) 33 C.R. (6<sup>th</sup>) at 13.

<sup>99</sup> *Ibid.*

interaction with the investigator that follows because it has created a confirmation-bias<sup>100</sup> in favour of perceiving what the suspect says and how the suspect behaves as being confirmatory of the presumed-guilt. While a sixth-sense is important, and is also an unavoidable aspect of investigation, it should be secondary to the rigorous application of logical reasoning to facts from a starting point of presumed-innocence. When making an evaluation of the likelihood of guilt of a suspect, an investigator should seek to be objective, and clear his or her mind of prejudices and preconceived notions. The rules of thumb are dangerous, because they are essentially the codification of prejudice.<sup>101</sup>

The factual analysis is divided, according to the Reid Technique, into five constituent parts: “Opportunity/Access; Attitude; Motivation; Biographical Information; and Evidence.”<sup>102</sup> Moreover, “factual analysis requires two different types of comparisons: intra-suspect comparisons (between different suspects) and heuristic comparisons (between what is commonly observed or expected).”<sup>103</sup> Let us discuss the components of the factual analysis phase.

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<sup>100</sup> *Ibid.*

<sup>101</sup> The term prejudice can have unpleasant connotations associated with unfairness, stereotyping and improper discrimination. I don’t intend to moralize here about whether pre-judgments are always reprehensible or whether they can be a useful shortcut to making decisions in some situations. It would appear that most people succumb, in their personal lives to some degree of prejudice, for better or, more often perhaps, for worse. Where such preconceived notions become problematic is when they corrupt a process which is supposed to be fair and impartial and is supposed to accord an accused the presumption of innocence. When this prejudice results in the unfair targeting of some classes of person, the cause of justice is undermined.

It may be argued that given the adversarial nature of the system, the responsibility of fairness is one that should be left to the courts, and that the crown should remain free to conduct its investigations in its own interests in an aggressive way and without safeguards of fairness for the suspect or accused. But this is not consistent with the duties of the Crown in the trial process, so why should it be considered to be so during the pre-trial process? The Supreme Court of Canada has recognized this reality and held that the police are not immune from liability under the law of negligence, and owe a duty of care in negligence to suspects who they are investigating (*Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129 at 3). Their conduct during the course of an investigation is measured against the standard of how a reasonable officer in like circumstances would have acted. (*Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129).

<sup>102</sup> *Jayne & Buckley*, *supra* note 10 at 23.

<sup>103</sup> *Ibid.*



### **The Behaviour Analysis Interview, ‘Indicators of Guilt’ and Guilt-Presumptive Interrogation:**

In the Reid Technique, and in North American interrogations generally, following the factual analysis, the confrontational interrogation process that eventually ensues will be preceded by an “...information gathering pre-interrogation interview,”<sup>104</sup> again with the purpose of determining whether a suspect is likely to be guilty or innocent.<sup>105</sup> The proponents of the Reid techniques recommend “...the use of non-verbal cues, such as gaze aversion and anxiety,”<sup>106</sup> to serve as “markers of deception”.<sup>107</sup> When investigators make the determination for themselves that the suspect displays so-called “markers of deception”, then they will assume that the suspect is guilty and commence a guilt presumptive interrogation that is designed to extract a confession from the suspect.<sup>108</sup>

The determination of presumptive-guilt may be coloured by the detective’s assessments from the factual analysis; thus, the detective’s perception of the behavioural cues may be influenced strongly or weakly by factual analysis.

The Reid Institute’s technicians have developed a “science” of behavioural analysis. The inception of behavioural analysis began with John E. Reid’s observation of behavioural differences between polygraph subjects that he deemed to be truthful or deceptive.<sup>109</sup> In 1953, John E. Reid and Richard Arther published the results of a five-year study of the behaviours of 809 polygraph subjects with an “impressionistic” interpretation of the data.<sup>110</sup> This study was followed-up upon by a 1972 study conducted by one of John Reid’s associates, Frank Horvath.

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<sup>104</sup> *Supra* note 98 at 11.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> *Jayne & Buckley, supra* note 10 at 66.

<sup>110</sup> *Ibid.*

Horvath studied subjects' "...behavioural responses to a structured series of questions"<sup>111</sup> of "...50 verified truthful and 50 verified deceptive subjects."<sup>112</sup> Horvath observed major differences in their responses "...to the structured questions."<sup>113</sup>

In Canada Reid training and Reid-inspired training also makes use of the techniques that were developed by John E. Reid and Associates. *The Law Enforcement Handbook*,<sup>114</sup> a Canadian resource manual, cites 17 non-verbal signals of deception, including: "breaks in eye contact;"<sup>115</sup> "inability to sit still in the chair;"<sup>116</sup> "nervous manipulation of jewelry, small change,"<sup>117</sup> etc.; "pallid skin colour;"<sup>118</sup> and "arms crossed in front of the body."<sup>119</sup> The same manual cites 8 non-verbal signals of truthfulness that include: "no hesitation"<sup>120</sup> in the suspect's replies; "detailed answers;"<sup>121</sup> "arms on armrests"<sup>122</sup> of chair; and "hands clasped behind head while answering."<sup>123</sup> The content of this resource manual is similar to what one encounters in the Reid literature.

"So-called "experts" at interrogations have identified suspect symptoms and behaviours which they have deemed to be 'indicators of guilt'. Fred Inbau, one of the chief architects of the Reid techniques, has identified telltale verbal and non-verbal clues, which he and his compatriots assert, indicate guilt. Inbau et al., maintain that an innocent suspect will "give concise answers

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<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> Desmond Rowland, James Bailey & Stephen Rowland, *The Law Enforcement Handbook*, 4<sup>th</sup> ed. (Toronto: Nelson Education Limited 2010).

<sup>115</sup> *Ibid.* at 134.

<sup>116</sup> *Ibid.* at 135.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

because he has no fear of being trapped”<sup>124</sup> and will “sit upright, but not rigid, directly positioned in front of the interrogator”;<sup>125</sup> and that the guilty suspect does not make eye contact<sup>126</sup> and will be overly polite.<sup>127</sup>

### **Criticisms of Behavioural Analysis**

The behavioural analysis concept has come under much fire. Research indicates that the important differences between guilty and innocent suspects are not reflected in their contrasting demeanours,<sup>128</sup> and cannot easily or accurately be ascertained by observing suspects’ non-verbal cues.<sup>129</sup> ‘Tells’,<sup>130</sup> betraying a suspect’s internal perceptions, cognitions about their immediate situation,<sup>131</sup> memories (including the presence or absence of memories about committing a crime) and their ongoing mental activities and decisions, are capable of being reliably read, only *after* a confessional statement has been given – that is, by analyzing the *contents* of the respective statements of persons who are truly guilty versus those who are truly innocent.<sup>132</sup>

The research, contrary to the views of Inbau and other proponents of the Reid techniques, indicates that people are poor intuitive judges of truth and deception.<sup>133</sup> Even experts, who make these judgments for a living such as law enforcement professionals and judges, have been shown to be “highly prone to error”.<sup>134</sup> According to Kassir, intuitive judgments by interrogators about

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<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ofshe & Leo, supra* note 24 at 15.

<sup>129</sup> *Ibid.* at 12-13.

<sup>130</sup> *Ibid.* at 16.

<sup>131</sup> *Ibid.* at 14.

<sup>132</sup> *Ibid.* at 16; Charles F. Bond & Bella M. DePaulo, “Accuracy of Deception Judgments” (2006) 10 *Personality and Social Psychology Review* 214.

<sup>133</sup> *Zuckerman, Depaulo and Rosenthal, supra* note 25.

<sup>134</sup> Paul Ekman, & Maureen O’Sullivan, “Who can catch a liar?” (1991) 46 *American Psychologist* 913, cited in *Supra* note 7 at 222. Ekman and O’Sullivan found that the accuracy rate for catching a liar among professions where this skill is required to be used is as follows: secret service: 64.12%; federal polygraphers: 55.67%; robbery investigators: 55.79%; judges 56.73%; psychiatrists: 57.61%; and college students: 52.82%. Thus “it is considered axiomatic in the deception literature that individuals are at best inaccurate at deception detection ...”

whether an individual is being deceptive are “confidently made but biased and frequently in error.”<sup>135</sup>

Research by Kassin, Meissner and Norwick has demonstrated that both police investigators and college students who viewed videotaped confessions of inmates’ admissions of guilt for crimes, had no better likelihood of recognizing a false confession than the odds of pure chance,<sup>136</sup> although the professional investigators had more confidence in their ability to make these judgments than college students did.<sup>137</sup>

Kassin et al. point out, following Inbau et al., that “An interrogation is conducted only when the investigator is reasonably certain of the suspect’s guilt.”<sup>138</sup> However, whereas Inbau et al. see this as an adequate justification for unleashing a battery of Reid tactics and strategies against a detained suspect, Kassin et al. raise the important concern that the basis upon which that ‘reasonable certainty’ was arrived at, is fundamentally flawed. People, in general, are no better at determining guilt or innocence on the basis of behavioural cues than pure chance would predict;<sup>139</sup> yet this initial determination is intended to form the basis for a highly manipulative, deceitful and potentially psychologically coercive guilt-presumptive interrogation that is designed to extract a confession from a resistant suspect.<sup>140</sup>

It is the initial interview wherein investigators analyze the suspect’s verbal and non-verbal behaviour to determine whether he or she is being deceptive, and hence, guilty that

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(Anne P. Hubbell, Monique Mitchell & Jennifer C. Gee, “The Relative Effects of Timing of Suspicion and Outcome Involvement on Biased Message Processing” (2001) 68 *Communication Monographs* 115.

<sup>135</sup> Saul M. Kassin. “On the psychology of confessions: Does *Innocence* put innocents at risk?” (2005) 60 *American Psychologist* 215 at 217.

<sup>136</sup> Saul M. Kassin, Christian A. Meissner, & Rebecca J. Norwick, ““I’d Know a False Confession if I Saw One”: A Comparative Study of College Students and Police Investigators” (2005) 29 *Law and Human Behaviour* 211 at 212.  
<sup>137</sup> *Ibid.*

<sup>138</sup> Fred E. Inbau et al., *Criminal Interrogations and Confession*, 4<sup>th</sup> ed. (Gaithersburg: Aspen Publishers, 2001) cited in Saul M. Kassin, Christine Goldstein, and Kenneth Savitsky, “Behavioural Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt” (2003) 27 *Law and Human Behaviour* 2 at 188.

<sup>139</sup> Kassin, Goldstein & Savitsky, *Ibid.*

<sup>140</sup> *Ibid.* at 189.

motivates them to proceed with a heavy-handed guilt-presumptive interrogation or else completely abandon investigation of the suspect.<sup>141</sup> There “...is no empirical evidence to suggest that police can distinguish between the denials made by guilty and innocent suspects at high levels of accuracy,”<sup>142</sup> and moreover, studies show “...that people are poor intuitive judges of truth and deception.”<sup>143</sup> “Some professionals *do* outperform the average person”<sup>144</sup> at detecting deception, but even those professionals barely outperform college students at this.<sup>145</sup> Moreover, “It is normatively clear ... that police hold many false beliefs about the behavioural indicators of deception,”<sup>146</sup> and, further, that professionals, including “psychiatrists, police investigators, judges, customs inspectors, and polygraphers for the FBI, CIA and military – are highly prone to error.”<sup>147</sup> “Trained law enforcement investigators,”<sup>148</sup> specifically, “are not reliably more accurate than the average person – and often fail to exceed chance level performance despite high levels of confidence.”<sup>149</sup> Thus, the decision to proceed with a hard

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<sup>141</sup> *Ibid.* at 188.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.*

<sup>145</sup> Paul Ekman, Maureen O’Sullivan & Mark G. Frank, “A few can catch a liar” (1999) 10(3) *Psychological Science* 263.

<sup>146</sup> Kassin, Goldstein & Savitsky, *supra* note 137.

<sup>147</sup> *Ibid.* See also Bella M. DePaulo & Roger L. Pfeifer, “On-the-job experience and skill at detecting deception” (1986) 16(3) *Journal of Applied Psychology* 249 and Ekman & O’Sullivan, *supra* note 134.

In another study, Kassin, Appleby and Perillo report that: “Consistently, empirical research has shown that many of the behavioural cues that police are trained to use – such as gaze aversion, rigid posture, and fidgeting – are not diagnostic of truth and deception; that laypeople on average are only 54% accurate; that training produces only marginal improvement; and that police investigators, like judges, psychiatrists, customs inspectors, and other professionals who make these judgments for a living, perform only slightly better, if at all” (*references omitted*). These researchers suggest “...that people over rely on behavioural cues” in making assessments “...between truth and deception,” that these assessments are not reliable, and that they are overconfident in their abilities in doing so (“77% accurate”). See: Saul M. Kassin, Sara C. Appleby and Jennifer Torkildson Perillo, “Interviewing Suspects: Practice, Science, and Future Directions” (2010) 15 *Legal and Criminological Psychology* 39 at 40.

<sup>148</sup> Kassin, Goldstein & Savitsky, *supra* note 137 at 199.

<sup>149</sup> DePaulo & Pfeifer, *supra* note 147; and Ekman & O’Sullivan, *Supra* note 134.

interrogation is made based<sup>150</sup> on “prejudgments of guilt confidently made but frequently in error.”<sup>151</sup>

Moreover, additional research conducted by Kassir and Fong indicates that persons having been instructed in the Reid approach to behavioural and nonverbal cue identification were no better than pure chance at distinguishing truth from deception, yet they “...cited *more reasons*”<sup>152</sup> for making the judgments that they made.<sup>153</sup> Research conducted by Mann, Vrij, and Bull in 2004 found that those officers who cited the highest number of these supposed cues were, in fact, the poorest lie/truth detectors.<sup>154</sup> Thus, rigorous Reid training, and a hyper-vigilant approach to behaviour analysis would actually be more prejudicial to innocent suspects than interrogation with no Reid training at all.

As Professor Timothy Moore notes, the consequence of this is that interrogations that are designed to extract confessions are conducted with “a non-trivial number of innocent persons.”<sup>155</sup> Moore makes the related criticism that the Reid method is “self-reinforcing.”<sup>156</sup> He notes that from the outset, “there’s a smorgasbord of signs of deception to rely on, any one of which might be enough to arouse suspicion.”<sup>157</sup> Once suspicion is aroused the guilt-presumptive interrogation that follows may produce (or *induce*) a confession, and, if it does, the fact that the interrogation was proceeded-with on the justification that the indicators of deception were present, will then reinforce the validity of relying on those indicators as a reason to

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<sup>150</sup> Kassir, Goldstein & Savitsky, *supra* note 137 at 199.

<sup>151</sup> *Ibid.*

<sup>152</sup> Saul M. Kassir & Christina T. Fong, “I’m Innocent!” Effects of Training on Truth and Deception in the Interrogation Room”(1999) 23 Law and Human Behaviour 499 at 499.

<sup>153</sup> *Ibid.*

<sup>154</sup> S. Mann, A. Vrij, & R. Bull, “Detecting true lies: Police Officers’ ability to detect suspects’ lies” (2004) 89(1) Journal of Applied Psychology 137 at 6.

<sup>155</sup> *Inbau et. al, supra* note 137.

<sup>156</sup> Timothy E. Moore, paper presented to the International Investigative Interviewing Research Group’s 5th Annual Conference, “Eliciting truth by telling lies: On the reliability of admissions arising from the Mr. Big tactic” Toronto, May 24, 2012 at 6.

<sup>157</sup> *Ibid.*

interrogate;<sup>158</sup> by the same token, the necessity of resorting to the manipulative<sup>159</sup> tactics is also affirmed by the fact a presumption of guilt led to a confession of it. If there is a conviction, the credibility of the process is bolstered even further. Moore writes: “Confessions are compelling to jurors. A false confession may well be followed by a false conviction. So you have double confirmation.”<sup>160</sup>

Moreover, the very verbal and non-verbal cues that Inbau et al. associate with guilt are also symptoms of stress and nervousness. As Simon puts it:

Nervousness, fear, confusion, hostility, a story that changes or contradicts itself – all are signs that the man in an interrogation room is lying, particularly in the eyes of someone as naturally suspicious as the detective. Unfortunately, these are also signs of a human being in a state of high stress.<sup>161</sup>

Therefore, the rationale which an interrogator relies upon to make his decision to press the interrogation of a suspect further and potentially either apply increased direct coercive pressure or increased psychological manipulation, has a significant chance of being based upon the misattribution of non-verbal cues indicating a stressed state of mind, to guilt,<sup>162</sup> when in fact the reason the suspect is betraying stress, is because of the stressful circumstances that are inherent in any interrogation.<sup>163</sup> The risk is that because the initial determination by the investigator of whether a suspect is innocent or guilty is flawed, “...innocent people will be included in the subsequent interrogation exercise which is psychologically coercive, manipulative, and guilt presumptive.”<sup>164</sup>

The difficulty with using ‘indicators of guilt’ as a reason to press harder upon or manipulate a suspect, is that the greater the degree of persistent coercion or manipulation that is

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<sup>158</sup> *Supra* note 98 at 12.

<sup>159</sup> *Ibid.*

<sup>160</sup> *Supra* note 156.

<sup>161</sup> *Supra* note 51 at 219.

<sup>162</sup> *Supra* note 98 at 12.

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

applied and the longer the time it is applied for, the more probable that an innocent suspect will make a false confession.<sup>165</sup> False confessions have been widely recognized as one of the major causes of wrongful convictions.<sup>166</sup>

Kassin, Goldstein and Savitsky provide an additional criticism of the reliance of police upon so-called indicators of guilt collected during the pre-interrogation phase: suspects tend to “...behaviourally confirm the prior beliefs of interrogators”<sup>167</sup> when confronted with the guilt-presumptive behaviour of an interrogator.<sup>168</sup> This is referred to as the “confirmation bias”.<sup>169</sup> Kassin, Goldstein and Savitsky showed through their research “...that interrogator expectations”<sup>170</sup> (of guilt or innocence) before an interrogation<sup>171</sup> tends to “...trigger a range of behavioural confirmation effects,”<sup>172</sup> ultimately serving to further<sup>173</sup> bias “...perceptions of guilt.”<sup>174</sup> It has been found that interrogators who had “...guilty expectations chose more guilt-presumptive questions, used more techniques in their interrogation (including the presentation of false evidence and promises of leniency);”<sup>175</sup> as well, they “...were more likely to see suspects in incriminating terms”<sup>176</sup> following the interview, “...exhibiting a 23% increase in guilty judgments relative to those with innocent expectations.”<sup>177</sup> Furthermore, a particularly disturbing phenomenon was observed. *Innocent* suspects who interrogators were made to believe were guilty by researchers prior to the interrogation, had *more* pressure exerted upon

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<sup>165</sup> *Ibid.*

<sup>166</sup> C. Ronald Huff, “Wrongful Conviction and Public Policy: The American Society of Criminology 2001 Presidential Address” (2002) 40 *Criminology* 1 at 5.

<sup>167</sup> Kassin, Goldstein & Savitsky, *supra* note 137 at 200.

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.* at 189.

<sup>170</sup> *Ibid.* at 199.

<sup>171</sup> *Ibid.*

<sup>172</sup> *Ibid.*

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.*

<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid.*

<sup>177</sup> *Ibid.*



them during the ensuing interrogation than suspects who interrogators believed were guilty, *who were actually guilty*.<sup>178</sup> The research suggests that “erroneous prior expectations ... blind interrogators to contradictory evidence in the form of forceful and plausible assertions of innocence”,<sup>179</sup> and that, interrogators “...interpreted the [innocent person’s] denials as proof of a guilty person’s resistance – and redoubled their efforts to elicit a confession.”<sup>180</sup> A more recent study by Kassin shows that, depending on how they are interrogated, actual innocence may put innocent people at risk.<sup>181</sup>

This feature of guilt-presumptiveness, coupled with the fact that law enforcement professionals have difficulty correctly ‘reading’ so-called indicators of guilt (yet confidently persist with the practice of behavioural analysis) creates a distinct and highly regrettable risk of innocent suspects being railroaded into false confessions by overzealous interrogators afflicted with tunnel-vision.

According to Kassin, Goldstein, and Savitsky’s research, the behavioural confirmation bias also impacts upon suspects.<sup>182</sup> They write:

Paralleling Snyder and Swann’s observation that a confirmatory approach to questioning constrains a target’s response options, suspects in the guilty expectations condition became noticeably more defensive. It is not clear what aspects of their behaviour gave rise to this impression. But it is not hard to imagine, as our results suggest, that people trapped in coercive interrogations may well look away, slouch, sigh in despair, or exhibit other cues that trained police regard as indicators of guilt.”<sup>183</sup>

Furthermore, “...whatever suspects did to be perceived as defensive, those who were presumed guilty by interrogators later tended to be judged as such by neutral observers. By neglecting to account sufficiently for the way in which the suspect’s behaviour was shaped by the interrogative situation, observers thus committed the fundamental attribution error, or correspondence bias.”<sup>184</sup>

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<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid.* at 200.

<sup>181</sup> *Supra* note 136.

<sup>182</sup> Kassin, Goldstein & Savitsky, *supra* note 137 at 199.

<sup>183</sup> *Ibid.* citing Inbau *et al.*, *supra* note 137.

<sup>184</sup> Kassin, Goldstein & Savitsky, *Ibid.* citing Daniel T. Gilbert & Patrick S. Malone, “The Correspondence Bias” (1995) 117(1) *Psychological Bulletin* at 21 and others.

One promising aspect of the Kassir, Goldstein and Savitsky study was that non-party observers of the interrogations could both "...distinguish interrogators with guilty and innocent expectations and detect differences in their behaviour;"<sup>185</sup> and could identify innocent suspects on the basis of the plausibility of their denial stories<sup>186</sup>, picking up successfully on "...narrative cues"<sup>187</sup> of guilt and innocence that the interrogators themselves (who entered the interrogation with a bias) missed.<sup>188</sup> If this research is accurate, then it is cause for some optimism in relation to the evaluation of the voluntariness of confessions for potential exclusion at the *voir dire*. However, under the law currently, guilt-presumptiveness at the interview and interrogation stages of the criminal process does not appear in the courts' view to violate the presumption of innocence, as *R. v. Sinclair*, among other cases, instruct.<sup>189</sup>

### **The Nine Reid Steps of Interrogation:**

Following the conclusion of the factual analysis and the behavioural analysis, and upon an interrogator's determination of presumptive-guilt, the Reid technician will commence a nine-step interrogation.<sup>190</sup> Inbau, in the 2004 version of *Criminal Interrogation and Confession*<sup>191</sup> prescribes nine core steps and a variety of general suggestions and guidelines that underlie the Reid method.<sup>192</sup> The sequence of the steps is flexible, according to Inbau et al., despite being presented numerically.<sup>193</sup> The interrogation commences when the behavioural analysis portion has been completed and the interrogator has made the determination of presumptive-guilt that

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<sup>185</sup> Kassir, Goldstein & Savitsky, *Ibid.* at 200.

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.*

The authors write: "Listening to interrogators who – unbeknownst to them – had been armed with guilty expectations, observers "heard" a presumption of guilt and perceived greater effort and more pressure to get a confession (they were able to make these distinctions even when listening to tapes that contained only the suspects)."

<sup>189</sup> *R. v. Sinclair*, 2010 SCC 35, [2010] 2 S.C.R. 310.

<sup>190</sup> Inbau et. al., *supra* note 137 at 8.

<sup>191</sup> *Ibid.*

<sup>192</sup> Jayne & Buckley, *supra* note 10 at 11.

<sup>193</sup> *Supra* note 14 at 675.

justifies the interrogation that will follow.<sup>194</sup> The nine steps are briefly canvassed here to provide the reader with a sketch of the process; there is no substitute in conveying an understanding of Reid to having the opportunity to watch a sample-set of video-taped Reid-style interrogations. Armed with an understanding of the psychological tactics at play and benefiting by a real-life illustration of the tactics at work, viewers will be struck by just how manipulative this methodology actually is.

**(i) Step 1 – The Positive Confrontation**

“The initial step in Reid involves directly confronting suspects with a statement indicating the interrogator’s belief in their guilt, which is then followed by a behavioural pause.”<sup>195</sup> The interrogator may “...look through the evidence folder” to convey the idea that the interrogator has an accumulation of evidence showing the suspect’s guilt.<sup>196</sup>

At some point during Step 1, the interrogator provides a “transition statement,”<sup>197</sup> which is a statement in which the interrogator subtly introduces<sup>198</sup> a “perceived benefit for telling the truth.”<sup>199</sup> The idea is for the suspect to be left with the impression that the investigators already know with certainty that he is guilty<sup>200</sup> and that there is some reason other than a confession<sup>201</sup> for “...initiating an interrogation.”<sup>202</sup> King and Snook cite the example: “The only thing we have left to figure out is *why* you started the fire”<sup>203</sup> as how an interrogator might convey certainty-of-guilt to a suspect.<sup>204</sup>

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<sup>194</sup> *Jayne & Buckley, supra* note 10 at 11.

<sup>195</sup> *Supra* note 14 at 675.

<sup>196</sup> *Ibid.*

<sup>197</sup> *Ibid.*

<sup>198</sup> *Ibid.*

<sup>199</sup> *Ibid.* at 678.

<sup>200</sup> *Ibid.*

<sup>201</sup> *Ibid.* at 675.

<sup>202</sup> *Ibid.*

<sup>203</sup> *Ibid.*

<sup>204</sup> *Ibid.* at 678.

## **(ii) Step 2 – Theme Development**

In the second step, the Reid instructors “...recommend developing a theme, or explanation, of why the crime”<sup>205</sup> happened. To do this, it is first necessary to establish whether the suspect is an “emotional offender,”<sup>206</sup> who expresses remorse for his crime,<sup>207</sup> or a “non-emotional offender,”<sup>208</sup> who does not express any remorse.<sup>209</sup> The development of the theme will depend upon whether the suspect is identified as being an emotional or a non-emotional offender.

For emotional offenders, the theme should present a “moral excuse”<sup>210</sup> for offensive behaviour.<sup>211</sup> Furthermore, it is suggested that the theme that is chosen should reinforce the suspect’s<sup>212</sup> “...rationalizations for committing the crime.”<sup>213</sup> This will make it easier to overcome the problem of denials.<sup>214</sup>

For non-emotional offenders, Inbau et al. suggest using themes that appeal to suspect’s reasoning and systematically work them towards confessing.<sup>215</sup> This may require a process of trial and error, until a theme that works with “...the suspect’s identity”<sup>216</sup> ‘sticks.’

## **(iii) Step 3 – Handling Denials**

This step “...involves handling denials.”<sup>217</sup> Reid instructors operate on the assumption that offenders almost never confess upon being confronted with their crime, and they usually

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<sup>205</sup> *Ibid.* at 675.

<sup>206</sup> *Ibid.* at 676

<sup>207</sup> *Ibid.*

<sup>208</sup> *Ibid.*

<sup>209</sup> *Ibid.*

<sup>210</sup> *Ibid.*

<sup>211</sup> *Ibid.*

<sup>212</sup> *Ibid.*

<sup>213</sup> *Inbau et. al., supra* note 137 at 232.

<sup>214</sup> *Supra* note 14 at 676.

<sup>215</sup> *Ibid.*

<sup>216</sup> *Ibid.*

<sup>217</sup> *Ibid.*

deny committing the offence.<sup>218</sup> The Reid instructors take the view that the<sup>219</sup> denial stage is critical.<sup>220</sup> The prevailing view is that denials, if left unchallenged will make it more difficult to persuade someone to confess later in the process.<sup>221</sup> Therefore, the interrogator is advised to “...prevent or discourage”<sup>222</sup> denials by the suspect by ardently maintaining his belief in the suspect’s guilt, and then by returning to the theme that is being worked on following the denials.<sup>223</sup>

#### (iv) Step 4 – Overcoming Objections

This step is designed to deal with objections raised by suspects as to why they are not guilty of the offence.<sup>224</sup> Objections are classified as being either: emotional, factual, or moral.<sup>225</sup> According to Reid instructors, objections are signs of guilt and “a movement from denials to objections is argued to be a good indication of deception.”<sup>226</sup>

Objections can be useful “...because they can be used to further the development of a theme.”<sup>227</sup> The interrogator can “...reverse the significance of the suspect’s objection”<sup>228</sup> in order to “...match the proposed theme, or to develop a new one.”<sup>229</sup> The Reid instructors therefore suggest “returning to the interrogation theme without delay.”<sup>230</sup>

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<sup>218</sup> *Ibid.*

<sup>219</sup> *Inbau et. al., supra* note 137 at 304.

<sup>220</sup> *Ibid.*

<sup>221</sup> *Ibid.*

<sup>222</sup> *Supra* note 14 at 676.

<sup>223</sup> *Ibid.*

<sup>224</sup> *Inbau et. al., supra* note 137 at 330.

<sup>225</sup> *Supra* note 14 at 676. King and Snook tell us the difference between the three types: “Objections can be emotional (e.g., “I’d be too nervous to do something like that”), factual (e.g., “I don’t even own a gun”), or moral (e.g., “I wasn’t brought up that way”).

<sup>226</sup> *Ibid.* and see also *Inbau et. al., supra* note 137 at 334-335.

<sup>227</sup> *Ibid.*

<sup>228</sup> *Inbau et. al., supra* note 137 at 335.

<sup>229</sup> *Ibid.*

<sup>230</sup> *Ibid.*

**(v) Step 5 – Keeping the Subject’s Attention**

Step 5 is aimed at the “procurement and retention of the suspect’s attention.”<sup>231</sup> The concept here is that discouraging denials, and after having their objections reversed<sup>232</sup> “...to support the development of the interrogator’s proposed theme,”<sup>233</sup> guilty suspects may “psychologically withdraw”<sup>234</sup> and “ignore”<sup>235</sup> the interrogator’s theme.<sup>236</sup> Techniques are then used by the interrogator to “maintain the suspect’s attention.”<sup>237</sup>

**(vi) Step 6 – Handling Subject’s Passive Mood**

Step 6 is designed to exploit suspect’s “defeatist posture.”<sup>238</sup> After the suspect’s attention has been captured (in Step 5),<sup>239</sup> he should be more willing to listen, however he may by this point appear to be “...downcast and depressed.”<sup>240</sup> The interrogator counters this by concentrating on<sup>241</sup> “...the central core of the selected theme,”<sup>242</sup> while demonstrating “...understanding and sympathy, and urge the individual to tell the truth.”<sup>243</sup> The Reid instructors say that these techniques<sup>244</sup> “...should continue until the suspect shows signs of mentally considering whether to tell the truth”<sup>245</sup>

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<sup>231</sup> *Supra* note 14 at 676.

<sup>232</sup> *Ibid.*

<sup>233</sup> *Ibid.*

<sup>234</sup> *Inbau et. al., supra* note 137 at 338.

<sup>235</sup> *Supra* note 14 at 676.

<sup>236</sup> *Inbau et. al., supra* note 137 at 338.

<sup>237</sup> *Supra* note 14 at 676.

<sup>238</sup> *Inbau et. al., supra* note 137 at 345.

<sup>239</sup> *Supra* note 14 at 676.

<sup>240</sup> *Inbau et. al., supra* note 137 at 345.

<sup>241</sup> *Ibid.*

<sup>242</sup> *Ibid.*

<sup>243</sup> *Supra* note 14 at 677.

<sup>244</sup> *Ibid.*

<sup>245</sup> *Ibid.*

**(vii) Step 7 – Presenting the Alternative Question**

Step 7 is the point at which theme development culminates in the presentation of alternative questions.<sup>246</sup> This approach involves presenting the suspect with<sup>247</sup> “...a choice between two explanations for possible commission of the crime.”<sup>248</sup> One explanation is somewhat honourable whereas the other one is relatively immoral.<sup>249</sup> Crucially, both will “...involve an admission of guilt.”<sup>250</sup> They allow the suspect to “save-face”<sup>251</sup> while at the same time he makes an inculpatory statement from a legal standpoint.<sup>252</sup> When the suspect selects one of the two alternatives, then, it is suggested, that interrogators should provide positive reinforcement for their choice.<sup>253</sup>

**(viii) Step 8 – Subject Orally Relates Confession**

Step 8 is to persuade the suspect to verbally develop the confession obtained in the previous step<sup>254</sup> “into a legally acceptable and substantiated confession that discloses the circumstances and details of the act.”<sup>255</sup> This is achieved by going back to the original offence to obtain confession evidence<sup>256</sup> “...that can be corroborated.”<sup>257</sup>

**(ix) Step 9 – Converting Oral Confession to Writing**

In the ninth step, the interrogator converts<sup>258</sup> “...the oral confession into a written one.”<sup>259</sup> The ninth step is designed to prevent the suspect from changing his mind about his confession

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<sup>246</sup> *Ibid.*

<sup>247</sup> *Ibid.*

<sup>248</sup> *Inbau et. al., supra* note 137 at 353.

<sup>249</sup> *Supra* note 14 at 676.

<sup>250</sup> *Ibid.*

<sup>251</sup> *Ibid.*

<sup>252</sup> *Ibid.*

<sup>253</sup> *Ibid.*

<sup>254</sup> *Ibid.* at 677.

<sup>255</sup> *Inbau et. al., supra* note 137 at 366.

<sup>256</sup> *Supra* note 14 at 677.

<sup>257</sup> *Ibid.* at 676. See also *Inbau et. al., supra* note 137 at 374-375.

<sup>258</sup> *King and Snook, Ibid.* at 677; *Inbau et. al., ibid.*

<sup>259</sup> *Inbau et. al., ibid.* at 375.

later,<sup>260</sup> and to “ensure”<sup>261</sup> that the confession will survive legal challenge in court.<sup>262</sup> When the written confession is done, “...it should be read aloud, corrected for any errors, and then signed by the suspect.”<sup>263</sup>

Moreover, the Reid instructors also recommend that interrogators follow certain guidelines.<sup>264</sup> These guidelines include: (i) “demonstrate high confidence and knowledge of the case details and avoid an evidence-based interrogation;”<sup>265</sup> (ii) “avoiding the use of legal terms to describe the crime;”<sup>266</sup> (iii) “Using a plain room;”<sup>267</sup> and (v) “using straight backed chairs,”<sup>268</sup> for example.

### **Criticisms of the Nine-Step Reid Interrogation Model:**

Professors Ofshe and Leo divide modern interrogations into two phases,<sup>269</sup> for heuristic purposes. The first phase of the interrogation, “...the *pre-admission phase* is organized to change the suspect’s decision to deny responsibility and elicit the statement saying “I did it.””<sup>270</sup> The objective of the second phase of the interrogation “...is to obtain from the suspect a *post-admission narrative* of the crime that proves the suspect’s guilt.”<sup>271</sup> The pre-admission phase corresponds to Reid steps 1 to 7, and post-admission narrative corresponds to steps 8 and 9 of the Reid model of interrogation.

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<sup>260</sup> *Supra* note 14 at 677.

<sup>261</sup> *Ibid.*

<sup>262</sup> *Ibid.*

<sup>263</sup> *Ibid.*

<sup>264</sup> *Ibid.*

<sup>265</sup> *Ibid.*

<sup>266</sup> *Ibid.*

<sup>267</sup> *Ibid.*

<sup>268</sup> *Ibid.* at 678.

<sup>269</sup> *Supra* note 124 at 17.

<sup>270</sup> *Ibid.*

<sup>271</sup> *Ibid.*



### **Criticisms of the Pre-Admission Phase - Steps One to Seven:**

In their 2004 review, Kassin and Gudjonsson described the Reid approach as being essentially "...an interplay between three processes:"<sup>272</sup> "custody and isolation"<sup>273</sup> (cutting the accused off from outside influence and the ability to leave); "confrontation"<sup>274</sup> (that is, involving the accused in the accusations and rejecting his denials); "and minimization"<sup>275</sup> (presenting the interrogator as a sympathetic and helpful person who, by providing moral justification for the crime, implies that the accused may be "treated leniently" when he cooperates).<sup>276</sup>

There are multiple steps involved in persuading a suspect to shift from a state of denial to confession.<sup>277</sup> Investigators must first persuade the suspect to waive the right to silence by creating the perception that they would be better off by talking.<sup>278</sup> "The initial structure of the interrogation,"<sup>279</sup> therefore, is set "...to create the impression"<sup>280</sup> "...that the questioning will be relatively risk-free"<sup>281</sup> and that the interrogator is a "benign"<sup>282</sup> figure, yet one who has real power to determine the course<sup>283</sup> of "...the suspect's life,"<sup>284</sup> in light of the circumstances.<sup>285</sup> The second step in the interrogation is for the investigator to convince the suspect that the situation is hopeless<sup>286</sup> for him and that the only thing "...his future holds"<sup>287</sup> is the certainty<sup>288</sup>

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<sup>272</sup> Saul M. Kassin & Gisli H. Gudjonsson. "The Psychology of Confessions: A review of the literature and issues" (2004) 5 *Psychological Science in the Public Interest* 35 at 43.

<sup>273</sup> *Ibid.*

<sup>274</sup> *Ibid.*

<sup>275</sup> *Ibid.*

<sup>276</sup> *Ibid.*

<sup>277</sup> *Ofshe and Leo, Supra* note 24 at 19.

<sup>278</sup> *Bond & Depaulo, supra* note 132 at 21.

<sup>279</sup> *Ofshe and Leo, supra* note 24 at 19.

<sup>280</sup> *Ibid.* at 21.

<sup>281</sup> *Ibid.*

<sup>282</sup> *Ibid.*

<sup>283</sup> *Ibid.*

<sup>284</sup> *Ibid.*

<sup>285</sup> *Ibid.*

<sup>286</sup> *Ibid.* at 17.

<sup>287</sup> *Ibid.* at 21.

of "...arrest, trial, conviction, and punishment."<sup>289</sup> Following the brief "information gathering"<sup>290</sup> phase of the Behavioural Analysis Interview, the investigator will begin the "accusatory phase"<sup>291</sup> of the interrogation,<sup>292</sup> wherein he will point out "contradictions,"<sup>293</sup> confront the suspect with evidence of<sup>294</sup> "...flaws in his story,"<sup>295</sup> he will reveal the evidence that he has, sparingly, so as to counter each move that the suspect makes with a move of his own, and to give the impression that he is in possession of a limitless<sup>296</sup> "...supply of information."<sup>297</sup>

Once a feeling of "hopelessness"<sup>298</sup> has been created, the interrogator will direct his efforts towards convincing the suspect to make an admission of guilt.<sup>299</sup> The proper time in the interrogation for the investigator to 'go for' the confession<sup>300</sup> is "...when the suspect's subjective"<sup>301</sup> belief in the probability that he will leave the interrogation room without charges approaches<sup>302</sup> "zero."<sup>303</sup> When hopelessness has taken root, and the interrogator senses that the suspect's resistance has been lowered, then he will become more forceful.<sup>304</sup> For example, he may indicate to the suspect that "...he is no longer interested in wasting time debating whether or not the suspect committed the crime;"<sup>305</sup> or he "...may summarize the evidence supporting his position yet again and say "all I'm really interested in is why you did it."<sup>306</sup> Moral inducements

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<sup>288</sup> *Ibid.*

<sup>289</sup> *Ibid.*

<sup>290</sup> *Ibid.* at 22.

<sup>291</sup> *Ibid.*

<sup>292</sup> *Ibid.*

<sup>293</sup> *Ibid.*

<sup>294</sup> *Ibid.*

<sup>295</sup> *Ibid.*

<sup>296</sup> *Ibid.*

<sup>297</sup> *Ibid.*

<sup>298</sup> *Ibid.* at 12, 14, and 26.

<sup>299</sup> *Ibid.* at 26.

<sup>300</sup> *Ibid.*

<sup>301</sup> *Ibid.*

<sup>302</sup> *Ibid.*

<sup>303</sup> *Ibid.*

<sup>304</sup> *Ibid.* at 27.

<sup>305</sup> *Ibid.* at 27 and 28.

<sup>306</sup> *Ibid.* at 28.

may be given (along the lines of ‘do the right thing’, ‘be a man’ or ‘be a good Christian’);<sup>307</sup> as well as assurances “...that there are systemic benefits to confessing and systemic punishments for a failing to confess”<sup>308</sup> (such as sentencing benefits, or how the prosecutor or judge’s sympathies will be engaged by a pre-trial confession<sup>309</sup> – both of which tread “dangerously close”<sup>310</sup> to fear of harm and hope of advantage).<sup>311</sup>

More likely to attract issues of voluntariness (but sometimes still used, nevertheless) are the following techniques: the investigator “...may emphasize that he wants to “help” the suspect”<sup>312</sup> in some way, but on the condition that “...the suspect”<sup>313</sup> tell “...his side of the story;”<sup>314</sup> the investigator may threaten<sup>315</sup> or imply “...direct physical harm,”<sup>316</sup> a long jail term<sup>317</sup> or “...directly promise that a confession will result in prosecutorial leniency;”<sup>318</sup> investigators may use maximization and minimization techniques, such as the “accident scenario”<sup>319</sup>, where the investigator offers a version of the facts that, if true, would drastically lower the severity of the charge<sup>320</sup> for the suspect, or the moral culpability of his actions.<sup>321</sup>

The accident scenario functions to “...persuade a suspect that the beneficial consequences of confessing outweigh the harmful consequences.”<sup>322</sup> But proponents of this

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<sup>307</sup> *Ibid.*

<sup>308</sup> *Ibid.*

<sup>309</sup> *Ibid.* at 29.

<sup>310</sup> *Ibid.* at 28.

<sup>311</sup> *Ibid.*

<sup>312</sup> *Ibid.* at 30.

<sup>313</sup> *Ibid.*

<sup>314</sup> *Ibid.*

<sup>315</sup> *Ibid.* at 31

<sup>316</sup> *Ibid.*

<sup>317</sup> *Ibid.*

<sup>318</sup> *Ibid.*

<sup>319</sup> *Ibid.*

<sup>320</sup> *Ibid.* at 31-32.

<sup>321</sup> *Ibid.* at 30-32.

<sup>322</sup> *Ibid.* at 34. See also Saul M. Kassin & Karlyn McNall, “Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication” (1991) 15(3) *Law and Human Behaviour* 233.

technique fail to recognize how coercive it is,<sup>323</sup> rationalizing and defending it<sup>324</sup> “as permissible<sup>325</sup> so long as the interrogator alters only the suspect’s perception, but not reality.”<sup>326</sup> What these proponents “...fail to appreciate”<sup>327</sup> is that “the suspect’s will to resist and whether it is overborne by the conduct of the interrogator,”<sup>328</sup> is “...what is at issue,”<sup>329</sup> and not “whether in the interrogator’s mind his threat or promise is sincere.”<sup>330</sup> From the point of view of the suspect, there is no difference between creating the perception about some kind of “...anticipated punishment”<sup>331</sup> through deception, and an intention to follow through on that threat of punishment.<sup>332</sup> For the suspect, an identical reality has been created in either case.<sup>333</sup>

Research shows that some suspects are more vulnerable to interrogation-room manipulation than others. In a 2003 study of personality traits, Gudjonsson found that individuals scoring “...high on a self-report measure of compliance in social situations are especially vulnerable”<sup>334</sup> to making false confessions “... because of their eagerness to please others and a desire to avoid confrontation, particularly with those in authority.”<sup>335</sup> Additionally, those who suffer from “...poor memories, high levels of anxiety, low self-esteem and a lack of assertiveness”<sup>336</sup> relative to average levels have been found to be susceptible to suggestions and alterations in their memories.<sup>337</sup>

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<sup>323</sup> *Ofshe & Leo, ibid.* at 33.

<sup>324</sup> *Ibid.* at 34

<sup>325</sup> *Ibid.*

<sup>326</sup> *Ibid.*

<sup>327</sup> *Ibid.*

<sup>328</sup> *Ibid.*

<sup>329</sup> *Ibid.*

<sup>330</sup> *Ibid.*

<sup>331</sup> *Ibid.*

<sup>332</sup> *Ibid.*

<sup>333</sup> *Ibid.* at 35.

<sup>334</sup> *Kassin, Appleby & Perillo, supra* note 147 at 43. See also *Gudjonsson, supra* note 24 at 370 – 375.

<sup>335</sup> *Kassin, Appleby & Perillo, Ibid.*

<sup>336</sup> *Ibid.*

<sup>337</sup> *Ibid.*

As previously discussed, King and Snook conducted a 2009 study, in which they analyzed 44 video-recorded interrogations, and showed that,<sup>338</sup> “on average, interrogators used 34% of the components composing the nine-step Reid model.”<sup>339</sup> This data raises the question: why are interrogators only using around one-third of the techniques in any given interrogation?

King and Snook suggest four possible explanations.<sup>340</sup> (i) time limitations upon the interrogation-length may have foreclosed the opportunity to be thoroughgoing and use all of the techniques;<sup>341</sup> (ii) “the officers may have forgotten to”<sup>342</sup> use the other two-thirds of the techniques<sup>343</sup> due to “...the sheer number”<sup>344</sup> of techniques available and the difficulty in remembering them all;<sup>345</sup> (iii) the officers may have received only partial Reid training which did not teach them all of the techniques;<sup>346</sup> or (iv) the officers may have certain views<sup>347</sup> “...about the efficacy of”<sup>348</sup> particular techniques and only used the ones they thought would work.<sup>349</sup> We cannot express any certainty with respect to any of the explanations for why interrogators are only utilizing a portion of the Reid Techniques. It may indicate a fundamental inadequacy with the model itself, whether this is related to the believed-efficacy of the techniques,<sup>350</sup> on the one hand, or is related to the substantial volume and complexity of the method in relation to officers’ capacities to absorb it.

While there is an outside chance that the technique doesn’t actually work to induce confessions, a more convincing criticism holds that it is not that the Reid technique doesn’t get

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<sup>338</sup> *Supra* note 14 at 674.

<sup>339</sup> *Ibid.*

<sup>340</sup> *Ibid.* at 690.

<sup>341</sup> *Ibid.*

<sup>342</sup> *Ibid.*

<sup>343</sup> *Ibid.*

<sup>344</sup> *Ibid.*

<sup>345</sup> *Ibid.*

<sup>346</sup> *Ibid.*

<sup>347</sup> *Ibid.*

<sup>348</sup> *Ibid.*

<sup>349</sup> *Ibid.*

<sup>350</sup> *Ibid.*

confessions out of suspects, but rather that it is not accurately “...diagnostic”<sup>351</sup> of actual guilt<sup>352</sup> because it risks inducing confessions from the innocent.<sup>353</sup> This concern has been decisively confirmed by Brandon Garrett’s recent work on false confessions and wrongful convictions.<sup>354</sup>

Additionally, King and Snook’s 2009 research is supportive of the contention that the Reid Technique elicits incriminating statements (irrespective of the question of their truth or falsity). In that study, the authors make an observation in favour of Reid. That is, that “interrogations ending in partial and full confessions contained a greater proportion of core Reid component use than those ending in no comment or denial. Similarly, interrogations ending in partial and full confessions contained more influence tactics and more coercive strategies than did those ending without a confession.”<sup>355</sup> This leads to the conclusion, as King and Snook point out, that “the increased application of Reid and other influence and coercive strategies are effective in obtaining confessions,”<sup>356</sup> and they suggest that “only through true experimental research can the relationship between the use of more Reid components, influence tactics or coercive strategies and confessions (proportion of true and false) be determined.”<sup>357</sup> The same study by King and Snook found that confessions were negatively “...associated with the number of discouraged denials but were positively associated with the number of alternative questions provided,”<sup>358</sup> suggesting that some techniques may be more likely to provoke a confession than others. By the same token, some techniques may be more likely to provoke a *false* confession than others.

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<sup>351</sup> *Supra* note 156.

<sup>352</sup> *Ibid.*

<sup>353</sup> *Ibid.*

<sup>354</sup> *Supra* note 36.

<sup>355</sup> *Supra* note 14 at 690.

<sup>356</sup> *Ibid.*

<sup>357</sup> *Ibid.*

<sup>358</sup> *Ibid.* at 674.

One of the difficulties with this line of research, as King and Snook later note, is the fact that the relationship between the "...amount of strategy used and confession outcome"<sup>359</sup> may be "spurious,"<sup>360</sup> as Richard Leo originally pointed out.<sup>361</sup> "First, the ability to obtain a confession may simply be due to the amount of *effort* put into the interrogation"<sup>362</sup> – a longer interrogation will mean more techniques are tried, and the likelihood that the interrogator finds one that works increases.<sup>363</sup> According to this view, it would not only be the psychologically manipulative tactics *per se* that influenced the suspect to give the confession; rather it would be the duration and persistence of the interrogation.<sup>364</sup> Second, "...is that more components, influence tactics, and coercive strategies are employed in those interrogations that are perceived to have a promising outcome (e.g. where guilt appears certain, where there is strong evidence, or where a confession is fully or partially made early into the interrogation)."<sup>365</sup> When interrogators identify the prospect of a more promising chance of getting a confession out of the suspect, they will expend greater effort (and more tactics) to make sure that they get one.<sup>366</sup> So the interrogator may have used more psychologically manipulative tactics, but it is not clear whether the use of those tactics really caused the confession to be given, since the "preinterrogation variables"<sup>367</sup> were rather suggestive of guilt anyway. This seems to amount to saying that the likelihood of getting a confession is strongly influenced by the strength of the case against the suspect.

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<sup>359</sup> *Ibid.* at 690.

<sup>360</sup> *Ibid.*

<sup>361</sup> *Ibid.*

<sup>362</sup> *Ibid.*

<sup>363</sup> *Ibid.* A "post-hoc analysis" of the data garnered in this experiment showed that there is "...a positive relationship between the length of an interrogation ("a crude estimate of effort") and "interrogation outcome" (*Ibid.*) (i.e. whether a confession, whether true or false, was made).

<sup>364</sup> *Ibid.*

<sup>365</sup> *Ibid.*

<sup>366</sup> *Ibid.* King and Snook write at 690-91: "This ... is supported by research showing the tactics employed by interrogators have little effect on interrogation outcome (Baldwin 1993; Mosten & Stephenson, 1993). Future investigation should examine the possibility of using preinterrogation variables to predict interrogation outcome".

<sup>367</sup> *Ibid.* at 691.

The explanation put forward would be that tactics employed by interrogators have little effect on interrogation outcome and that “preinterrogation variables”<sup>368</sup> may be the factor having the greatest impact on whether a confession is ultimately made.

While the research potentially allows for the conclusion that the degree to which psychologically manipulative techniques are used is proportional to the likelihood of inducing a suspect to give a confession (though this is not a certainty, as Professor Leo’s research reveals), there is simply no way of knowing whether any confession given was a true or a false one unless post-conviction DNA testing is available. As discussed previously, the ratio of true to false confessions is not an object that is capable of reliable measurement. Therefore, I am extremely skeptical of King and Snook’s claim that “true experimentation”<sup>369</sup> will be able to establish the “...relationship between the use of”<sup>370</sup> particular psychologically manipulative interrogation techniques and strategies, and the true or false confessions (respectively) that result from their use.<sup>371</sup> A much more promising avenue is, in the first instance, to pay close attention to the narratives that have been provided by those convicted because a confession that was proven false by DNA testing. Looking closely at the interrogations that led to false confessions in these cases provides the most insight into the extent of the danger. In this way, researchers can access the subjective experiences of the interrogated detainees and link them to the techniques that were being used. It may even be appropriate to similarly consult the post-exoneration narratives of the interrogating officers to determine their subjective intent at various points during the interrogation, though this approach is debatable. It may be helpful to review the tapes alongside

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<sup>368</sup> *Ibid.*

<sup>369</sup> See King and Snook, whereby reference is made “true experimental research” (*Ibid.* at 690) as key to discovering “...the relationship between the use of more Reid components” (*Ibid.* at 690) and true and false confessions. – (*Ibid.* at 690).

<sup>370</sup> *Ibid.*

<sup>371</sup> *Ibid.*



the interrogator and the exonerated detainee, respectively, and stop the tape at key junctures in the interview to query the subject about what they were thinking and feeling. Once this data has been collected and the pool of research subjects (i.e. officers and exonerees) has been exhausted, researchers will have to carefully compare the data that has been collected and try to identify patterns that can lead to statistical tendencies about which techniques and approaches achieve what kind of results, and to what degree the personal temperaments and disposition of the interrogating officers and detainees influenced the outcome in the situation. Such an approach would be very sloppy science, at best, however it may be the most scientifically rigorous approach that is available to researchers under the circumstances, and it may have to do.

King and Snook's proposal for true experimentation suffers from an even greater amount of uncertainty and lends itself to drawing unreliable (inadequately testable) conclusions. Let us suppose that some ingenious method of measuring the ratio between true and false confessions prompted by the use of a particular technique could be devised just from watching interrogation videos. This would allow us to find the answer to a very important question that the current research leads us to ask. It is established that using a greater number of psychologically manipulative tactics correlates (whether causatively or spuriously) to an increased propensity on the part of a suspect to make a confession. We cannot quantify the degree of manipulation of any given tactic used or the degree of manipulation perceived by a suspect, although if we could do so, it would assist us to establish the claim that the more manipulation used, the greater the likelihood that a confession will be given (as suggested, in my view, by King and Snook's research). The question that arises if we accept the premise that more manipulation means a greater propensity to confess is this: Does a greater degree of psychological manipulation also increase the propensity to give a *false* confession? That is, what proportion of the increase in the

likelihood of suspects to make a confession in response to psychologically manipulative interrogation techniques is attributable to those suspects being in some way incentivized to make a false confession or actually becoming (mistakenly) convinced that they committed the offence?

As I have suggested, without a method to accurately measure the relationship between true and false confessions, there is no way (that I can see) of reliably answering this question. However, it is not difficult, on the basis of forensic psychologists' valuable work on the reasons that false confessions are given, to hypothesize (without the capability to verify or disprove one's hypotheses according to the rigours of scientific proof), how it is that an increase in manipulation could incentivize a suspect to make a confession of some kind, indicating guilt, regardless of whether he was, in actual fact, guilty.

#### **Criticisms of the Post-Admission Narrative: Steps Eight and Nine**

The post-admission narrative will include a detailed narrative of how the offence occurred<sup>372</sup> and that includes<sup>373</sup> "his motive, his planning, the circumstances leading up to the crime, how he executed it, facts about the crime scene and the location of evidence unknown to the police."<sup>374</sup>

Notwithstanding the fact that investigators "...are not trained to recognize"<sup>375</sup> it, a "...post-admission narrative can also provide"<sup>376</sup> evidence that would assist "...to prove a suspect's innocence"<sup>377</sup> in false confession cases.<sup>378</sup> According to Ofshe and Leo, while a post-admission narrative that is consistent with guilt can provide almost irrefutable evidence that a

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<sup>372</sup> *Ofshe & Leo, supra* note 24 at 18.

<sup>373</sup> *Ibid.*

<sup>374</sup> *Ibid.*

<sup>375</sup> *Ibid.* at 17.

<sup>376</sup> *Ibid.*

<sup>377</sup> *Ibid.*

<sup>378</sup> *Ibid.*

suspect committed the crime,<sup>379</sup> a confession that is inconsistent with guilt can “generate persuasive evidence showing that he has no actual knowledge of the crime”<sup>380</sup>, if investigators carry out “...a thorough post-admission information gathering exercise.”<sup>381</sup>

Ofshe and Leo further argue that “A post-admission narrative that is riddled with errors, demonstrating the suspect’s inability to correctly describe significant facts, inability to provide corroboration (e.g. correct information regarding the missing murder weapon, loot, etc.) and inability to contribute a host of specific details the perpetrator should know must lead to the conclusion that the suspect is ignorant of the crime.”<sup>382</sup>

The fit between the suspect’s post-admission narrative and the evidence that the police have already obtained outlining the factual circumstances of the crime, will provide strong evidence, Professors Ofshe and Leo contend, about whether the suspect possesses actual knowledge of the crime or is ignorant of information that would only be known by the perpetrator.<sup>383</sup>

But Professor Garrett’s research shows why the intuitive assumptions of Professors Ofshe and Leo are, in reality, problematic.

In addition to the criticism that follows from Professor Garrett’s research conclusions, the argument is susceptible to critique from a pre-interrogation perspective, as well. It may be that in cases where there is no independent evidence corroborating the details described in the post-admission narrative, or the external evidence conflicts with the accused’s post-admission account, the suspect is almost certainly innocent. However Ofshe and Leo appear not to have considered the first retort that comes to mind, and undoubtedly one that the proponents of

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<sup>379</sup> *Ibid.* at 18.

<sup>380</sup> *Ibid.* at 19.

<sup>381</sup> *Ibid.* at 18-19.

<sup>382</sup> *Ibid.* at 19.

<sup>383</sup> *Ibid.*

psychological interrogation will rely upon. They will say that even though the interrogators managed to “persuade” the suspect to admit to committing the crime, the guilty suspect then provided false information about the details on purpose to improve his chances of beating the charge at trial. It would not require a great deal of sophistication on the part of a guilty suspect to determine that such a strategy would be better than the alternative, which would be to provide a true story that essentially sealed his fate at trial. By fabricating false details about the crime, the suspect may believe he is giving his lawyer something to work with in the courtroom, and therefore he has a reason to do it, particularly when the alternative is to have nothing to work with. Therefore, it is very difficult to determine with certainty from the degree of the accuracy of the details provided in a post-admission narrative, whether the suspect is innocent or guilty.

Inaccurate details could indicate either an innocent suspect, or a guilty one who is trying to ‘outsmart the system’. As Ofshe and Leo note “A guilty suspect may be thought of as engaging in a game with the interrogator in which each has as his goal manipulating and deceiving the opponent.”<sup>384</sup> If, for whatever reason, the guilty suspect ends up confessing to the crime, then how can we be certain that his capitulation in the face of pressure is complete? He may continue trying to deceive and manipulate investigators to his perceived advantage.

But the argument against over-reliance upon post-confession details that comes to us through Professor Garrett’s research is the more compelling of the two. Even if the details are accurate, the confession may still be a false one, because it was engineered by the police and the suspect was fed facts (deliberately or even inadvertently) which were then repeated back later.

Hence, in view of the fact that manipulation can include the purposeful or unintentional feeding of investigative facts to a suspect, relying on the post-confession narrative to bolster the credibility of the confession may be a misguided approach.

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<sup>384</sup> *Ibid.*

### **The Strategies and Tactics of the Reid Technique:**

Of the 25 identified manipulative and coercive interrogation techniques, Reid advocates heavy reliance upon a few in particular, to be used in conjunction with some general interrogation concepts. The general concepts fit within the nine-step Reid interrogation framework. But the interrogation tactics are also intended to fit-together in a particular way. Developing a theme and then posing an alternative question is the main technique that is relied upon.<sup>385</sup> This is done by the investigator engaging in a monologue<sup>386</sup> of which the investigator must be particularly attentive to the delivery, because posing an alternative question after the delivery of a monologue that was either too short or otherwise unconvincing will likely result in a suspect's denial of guilt.<sup>387</sup> The Reid Institute recommends that during a theme-development monologue the interviewer (i) talk slowly and convey sincerity and understanding with each statement and action;<sup>388</sup> (ii) use "...a third person theme"<sup>389</sup> to prevent the suspect from denial;<sup>390</sup> or (iii) use a "personal story."<sup>391</sup>

The route to get to an alternative question and eventually to a confession is through theme-development.<sup>392</sup> It is thought that suspects will rely upon "...defence mechanisms"<sup>393</sup> during an interrogation. The three most commonly relied-upon are "projection, rationalization, and minimization (RPMs)."<sup>394</sup> Rationalization re-describes the intent behind a behaviour to

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<sup>385</sup> *Jayne & Buckley, supra* note 10 at 191.

<sup>386</sup> *Ibid.* at 13.

<sup>387</sup> *Ibid.* at 165.

<sup>388</sup> *Ibid.*

<sup>389</sup> *Ibid.*

<sup>390</sup> *Ibid.* at 166; That is, discuss a situation which is removed from the suspect's case. This may be a fictitious case.

<sup>391</sup> *Ibid.* at 168; That is, when the interrogator tells the suspect that he has done something similar to what the suspect is accused of.

<sup>392</sup> *Ibid.* at 15.

<sup>393</sup> *Ibid.* at 146.

<sup>394</sup> *Ibid.*

present it in a more acceptable light.<sup>395</sup> Commission of the crime for “honourable reasons”<sup>396</sup> or unintentionally<sup>397</sup> are “...two common rationalizations.”<sup>398</sup> Projection is when the suspect places the blame for his actions onto other people or events.<sup>399</sup> “Minimization is a two-part defence mechanism,”<sup>400</sup> where the suspect first assumes that others share his “...attitudes or behaviour (identification)”<sup>401</sup> and second, that in comparison to these other people, the suspect’s behaviour “...is not nearly as bad.”<sup>402</sup> Usually one defence mechanism will be predominately relied-upon,<sup>403</sup> and it is useful for the interrogator to identify which one it is, so that he may tailor a theme around that defence mechanism.<sup>404</sup>

The Reid Institute theory behind defence mechanisms is as follows:

At the time of committing a criminal act, most suspects utilize a defence mechanism to help reduce the guilt associated with the offence. The defence mechanism continues to be effective during the Behaviour Analysis Interview up until the direct positive confrontation of the interrogation. At the outset of the interrogation, the suspect suppresses the previously held defence mechanism and is psychologically focused on the consequences associated with his act. During theme development, therefore, the investigator reintroduces and reinforces the latent defence mechanism, which was in force at the time the crime was committed. By reinforcing the suspect’s own defence mechanism during theme development, the investigator allows the suspect to cognitively reduce the perceived consequences of his act.<sup>405</sup>

It is thought to be important to the outcome of an interrogation to select the right theme for the right suspect. Thus, “If the investigator can identify which defence mechanism the suspect used in conjunction with his offense, the investigator has also identified which theme

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<sup>395</sup> *Ibid.*

<sup>396</sup> *Ibid.*

<sup>397</sup> *Ibid.*

<sup>398</sup> *Ibid.*

<sup>399</sup> *Ibid.*

<sup>400</sup> *Ibid.* at 147.

<sup>401</sup> *Ibid.*

<sup>402</sup> *Ibid.*

<sup>403</sup> *Ibid.*

<sup>404</sup> *Ibid.*

<sup>405</sup> *Ibid.* The authors further note in a footnote that: “It should be made clear that at no time should the investigator make promises of leniency, or imply to the suspect that if he committed the crime for what he believed to be an acceptable reason that the consequences will be less. This, however, does not preclude the suspect, through wishful thinking, to form these beliefs of his own accord.”

will be most productive in eliciting a confession.”<sup>406</sup> “...A shotgun approach,”<sup>407</sup> where all of the defence mechanism themes are used should be avoided, it is thought, because each time an investigator selects the incorrect one, he will lose credibility – “an absolutely essential”<sup>408</sup> quality to convey for an interrogation to succeed.<sup>409</sup>

### **The Ethics of the Reid Technique:**

An additional issue that deserves critical consideration is the question of whether or not it is ethically justifiable to use the Reid interrogation technique at all? Whereas most of the foregoing discussion has centered on false confessions and the broader issue of reliability, we should give some consideration to the issue of whether these interrogations are sufficiently humane.

Psychologically manipulative interrogation engages issues of privacy, autonomy and human dignity.<sup>410</sup>

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<sup>406</sup> *Ibid.* at 148. The authors contend that “to hold an Behavioural Analysis Interview before the interrogation will assist the interrogator to “...identify which defence mechanism” was used “...in association with the crime,” as well as assessing truthfulness. Defence mechanisms can be identified, it is argued, when the accused makes “introspective statements” during the non-accusatory interview, that is, when they editorialize answers to yes or no questions, they often betray one of the defence mechanisms. “Behaviour provoking questions” can also be used to elicit responses that may betray defence mechanisms.

<sup>407</sup> *Ibid.* at 153.

<sup>408</sup> *Ibid.*

<sup>409</sup> *Ibid.*

<sup>410</sup> *Supra* note 156 at 4. The following confession was given by a Hamilton man who was a retired school teacher. He described his own interrogation which induced a confession to sexual touching that was ultimately excluded at trial. This individual who experienced an interrogation reports:

I had never been in any kind of trouble in my life and always respected authority. This was the worst day of my life. I trusted the officer who was going to interview me. I decided I would answer all his questions. He started out being very friendly but then he got into a badgering mode and he was getting angry. I am not comfortable with confrontations and never have been. I often give in to arguments easily. He kept badgering me. He assumed I did it. I was finally manipulated into saying “I’m sorry for it” but I meant sorry for what had happened and he assumed I was saying I did it. I was totally frustrated with his badgering and putting words in my mouth. I started to go along with some of his statements about me. I felt beaten down. He kept saying things about me and then getting angry if I denied them. I felt totally helpless. My denials were thrown back at me in anger. I felt I had no other options because all my life I have respected authority. It was a long interview and I was totally exhausted by it and I wanted it to end. I actually did not say that I had touched that girl. In essence, he did all the talking and expected me to agree with him. I simply agreed with authority to get it over with after an exasperating 2 hours. I tried to be vague with my answers and humor him. I simply made up a lot of stuff. (*Ibid* at 5.)

Jerome H. Skolnick and Richard A. Leo observe that: “Although we share a common moral sense in the West that police torture of criminal suspects is so offensive as to be impermissible – a sentiment ... reaffirmed by the violent images of the Rodney King beating – the propriety of deception by police is not nearly so clear. The law reflects this ambiguity by being inconsistent, even confusing.”<sup>411</sup>

False confessions negatively impact the other dimensions of a criminal investigation.<sup>412</sup> “Once a suspect confesses, investigators may ignore other leads and focus only on finding evidence that further implicates the suspect.”<sup>413</sup> When ambiguous evidence is discovered, it “will be interpreted as indicative of guilt,”<sup>414</sup> whereas exculpatory evidence “...will be ignored or discredited.”<sup>415</sup> “Witnesses and alibis may also be affected by the false confession,”<sup>416</sup> as they may change their recollections “...based on the suspect’s confession.”<sup>417</sup>

#### **B. How do Suspects React to Police Interrogation Tactics: The Causes of False Confessions**

Two types of police induced false confessions<sup>418</sup> are recognized in the literature on the subject:<sup>419</sup> those in which the suspect falsely comes to believe that he is guilty of the offence he confess and those in which he does not.<sup>420</sup> When a suspect, through interrogation process, is actually falsely persuaded that he has committed the crime, the confession he gives is called an

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<sup>411</sup> Jerome H. Skolnick & Richard H. Leo, “The Ethics of Deceptive Interrogation” (1992) 11 *Crim. Just. Ethics* 3 at 3. For example, the authors note that “...the police are permitted to pose as drug dealers but not to use deceptive tactics to gain entry without a search warrant, nor are they permitted to falsify an affidavit to obtain a search warrant.” (pg. 1) Additionally, the permissibility of deception varies at different stages “...of the criminal process.” (pg. 1) Police can (and do) lie “...during the investigation of crime,” (pg. 1) especially in undercover operations, they may be permitted to lie or not during custodial interrogations depending upon the circumstances and how they go about it (pg. 1), and they are unequivocally prohibited from lying in the courtroom (pg. 1).

<sup>412</sup> Steven Smith, Veronica Stinson and Marc Patry, “Confession Evidence in Canada: Psychological Issues and Legal Landscapes” in (2010) *Psychology, Crime and Law* 317 at 322.

<sup>413</sup> *Ibid.*

<sup>414</sup> *Ibid.*

<sup>415</sup> *Ibid.*

<sup>416</sup> *Ibid.*

<sup>417</sup> *Ibid.*

<sup>418</sup> *Gudjonsson, Supra* note 24 at 165.

<sup>419</sup> J.P. Blair, “A Test of the Unusual False Confession Perspective” (2005) 41(2) *Criminal Law Bulletin* 127 at 127 and 128.

<sup>420</sup> *Ibid.* at 127-128; and *Ofshe & Leo, supra* note 24 at 35-39.



“internalized false confession.”<sup>421</sup> When the false confessor is not actually persuaded that he committed the crime, but confesses anyway in response to interrogation, the confession he gives is referred to as a “compliant false confession”.<sup>422</sup> In addition to a confession being either internalized or compliant, it may also be classified as being either “voluntary” or “coerced”, depending upon how it was obtained.<sup>423</sup> Hence, a confession may be a voluntary-true-confession, a voluntary-false-confession (which, it is believed, is a rare occurrence), a coerced-internalized-confession, or a coerced-compliant-confession.<sup>424</sup> The research in which King and Snook analyzed 44 videotaped interrogations, shows that “Approximately 27% of the interrogations met Leo’s criteria for a coercive interrogation.”<sup>425</sup>

A voluntary false confession happens “...when someone voluntarily confesses to a crime that he or she did not commit without any elicitation from the police.”<sup>426</sup> People may make a voluntary false confession for a number of reasons,<sup>427</sup> including: (i) the “desire for notoriety;”<sup>428</sup> (ii) an inability “...to distinguish fact from fantasy;”<sup>429</sup> (iii) a “...need to make up for feelings of guilt”<sup>430</sup> (for something unrelated to the offence) and receive punishment; or (iv) “...a desire to protect somebody else from harm.”<sup>431</sup>

It may seem unlikely to those lacking familiarity with the scholarship on false confessions that anyone would voluntarily confess to a crime that they did not commit, due to the

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<sup>421</sup> Blair, *Ibid.*

<sup>422</sup> *Ibid.*

<sup>423</sup> Ofshe & Leo, *supra* note 24 at 35.

<sup>424</sup> *Ibid.*

<sup>425</sup> *Supra* note 14 at 674.

<sup>426</sup> Joanna Pozzulo, Craig Bennell & Adelle Forth, “False Confessions” in Chapter Four “The Psychology of Police Interrogations”, in *Forensic Psychology* (Toronto: Pearson Prentice Hall, 2006) at 98.

<sup>427</sup> *Ibid.*

<sup>428</sup> *Ibid.*

<sup>429</sup> *Ibid.*

<sup>430</sup> *Ibid.*

<sup>431</sup> *Ibid.*

apparent irrationality of such an admission. However, there are a significant number of documented cases of *voluntary* false confessions.<sup>432</sup>

A coerced-internalized false confession is thought to follow a three-step process.<sup>433</sup> First, the interrogator “attacks the suspect’s confidence”<sup>434</sup> “...in his memory.”<sup>435</sup> Next the interrogator will suggest that the suspect committed the crime but does not remember having committed it due to some kind of “amnesia,”<sup>436</sup> blackout or other failing of memory.<sup>437</sup> Finally, after the accused accepts that “...he *must* have committed the crime,”<sup>438</sup> the interrogator and the accused “work together” to produce a detailed confession.<sup>439</sup> As in the case of voluntary false confessions, the notion may sound outlandish, to a reader who is unfamiliar with the body of research surrounding confessions, that an innocent person, in the absence of some kind of mental handicap or psychiatric illness, could actually be made to believe that they are guilty of committing a crime. Research indicates that it does happen, however.

In a 1996 study, Kassin and Kiechel “accused subjects of causing a desktop computer to crash by hitting a key that they were specifically told not to push. All subjects were innocent. Yet among those who were forced to type quickly (a procedure which rendered them vulnerable to manipulation) *and* who were presented with false incriminating evidence (in the form of a confederate-eyewitness), 100% signed a confession, 65% internalized a belief in their own guilt, and 35% confabulated details to fit that newly created belief.”<sup>440</sup> Professor Timothy Moore tells us that “false beliefs can be cultivated by the interrogator’s use of pseudo-technical explanations

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<sup>432</sup> See Professor Garrett’s article, *supra* note 36.

<sup>433</sup> *Leo*, *supra* note 24 at 43; *Gudjonsson*, *supra* note 24.

<sup>434</sup> *Leo*, *ibid.*

<sup>435</sup> *Ibid.*

<sup>436</sup> *Ibid.*

<sup>437</sup> *Ibid.*

<sup>438</sup> *Ibid.*

<sup>439</sup> *Ibid.* at 43-44.

<sup>440</sup> *Kassin, Goldstein, and Savitsky*, *supra* note 137.

of how the crime could have occurred without the culprit's conscious awareness."<sup>441</sup> He recounts, as an example, the case of Michael Crowe. Crowe confessed to killing his sister, maintaining that he must have "...somehow blocked the event from his memory."<sup>442</sup> This was "...after three lengthy interrogation sessions during which incriminating (but false) evidence was presented to him."<sup>443</sup> Research by Kassin and Keichel shows the power of false evidence to both induce false confessions and to contribute to "internalized guilt"<sup>444</sup> and the confabulation of "concocted supportive details."<sup>445</sup>

The causes of the third type of false confession, coerced-compliant false confessions, are a matter of some debate. One perspective, termed in the literature, the "unusual perspective,"<sup>446</sup> is that the use of "...legally coercive interrogation tactics may overwhelm the rational restraints that would normally keep innocent suspects from confessing falsely."<sup>447</sup> Examples of the types of tactics believed to induce coerced-compliant false confessions according to the "unusual perspective"<sup>448</sup> include: "...physical force; denial of food, sleep or bathroom; explicit threats of punishment; explicit promises of leniency; and extremely lengthy interrogations."<sup>449</sup> This perspective also contemplates the likelihood<sup>450</sup> "...that false confessions may occur when cognitively sub-normal individuals are exposed to normal, legally permissible interrogation

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<sup>441</sup> *Supra* note 98 at 12.

<sup>442</sup> *Ibid.*

<sup>443</sup> *Ibid.*; S.A. Drizin & B.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 G. Daniel Lassiter (Ed.), *Interrogations, confessions, and entrapment* (pp. 127-162) (New York: Plenum, 2004). Michael Crowe and his two co-accused Joshua Treadway and Aaron Houser were later exonerated as the DNA of the victim and her blood were found on the clothing of a homeless transient suspect, Richard Raymond Tuite. See: Mark Sauer, "Michael Crowe found 'factually innocent' in sister's murder" *KPBS News* (22 May, 2012), online: <http://www.kpbs.org/news/2012/may/22/michael-crowe-found-factually-innocent-sisters-mur/>.

<sup>444</sup> *Supra* note 272 at 54.

<sup>445</sup> *Ibid.* See also Saul M. Kassin & Katherine L. Keichel. "The social psychology of false confessions: Compliance, internalization, and confabulation", (1996) 7 *Psychological Science* 125.

<sup>446</sup> *Supra* note 419 at 129.

<sup>447</sup> *Ibid.*

<sup>448</sup> *Ibid.*

<sup>449</sup> *Ibid.* at 128-129.

<sup>450</sup> *Ibid.* at 129.

tactics.”<sup>451</sup> The two recognized categories of susceptible persons<sup>452</sup> are “...the mentally handicapped”<sup>453</sup> (i.e. those with a mental illness or low intelligence); and “juveniles.”<sup>454</sup> Professor Timothy Moore notes that persons with Fetal Alcohol Syndrome Disorder (FASD) are at particularly high risk for giving false confessions under interrogation due to their cognitive deficits,<sup>455</sup> and that this is particularly troubling since “critical aspects of FASD,”<sup>456</sup> including “organic brain damage and the concomitant cognitive shortfalls – are invisible to the naïve observer, thus allowing the police, counsel and the courts to ‘miss’ the underlying pathology.”<sup>457</sup>

Notably, the presence of one or more of the three factors (youth, low intelligence or other mental handicap and the presence of fairly explicit coercion) is thought to create a necessary but not sufficient condition-precedent for a confession – that is to say, that just because a factor was present does not necessarily mean that it caused the confession that was given, but that it *may* have done so.

The “ordinary perspective”<sup>458</sup> on false confessions, which is the perspective I adhere to, does not reject the claims that the youth and the mentally challenged may be particularly susceptible to coercive interrogation techniques.<sup>459</sup> Rather, proponents of the ordinary perspective widen the scope,<sup>460</sup> and take the view that “contemporary methods of psychological interrogation can, and sometimes do, cause cognitively and intellectually normal individuals to

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<sup>451</sup> *Ibid.*

<sup>452</sup> *Ibid.*

<sup>453</sup> *Ibid.*

<sup>454</sup> *Ibid.*

<sup>455</sup> Timothy E. Moore & Melvyn Green, “Fetal Alcohol Syndrome Disorder (FASD): A Need for Closer Examination by the Criminal Justice System” (2004) 19 C.R. (6<sup>th</sup>) 99 at 1-2.

<sup>456</sup> *Ibid.*

<sup>457</sup> *Ibid.* at 1-2.

<sup>458</sup> *Supra* note 419 at 131.

<sup>459</sup> *Ibid.* at 129.

<sup>460</sup> *Ibid.*

give false confessions to serious crimes of which they are entirely innocent.”<sup>461</sup> According to this view, compliant confessions<sup>462</sup> are “...induced through a two-step process,”<sup>463</sup> which may cause either true or false confessions.<sup>464</sup> The first step requires that the interrogator creates a helpless situation for the accused.<sup>465</sup> The second step involves the interrogator offering promises to the accused to make him believe that confession is the only way for him to improve his otherwise helpless situation.<sup>466</sup>

The creation of a perception on the part of a suspect that it may be better to confess may be motivated by either or both of two techniques:<sup>467</sup> the “hard sell,”<sup>468</sup> where the interrogator engages in “maximization,”<sup>469</sup> so as “...to increase the subject’s perceptions of the negative consequences of continuing to deny having committed the crime;”<sup>470</sup> and the “soft-sell”, where the interrogator seeks to minimize the accused’s<sup>471</sup> “...perception of the negative consequences of confessing.”<sup>472</sup> These techniques are alternatively referred to simply as “maximization” and “minimization.”<sup>473</sup> The minimization and maximization techniques may not amount to “...explicit threats or promises,”<sup>474</sup> but from the perspective of the ordinary false confession, the use of these techniques may<sup>475</sup> “...communicate promises of leniency and threats of punishment to suspects that are similar to the explicit threats of punishment and promises of leniency that are

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<sup>461</sup> *Leo, Supra* note 24 at 37.

<sup>462</sup> *Supra* note 419 at 130.

<sup>463</sup> *Ibid.*

<sup>464</sup> *Ibid.*

<sup>465</sup> *Ibid.* see also *Leo, supra* note 24 at 38.

<sup>466</sup> *Blair, Ibid.*; See also *Leo, Ibid.* at 39.

<sup>467</sup> *Blair, Ibid.*

<sup>468</sup> *Blair, Ibid.* at 131.

<sup>469</sup> *Ibid.* at 130.

<sup>470</sup> *Ibid.*

<sup>471</sup> *Ibid.*

<sup>472</sup> *Ibid.*

<sup>473</sup> *Ibid.* at 136.

<sup>474</sup> *Ibid.* at 131.

<sup>475</sup> *Ibid.*

prohibited by law.”<sup>476</sup> Those who take the position, as I do, that modern psychological techniques of interrogation create a significant risk of provoking a false confession recognize that a person may perceive threats or negative consequences from speech-acts that fall short of explicit threats, and may perceive benefits and advantages to be gained from speech-acts that fall short of a *quid pro quo* inducement. Interrogators may use subtle techniques of psychological manipulation to produce in their subjects the perception of threats and inducements which may have a very similar effect upon the subject as explicit threats or inducements. The contemporary jurisprudence on the voluntariness of confessions (reviewed in Chapter 1), by providing insufficient protection to suspects and too much leeway for police interrogators, has created a gray-area where there are loopholes to be found, which police interrogators have developed tested-techniques to exploit. The courts have prohibited the use of the “third degree” to beat incriminating statements from detained suspects. They have also, to their credit, prohibited the conversational blunt-instrument of the explicit threat or inducement from use. But brute force and overt threats are not the only way to extract a confession. , What “police-scientists” have developed in response to the law’s clumsy constraints are more surgical psychological methods of extracting confessions, requiring a delicate management of suspects’ perceptions in the interrogation room.

The questions, respectively, of whether a suspect’s confession is true or false, and whether, if false, his belief in the truth of the confession’s contents has been internalized,<sup>477</sup> or alternatively he is merely complying in order to gain a perceived benefit in the circumstances, are ones that cannot be accurately answered by watching the behaviour of suspects caught on video. The answer to the question of whether a suspect’s confession is true or false may,

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<sup>476</sup> *Ibid.*

<sup>477</sup> Kassin, Appleby & Perillo, *supra* note 147 at 45.

according to the limitations of today's technology, only be determined by having recourse to DNA testing (where available). It is through this method that false confessions that were once believed to be true may be proven false, with almost absolute certainty. I explore some recent research on post-conviction DNA exonerations, as they relate to false confessions, in the next chapter.<sup>478</sup>

The question of whether a false confession was internalized by the suspect or was given to comply with the perceived wishes of the investigating officer, and thereby hope to procure some advantage or minimize culpability with respect to the prosecution of the charged offence, may best be answered with sufficient credibility by a DNA-validated exoneree through his or her provision of some kind of post-exoneration narrative. Asking persons who were wrongfully convicted on the basis of confession evidence, and then subsequently exonerated, to describe how they came to make a false confession is the most accurate way to gain insight into the respective frequencies of internalized versus compliant false confessions.

All of this is to say that watching videotapes of interrogations and attempting to discern whether coercive, manipulative or deceitful techniques have been deployed by the interrogator, while valuable to some extent, will only take us so far. It can only tell us whether it *appears* that the officer coerced a confession from the suspect, by watching the words and actions and reactions of the officer and the suspect.

But to know definitively whether the resulting confession was false, and if it was, why it was given, we must consult the victims of wrongful convictions and give them an opportunity to tell their side of the story. It is from such narratives that penetrating insights about the dangers of modern-day custodial interrogation may be drawn, and prospective avenues for reform may be more confidently discussed. In these endeavours we shall be greatly assisted by Professor

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<sup>478</sup> *Supra* note 36.

Garrett, whose recent article “The Substance of False Confessions”, published in the *Stanford Law Review*, provides much needed research in this crucial area, and whose insights future researchers in this area, no doubt, will owe a debt of gratitude.

### **Conclusion:**

The Reid Technique creates a substantial risk of railroading innocent suspects into false confessions and should be eliminated from use. Although, when the technique is correctly applied, it is within the permissible boundaries of Canadian confession law, it nevertheless operates to create an enormous risk that an involuntary statement will be given and that a wrongful conviction may result.

There are several problems with the Reid interrogation method. First, it promotes tunnel vision and is over-reliant upon stereotyping and reductionism. During the factual analysis, incorrect conclusions about likely guilt may be drawn from suspicious characteristics, attributes, or happenstance relating to the suspect. Whereas these indicators could be consistent with factual guilt, they may also be explained by other reasons. By mentally treating every fact as being on one side or the other of a ledger of probable guilt, interrogators run the risk of unfairly entering into an interrogation room with a litany of strikes against the accused weighing in favour of guilt, and many details with which to trip him up – even if he is innocent. The factual analysis may, in this way, give rise to an early “confirmation bias,”<sup>479</sup> towards a suspect’s guilt.

Tunnel vision is further promoted by use of the behavioural analysis interview. Tainted by an analysis of the evidence which suggests relying on “rules of thumb” (which are little more than untested assumptions and stereotypes) to ascertain the likelihood of factual guilt, the interrogator enters the austere environs of the interrogation room to find a suspect who has been isolated from all contact with others, save a brief discussion with his counsel where that right has

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<sup>479</sup> *Kassin, Goldstein & Savitsky, supra* note 137 at 189.



been exercised, who is left with the unmistakable impression that he may be in serious trouble and that his liberty is at stake. His nerves are likely wracked by his uncertainty and lack of a nuanced understanding of the situation he finds himself in. A person in custodial interrogation is unmistakably under state control, and wants what any human in such a situation wants: to be free. As a result, in all likelihood, he is nervous.

The Reid Institute has provided a list of behavioural indicators which it sees as indicating guilt. Underlying these “tell tale” signs of guilt, there is a cause, it is believed. For the Reid Institute, the presence of these indicators means that a person is trying to hide their guilt.<sup>480</sup> Of course, there are other explanations for why someone might display the kind of shifty body-language that would appear to indicate a guilty demeanour. Chief among these reasons is the sheer fear and apprehension that is created in the psyche of the suspect due to his isolation and the fact of his control by the state. The situation, understandably, makes him nervous. Another reason may simply be that the suspect is someone who has weird mannerisms. The data indicates that people are remarkably poor detectors of deception by non-verbal cues alone.<sup>481</sup> Thus, teaching interrogators to rely upon these indicators creates a tendency for interrogators to see suspects in guilty terms and this affects the character of the interrogation phase that follows. It is guilt presumptive, and the goal is to extract a confession or incriminating statements, not to have any kind of neutral dialogue, and not to clear up misunderstandings. In other words, the object is to get a confession; not to get at the truth.

With the bias confirmed, Reid Interrogators have a number of tactics that they use to create the perception by the suspect of pressures and inducements whilst evading the *quid pro quo* that may lead to a confession being excluded from evidence at trial. The kinds of questions

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<sup>480</sup> *Supra* note 154 at 25.

<sup>481</sup> *Ibid.* at 3-25.

that interrogators ask are confirmatory of guilt, they place suspects on the defensive, and they are tactically designed to incentivize a response. In some significant number of instances, the atmosphere in combination with the questioning tactics can lead to a feeling of such hopelessness that an innocent suspect may be led to make a false admission just to tell the interrogator what he thinks the interrogator wants to hear, because he thinks he will assist himself by being compliant, and because of the certainty in his guilt that will be expressed by the interrogator verbally or through the untested evidence that the suspect is confronted with.

Reid provides not only tactics to use, but a systematic approach to interrogation. Themes are developed which are asserted confidently to the suspect, making it seem like the interrogator has already made his mind up about the suspect's guilt and will not entertain indications to the contrary. The theme culminates in an alternative question: both possible answers will suffice to create legal guilt, however one answer will seem less morally reprehensible to the suspect. A mentally defeated and demoralized suspect, even if innocent, may capitulate and just tell the interrogator what he thinks he wants to hear.

For an innocent suspect he may give an admission of guilt for something he didn't do, just to make the interrogation stop, just to please his captor, because it appears to him that he will be found guilty anyway, and he hopes that by confessing he will get favourable consideration, or because he thinks that he can agree with the police interrogator now to make the interrogation end, and then fix the record later in court, trusting that justice will prevail and abhor sending an innocent man to prison for a crime he did not commit.

Evidence is now available about the nature of false confessions, and in particular about the fact that they are not merely given, but are elaborated upon in considerable detail, sometimes by giving incorrect facts and other times by repeating for the interrogators, facts that have been

deliberately or inadvertently communicated to the suspect.<sup>482</sup> Persons under the control of an interrogator in custodial detention will not necessarily only make damaging admissions or accept an alternative question without providing any elaboration; in some cases, they may go so far as to cooperate with their interrogator to such a great extent that they offer facts that lend credibility to the notion that the factually false confession is true, and cause significant harm to both their interests and to the discovery of the truth.

The power of this technique to cause unjust outcomes and damage to innocent people is difficult to overstate. It may be correct to say that the Reid Technique is effective at getting confessions from suspects. However, it is also correct to say that there is no effective method for screening for the false ones, and that as a method, it lends itself in significant ways to producing false confessions which will be convincing evidence of guilt before a jury. If we are concerned with reducing the number of wrongful convictions, the Reid Technique should be abandoned, and replaced by a system of questioning that takes precautions to avoid miscarriages of justice.

We have now discussed the Reid Technique and have discovered some of the coercive and manipulative tactics that characterize this method. This discussion of Reid has demonstrated where some of the gaps are in the confessions rule and how these gaps can be exploited to get confessions from unwilling or innocent suspects.

Having discussed the actual method of the Reid Technique we will now turn our attention to the way confessions evidence procured by these tactics is treated by judges and juries. While it has been shown that the Reid method is capable of exploiting weaknesses and shortcomings in the confessions rule, the next chapter will show the dangers of this and how it can lead innocent suspects to make false confessions.

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<sup>482</sup> See Garrett (*Supra* note 36).

## **Chapter 5: How are Confessions Regarded in Court: Judges, Juries and the Evaluation of Confession Evidence**

### **Introduction:**

In the previous chapter we discussed in some depth how the use of Reid Techniques create a substantial risk of compelling detained individuals to make false or involuntary confessions. We now need to examine the judicial treatment of confessions that have been procured by the use of the Reid method. In this chapter, I intend to demonstrate the powerful effect that confession evidence has on the minds of judges and juries and how the trier of fact is unlikely to accept that an individual who made a confession may be innocent. I wish to illustrate this point by offering some examples of how false confessions have been procured from innocent suspects in Canada and the United States, and how these confessions have resulted in wrongful convictions.

Moreover, I will also discuss the judicial attitude in Canada towards the use of Reid Techniques. It will be shown in this chapter that the wide latitude given to police by the appellate courts in order to conduct their interrogations, has contributed to the coercive nature of custodial interrogations.

It is hoped that the discussions in this chapter will help substantiate one of the main arguments of this thesis: that the use of the Reid method of interrogation should be prohibited. This argument is most strongly supported by evidence that will be provided here, indicating that detained individuals may be railroaded by the use of the Reid interrogation techniques, into giving false or involuntary confessions. Once they do so, their conviction is a virtual certainty.

## The Problem of False Confessions:<sup>1</sup>

The problem of false confessions resulting in the wrongful conviction of accused persons has been demonstrated to be a serious problem in North American courts. Juries who are confronted with confession evidence seem extremely reluctant to entertain the possibility that a confession is false.<sup>2</sup> A 1998 study by Leo and Ofshe, for example, found that 73% of defendants were convicted at trial in cases that contained evidence of confessions later proved to be false.<sup>3</sup> Scheck, Neufeld and Dwyer found that 23% of all DNA exoneration cases contained confessions (which DNA evidence later showed almost certainly had to be false).<sup>4</sup> Professor Garrett, in his research, found that 16% of all DNA exonerations cases involved false confessions.<sup>5</sup>

Since confessions are inculpatory statements,<sup>6</sup> sometimes, "...even defence counsel,"<sup>7</sup> are "predisposed to infer guilt from a confession."<sup>8</sup>

Jurors may not be able to properly assess confession evidence,<sup>9</sup> including those obtained by coercive means, because of something known as the "fundamental attribution error."<sup>10</sup> The

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<sup>1</sup> "The presence of vivid details is not the only reason that false confessions are so often credible. Based on a content analysis of 20 known false confessions, Appleby, Hasel, Shlosberg, and Kassin (2009) found that most of the statements contained a full narrative description of what and how, complete with vivid details pertaining to the crime, the scene, and the victim. All twenty confessions referenced the victim's appearance and behaviour, the time of day, the location, and various visual and auditory details. Eighty-five per cent of false confessors 'reflected' on their own thoughts and feelings, 80% provided a motive statement to explain why they committed the crime, 65% sought to minimize or excuse their involvement, 40% expressed remorse, and 25% outright apologized. Importantly, half of all innocent confessors made a point to assert that their statement was voluntary. Taken together, these findings are important because the more elaborate a confession is, the more credible it is and the greater its potential for impact is on the jury." - Saul M. Kassin, Sara C. Appleby & Jennifer T. Perillo, "Interviewing Suspects: Practice, Science, and Future Directions" (2010) 15 *Legal and Criminological Psychology* 39 at 49.

<sup>2</sup> *Escobedo v. Illinois*, 378 U.S. 478 (1964) at 488. The United States Supreme Court highlighted the importance of confessions by holding that even the best lawyers cannot save their client from the prejudicial implications of a confession.

<sup>3</sup> Leo, R.A. & Ofshe, R.J., "The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation" (1998) 88 *The Journal of Law and Criminology* 429 at 484.

<sup>4</sup> B. Scheck, P. Neufeld, & J. Dwyer. *Actual Innocence: Five days to execution and other dispatches from the wrongly convicted* (New York: Doubleday, 2000).

<sup>5</sup> Brandon L. Garrett, "The Substance of False Confessions" (2010) 62 *Stanford Law Rev.* 1051.

<sup>6</sup> Timothy E. Moore and C. Lindsay Fitzsimmons, "Justice Imperiled: False Confessions and the Reid Technique" (2011) 57(4) *C. L. Qlty* 509 at 509.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

fundamental attribution error holds that “...when people seek to explain another’s behaviour, they are predisposed to overlook or underestimate the social circumstances that are operating, and tend to attribute the causes of behaviours or decisions to internal motives, if not ‘character flaws’.”<sup>11</sup> As Bradford and Goodman, the fundamental attribution error “leads people to expect self-serving behaviour in others – and, hence, to trust confessions.”<sup>12</sup> Social circumstances which may be overlooked in favour of an explanation attributing the confession to internal causes (for example, actual guilt),<sup>13</sup> may include: the use by the police of coercion<sup>14</sup> (in cases of coerced-compliant or coerced-internalized false confessions); the “...desire for notoriety”<sup>15</sup> on the part of the suspect (in cases of voluntary false confessions, later retracted); and the goal of the suspect to protect “...the real perpetrator”<sup>16</sup> of the offence from criminal liability (again, in the cases of voluntary false confessions, later retracted).<sup>17</sup>

Most important from amongst the often overlooked social factors that may lead to a confession, is the fact that jurors may be insufficiently cognizant of the power imbalance inherent to the interrogation-room setting that may motivate a suspect to confess or to make an incriminating statement; jurors may instead attribute such a decision to the operation of the suspect’s “free will”.

There are additional reasons, other than the fundamental attribution error, that have been offered to explain why judges or jurors are unlikely to believe that an accused who confessed

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<sup>9</sup> Timothy Moore, Peter Copeland & Regina A. Schuller, “Deceit, Betrayal and the search for truth: Legal and psychological perspectives on the “Mr. Big” technique” (2009) 55 Criminal Law Quarterly 348 at 383.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> Deborah Bradford & Jane Goodman-Delahunty, “Detecting Deception in Police Investigations: Implications for False Confessions” (2008) 15 Psychiatry, Psychology and Law 105 at 114.

<sup>13</sup> Eugene R. Milhizer, “Confessions After *Connolly*: An Evidentiary Solution for Excluding Unreliable Confessions” (2008) 81 Temp. L. Rev. 1 at 8.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

could be innocent. First, "...because confessing appears to conflict with a defendant's self-interest, jurors assume that the defendant would not falsely confess absent of police misconduct,"<sup>18</sup> unless he was actually guilty.<sup>19</sup> If no such misconduct can be clearly demonstrated then establishing that the confession was a false one may be difficult.

Second, "...jurors tend to attach greater credibility to testimony based on personal knowledge, and a defendant's confession, more than any other type of evidence, ostensibly exhibits first-hand knowledge,"<sup>20</sup> jurors will likely attach great weight to confession evidence.<sup>21</sup>

Third, the empirical evidence that researchers have accumulated,<sup>22</sup> thus far, suggests that "...observers are not very proficient at distinguishing truthful and deceptive messages via behavioural cues",<sup>23</sup> and that this may affect not only the judgments of law enforcement officers in the interrogation room,<sup>24</sup> as will be discussed, but ultimately, the judgment of judges and juries.

Fourth, a review of false confessions that were extracted during real-life interrogations, confirms that such statements may display a number of features that would normally be seen as signs of truthfulness.<sup>25</sup> For example, the statements that are eventually extracted from suspects are often highly detailed,<sup>26</sup> and include not only details about the offence, but also include descriptions of the motive for committing it,<sup>27</sup> as well as fabricated or imagined expressions of

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<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Supra* note 12 at 115.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

remorse.<sup>28</sup> These supposed markers of truthfulness and reliability may result in jury members perceiving a false confession to be, without reasonable doubt, a truthful recounting of criminal events that transpired.<sup>29</sup>

Whatever the ultimate causes may be, studies have also shown that among mock jurors, “the insertion of a confession into evidence increases the conviction rate even among mock jurors who believe that the confession was coerced,”<sup>30</sup> and they claim that knowing it was coerced “...did not influence their decision-making.”<sup>31</sup>

Research by Kassir, Meissner and Norwick has demonstrated that both police investigators and college students who viewed videotaped confessions of inmates’ admissions of guilt of crimes, had no better likelihood of recognizing a false confession than the odds of pure chance (i.e. half of the time),<sup>32</sup> although the professional investigators had more confidence in their ability to make these judgments than the college students did.<sup>33</sup>

Fifth, interrogations, as presently employed by North American investigators, are designed to be “relentless,”<sup>34</sup> focused on “moving the suspect to confess”<sup>35</sup> and are “insensitive to denials or protestations of innocence.”<sup>36</sup> The tactics that are used are designed to overcome “...the resistance of a person who has no reason to confess and is”<sup>37</sup> “...initially, unwilling to do so.”<sup>38</sup>

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<sup>28</sup> Saul M. Kassir, “True or false: ‘I’d Know a False Confession if I Saw One.’” in P.A. Granhag & L.A. Stromwall eds., *Deception Detection in Forensic Contexts* (Cambridge: Cambridge University Press, 2004) at 183. See also Saul M. Kassir, C.A. Meissner, & R.J. Norwick, “‘I’d know a false confession if I saw one’: A comparative study of college students and police investigators” (2005) 29 *Law and Human Behaviour* 211 and *supra* note 12.

<sup>29</sup> *Bradford and Goodman-Delahunty, Ibid.*

<sup>30</sup> Saul M. Kassir, Christine Goldstein, & Kenneth Savitsky, “Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt” (2003) 27(2) *Law and Human Behaviour* 187 at 187.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Kassir, Meissner and Norwick, supra* note 28 at 211.

<sup>33</sup> *Ibid.* at 211-227.

<sup>34</sup> Richard J. Ofshe & Richard A. Leo, “The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions” in *Studies in Law Politics & Society* vol. 16 (JAI Press, 1997) at 12.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*



Juries, however, may be unaware or insufficiently apprised of these salient issues and a judge's instructions, if they do address this possibility, will often fall short in elucidating the dangers.

### **Examples of False Confessions:**

Recent research carried out in the United States has demonstrated that a significant number of false confessions have occurred.<sup>39</sup> Canadian research of a similar character has not been carried out, and it would appear that there have been fewer post-conviction exonerations of false confessions cases in Canada than in the United States, although in light of the facts that Canada and the United States police forces share similar interrogation methods and a reasonably similar law of confessions exists in each country, there is no reason to suppose that the actual rate of false confessions is markedly different. Moreover, unlike in the United States where there have been a significant number of convictions involving confessions that were later overturned through DNA evidence, the Canadian examples of false confession exonerations have been based on the reevaluation of other evidence.

### **Canadian Examples:**

Far fewer examples of Canadian wrongful convictions due to false confessions exist than American ones; however where narratives exist they lend some insight into how such miscarriages of justice can occur.

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<sup>39</sup> *Supra* note 5. It should be pointed out that the Miranda rule in the U.S. (John J. Donohue, "Did Miranda Diminish Police Effectiveness" (1998) 50(4) Stan. L. Rev. 1147.) affords greater rights to accused individuals than the rights that are available to suspects in Canada. The Miranda Rule obligates state agents to issue warnings and obtain a waiver to consult counsel before proceeding with an interrogation. Also, unlike in Canada, the suspects in the U.S. have the right to have counsel present at the interrogation room (*Moore & Fitzsimmons, infra* note 93 at 524). The suspect can also stop the interrogation by asserting his/her right to silence (*Moore & Fitzsimmons, infra* note 93). Despite the fact that the accused individuals in the U.S. enjoy greater rights, the overwhelming majority of cases of false confessions are produced in the U.S. This may be due to the significantly greater population base in the U.S. (about 10 times the population of Canada). Alternatively, the police in the U.S. may be more effective in getting suspects to waive their rights to consult counsel (Paul G. Cassell & Bret S. Hayman, "Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda" (1996) 43 UCLA L. Rev. 839 at 860). It may also mean that the occurrence of false confessions in Canada is much more prevalent than the few known examples may suggest. This may mean that the problem of false confessions in Canada may be much deeper than we may think, and it is possible that the true extent of it is yet to be discovered.

### **The Case of Kyle Unger:**

Kyle Unger was convicted of murder and sexual assault and he was sentenced to life following a confession that was later demonstrated false.<sup>40</sup> The confession that contributed to securing his conviction was procured during an undercover police operation.<sup>41</sup> There was additionally a piece of hair that was consistent with being Mr. Unger's, and the testimony of a jailhouse informant that was adduced against him.<sup>42</sup> The jailhouse informant came forward after the preliminary inquiry<sup>43</sup> and claimed that Unger had come back into their cell, and stated, "I killed her and I got away with it".<sup>44</sup> Though the informant testified that he did not ask for or receive any kind of consideration from the Crown in exchange for his testimony, shortly before trial the informant, who was in custody, through his counsel, did make overtures toward receiving some benefit.<sup>45</sup> The hair comparison evidence was ultimately found invalid upon review, due to advances in hair examination technologies between 1993 and the time of the review.<sup>46</sup>

On review, the Crown said that "[t]here is no doubt that without Mr. Unger's confession to the undercover officers this matter would never have gone to trial."<sup>47</sup> The undercover operation was a Mr. Big sting<sup>48</sup>, where the undercover members of a fake gang (in fact undercover police officers) "...approach the suspect with the suggestion that he be considered to join their gang,"<sup>49</sup> and they "impress him with expensive meals, flashy cars, large rolls of money and fancy hotel

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<sup>40</sup> Steven Smith, Veronica Stinson & Marc Patry, "Confession Evidence in Canada: Psychological Issues and Legal Landscapes" (2010) 18(3) Psychology, Crime and Law 317 at 317.

<sup>41</sup> Crown Submissions: *R. v. Kyle Wayne UNGER*. at 3.

<sup>42</sup> *R. v. Unger*, 2005 MBQB 238 at para. 2.

<sup>43</sup> Unger's chargers proceeded to preliminary hearing. However, at the end of the preliminary hearing, the crown stayed the charges as a result of the effective cross-examination of a bite mark expert. – *Supra* note 41.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.* at 7.

<sup>48</sup> Mr. Big is an undercover operation conducted by police in select cases. See *Supra* note 9.

<sup>49</sup> *Supra* note 42 at para. 16.

rooms. The only catch is that he has to admit to them to having committed a serious crime”<sup>50</sup> the one that the undercover police officers are investigating.<sup>51</sup>

At his trial, Unger maintained his confession was false,<sup>52</sup> he denied any involvement in the murder, and that he had made it “...to impress the gang members,”<sup>53</sup> “in order to “...obtain employment with them, to earn a lot of money and to join their group.”<sup>54</sup>

Unger’s counsel argued that there had been inducements, all of which stemmed from a “grand inducement” given by Corporal Forbes who was posing as the leader of the criminal gang.<sup>55</sup> Forbes and Unger had a meeting at<sup>56</sup> which Forbes said to Unger: “Larry tells me you whacked somebody. That’s fine with me. That’s fucking excellent. It’s the kind of thing that, uh, I know that I’m dealing with somebody that’s on my fuckin’ – somebody that I can trust ... That’s the kind of person I’m looking for.”<sup>57</sup> Counsel argued that the impression left with Unger when Forbes approved of his “whacking” somebody was that this criminal group was looking for a murderer.<sup>58</sup>

When he made admissions,<sup>59</sup> untrue details that Mr. Unger provided to the police included “...that he had committed the murder alone; that he had disposed of the sticks from the murder by throwing them into a creek;<sup>60</sup> and that he had killed the victim by a bridge (and he took one of the police officers to the bridge to show him the location)”<sup>61</sup> The Crown did not accept the

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<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.* at para 17.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Supra* note 41.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> *Supra* note 42 at para 23.

<sup>59</sup> When asked by the media why he confessed to a crime he did not commit, Unger said:

When you’re young, naïve and desperate for money, they hold a lot of promises to you, so you say and do what you have to do to survive, just like in prison. – Globe and Mail, October 23, 2009.

<sup>60</sup> The sticks were used to murder the victim.

<sup>61</sup> *Supra* note 42 at para. 18.

notion that Mr. Unger had acted alone and proceeded to trial against his co-accused, Mr. Houlihan;<sup>62</sup> the sticks that he said he threw in the creek were in fact found and recovered by police “protruding from the victim’s body;”<sup>63</sup> and the bridge that he said he had killed the victim near had not even been built at the time of the murder.<sup>64</sup> Unger had not limited his false statements to those concerning the murder either; the statements that he made that were additionally found to be untrue were “that he had gone to Rio de Janeiro for a rock festival; that he raced cars and snowmobiles with his father and he had a souped up snow mobile; that he attended college for a year; that he had taken a demolitions course; that he had worked in demolitions in Alberta; that he had broken his neck in a motorcycle accident, been in traction for three months, and spent a year and a half in a wheel chair; that he had been engaged; that he had a class 1 driver’s license; and that he took a course in forensic science.”<sup>65</sup> Each of these statements had been fabricated according to several of his friends and his mother.<sup>66</sup> Unger was nevertheless convicted at trial because notwithstanding his reputation as a “bullshitter,”<sup>67</sup> according to his friends, “...the reliability of his confession was supported by the two other pieces of evidence, the hair and the confession to the jailhouse informant.”<sup>68</sup> These pieces of evidence were withdrawn by the Crown upon a post-conviction review, and the reliability of Unger’s confession under the circumstances came back into question.<sup>69</sup>

When the case had been considered before the Manitoba Court of Appeal the court conceded that: “While Unger, during the extensive conversations with various undercover officers which took place between June 23<sup>rd</sup> and June 25<sup>th</sup>, got a number of the details of the

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<sup>62</sup> *Ibid.* at para 19.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.* at para. 20.

<sup>66</sup> *Ibid.* at para. 21.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.* at para 22.

<sup>69</sup> *Ibid.* at para. 48.

murder wrong, the essential features of the murder as he described them continued to be consistent with the physical evidence. That some specific descriptions were inconsistent or simply wrong is not significant in the totality of his confessions.”<sup>70</sup>

At the retrial of Mr. Unger, the Crown called no evidence,<sup>71</sup> and said that advances in DNA testing in the intervening 17 years since the initial trial allowed for a more thorough testing of the physical evidence, and that the “...testing did not find any trace of Unger’s DNA on any of the exhibits.”<sup>72</sup> In fact the new DNA tests in 2005 showed that a hair found on the victim’s sweater did not even belong to Unger.<sup>73</sup> Thus, without any physical evidence and without a credible statement from a jailhouse informant, all that was left was the Mr. Big-obtained confession. The Crown concluded that under the circumstances it would be “unsafe to retry Unger on the available evidence.”<sup>74</sup>

### **The Case of Romeo Phillion:**

On January 11, 1972, Romeo Phillion was arrested in relation to an armed robbery charge. While conversing with the officer in charge of his robbery case, he admitted to the murder of an Ottawa fireman which had occurred in 1967.<sup>75</sup> His confession to police came four days after he had confessed to his lover, Neil Miller.<sup>76</sup> Later on January 11, 1972, he recanted his confession.<sup>77</sup> Despite his recantation, he was convicted by a jury of non-capital murder<sup>78</sup> and

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<sup>70</sup> *Ibid.* at para 60.

<sup>71</sup> *Supra* note 41 at 8.

<sup>72</sup> *Ibid.*

<sup>73</sup> Steve Lambert, “Kyle Unger acquitted of murder, tries to ‘let it all absorb’” *The Globe & Mail* (23 October, 2009), online: *Globe & Mail* < <http://www.theglobeandmail.com/news/national/kyle-unger-acquitted-of-murder-tries-to-let-it-all-absorb/article4256691/>>.

<sup>74</sup> *Supra* note 41. at 8.

<sup>75</sup> *R. v. Phillion*, [2009] O.J. No. 849 (Ont.C.A.) at paras 1-5.

<sup>76</sup> *Ibid.* at paras 16-19.

<sup>77</sup> *Ibid.* at para 21.

<sup>78</sup> *Ibid.* at paras 7-8.

was sentenced to life imprisonment.<sup>79</sup> He continued to maintain his innocence following his conviction for 31 years, until his conviction was ultimately overturned.<sup>80</sup>

Romeo Phillon was another Canadian who was found to have been wrongfully convicted as a result of a false confession. Mr. Phillon had appealed his conviction in the mid-1970s to the Court of Appeal for Ontario and then the Supreme Court of Canada, and in each venue, his appeals were dismissed.<sup>81</sup> Following his failed appeals, Mr. Phillon began to write the Minister of Justice asking to re-open his case.<sup>82</sup> Upon requesting the original Ottawa Police files on his case,<sup>83</sup> he received a heavily edited copy with large portions blacked out.<sup>84</sup> In 1996, the Criminal Conviction Review Group and the Department of Justice prepared a draft investigation brief in response to his application.<sup>85</sup>

In 1998, Mr. Phillon obtained a report from his Corrections Canada security file that had been prepared by the officer in charge of his case, that the investigation had established that Mr. Phillon had been in Trenton, Ontario, less than two hours before the murder, such that it was impossible for him to have been the man who murdered the victim (which was committed in Ottawa).<sup>86</sup> Upon, further inquiries about this new information, the Archives of Ontario confirmed that it was in the possession of the “Crown Investigative File” on the Roy murder.<sup>87</sup> It was subsequently confirmed that there were over 700 pages of other documents that had also gone undisclosed.<sup>88</sup>

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<sup>79</sup> *Ibid.* at para 8.

<sup>80</sup> *Ibid.* at paras 44 and 182.

<sup>81</sup> *Ibid.* at paras 8 and 33-37.

<sup>82</sup> *Ibid.* at para 38

<sup>83</sup> Bail Factum of Romeo Phillon, Memorandum of Argument, in the Superior Court of Justice, online at AIDWYC <[http://www.aidwyc.org/public\\_html/index.html](http://www.aidwyc.org/public_html/index.html)> at para. 5.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.* at para 40.

<sup>87</sup> *Supra* note 83 at para 10.

<sup>88</sup> *Ibid.*

Mr. Phillion then hired Dr. Gudjohnsson, an expert on false confessions, and a psychologist, Dr. Turrall, to conduct a review of his case.<sup>89</sup> In the conclusion of their report the following was stated: “The confession, without good independent corroboration is inherently unreliable due to Mr. Phillion’s psychological problems and psychopathology at that time.”<sup>90</sup> A similar finding was made with respect to his confession to his lover.<sup>91</sup>

### **The Case of Joel Labadie:**

Joel Labadie, Douglas Firemoon and a 17-year old youth falsely confessed to the 1996 murder of Darelle Exner in Saskatchewan after having been arrested and interrogated for over 15 hours.<sup>92</sup> During the interrogation the police convinced Labadie that he had blacked out the murder.<sup>93</sup> Afterwards, Labade had this to say:

All I know is for hours on end I said “No, I had nothing to do with it.” The next this I know, I’m sitting here going “sure, why not. I did it.” More or less, it’s like they kill your spirit or something.<sup>94</sup>

After spending four months in jail, all three men were eventually released by the Crown due to a lack of evidence.<sup>95</sup> Later, DNA evidence led to the arrest and the conviction of another individual.<sup>96</sup>

### **The Case of Simon Marshall:**

In 1997, Simon Marshall, a person with borderline personality disorder and an intellectual disability confessed to 15 counts of rape.<sup>97</sup> He was released in 2003, and then subsequently

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<sup>89</sup> *Supra* note 75 at paras 42, 209 and 202.

<sup>90</sup> *Supra* note 83 at para. 11; See also, *Ibid.* at para 207.

<sup>91</sup> *Phillon, Ibid.* at 183.

<sup>92</sup> *Supra* note 40.

<sup>93</sup> Timothy E. Moore & C. Lindsay Fitzsimmons, “Justice Imperiled: False Confessions and the Reid Technique” (2011) 57(4) C. L. Qly 509 at 514.

<sup>94</sup> CBC News, “Widely used police interrogation technique can result in false confession: disclosure” *CBC News* (28 January, 2003), online: CBC News < <http://www.cbc.ca/news/canada/story/2003/01/27/interrogation030127.html>>.

<sup>95</sup> *Supra* note 40.

<sup>96</sup> *Supra* note 94.

<sup>97</sup> *Supra* note 40.

arrested for 3 more counts of sexual assault, to which he also falsely confessed.<sup>98</sup> At the sentencing for his second set of charges, the Crown brought a dangerous offender application. However, the presiding Judge, ordered a DNA test to ensure there was a solid basis for the convictions.<sup>99</sup> Subsequent DNA analysis showed that he was not guilty of the 2003 crimes, and a further investigation demonstrated that he was innocent of the earlier offences as well.<sup>100</sup> According to Marshall's lawyer, while incarcerated, Marshall "... was the victim of sexual, physical and verbal abuse from fellow inmates."<sup>101</sup> After being released Marshall was hospitalized for psychosis.<sup>102</sup>

### **American Examples:**

Brandon Garrett, who has reviewed numerous cases of false confessions has provided ample data which suggest features of investigation or interrogation that can be found in false confessions cases.<sup>103</sup> These features may cause or contribute to false confessions. The categories that he identifies are: the police fed facts to the suspect or leaked facts to the community;<sup>104</sup> the police insisted that the facts provided by the suspect were both corroborated by other evidence and by non-public facts; the police specifically denied disclosing the facts to the accused when they testified under oath at trial;<sup>105</sup> in cases of recorded confessions there were unrecorded portions for which there was no record, including initial interviews before the recorders had been switched on;<sup>106</sup> mistaken facts suggested to suspects due to incomplete or

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<sup>98</sup> *Ibid.*

<sup>99</sup> Canwest News Service, "Wrongfully convicted man awarded \$2.3 million" *Montreal Gazette* (22 December 2006), online: Canada.com <<http://www.canada.com/story.html?id=3b95d3e6-22f8-47dc-aecc-9b9e84a01c97>>.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

<sup>103</sup> *Supra* note 5.

<sup>104</sup> *Ibid.* at 1056.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.* at 1058.



inaccurate crime scene evidence;<sup>107</sup> crime scene visits may have reinforced or rehearsed with the suspect fed facts; investigations were stopped after the confession was obtained,<sup>108</sup> and police failed to substantiate the confession and failed to investigate glaring inconsistencies between the confession and the crime scene evidence.<sup>109</sup>

When litigating these cases, even unreliable confessions were admitted into evidence even in circumstances where there was some element of coercion (attributable, Garrett says, to U.S. Constitutional rules of admissibility);<sup>110</sup> there was often some corroboration of the confession although it may have been “...thin corroboration;”<sup>111</sup> and in one third of the cases the defendant’s counsel had argued that the confessions had been contaminated<sup>112</sup> (however “[t]hey typically had little evidence to support an allegation that facts had been disclosed”).<sup>113</sup>

#### **The Case of Jeffery Deskovic:**

Jeffrey Deskovic, a seventeen year-old, was convicted of rape and murder.<sup>114</sup> He “...was a classmate of the fifteen-year old victim, had attended her wake and was eager to help solve the crime.”<sup>115</sup> Deskovic was interrogated a number of times.<sup>116</sup> During one of the sessions, the police had a tape recorder, but selectively recorded only 35 minutes of the encounter.<sup>117</sup> During one of the interviews he “supposedly drew an accurate diagram”<sup>118</sup> “...which depicted details concerning “three discrete crime scenes” which were not ever made

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<sup>107</sup> *Ibid.* at 1083.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Supra* note 5.

<sup>110</sup> *Ibid.* at 1090.

<sup>111</sup> *Ibid.* at 1091.

<sup>112</sup> *Ibid.* at 1092.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.* at 1054.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.* at 1055.

<sup>118</sup> *Ibid.*

public.”<sup>119</sup> Although he never admitted to any murder, he provided important information that supported a strong inference that he had done so, including: “that the victim suffered a blow to the temple, that he tore her clothes, that he struggled with her, that he held his hand over her mouth,”<sup>120</sup> and that he “may have left it there a little too long.”<sup>121</sup> He also told police<sup>122</sup> that he had “hit her in the back of the head with a Gaitoraid [sic] bottle that was lying on the path.”<sup>123</sup> By the end of this statement Jeffrey Deskovic was curled up in the “fetal position”<sup>124</sup> sobbing uncontrollably.<sup>125</sup>

Deskovic’s confession was crucial to the State’s case.<sup>126</sup> DNA tests conducted by the FBI laboratory had actually excluded Deskovic as a perpetrator,<sup>127</sup> but the “...district attorney asked the jury to ignore that DNA evidence speculating that perhaps the victim was “sexually active” and “romantically linked to somebody else” who she had sexual relations with shortly before her rape and murder.”<sup>128</sup> The prosecution, in his closing arguments, stressed the reliability of Deskovic’s statements, pointing out “...that after he told police about the Gatorade bottle “it was found there,”<sup>129</sup> and that detectives “did not disclose any of their observations or any of the evidence they recovered from Jeffrey nor, for that matter, to anyone else they interviewed.”<sup>130</sup> Moreover the prosecution emphasized with the jury that Deskovic was never fed facts, stating “Ladies and gentlemen, it doesn’t wash in this case, it just doesn’t wash.”<sup>131</sup>

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<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.* at 1056.

Deskovic was convicted and sentenced to fifteen years to life.<sup>132</sup> He was eventually exonerated by further DNA testing in 2006.<sup>133</sup> The new testing matched the profile of a convicted murderer, “who subsequently confessed and pleaded guilty.”<sup>134</sup> The District Attorney’s post exoneration inquiry stated that the fact that Deskovic’s statements referenced intimate details that only the killer could have known, and that there were only two possible explanations for this: “either the police (deliberately or inadvertently) communicated this information directly to Deskovic or their questioning at the high school and elsewhere caused this supposedly secret information to be widely known throughout the community.”<sup>135</sup> Thus, “...the confession was contaminated either by police leaking facts or feeding them.”<sup>136</sup> However, at the trial, the police and the prosecutor denied having told Deskovic the facts and insisted that they did not leak them “...to the media or to anyone else.”<sup>137</sup> Deskovic himself commented in the following way: “[b]elieving in the criminal justice system and being fearful for myself, I told them what they wanted to hear.”<sup>138</sup> In a lawsuit against the police, Deskovic alleges the “...police disclosed facts to him.”<sup>139</sup>

### **The Case of Douglas Warney:**

Douglas Warney’s case also involved a confession that included facts that could have only been known to the killer. Warney’s confession contained the following details:<sup>140</sup> “that the victim was wearing a nightshirt; that the victim was cooking chicken; that the victim was

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<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

<sup>135</sup> Leslie Crocker Snyder et al., Westchester County Dist. Attorney, (2007) Report on the Conviction of Jeff Deskovic 2, at 6. See also *Ibid.*

<sup>136</sup> *Garrett, Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.* citing Fernanda Santos, “DNA Evidence Frees Man Imprisoned for Half His Life” *N.Y. Times* (21 September 2006) B1.

<sup>139</sup> *Garrett, Ibid.*

<sup>140</sup> *Ibid.* at 1071.

missing money from his wallet; that the murder weapon was a knife about twelve inches with a serrated blade, kept in the kitchen; that the victim was stabbed multiple times; that the victim owned a pinky ring and a particular necklace; that a tissue used as a bandage was covered with blood; that there was a pornographic tape in the victim's television."<sup>141</sup> At trial, the interrogating officer denied feeding any facts to Warney.<sup>142</sup>

At the closing address to the jury, the prosecutor pointed out that Warney's confession was true, because it contained detailed, non-public facts.<sup>143</sup> For example, the prosecutor said:

The Defendant says he's cooking dinner, and he's particular about it, cooking chicken ... Now, who could possibly know these things if hadn't been inside that house, inside the kitchen? You heard the Defendant say that he took money ... You know the wallet was found upstairs, empty, near the closet ... You will see photographs of it ... You heard the Defendant say that he stabbed [the victim] with a knife taken from the kitchen. Do you recall Mr. Lee's testimony? ... Regarding the murder weapon, he said that was the knife that they kept in the house. Where did they keep it? They kept it in a drawer under the crockpot where the chicken was cooking. Now, who would know the chicken was cooking? A person who got that knife and used it against [the victim], the killer. The Defendant described the knife as being twelve inches, with ridges. I think Technician Edgett said it was thirteen inches with the serrated blade.<sup>144</sup>

Warney had experience a number of delusions. He had very minimal education, having only completed grade 8, and had "advanced AIDS."<sup>145</sup> Warney had been exonerated many years later.<sup>146</sup> Through DNA testing, it was revealed the DNA matched that of another man who had later confessed to the killing.<sup>147</sup> Warney continued to maintain the fact that the sergeant had told him the details found in his confession, such as, for example, "what was cooking in the hot pot."<sup>148</sup>

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<sup>141</sup> *Ibid.* at 1071 - 1072.

<sup>142</sup> *Ibid.* at 1072.

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.* citing 3 Trial Transcript at 570-71, *People v. Warney*, No. 96-0088 (N.Y. Sup. Ct. Feb. 11, 1997).

<sup>145</sup> *Garrett, Ibid.*

<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

### **The Case of Anton McCray:**

The famous Central Park Jogger case also saw the prosecutor pointing out to the jury that Anton McCray's confession contained non-public facts that could have only been known by the perpetrator:<sup>149</sup>

You heard in that video Antron McCray was asked about what she was wearing, and he describes she was wearing a white shirt. This is the shirt that [the victim] was wearing. You saw the photograph of what that shirt looked like. There is no way that you knew that that shirt was white unless you saw it before it became soaked with blood and mud. I submit to you that Antron McCray describes details and describes them in a way that make you know beyond any doubt, beyond a reasonable doubt, that he was present, that he helped other people rape her and that he helped other people beat her and that he left her there to die.<sup>150</sup>

The Central Park Jogger case involved an assault and a sexual assault that took place in New York City's Central Park, in 1989.<sup>151</sup> The accused in the case were Anton McCray, Yusef Salaam, Kevin Richardson, Kharey Wise, and Raymond Santana.<sup>152</sup> All five were teenage persons of colour. The investigation revealed that gangs of teenagers were assaulting strangers in Central Park in large numbers. Although there were many persons who were identified as participating in the assaults that night, only five were brought forward as having perpetrated the attack on the central park jogger.<sup>153</sup> All five were convicted, and four of the five confessed.<sup>154</sup>

Following interrogation, they admitted being involved in the attack against the victim and provided the police interrogators with details about their respective roles, and the roles of the

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<sup>149</sup> *Ibid.* at 1077

<sup>150</sup> *Ibid.* at 1078, citing Trial Transcript at 591-92, *People v. McCray*, No. 4762/89 (N.Y. Sup. Ct. Aug. 8, 1990).

Also See *Ibid.*

<sup>151</sup> Sharon L. Davies, "The Reality of False Confessions – The Lessons of the Central Park Jogger Case" (2005-2006) 30 N.Y.U. Rev. L. and Soc. Change 209 - When the victim was found she had suffered internal bleeding and a skull fracture of such seriousness it removed her eye from its socket. As a result of the severe trauma, she had no memory of the attack or of any of the events up to an hour preceding the assault (pgs. 214 and 215).

<sup>152</sup> *Ibid.* at 215-16.

<sup>153</sup> Timothy Sullivan, *Unequal Verdicts: The Central Park Jogger Trials* (New York: Simon & Schuster, 1992) at 50.

<sup>154</sup> *Ibid.*

other accused.<sup>155</sup> At the outset of the interrogations, they were all given their rights and<sup>156</sup> “...yet each agreed to speak to the police and the prosecutor without counsel present.”<sup>157</sup>

Each of the teenage-accused stated specifically on videotape “...that the police had not abused them;”<sup>158</sup> in fact, several of the accused “...were accompanied by adult family members when they waived their rights to remain silent and have counsel present during questioning.”<sup>159</sup> This made it exceptionally difficult for the defence to argue that police pressure had produced five detailed false confessions.<sup>160</sup>

The confessors retracted their statements within weeks, claiming they had been intimidated, lied to and coerced into making false confessions.<sup>161</sup> While the confessions themselves were videotaped, the hours of interrogation that had preceded them were not.<sup>162</sup>

In January 2002 another individual by the name of Matias Reyes provided a detailed and accurate confession of the assault at the Central Park.<sup>163</sup> As a result of Reyes’ confession, DNA testing was ordered. The tests showed that the semen and pubic hair found at the scene belonged to Reyes. On December 5, 2012, the convictions of all five accused were vacated.<sup>164</sup>

### **The Case of Earl Washington Jr:**

Earl Washington Jr., a “mentally retarded farmhand,”<sup>165</sup> gave a false confession to a rape and murder.<sup>166</sup> He was sentenced to death. After eighteen years in prison, and only nine days prior

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<sup>155</sup> *Supra* note 151 at 216.

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.* at 218.

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.* at 224.

<sup>161</sup> N. Jeremi Duru, “The Central Park Five, The Scotsboro Boys, And the Myth of the Bestial Black Man” (2003-2004) 25 Cardozo Law Review 1317 at 1317.

<sup>162</sup> New York City Police Department – Executive Summary, online: p.17

<<http://f11.findlaw.com/news.findlaw.com/cnn/docs/cpiqr/nypd12703jgrrpt.pdf>>

<sup>163</sup> *Ibid.* at 30.

<sup>164</sup> *Supra* note 161 at 1317 -1357.

<sup>165</sup> *Supra* note 5 at 1077.

<sup>166</sup> *Ibid.* at 1075.

to his scheduled execution, DNA testing exonerated him of the crime..<sup>167</sup> Washington had tried to appeal his conviction to several state and federal courts,<sup>168</sup> which cited “...the reliability of his confession”<sup>169</sup> in denying his appeals.<sup>170</sup> Washington was “...borderline mentally retarded,”<sup>171</sup> but was found by the Fourth Circuit to have “supplied without prompting details of the crime that were corroborated by evidence taken from the scene and by the observations of those investigating the [victim’s] apartment.”<sup>172</sup>

Washington reportedly told police that he had left a shirt at the crime scene, and that that shirt had an identifying characteristic, a torn-off patch, making it unusual.<sup>173</sup> He knew with precision that the shirt had been left in the dresser drawer of the bedroom,<sup>174</sup> and he told police “...that he had left it there because it had blood on it”<sup>175</sup> (even though the stains on the shirt that officers later showed Washington had been cut from the shirt for forensic analysis).<sup>176</sup>

Every time Washington was asked non-leading questions<sup>177</sup> in the initial stages of his interrogation, he gave the wrong answer.<sup>178</sup> For example, he got the race, the height, and the number of times the victim got stabbed wrong.<sup>179</sup> He also said “...he didn’t see anyone else in the apartment when the victim’s two children were there.”<sup>180</sup> But notwithstanding these

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<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid.*

<sup>172</sup> *Ibid.*, citing *Washington v. Murray*, 4 F. 3d 1285, 1292 (4<sup>th</sup> Cir. 1993).

<sup>173</sup> *Garrett, Ibid.* at 1076.

<sup>174</sup> *Ibid.*

<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid.* at 1077.

<sup>177</sup> *Ibid.* at 1088.

<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid.*

inconsistencies, the prosecutor stressed with the jury that Washington reportedly volunteered information that he left his shirt at the crime scene.<sup>181</sup>

The prosecutor defended the police by telling the jury that the police did not feed facts about the crime to Washington<sup>182</sup>, but that Washington "...knew exactly how the crime had been committed."<sup>183</sup> He noted that he knew the patch was missing,<sup>184</sup> and he stated: "Now, how does somebody make all that up, unless they were actually there and actually did it? I would submit to you that there can't be any question in your mind about it, the fact that this happened and the fact that Earl Washington Junior did it."<sup>185</sup>

Garrett comments on the significance of this:

Now that we know Earl Washington, Jr. did not commit the crime, but rather another man later identified through a DNA database who has now pleaded guilty, there are limited explanations for how Washington could have uttered those remarks concerning the shirt, together with other details concerning how the crime was committed. Either the police offered those facts to him, or the police had actually leaked all of that information to the public and somehow Washington, a mentally retarded farmhand living in the next county, heard it all and carefully incorporated it into his confession.<sup>186</sup>

The fact that the exonerees videotaped confessions showed that they knew key non-public facts about the crimes they were charged with shows that the police must have fed them facts during their interrogations, either directly or by asking leading questions. In the cases detailed above, we have also seen how prosecutors use this confession evidence in their submissions to persuasively establish a case for guilt. Now we turn to what the effect of this kind of information is upon triers of fact, both judges and jurors, as well as their receptivity to the interrogation techniques that ostensibly draw out the confessions.

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<sup>181</sup> *Ibid.*

<sup>182</sup> *Ibid.* at 1076.

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*

<sup>185</sup> *Ibid.* citing Trial Transcript at 527-37, 540, 566, Commonwealth v. Washington (Va. Cir. Ct. Jan. 19, 1984).

<sup>186</sup> Garrett, *Ibid.* at 1077.



## **The Treatment at Law of Confession Evidence Obtained by Interrogation:**

Methods of psychological interrogation, and specifically the methods embodied in the Reid Technique, are not of a particularly recent vintage and are not unknown to the courts. The Reid Technique was referenced numerous times by Chief Justice Warren, of the United States Supreme Court, in his influential and widely disseminated majority reasons for the Court in its now famous decision in *Miranda v. Arizona*.<sup>187</sup> Although no Supreme Court of Canada case has explicitly considered the Reid Technique, in the landmark case of *R. v. Oickle*, the Court gave consideration to (and approval of) certain specific *strategies and tactics* of interrogation that are advocated by the Reid Institute (notwithstanding that they did not identify these strategies and tactics as being Reid methods and tactics *per se* – in fact, the name “Reid” does not appear in the judgment at all).<sup>188</sup>

*Oickle* appears to signify a retreat from the Court’s earlier decision in *R. v. Hebert*, wherein the Court was critical of police trickery in the context of undercover operations carried-

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<sup>187</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966). Interrogation manuals, including Inbau & Reid’s *Criminal Interrogation and Confessions*, are referred to, explained in some detail, and cited liberally, by the Chief Justice Warren. The works of Inbau & Reid, the chief architects of the Reid Technique, are cited in 11 separate footnotes throughout this landmark judgment (which contains a total of 71 footnote citations).

One of the key Reid Technique concepts, for example, is referred to (with a citation to Inbau & Reid, 1962) at 451: that is, the concept of minimization. Chief Justice Warren writes at 451: “To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the suspect’s guilt and, from outward appearance, to maintain only an interest in confirming certain details. The guilt of the subject is to be positioned as a fact. The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire for women. The officers are instructed to minimize the moral seriousness of the offense, to cast blame on the victim or on society. These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already – that he is guilty. Explanations to the contrary are dismissed and discouraged.”

<sup>188</sup> *R. v. Oickle*, [2000] 2 S.C.R. 3. In *R. v. Oickle* at paragraph 65, Mr. Justice Iacobucci, writing for the majority, reaffirmed the test for police trickery and deception that will defeat voluntariness, taken from Mr. Justice Lamer’s reasons in *R. v. Rothman*, [1981] 1 S.C.R. 640. In that case, Lamer J. wrote, at 691, that additional to concerns about the reliability of involuntary statements, a trier of fact must be concerned about “...whether the authorities have done or said anything that could have induced the accused to make a statement which was or might be untrue. It is of the utmost importance to keep in mind that the inquiry is not concerned with reliability but with the authorities’ conduct in regards to reliability.”

out while the suspect is in police custody. In that judgment, Madam Justice McLachlin links the scope of the informed choice to exercise or waive the constitutional right to silence to the problem of police trickery. She says the right to silence "... must extend to exclude tricks which would effectively deprive the suspect of this choice. To permit the authorities to trick the suspect into making a confession to them after he or she has exercised the right of conferring with counsel and declined to make a statement, is to permit the authorities to do indirectly what the *Charter* does not permit them to do directly. This cannot be in accordance with the purpose of the *Charter*.”<sup>189</sup>

Nevertheless, the Court’s decision in *R v. Rennie* (1981), 74 Cr. App. 207 (C.A.) at 212, was cited with approval by the Supreme Court of Canada in *R. v. Oickle* at para. 57 (in support of the “necessity” in the “vast majority of cases” for the police to “somehow convince the suspect it is in his or her best interests to confess”). The *Rennie* Court was quoted as saying:

Very few confessions are inspired solely by remorse. Often the motives of an accused include a hope that an early admission may lead to an earlier release or a lighter sentence. If it were the law that the mere presence of such a motive, even if prompted by something said or done by a person in authority, led inexorably to the exclusion of a confession, nearly every confession would be rendered inadmissible. This is not the law. In some cases the hope may be self-generated. If so, it is irrelevant, even if it provides the dominant motive for making the confession. In such a case the confession will not have been obtained by anything said or done by a person in authority. More commonly the presence of such a hope will, in part at least, owe its origin to something said or done by such a person. There can be few prisoners who are being firmly questioned in a police station to whom it does not occur that they might be able to bring both their interrogation and their detention to an earlier end by confession.<sup>190</sup>

The Ontario Court of Appeal has given the Reid Technique explicit consideration (and approval). In *Regina v. Barrett*, Arbour J.A., as she then was, (with Tarnopolsky, J.A. concurring), wrote:

Trained police investigators understand the psychology of criminal behaviour and recognize the symptoms of guilt or innocence. They have methods of questioning to reveal one or the other, and to draw confessions from the guilty. These tactics and techniques are described in full in

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<sup>189</sup> *R. v. Hebert*, [1990] 2 S.C.R. 151, 77 C.R. (3d) 145 at para. 66.

<sup>190</sup> *Oickle*, *Supra* note 188 at para. 57.

Criminal Interrogation and Confessions, 3<sup>rd</sup> ed., Ingrau (*sic*), Reid and Buckley. So far as I can see there is nothing offensive in these techniques, but the fact that I have never seen them outlined in viva voce evidence on a voir dire suggests that the police may be reticent in publicizing their methods. They need not be.<sup>191</sup>

Madame Justice Arbour's intimation that trained investigators can "understand the psychology of criminal behaviour and recognize symptoms of guilt or innocence" is troubling. It is troubling because she seems to be lending undeserved credibility to the refuted notion that behavioural cues can betray a person's guilt, and there are methods (i.e. trickery, deception, and psychological coercion) to draw confessions from "the guilty" (as determined by the behavioural cues, presumably). One hopes that Madame Justice Arbour did not determine the guilt or innocence of any accused persons or whether that person was lying or telling the truth on the sole basis of behavioural cues during her tenure as a trial judge. It is perplexing why she feels that the procedural protections safeguarding adverse findings of credibility may be dispensed-with in the interrogation room.<sup>192</sup>

Should the demeanour of a suspect or a charged person not be accorded the same, limited significance during pre-trial questioning as it is accorded at trial?<sup>193</sup> And should a person found

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<sup>191</sup> *R. v. Barrett* (1993), 13 O.R. (3d) 587, 82 C.C.C. (3d) 266 (C.A.). There was a further appeal to the Supreme Court of Canada, but it did not address the appropriateness of the Reid Technique. See *R. v. Barrett*, [1995] 1 S.C.R. 752, 21 O.R. (3d) 736.).

<sup>192</sup> It may be the case that Madame Justice Arbour is acting on what was found in the text she referenced, which supports the fiction surrounding the efficacy of behavioural analysis to determine reliable symptoms of guilt. Perhaps she was writing without the benefit of the scholarship that casts serious doubt on the assumption that police are skilled at distinguishing truth from lies, the guilty from the innocent, on the basis of verbal and non-verbal cues.

<sup>193</sup> There are numerous cases wherein it is emphasized that demeanour evidence is unreliable. In *Law Society of Upper Canada v. Neinstein* (2010), 99 O.R. (3d) 1 at para. 66 (C.A.) "while demeanour is a relevant factor in a credibility assessment, demeanour alone is a notoriously unreliable predictor of the accuracy of evidence given by a witness". In *R. v. G.G.* (1997), 115 C.C.C. (3d) 1 (Ont. C.A.) at paras. 14, 42, it was held that the trial judge committed reversible error in finding an accused guilty based, "almost exclusively upon his favourable assessment of the complainant's demeanour without embarking upon any critical assessment of her testimony in the light of the evidence as a whole" which included "significant contradictory evidence and inconsistencies". *R. v. P-P* (S.H.) (2003), 176 C.C.C. (3d) 281 at 291-92 (N.S.C.A.): "Appearances alone may be very deceptive. A most reprehensible witness may well be telling the truth. A polished, well-mannered individual may prove to be a consummate liar.

Reasons of intelligence, upbringing, education, race, culture, social status and a host of other factors may adversely affect a witness's demeanour and yet may have little bearing on that person's truthfulness. Consequently, quite apart from that witness's appearance or mood, his or her testimony must be carefully considered for its consistency

“guilty” by the application of such a poorly founded method of making determinations of guilt or innocence be condemned to face the punishment of the guilt-presumptive coercive interrogation? In my view, given the significant risk of generating a police induced false confession and subsequent wrongful conviction posed by the use of these tactics, so-called “guilt”, as determined by non-verbal cues’ behavioural analysis, ought not to suffice to condemn a suspect to these unfair and coercive interrogation tactics which expose the person affected to the risk of making a false confession. If it is inappropriate to rely solely on behavioural analysis in the assessment of trial testimonial evidence, then what compelling reason is there that is not trumped by considerations of fairness, for permitting such wide latitude at pre-trial in the interrogation room?<sup>194</sup>

If the Ontario Court of Appeal has demonstrated a generally pro-Reid orientation, then the Nova Scotia Court of Appeal has historically taken the opposite view. This is evidenced by that court’s treatment of police trickery in *Oickle*, when it dealt with that case before it ultimately made its way to the Supreme Court of Canada. In its decision, the Nova Scotia Court of Appeal suggested that the interrogator’s understanding of demeanour in questioning the suspect

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or inconsistency with all of the other evidence presented at trial before any decision can be made concerning its acceptance, in whole or in part, or the weight to be attached to it.” See also: *R. v. Norman* (1993), 87 C.C.C. (3d) 153 at para. 55 (Ont. C.A.): “I do not think that an assessment of credibility based on demeanour alone is good enough in a case where there are so many significant inconsistencies.” In *R. v. S.(W.)* (1994), 90 C.C.C. (3d) 242 at para. 19 (Ont. C.A.): “Demeanour alone should not suffice to found a conviction where there are significant inconsistencies and conflicting evidence on the record.”

<sup>194</sup> It might be argued that the investigative role of police is a different one from the adjudicative role played by judges and juries. Without being able to rely on indicators of guilt, the police would have to ignore their investigative hunches. It is impossible to regulate the very thoughts of the police so that they are unable to take non-verbal behavioural cues into consideration.

However, the impossibility of stopping the police from relying on behavioural cues is not a reason in favour of allowing them to rely on them; it is a reason to do away with police interrogations. We all rely on dubious behavioural indicators in making judgments in our personal lives. Such judgments can be prejudicial. It is important, therefore, that such prejudices not be given an opportunity to influence the outcome of criminal proceedings. This is important at the investigative stage as well as at the adjudicative stage of the process.

amounted to an improper abuse of the suspect's trust. The Supreme Court of Canada disagreed with this view, stating that:

In essence, the [lower] court criticizes the police for questioning the respondent in such a gentle, reassuring manner that they gained his trust. This does not render a confession inadmissible. To hold otherwise would send the perverse message to police that they should engage in adversarial, aggressive questioning to ensure they never gain the suspect's trust, lest an ensuing confession be excluded.<sup>195</sup>

In its decision in *Oickle*, the Nova Scotia Court of Appeal had also concluded that the police improperly made an offer of leniency to the accused by minimizing the seriousness of his offence. The Supreme Court of Canada again disagreed, stating: "Insofar as the police simply downplayed the moral culpability of the offence, their actions were not problematic."<sup>196</sup>

In *Oickle* the Supreme Court made reference to Mr. Justice Lamer's reasons in *Rothman*, wherein he wrote: "The investigation of crime and the detection of criminals is not a game to be governed by the Marquis of Queensbury rules. The authorities in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through rules be hampered in their work. What should be repressed vigorously is conduct on their part that shocks the community."<sup>197</sup>

The Nova Scotia Court of Appeal expressed concern that the use of "alternative questions" implied a threat or a promise of leniency. The Supreme Court of Canada rejected this argument and offered a different test of whether or not an implied threat or promise crosses the line when it wrote: "The most important consideration in all cases is to look for a quid pro quo offer by interrogators, regardless of whether it comes in the form of a threat or a promise."<sup>198</sup>

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<sup>195</sup> *Oickle*, *supra* note 188.

<sup>196</sup> *Ibid.*

<sup>197</sup> *Rothman*, *supra* note 188, cited in *Oickle*, *supra* note 188.

<sup>198</sup> *Oickle*, *supra* note 188.

While the Supreme Court of Canada has avoided assessment of the appropriateness or legal permissibility of the Reid Technique directly, by name, it has given tacit approval to this method by permitting the use of police trickery.

Nevertheless, lower courts have given explicit consideration to the Reid Technique in several cases. There have been a number of decisions from the Ontario Superior Court, for example.<sup>199</sup> For instance, in *R. v. Amos*, many of the Reid techniques met with judicial approval and resulted in the admission of an accused's confession to police.<sup>200</sup>

*Amos* is consistent with the *Oickle* ruling, insofar as it indicates that courts are directed to accord the police a great deal of latitude in resorting to tricks on the view that such tricks will not severely interfere with a suspect's exercise of informed free-choice. For example, when discussing the interrogator's efforts to minimize the suspect's moral responsibility, the court stated:

There is nothing problematic or objectionable about police, when questioning suspects, in downplaying or minimizing the moral culpability of their alleged criminal activity. I find there was nothing improper in these and other similar transcript examples where [the detective] minimized [the accused's] moral responsibility. At no time did he suggest that a confession by the subject would result in reduced or minimal legal consequences. Those questions did not minimize the offence anywhere close to the extent of oppression within the meaning of *Oickle* and other authorities. In using the words "this is your opportunity" to tell your story, and statements to the effect that "your credibility is at its highest now", and in asserting to the accused that he would not be as credible ten months down the road at trial when he had "spoken to lawyers", and the like, the detective was making an approach to the accused's intellect and conscience.<sup>201</sup>

But the positive reception of the technique has not been unanimous across the courts in every province. The Reid Technique has been considered in cases heard in other Canadian

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<sup>199</sup> See: *R. v. Amos* (2009), CarswellOnt 7126, 202 C.R.R. (2d) 106; *R. v. Vicioso* (2006), CanLII 27311, 70 W.C.B. (2d) 592 (ON S.C.).

<sup>200</sup> John E. Reid & Associates, correspondence by email to me, May 3, 2010; *Amos*, *ibid*.

<sup>201</sup> *Amos*, *ibid*.

jurisdictions,<sup>202</sup> and some lower courts appear to have responded to the methodology with greater skepticism. In *R. v. M.J.S.*,<sup>203</sup> Ketchum Prov. Ct. J., wrote:

It is only by watching these interrogations that one can experience the full flavour of the intensity of the questioning, and the psychological suggestions and manipulation of the accused through the use of themes. This is an investigative technique pioneered by John E. Reid and Associates, Inc. of Chicago, Illinois, U.S.A. The Reid Technique involves a skillful development of 'themes' and suggestions put to the suspect in a rapid-fire and high intensity manner where the interrogator stays in complete control of the situation. On the rare occasions when there is an opportunity for the accused to respond, any disagreement is immediately ignored or overridden and, in particular, any denial is countered with a shift to another theme, or a cutoff remark such as 'we are beyond that point, we know you did it'. This technique is used over 40 times.<sup>204</sup>

The *M.J.S.* court found that a confession was inadmissible, in part, because the investigators used an "alternative question" that contrasted a situation in which, if the suspect confessed he could continue to raise his children and keep his family together; and if he refused to confess, on the other hand, he would never see his children again and they would be raised by foster parents.<sup>205</sup> Because the alternative question was clearly directed at real potential consequences, and it was a lie for the interrogator to suggest he had any real pull in the matter, it was decided to have been improper by the court. The Court held that this technique raised doubt about the voluntariness of the resulting statement. On the Reid Technique itself, Mr. Justice Ketchum provided the following valuable commentary:

I have also come to the conclusion that the technique employed in interrogating this accused by all three interrogators was oppressive. More specifically, I find that the accused wrote this confession in order to escape the oppressive atmosphere created by these interrogations all of which followed the Reid Technique almost to the letter.<sup>206</sup>

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<sup>202</sup> *R. v. M.J.S.*, [2000] A.J. No. 391; *R. v. Minde*, 2003 ABQB 797, 343 A.R. 371, 179 C.C.C. (3d) 188; *R. v. Cruz*, 2008 ABPC 155 (CanLII), 455 A.R. 10.

<sup>203</sup> *M.J.S.*, *ibid.*

<sup>204</sup> *Ibid.* at paras 18 and 19.

<sup>205</sup> *Ibid.* at para 28.

<sup>206</sup> *Ibid.* at para. 39.

In another Alberta case, *R. v. Minde*,<sup>207</sup> Madam Justice Moreau, after outlining the point of contention, went on to decide that the evidence obtained by virtue of a Reid-inspired interrogation should be excluded. Moreau J., at paragraph 87, writes:

In all of the circumstances, the combined effect of:

- the deceit perpetrated by the officers,
- their powerful moral and spiritual inducements,
- the minimization techniques used,
- the absence of any offer of food or refreshment for a number of hours,

created an atmosphere in which the accused had to trade admissions in order to extract himself from the more serious consequences of a murder charge. Minde having admitted to having been drinking on the evening in question and to having memory problems, there was a further risk created by the conduct of the officers, that he felt obliged to provide an explanation for the death, whether or not the explanation was true. ... [T]he comments of police in my view carried the ... implication that the officers would assist [Minde] to avoid being prosecuted for murder if he told his side of the story. I am left in a state of reasonable doubt as to whether as a result of the conduct of the police, the accused's incriminating admissions were obtained through fear of prejudice or hope of advantage held out to the accused.<sup>208</sup> (emphasis mine)

In a recent Alberta case, *R. v. Chapple*,<sup>209</sup> the Alberta Provincial Court was sharply critical of the Reid Technique and reiterated the earlier criticisms in *R. v. M.J.S.* The Court wrote:

Twelve years after Judge Ketchum warned of the dangers of the use of the Reid Technique in *M.J.S.*, it continues to be criticized by a number of courts. I now add my voice to the chorus. Like Judge Ketchum, I denounce the use of this technique in the strongest terms possible and find that its use can lead to overwhelmingly oppressive situations that can render false confessions and cause innocent people to be wrongfully imprisoned. In this case the police were convinced of the accused's guilt even though there was medical evidence available that was consistent with the accused's version of events. They pushed ahead with the interview with one goal in mind: a confession. And that confession had to fit their theory of the case.<sup>210</sup>

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<sup>207</sup> *Minde*, *supra* note 202.

<sup>208</sup> *Ibid.* at para. 87.

<sup>209</sup> *R. v. Chapple*, 2012 ABPC 229.

<sup>210</sup> *Ibid.* at para. 122.



The current jurisprudence of the Supreme Court of Canada considering the use by police of the modern techniques of psychological interrogation, and in particular, the Reid Technique as well as other Reid-inspired interrogation methods, indicates a general acceptance of the strategies and tactics espoused by these schools of interrogation. The written judgments of lower court judges, notably the Alberta Queen's Bench, have articulated valuable reservations about the uses of the Reid techniques showing that the opinion of the judiciary generally on the appropriateness of these techniques has been far from unanimous. But the different rulings in the courts below do not necessarily indicate inconsistency with those of the Supreme Court. The Supreme Court has not mentioned the Reid Technique explicitly in its reasons and has indicated that determinations of voluntariness are to be made contextually taking all the factors into account by the trial judge.<sup>211</sup> For the Supreme Court this is arguably an issue of deference to the trier of fact, and it could be argued that the circumstances in cases like *Minde* and *M.J.S.* reflect sufficiently different facts from *Oickle* and *Spencer*, for example, that there was no inconsistency between the rulings at all – merely deference in the latter cases.

The lower court judgments appear to indicate deeper consideration of some of the key issues at play, however, whereas the Supreme Court's consideration of the atmosphere created by Reid interrogation and its impact upon the suspect appears to have been more limited. Decades of research in "social psychology"<sup>212</sup> tells us that a social situation has great power to influence a person's behaviour.<sup>213</sup> At issue is the question of whether a given trick will rob a suspect of his ability to make a free choice. The Supreme Court of Canada and the Ontario Superior Court of Justice have given very wide latitude to the amount of permissible trickery in

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<sup>211</sup> *Oickle*, *Supra* note 188.

<sup>212</sup> Timothy Moore & Karina Gagnier, "'You Can Talk if you want to': Is the Police Caution on the 'Right to Silence' Understandable?" (2008) 51 C.R. (6th) 1 at 21.

<sup>213</sup> *Ibid.* According to the authors, our tendency to overestimate the significance of dispositional characteristics and underestimate the impact of situational circumstances has been labeled "the fundamental attribution error" (*Ibid.*).

the custodial interrogation setting. Other courts have demonstrated a more considered understanding of how the psychology of pressure and persuasion can alter a detainee's perception so as to interfere with rational choice, and arguably, by extension, with informed free-choice, as well.

Courts usually exclude confessions if they determine that statements were made in response to clear threat (inducement), or if the use of police trickery was sufficiently egregious that would be shocking to the conscience of the community.<sup>214</sup> Neither *Rothman*, nor any case which followed this decision, has<sup>215</sup> “prohibited use of police trickery (e.g. exaggerating the strength or amount of evidence against a suspect) - it is still an allowable interrogation technique.”<sup>216</sup>

The Reid Technique is the most widespread training regimen for police officers in North America; however, Reid-style interrogations are not the only means of procuring incriminating statements. We now turn our attention to a method of gathering confessions evidence that is thought to be more humane than the Reid Technique. That method is the PEACE model of investigative interviewing.

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<sup>214</sup> *Supra* note 40 at 323.

<sup>215</sup> *Ibid.* at 322.

<sup>216</sup> *Ibid.* at 322-323.

## Chapter 6: The Peace Model

### Introduction:<sup>1</sup>

As has been discussed, the Reid technique of interrogation has been roundly criticized for the manipulative character of the tactics it trains interrogators to employ. Many believe, based on the evidence earlier discussed, that the tactics advocated by the Reid Institute and its proponents create a substantial risk of inducing suspects to make false confessions.<sup>2</sup>

Many opponents of the Reid Technique support the implementation of a purported ethical alternative:<sup>3</sup> the PEACE method of investigative interviewing. It is to this method that we now turn our attention.

It is argued that proponents of PEACE may be overly optimistic in their assessment that this method will eliminate or substantially reduce false or involuntary confessions. Whereas the Reid technique appears to have a tendency to induce false confessions due to its heavy reliance upon fear-tactics, PEACE seems to rely more on creating false hope of advantage. It appears that in situations where a suspect can be compelled to speak by an external legal threat, like an adverse inference for a refusal to make a statement, PEACE may induce false confessions through its reliance on creating in the mind of a suspect the hope that there is an advantage to be gained by cooperating with police interviewers. In the absence of such an external legal threat, with the right to silence in place, PEACE may be ineffective. In such circumstances it is suggested that the elimination of the right to silence may become a necessary component of successful PEACE method implementation. Thus, it is proposed that where PEACE is adopted

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<sup>1</sup> “Over the years, the English police have not had much in the way of manuals about questioning. They have relied on American manuals and are now trying to move very far away from the typical style we are familiar with from television programs.” - Michael Zander, “You Have no Right to Remain Silent: Abolition of the Privilege Against Self-Incrimination in England” (1995) 40 St. Louis U. L.J. 659 at 663.

<sup>2</sup> See chapter 4.

<sup>3</sup> See the discussion in this chapter.

as an interviewing technique, the elimination of the right to silence may follow, whether it is intended by policy-makers that that should happen, or it occurs as a consequence of PEACE implementation.

Further to this point, as we shall see, in the United Kingdom, the adoption of the PEACE style of investigative interviewing was only two years before the government's effective elimination of the right to silence by legislative enactment. It is further suggested that the historical circumstances that permitted sweeping reforms to police procedure to be made in the 1980s and 1990s enabled the Conservative government of the United Kingdom to carry out a plan for the elimination of the right to silence that it had been unsuccessfully trying to implement since the 1970s. It is suggested that the pretext for comprehensive criminal justice reform was created by a number of high-profile miscarriages of justice that caused public outrage. It is further suggested that the government then seized this opportunity to enact reforms that were in keeping with its ideologically-driven agenda. The elimination of the right to silence was of paramount importance, and the PEACE method is the most suitable means of obtaining a statement, in an environment where there is no right to silence. I contend that it is possible that in the British case, PEACE may have been designed with the future elimination of the right to silence in mind, or as a policy instrument that may have assisted in the elimination of that right.

In this chapter I will illustrate the underlying principles of PEACE, its history and its methods. Upon the review of the PEACE method of interrogation I intend to argue that PEACE is not a suitable ethical alternative to Reid. This is important for our purposes as this thesis calls for the abolition of all custodial questioning. Hence, it is argued here that PEACE is not the solution to the problem of coercive custodial interrogations. This argument is predicated on a number of factors. Among these factors is the possibility that the implementation of PEACE

could pose a threat to the future of the right to silence in Canada. Moreover, the PEACE method of interrogation has a strong tendency to obscure the adversarial relationship that exists between a state agent and an accused person.

Keeping these introductory remarks in mind, let us begin this chapter by examining the PEACE model of interviewing.

### **The PEACE Model of Investigative Interviewing**

Professor H. Richard Uvillar has observed that although police frequently obtain evidence from the mind of an accused person<sup>4</sup> by “direct interrogation,”<sup>5</sup> more subtle variations of interrogation techniques, or even “casual conversation” may be just as effective or more so.<sup>6</sup> Some agree with this proposition, and some reject it out of hand; nevertheless, it is an idea that merits our attention as we discuss our next topic, the PEACE<sup>7</sup> model of investigative interviewing.

The highly persuasion-oriented Reid Technique may be compared, and where appropriate, contrasted with the PEACE model. When comparing the two models, we should ask whether the claims of the PEACE advocates in favour of their approach can be supported by the research data. The specific claims that we must consider include, at least, the following:<sup>8</sup>

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<sup>4</sup> H. Richard Uvillar, “Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint” (1987) 87 Columbia L. Rev. 1137 at 1137.

<sup>5</sup> *Ibid.* at 1142.

<sup>6</sup> *Ibid.* and *Ibid.* n. 14. Uvillar writes at footnote 14: “One of the more notable examples occurred in New York, where, after fruitless hours of interrogation (and a conference with his lawyer), the prime suspect in a brutal double murder finally opened up in response to an offhand remark from a cop he knew: “Rick, did you ever think it would wind up like this?”, citing *People v. Robles*, 27 N.Y. 2d 155, 158, 263 N.E. 2d 304, 305, 314 N.Y.S. 2d 794 (1970), cert. denied, 401 U.S. 945 (1971).

<sup>7</sup> PEACE is an acronym which stands for Planning & Preparation, Engage & Explain, Account, Closure, and Evaluation. These components provide a structure that can be used for all types of investigative interviewing.

<sup>8</sup> I don’t propose this list as an exhaustive one; these four claims are simply ones which appear relevant and are readily apparent to me.

- (1) That PEACE is equally or more effective at eliciting confessions from suspects than Reid;<sup>9</sup>
- (2) That PEACE lowers the risk of false confessions;<sup>10</sup>
- (3) That PEACE is less manipulative and coercive than Reid, and therefore more humane;<sup>11</sup>  
and
- (4) That if interviewers are properly trained in PEACE, this will cause them to adequately absorb the training program and successfully apply the methodology in their practice, thus realizing positive dividends in the above three areas.<sup>12</sup>

I am not prepared, at this time, to propose any definitive answers to these questions. All of these claims may be true, and may be subject to ultimate proof as being true, in time, or they may be untrue or not susceptible to proof. As far as I can tell, the data that is available is not yet extensive enough to reach hard conclusions on these questions, nor have the studies which have been done adequately addressed the high number of variables that are at play, even when they are aggregated and synthesized.

Advocates for PEACE uphold a distinction between the concepts of interrogating, on the one hand, and interviewing, on the other. They are proponents of the latter, and purport to offer a more humane way of searching for the truth than the advocates of the Reid technique. PEACE

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<sup>9</sup> Brent Snook et al., "Reforming Investigative Interviewing in Canada" (2010) 52 Canadian J. Criminology and Crim. Just. 215 at 222.

<sup>10</sup> *Ibid* at 223.

<sup>11</sup> *Ibid.*; Rebecca Milne & Ray Bull, *Investigative Interviewing Psychology and Practice* (Chichester: Wiley, 1999) at 5.

<sup>12</sup> Brent Snook et al., "Police Witness Interview Training, Supervision and Feedback: A Survey of Canadian Police Officers" (2012) Canadian J. Criminology and Crim. Just. 363 at 367-370; Brent Snook & Kathy Keating, "A Field Study of Adult Witness Interviewing Practices in a Canadian Police Organization" (2010) 16 Legal and Criminal Psychology 160; *Snook, et al., Ibid.*; Allison M. Wright & Laurence Allison, "Questioning Sequences in Canadian Police Interviews: Constructing and Confirming the Course of Events" (2004) 10(2) Psychology, Crime and Law 137.

interrogators “...reject the term “interrogation” completely”<sup>13</sup> and take the position that “all interviews, whether with victims, witnesses or suspects, are ‘investigative interviews’.”<sup>14</sup>

The PEACE model of investigative interviewing originated in the United Kingdom. The history shows that, up until towards the end of the 18<sup>th</sup> century, justices of the peace in England and Wales were responsible for conducting an “inquisition” of an accused person. However, when they no longer had that obligation, the police stepped-in and assumed control of the task of questioning.<sup>15</sup> Williamson writes:

As the new constabularies began to proliferate across England and Wales police officers began to question suspects prior to the judicial hearing. Some judges would allow reports of such conversations to be given in evidence whereas this was anathema to others. The Home Secretary referred the matter to the Judges and in 1906 the Judges Rules were published.<sup>16</sup>

The option to question suspects may clearly have fallen to English and Welsh police after 1906, however there was very “...little guidance”<sup>17</sup> on how the questioning should be done,<sup>18</sup> until literature on that subject began to be more widely published in the 1980s.<sup>19</sup> During that decade, “concerns over the perceived ineffectiveness of the Judges’ Rules”<sup>20</sup> and many other deficiencies in police procedure that were identified by the Phillips Royal Commission on Criminal Procedure led to the passing of the *Police and Criminal Evidence Act 1984* (“PACE 1984”).<sup>21</sup> The Act introduced ostensibly “...stricter controls over police questioning, including

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<sup>13</sup> Mary Schollum, *Investigative Interviewing: The Literature* (Wellington: Officer of the Commissioner of Police, 2005) at 13.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.* at 43.

<sup>16</sup> T. Williamson, “Review and Prospect” in Eric Shepherd, ed., “Aspects of Police Interviewing” (1993) 18 *Issues in Criminological and Legal Psychiatry* 57 at 57.

<sup>17</sup> *Supra* note 13 at 43.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Milne & Bull, supra* note 11.

<sup>20</sup> *Supra* note 13 at 43.

<sup>21</sup> See: Michael Zander, “The Police and Criminal Evidence (Northern Ireland) Order 1989” (1989) 40 *N. Ir. Legal Q.* 319.

the tape-recording of interviews with suspects.”<sup>22</sup> These measures highlighted the fact that the interview and interrogation techniques currently in vogue in England had not, in the main, been made the subject of any rigorous scientific testing.<sup>23</sup> Thus, research on interview and interrogation began to proliferate, particularly from the field of forensic psychology, following the emergence of the increased scrutiny of that decade.<sup>24</sup>

In 1991, the British Home Office created a “...steering group on “investigative interviewing, comprising members of the police service, the Home Office, and the Crown Prosecution Service”<sup>25</sup> to create and implement an interview methodology and a training program to disseminate it.<sup>26</sup> What they came up with was the PEACE model,<sup>27</sup> the aim of which was to move away from “persuasive interviewing”<sup>28</sup>, and replace it with an “ethical alternative”.<sup>29</sup> As early as 1992, two handbooks were dispatched to officers:<sup>30</sup> “A Guide to Interviewing”<sup>31</sup> and “The Interviewer’s Rule Book”.<sup>32</sup> “These were accompanied by a workbook<sup>33</sup> and guidance on the core principles of police interviewing.”<sup>34</sup>

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<sup>22</sup> *Supra* note 13 at 43.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Supra* note 13. The exonerations of the Birmingham Six, the Guildford Four and the MacGuire Seven also exposed interviewing and interrogation methods to greater scrutiny. These high-profile miscarriages of justice led to the creation of the Royal Commission on Criminal Justice (The Runciman Commission) (Stewart Field & Phillip A. Thomas, “Justice and Efficiency? The Royal Commission on Criminal Justice” (1994) 21 *The Royal Commission on Criminal Justice* 1 at 1).

<sup>25</sup> J. Baldwin, “Police Interview Techniques – Establishing Truth or Proof?” (1993) 33 *Brit J. Crim.* 325 at 327 note #10.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Supra* note 13 at 43

<sup>28</sup> I use this euphemism loosely, as we have already discussed at some length what so-called “persuasion” often entails as evidenced by the Reid Technique.

<sup>29</sup> *Supra* note 13.

<sup>30</sup> *Milne & Bull, supra* note 11 at 158.

<sup>31</sup> “A Guide to Interviewing” (CPTU, 1992a)

<sup>32</sup> “The Interviewer’s Rule Book” (CPTU, 1992b).

<sup>33</sup> CPTU, 1992c

<sup>34</sup> *Supra* note 13 at 43.



The PEACE method consists of the use of investigative techniques that its proponents claim follow higher ethical standards for custodial interrogation than are found in the Reid techniques. The PEACE conception of ethical interviewing includes the following ideas:<sup>35</sup>

1. "Interviews should be conducted with integrity, common sense and sound judgment."<sup>36</sup>
2. "Using unfair means to get a confession (i.e. noble cause corruption) is never justified."<sup>37</sup>
3. "Interviewers must avoid unethical behaviours such as making threats or promises or using coercive or oppressive tactics."<sup>38</sup>
4. "Suspects must be treated by the interviewer with respect, an open-mind, tolerance and impartiality."<sup>39</sup>
5. "An awareness of why some people will make false confessions, including dispositional factors (eg: age, personality characteristics, intellectual impairment, etc.) and situational (eg: isolation, confrontation and minimization)."<sup>40</sup>
6. "If offenders believe they have been treated well they are less likely to form a negative view of police or to communicate a negative view of police to others."<sup>41</sup>
7. "Many miscarriages of justice have resulted from police malpractice."<sup>42</sup>

The seven principles of investigative interviewing were developed in 1992 by the Home Office for use in England and Wales, and have since been adopted in other jurisdictions.<sup>43</sup> Home Office Circular 22/1992 provides the following seven principles of investigative interviewing:<sup>44</sup>

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<sup>35</sup> *Ibid.* at 3.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Home Office Circular 22/1992 p. 90 (Practice Advice on Core Investigative Doctrine 2005, produced on behalf of Chief Police Officers by National Center for Policy Excellence)*

1. "The role of investigative interviewing is to obtain accurate and reliable information from suspects, witnesses or victims in order to discover the truth about matters under police investigation."
2. "Investigative interviewing should be approached with an open mind. Information obtained from the person who is being interviewed should always be tested against what the interviewing officer already knows or what can be reasonably established."
3. "When questioning anyone a police officer must act fairly in the circumstances of each individual case."
4. "The police interviewer is not bound to accept the first answer given. Questioning is not unfair merely because it is persistent."
5. "Even when the right to silence is exercised by a suspect the police still have a right to put questions."
6. "When conducting an interview, police officers are free to ask questions in order to establish the truth; except for interviews with child victims of sexual or violent abuse which are to be used in criminal proceedings, they are not constrained by the rules applied to lawyers in court."
7. "Vulnerable people, whether victims, witnesses or suspects, must be treated with particular consideration at all times."

These principles seem to represent a commitment to fairness towards suspects that are to be interviewed. They are designed to take a more ethical approach to the practice of police interviewing. In other words, according to these principles, the search for the truth must be combined with a concern for fairness.

Lofty pronouncements of ethical aims are well-and-good, however some attention should be paid to the details of the method, and how it is applied, lest so-called investigative interviewing be reducible to nothing more than a public relations exercise on behalf of police. At its essence, what distinguishes PEACE from Reid?

## **The Stages of PEACE:**

### **(a) Planning and Preparation:**

The PEACE approach takes the view that there are very few interviewers who have the capability to carry-out a top-notch interviews<sup>45</sup> without putting in sufficient planning and preparation beforehand.<sup>46</sup> Planning, according to the CPTU (1992a) is “the mental process of getting ready to interview”<sup>47</sup> and preparation is “considering what needs to be made ready prior to the interview [including] such things as the location, the environment and the administration.”<sup>48</sup>

### **(b) Engage and Explain:**

The Engage and Explain stage requires that police interviewers realize how “nerve-wracking”<sup>49</sup> an experience being interviewed by police is for most people, and how beneficial it can be to the investigative aims of interviewing to “warm-up”<sup>50</sup> a suspect by engaging them in a cooperative and relaxed manner.<sup>51</sup>

Building rapport during the Engage and Explain stage has been identified by multiple commentators “...as the most influential factor in ensuring the success of a interview.”<sup>52</sup> The crucial components of Engage and Explain rapport-building have been identified as follows:<sup>53</sup>

(i) “creating a good impression from the outset;”<sup>54</sup> (ii) “treating the interviewee as an

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<sup>45</sup> *Supra* note 13 at 44.

<sup>46</sup> P. Hodgson, *A Practical Guide to Successful Interviewing* (Maidenhead: McGraw-Hill, 1987); B. Ord, G. Shaw, & T. Green, *Investigative Interviewing Explained* (Australia: LexisNexis Butterworths, 2004).

<sup>47</sup> *Supra* note 31 at 1.

<sup>48</sup> Joanna R. Adler & Jacqueline M. Gray. *The Interviewer's Rule Book* (New York: Willan Publishing, 1992). at 1.

<sup>49</sup> *Supra* note 13 at 45.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> Ord, Shaw, & Green, *Supra* note 46 at 15.

<sup>54</sup> Ord. et al, remind us of the old adage that: “you catch more flies with sugar than you do with vinegar” and that “Courtesy, politeness and understanding cost nothing but can greatly contribute to a successful interview.” *Ibid.* at 16.

individual;”<sup>55</sup> (iii) “understanding the feelings of the person being interviewed;”<sup>56</sup> (iv) “explaining the reason for the interview;”<sup>57</sup> (v) “giving an outline of the procedures and the reason for them;”<sup>58</sup> and (vi) “describing the format of the interview.”<sup>59</sup>

**(c) Accounting:**

During this stage, “...the interviewer obtains the interviewee’s full account of events.”<sup>60</sup> The three core components of the Accounting stage are to:<sup>61</sup>

- (1) Obtain the suspect’s uninterrupted, original version;<sup>62</sup>
- (2) Develop and clarify the original version;<sup>63</sup> and
- (3) If needed, challenge the suspect’s version of events.<sup>64</sup>

Interview skills are necessary for the final product “...to be both accurate and reliable,”<sup>65</sup> and interviewers must be aware that suspects “...can move from being cooperative to uncooperative,”<sup>66</sup> and adjust their approach accordingly.<sup>67</sup>

During the Accounting stage, there are different approaches that ought to be taken with cooperative witnesses as opposed to uncooperative ones.<sup>68</sup> For cooperative witnesses, the

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<sup>55</sup> This involves listening and accommodating the needs and concerns of the interviewees (*Ibid.* at 17).

<sup>56</sup> To use empathy. “[U]nderstand how the other person feels while maintaining an objective stance.” *Ibid.* at 18.

<sup>57</sup> *Ibid.* at 18. “The importance of the interviewee’s knowledge in assisting the investigation should be emphasized, in order for interviewees to identify their crucial role in the investigation and appreciate what is required of them.”

<sup>58</sup> The idea here is to convey to the interviewee that “there are good reasons for the routines” (*Ibid.* at 18) that are in place, and to convince the interviewee to accept that those routines be followed “to make the best use of their information so” (*Ibid.* at 18) that they can contribute to “information of a higher quality” (*Ibid.* at 18.).

<sup>59</sup> Ord et al suggest telling the interviewee that: “... the interviewee will be invited to give an account in their own words of the matter under investigation; the interviewer will then seek to clarify the account by asking supplementary questions; the interviewee will next be asked to comment on individual matters which have not been covered or adequately explained; the interviewer will verbally summarise what has been said at regular intervals to check for correct interpretation” *Ibid.* at 19.

<sup>60</sup> *Supra* note 13 at 46.

<sup>61</sup> NCF, *Investigative Interviewing: A Practical Guide* (England: Bramshill Training and Development Unit: National Crime Faculty, 1996). See also *ibid.*

<sup>62</sup> *Schollum, ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> Centre for Investigative Skills, *Practical Guide to Investigative Interviewing*, (England: Central Police Training and Development Authority: England). See also *ibid.*

interviewer will use “free recall” for “lower level interviews,”<sup>69</sup> and “enhanced cognitive interviewing techniques” for advanced ones.<sup>70</sup> For uncooperative witnesses, the interviewer should use the “conversation management techniques.”<sup>71</sup>

After the account has been given, the interviewing officer may wish to expand the witness’s story or question the suspect’s version.<sup>72</sup> The challenge phase of PEACE has been controversial, and some commentators<sup>73</sup> maintain that the “...actual practice of PEACE interviewing does not reflect the ethical philosophy of the PEACE model.”<sup>74</sup> On the other hand, other forensic psychological research,<sup>75</sup> has not found much evidence of the use of objectionable tactics during the challenge phase of PEACE.<sup>76</sup> Courts in England and Wales continue to rule some statements obtained through PEACE interrogation techniques inadmissible, thus suggesting, that sometimes Reid-like manipulation and coercion may continue to occur during the challenge phase of PEACE interviewing.<sup>77</sup>

#### **(d) Closure:**

It is believed that the closing phase of the interview is as important as any other phase.<sup>78</sup> The objectives of an adequate closure should be:<sup>79</sup> (i) “ensure there is mutual understanding about what has taken place (by reviewing and summarizing the account);<sup>80</sup>” (ii) “verify that all aspects have been sufficiently covered (by checking that interviewees have given all the information

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<sup>68</sup> Schollum, *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> See: R. Ede & E. Shepherd, *Active Defence* (London: Law Society Publishing, 2000).

<sup>74</sup> *Supra* note 13 at 47.

<sup>75</sup> Milne & Bull, *Supra* note 11; and C. Clarke & L. Milne, *National Evaluation of the PEACE Investigative Interviewing Course* (UK: Home Office, 2001).

<sup>76</sup> *Supra* note 13 at 47.

<sup>77</sup> *Ibid.*

<sup>78</sup> Clarke & Milne, *Supra* note 75; Also see *Ibid.*

<sup>79</sup> Schollum, *ibid.*

<sup>80</sup> *Ibid.*

they are able and willing to provide);”<sup>81</sup> (iii) “explain what will happen in the future (by giving the interviewee appropriate information on the next stages of the process);”<sup>82</sup> and (iv) “facilitate a positive attitude towards providing accurate and reliable information in the future.”<sup>83</sup>

**(e) Evaluation:**

During the evaluation phase, the PEACE interviewer:<sup>84</sup> (i) “examines whether the aims and objectives for the interview have been achieved;”<sup>85</sup> (ii) “reviews the investigation in the light of information obtained during the interview;”<sup>86</sup> and (iii) “reflects upon how well he or she conducted the interview and considers”<sup>87</sup> areas for future improvement.<sup>88</sup>

**The Tactics, Strategies and Techniques of PEACE:**

The PEACE method takes a more restricted approach than the Reid technique on the influence of psychology in the interviewing process. PEACE proponents take the position that body language and non-verbal cues *do* send messages<sup>89</sup> that “...may confirm, obscure or contradict what is being said,”<sup>90</sup> *however* officers are cautioned against “...developing an over-confidence in their ability to ‘read’”<sup>91</sup> these signs.<sup>92</sup> According to the PEACCE model, there is no such thing as a typical deceptive body language.<sup>93</sup> PEACE therefore holds that “conclusions based solely on someone’s behaviour in the interview room are not reliable.”<sup>94</sup> Furthermore,

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<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> NCF, *Investigative Interviewing: A Practical Guide*, *Supra* note 61; *Centre for Investigative Skills*, *Supra* note 67.

<sup>85</sup> *Supra* note 13 at 47.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.* at 4.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

PEACE recognizes that suspects may be susceptible to suggestive techniques that can alter the accuracy of what they say.<sup>95</sup>

PEACE uses four major interviewing techniques: “cognitive interviewing (CI);”<sup>96</sup> “enhanced cognitive interviewing (ECI);”<sup>97</sup> “free recall (FR);”<sup>98</sup> and “conversation management (CM).”<sup>99</sup> In addition to the four major techniques, PEACE allows for many minor tactics to fit into its framework, the application of which may vary according to the circumstances. A non-exhaustive list is as follows: creating a “good first impression; personalise the interview; establish rapport; explain the aims and purposes of the interview;”<sup>100</sup> using “open-ended and probing closed-questions; not interrupting the interviewee; initiate a free rapport; focused retrieval; activation and probing of an image; systematic probing of topics; active listening; mirroring/synchrony; challenging; clarification of inconsistencies;”<sup>101</sup> attentiveness to “seating arrangements; note-taking; mutual gaze and eye contact; friendliness, patience and support; change the temporal order; change perspectives; taking breaks”<sup>102</sup> and praising the interviewee’s efforts.<sup>103</sup>

PEACE specifically avoids certain techniques, including hypnosis; the polygraph; rationalizing, projecting and minimizing (RPMs); and other tactics, due to the fact that these techniques are unreliable, and in some cases “manipulative and oppressive.”<sup>104</sup>

PEACE recognizes that good interviewers possess certain qualities, with key goals of training in this method being that the interviewing officer should make himself or herself

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<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.* at 5.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.* at 5-6.

<sup>103</sup> *Ibid.* at 36.

<sup>104</sup> *Ibid.* at 6.

approachable by showing appropriate emotional responses to the changing dynamics of an interview<sup>105</sup> “Much of the literature describes the ideal interviewer as someone who can convey a range of emotions as well as empathy and sincerity at various times and as needed.”<sup>106</sup>

The attitude of the interviewing officer should show “self-awareness, confidence, purpose, vision, dedication and commitment to the highest professional standards.”<sup>107</sup>

During the challenge stage of the interview, it is instructed that this demeanour may change slightly; PEACE trainers recommend “...a confident, persistent demeanour, a firm tone of voice (but not aggressive or angry), the use of hand gestures when talking (palms up, arms open), looking away when the suspect gives denials,”<sup>108</sup> and modulation of the voice to make positive and negative points, respectively.<sup>109</sup>

According to the PEACE model, a good interviewer should always keep an open mind and he/she should have a keen interest in learning about human behavior in order to make more reliable observations during interviews<sup>110</sup>

PEACE interviewers put as high a degree of importance on interviewing witnesses, complainants and victims as they do on interviews conducted with suspects.<sup>111</sup> There are differences between the two; “there is a huge body of rules and rights that apply to suspect interviews but not to witness interviews.”<sup>112</sup>

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<sup>105</sup> C.R. Swanson, N.C. Chamelin & L. Territo, *Criminal Investigation* (United States: McGraw Hill Higher Education, 2002). See also *Ibid.* at 16.

<sup>106</sup> *Schollum, Ibid.* at 17.

<sup>107</sup> *Ibid.* at 16.

<sup>108</sup> D.E. Wicklander & D.E. Zulawski, *Interview and Interrogation Techniques – a Training Course* (Illinois: Wicklander-Zulawski and Associates, 2003); See also *Ibid.*

<sup>109</sup> *Wicklander & Zulawski, Ibid.*; See also *Schollum, Ibid.*

<sup>110</sup> J.W. Williams, “Interrogating Justice: A Critical Analysis of Police Interrogation and its Role in the Criminal Justice Process” (2000) 42(2) Can. J.Crim. 209; and G. Gudjonsson, *The Psychology of Interrogations, Confessions and Testimony* (Chichester: Wiley, 1992).

<sup>111</sup> *Supra* note 108.

<sup>112</sup> *Supra* note 13 at 17.



Many interviewers focus on the more ethically defensible aspects of PEACE in comparison to other interview and interrogation models at the disposal of police. “Early American literature points”<sup>113</sup> out that without safeguards and protections for the suspect explicitly enforced by the courts, the risk of abuses of power by the police increase.<sup>114</sup>

It is widely recognized that whereas suspects facing custodial interrogation may no longer have to contend with the flagrant physical abuse used by state agents of the past, there are nevertheless a significant number of unethical tactics that can be used in today’s psychologically-based interrogation room. Notable examples cited by PEACE advocates include: “using interrogation instead of interviewing; treating each interviewee as though culpable, making threats; making illegal promises; using coercion, using duress; using force or the threat of force; employing ruthless methods; falsely imprisoning the interviewee; not respecting the interviewee; and not maintaining the interviewee’s dignity.”<sup>115</sup> These unethical tactics are “often based on expedience; the ‘end justifies the means’ argument” PEACE advocates assert.<sup>116</sup>

PEACE avoids these aggressive and unethical tactics and relies on subtlety, active listening and the development of rapport between interviewer and interviewee to coax a confession from the suspect. While in both instances, the result, that is an inculpatory statement or confession, is detrimental to the interests of the suspect, the credit that the PEACE model claims is that it is less likely to result in false and unreliable confessions than more aggressive

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<sup>113</sup> *Ibid.* at 20.

<sup>114</sup> *Ibid.*

<sup>115</sup> Charles L. Yeshke, *The Art of Investigative Interviewing – A Human Approach to Testimonial Evidence* (Boston: Butterworth-Heinemann, 2003) at 12.

<sup>116</sup> D. Morgan & G. Stephenson, *Suspicion and Silence: the Right to Silence in Criminal Investigations* (London: Blackstone, 1994). See also *supra* note 13 at 20.

approaches. This proposition will need to be carefully analyzed at such time as sufficient research data has been collected and made available.

### **The Major Interview Techniques:**

The factors which have been shown to best contribute to procuring complete and accurate accounts from interviewees (victims, witnesses and suspects)<sup>117</sup> are: rules-based questioning;<sup>118</sup> “enhanced cognitive interviewing;”<sup>119</sup> “free recall interviewing;”<sup>120</sup> and “conversation management” interviewing.<sup>121</sup>

### **Effects of PEACE Training:**

Soukara et al.’s 2009 study on the use of investigative interview (and interrogation) tactics in the United Kingdom, a jurisdiction where officers undergo PEACE training, revealed interesting results. Researchers analyzed 80 videotaped interrogations<sup>122</sup> for the presence of 17 tactics: “disclosure of evidence;”<sup>123</sup> “maximization;”<sup>124</sup> “minimization;”<sup>125</sup> emphasizing contradictions; positive confrontation; gentle prods; [showing] concern; interruptions; silence; repetitive questioning; leading questions; open questions; intimidation; suggest scenario; handling [changes in a] suspect’s mood; challenging suspect’s account; and [emphasizing] situational futility.”<sup>126</sup>

Research showed that the most frequently used tactics in U.K. interviews are (i) “disclosure of evidence (99%); (ii) open questions (99%); (iii) leading questions (91%); and (iv)

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<sup>117</sup> *Supra* note 13 at 46.

<sup>118</sup> *Ibid.* at 54.

<sup>119</sup> *Ibid.* at 5.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

<sup>122</sup> S. Soukara et al., “What Really Happens in Police Interviews of Suspects? Tactics and Confessions” (2009) 15(6) *Psychology, Crime & Law* 493 at 497

<sup>123</sup> *Ibid.* at 499.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

repetitive questioning (84%).”<sup>127</sup> “Other tactics used in at least half of the sampled interviews were: (i) emphasizing contradictions [in the suspect’s account] (75%);”<sup>128</sup> (ii) “positive confrontations (74%);”<sup>129</sup> and (iii) “challenging the suspect’s account(71%).”<sup>130</sup> “...Tactics that were used in fewer than half of the interviews were: (i) gentle probes(43%); (ii) handling the suspect’s mood (33%); (iii) suggesting scenarios (29%); (iv) interruptions (19%); (v) showing concern (19%); and (vi) silence(15%).”<sup>131</sup> “The tactics that were almost never used were (i) maximization (1%); (ii) minimization (0 %); (iii) intimidation (0%) ; and (iv) situational futility,(0%)”<sup>132</sup> the hallmarks of Reid.<sup>133</sup>

Soukara et al. report:

The tactics deemed by several psychologists to be the most problematic (i.e. intimidation, minimisation, situational futility, and maximisation) never or almost never occurred. On the other hand, the tactics emphasised in the ‘new’ British ethos and training were often used; that is, those designed (i) to obtain information from the suspect (e.g. open questions, repetitive questions although the frequent use of leading questions is not in line with the training) and (ii) then to test this information (e.g. emphasising contradictions, challenging the suspect’s account, positive confrontation, disclosure of evidence).<sup>134</sup>

Suspects, in the Soukara et al. study, “confessed in 31 out of these 80 interviews.”<sup>135</sup>

Five of the confessions were given during the first<sup>136</sup> fifteen of the confessions during the middle and eleven of the confessions were obtained<sup>137</sup> “...in the final third”<sup>138</sup> of the interview.<sup>139</sup> This

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<sup>127</sup> *Ibid.* at 500.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.* at 502.

<sup>135</sup> *Ibid.* at 500.

<sup>136</sup> *Ibid.* at 499-500.

<sup>137</sup> *Ibid.* at 500.

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.*

point is important, because as Soukara et al. indicate: “Future research should try to establish when during typical interviews with suspects various tactics are used.”<sup>140</sup>

The tactics that were used in the highest number of interviews resulting in confessions were:<sup>141</sup> (i) “disclosure of evidence and open questions (used in all 31 confession interviews); (ii) leading questions (used in 30); (iii) positive confrontation (used in 28); (iv) challenging the suspect’s account (used in 26); and (v) emphasising contradictions and repetitive questioning (used in 25).”<sup>142</sup>

Soukara et al. report:

...the emphasis in the British PEACE training model on developing these particular tactics/skills seems well placed<sup>143</sup>

But any enthusiasm in favour of the position that milder interview techniques might replace the Reid Technique and enjoy comparable rates of success in facilitating the making of incriminating statements by accused persons (independent of the question of reliability), should be taken with a grain of salt due to the fact that data between jurisdictions is not presently susceptible to accurate comparison because of the different legal environments involved. In North America, the Reid Technique reigns supreme as the most pervasive method of interrogation, whereas in the United Kingdom, the PEACE method of interview has been adopted since 1992. The operation of the right to silence between the two jurisdictions is distinguishable.

Suspects in Canada and the United States enjoy a right to silence<sup>144</sup> in the face of police questioning without an adverse in-court presumption for exercising the right. In the United

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<sup>140</sup> *Ibid.* at 502.

<sup>141</sup> *Ibid.* at 501

<sup>142</sup> *Ibid.* at 501-502.

<sup>143</sup> *Ibid.* at 503.

Kingdom, where the PEACE method has been widely disseminated and officers have been instructed in its methods, there is no comparable right to silence. Although the right to silence historically emerged in the early-modern English common law, it has, in recent years, been effectively repealed by statutory enactments in that country.<sup>145</sup> Now, an accused person who refuses to answer questions during pre-trial custodial detention (as well as during other phases of the pre-trial and trial processes) will face a potential adverse presumption of guilt for his refusal to answer. Thus, with such a powerful incentive for a suspect to answer questions built-into English criminal procedure, the English legal-environment in this domain is not accurately comparable with the North American (or specifically the Canadian) one. If the Reid Technique used in North America has similar confession rates to the PEACE method used in the United

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<sup>144</sup> Though in Canada, it would appear that this right has been hollowed-out relative to the American version of the right by the trilogy of Supreme Court of Canada cases *R. v. Oickle*, [2000] 2 S.C.R. 3, *R. v. Singh*, 2007 SCC 48, [2007] 3 S.C.R. 405, and *R. v. Sinclair*, [2010] S.C.J. No. 35, [2010] 2 S.C.R. 310.

<sup>145</sup> *Police and Criminal Evidence Act*, 1984 C. 60, Code C, s. 10.10. "When a suspect interviewed at a police station or authorised place of detention after arrest fails or refuses to answer certain questions, or to answer satisfactorily, after due warning ... a court or jury may draw such inferences as appear proper under the Criminal Justice and Public Order Act (U.K.), Part III, 1994, sections 36 and 37. Such inferences may only be drawn when:

- (a) the restriction on drawing inferences from silence, see *Annex C*, does not apply; and
- (b) the suspect is arrested by a constable and fails or refuses to account for any objects, marks or substances, or marks on such objects found: on their person; in or on their clothing or footwear; otherwise in their possession; or in the place they were arrested;
- (c) the arrested suspect was found by a constable at a place at or about the time of the offence for which that officer has arrested them is alleged to have been committed, and the suspect fails or refuses to account for their presence there."

And, *Criminal Justice and Public Order Act*, (U.K.), Part III, 1994, C. 33, s. 34

"(1) Where, in any proceedings against a person for an offence, evidence is given that the accused

- (a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or
- (b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact,

being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) below applies.

(2) Where this subsection applies-

- (a) a magistrates' court inquiring into the offence as examining justices;
- (b) a judge, in deciding whether to grant an application made by the accused under paragraph 2 of Schedule 3 to the Crime and Disorder Act 1998; (c) the court, in determining whether there is a case to answer; and (d) the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper."

Kingdom, we cannot say that it is on account of the efficacy of the techniques themselves. It may be the case that the Reid Technique is more effective at inducing someone to confess than the PEACE method, but that the gap is compensated for by the fact that there is an adverse presumption at trial in the United Kingdom against accused persons who refuse to respond to allegations during their pre-trial custodial interviews.

### **Criticisms of the PEACE Model, and Responses:**

Critics claim that PEACE is the same as Reid's Behavioural Analysis Interview (BAI) technique.<sup>146</sup> PEACE proponents reject this characterization and contend that beyond the fact that the two are each "non-accusatorial", they are not similar.<sup>147</sup> "The BAI involves a series of questions and subsequent observations designed to differentiate between innocence and guilt in possible suspects."<sup>148</sup> PEACE interviewing does not rely upon non-verbal cues as a method of determining the likelihood of a given suspect's guilt.<sup>149</sup> Furthermore, they cite recent research that shows that the BAI is an unreliable method of spotting deception.<sup>150</sup>

PEACE proponents say that unlike the BAI, the goal of the PEACE model is "...to collect as much reliable and accurate information as possible"<sup>151</sup> from interviewees "...using scientifically-based interview procedures"<sup>152</sup> rather than using questionable techniques to identify deception.<sup>153</sup>

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<sup>146</sup> The Reid Institute, Untitled, *The Reid Institute* (retrieved August 12, 2013) online: The Reid Institute <<http://www.reid.com/pdfs/peacearticle.pdf>>.

<sup>147</sup> Brent Snook et al., "Dispelling Myths and Moving Forward with PEACE" (2010) *Blueline Magazine*, online: <<http://www.cbc.ca/thenational/includes/pdf/snook-blueline.pdf>> at 23.

<sup>148</sup> *Ibid.*; *Supra* note 146.

<sup>149</sup> *Snook et al.*, *Ibid.*

<sup>150</sup> *Ibid.*; J Masip, C. Herrero, E. Garrido, & A. Barba. "Is the behavioural analysis interview just common sense?" (2010) *Applied Cognitive Psychology*, published online, Wiley & Sons Ltd <[wileyonlinelibrary.com](http://wileyonlinelibrary.com)> at 2-8.

<sup>151</sup> *Supra* note 147.

<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.*

Critics argue that PEACE limits investigators' abilities to obtain confessions.<sup>154</sup> But proponents of PEACE defend against this claim by noting that unlike with the Reid Technique, PEACE interviewers do not stoop to the "lower moral plane"<sup>155</sup> that Reid interrogators do.<sup>156</sup> Whereas Reid advocates will argue that because PEACE does not resort to the use of interrogation, investigators are unable to obtain confessions.<sup>157</sup> Snook, Eastwood, House and Barron point out, first, that neither model has been empirically tested, but that confession rates are about 50% across countries regardless of whether they use the Reid model of interrogation or the PEACE model;<sup>158</sup> second that research supports the view that the proportion of the confessions obtained by way of "information-gathering approaches"<sup>159</sup> are fewer than the proportion obtained by "an accusatorial approach"<sup>160</sup> and that the use of coercive techniques coupled with an inability to accurately determine likely guilt of the suspect through the use of the BAI creates a significant danger for Reid to produce false confessions;<sup>161</sup> and third, that the measure of a successful interview "...ought to be whether it results in a full and accurate account of the event, not whether or not a confession has been elicited."<sup>162</sup>

Opponents of PEACE point out that the method will not work in North America because our laws are different.<sup>163</sup> Suspects in the United Kingdom do not have a meaningful right to

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<sup>154</sup> *Supra* note 146 at 1.

<sup>155</sup> *Supra* note 147.

<sup>156</sup> Fred E. Inbau et al., *Criminal Interrogation and Confessions*, 4<sup>th</sup> ed. (Sudbury: Jones and Bartlett Publishers, 2004) at xvi. See also *supra* note 147 where the authors cite Inbau, Reid, Buckley and Jayne at xvi. Snook et al, citing Inbau et al, write: "investigators must deal with criminal suspects on a somewhat lower moral plane than that upon which ethical law abiding citizens are expected to conduct their everyday affairs." (*Supra* note 132 citing note 156).

<sup>157</sup> *Supra* note 146 at 1.

<sup>158</sup> *Supra* note 147. See also *supra* note 11.

<sup>159</sup> Snook et al., *ibid.*

<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

remain silent.<sup>164</sup> PEACE advocates respond to this criticism by pointing out that “...no empirical research has been conducted to see whether these difference in legal rights has impacted the percentage of individuals who speak with police,”<sup>165</sup> and it suggests that despite the difference, “...the overwhelming majority of suspects and accused persons in Canada (around 90%) choose not to invoke their right to silence.”<sup>166</sup>

Finally, the critics of PEACE characterize the method as a “soft” one.<sup>167</sup> The defenders of PEACE say that even though the method “...makes no overt attempt to persuade a non-compliant suspect whom the interviewer thinks is guilty to confess,”<sup>168</sup> the method is quite effective by virtue of the fact that it allows the detective to take the “initial free-narrative”<sup>169</sup> and test it “...using evidence-based challenges,”<sup>170</sup> and that the cognitively demanding task of defending ones account can trip-up the suspect and reveal guilt or innocence.<sup>171</sup> In this sense, notwithstanding the absence of psychologically manipulative tactics, PEACE may be just as effective at getting an incriminating confession as Reid, with a lower risk of producing a false confession.

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<sup>164</sup> *Supra* note 146 at 5.

<sup>165</sup> *Supra* note 147 at 24.

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.*; See: Chapter 6 “Custodial Interrogations: What We Know, What We Do, and What We Can Learn from Law Enforcement Experiences” by Ariel Neuman & Daniel Salinas-Serano, *National Defence Intelligence College, Educating Information: Interrogation Science and Art* (Washington, D.C.: National Intelligence Defence College, 2006) at 221-22. The authors report that Detective Superintendent Colin Sturgeon of the Police Service of Northern Ireland Police informed them of the following in conversation in reference to PACE and its Codes of Conduct while he was visiting Harvard Law School in 2005: “...these legal restrictions on interrogation have made it impossible to secure a confession or incriminating admission from a suspect. In fact, he went so far as to say that he cannot recall ever obtaining a confession as a product of interrogation. Even though British law has attempted to bridge this gap by eliminating the right of a suspect to remain quiet during interrogation by allowing a judge to infer guilt from the suspect’s silence, Sturgeon noted that judges rarely, if ever, exercise this discretion against suspects.” (The quotation is from the Neuman and Salinas-Serano text, and not a direct quotation of Sturgeon).

<sup>168</sup> *Supra* note 9 at 223.

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid.*



Apart from the aforementioned considerations of whether PEACE is, in fact, methodologically significantly less manipulative than Reid, and whether, if implemented to the letter it will be of much assistance in eliciting confessions in environments that continue to enjoy a robust right to silence, there is a third critical issue raised by PEACE: namely, that it appears to be difficult to successfully implement by way of training and instruction. In studies conducted around the turn of the millennium, researchers generally agreed that the principles of PEACE-style investigative interviewing were sound ones, but that there was still “widespread evidence of poor questioning techniques, deficient interpersonal skills, inadequate support for trainers, poor quality control of interviews, and so on.”<sup>172</sup> Accordingly, attempts to revise and improve-upon the training program were undertaken.<sup>173</sup> But notwithstanding these efforts, later studies showed that the training that most officers received was “...quite limited”<sup>174</sup> and that in many jurisdictions, younger trainee officers “...were expected to learn by watching”<sup>175</sup> and emulating the approaches used by more seasoned veterans, who, themselves, were not always especially skilled interviewers.<sup>176</sup> Specific to the interviewing of suspects, a 2001 study by Milne & Clarke<sup>177</sup> made the following findings: (i) that with respect to Planning and Preparation, officers were mostly not knowledgeable about the details of the allegations and were often ignorant of the important information needed to prove the essential elements of the offence,<sup>178</sup> and frequently officers would read from prepared written statements in the middle of their interviews;<sup>179</sup> (ii) that in relation to Engage and Explain, the interviewers basically followed the

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<sup>172</sup> *Supra* note 13 at 48.

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.*

<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid.*

<sup>177</sup> *Supra* note 75. The study assessed 177 taped suspect interviews concerning “both bulk and serious crime.” It was collected from six police forces in urban and rural areas across England and Wales. (P. 29)

<sup>178</sup> *Ibid.* at 34.

<sup>179</sup> *Ibid.*

legal requirements of interviewing suspects, but that issues with ensuring understanding of the caution and providing information about the purpose of the interview persisted and undermined the development of rapport;<sup>180</sup> (iii) that during the Account stage police used the techniques of “open or closed questions”<sup>181</sup> competently and confidently, but made poor use of summarizing, linking and challenging;<sup>182</sup> and (iv) that only 16.4%<sup>183</sup> of interviews provided “clear and professional closure”<sup>184</sup> and that few interviewees gave good summaries of what had been said.<sup>185</sup> The evaluation stage was not measured by the researchers.<sup>186</sup> The researchers rated only 13% of interviewers studied as being “skilled” in the use of the PEACE model.<sup>187</sup> When the videotaped suspect interviews were assessed for oppressive behaviour, ten percent of the sample interviews were identified as “...possibly breaching”<sup>188</sup> the *Police and Criminal Evidence Act 1984*.<sup>189</sup>

Another critical consideration is the question of whether it is appropriate, wise or practical to assign a “quasi-inquisitorial neutral role” to “investigating officers.”<sup>190</sup> Eric Shepherd writes:

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<sup>180</sup> *Ibid.* at 36.

<sup>181</sup> *Ibid.* at 39.

<sup>182</sup> *Ibid.* at 37.

<sup>183</sup> *Ibid.* at 39.

<sup>184</sup> *Ibid.*

<sup>185</sup> *Ibid.*

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.* at 105 & 106.

<sup>188</sup> *Ibid.* at 40.

<sup>189</sup> *Ibid.* at 39-40. The PACE 1984, ss. 76-78 contemplate confessions and the exclusion of unfairly obtained evidence.

s. 76 provides for the exclusion from evidence of confessions procured under oppression or likely to have been rendered unreliable as a consequence of anything said or done during the interview.

s. 77 provides for special jury instructions in cases that rely principally on confession evidence where the court is satisfied that the suspect was mentally handicapped and the statement was not made in the presence of an independent person.

s. 78 provides a residual discretionary power to exclude evidence. It says that: “the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.”

<sup>190</sup> E. Shepherd, “The Trouble with PEACE” (26 July, 1996) *Police Review* 14 at 14.

... the Director of Police Training and official research have informed police management of facts unknown to the general public – investigative ability throughout the service is alarmingly low; unsystematic behaviour and poor time management are commonplace; basic systems are lacking to ensure professional standards of information gathering, evaluation and dissemination by officers.

... Actions by attending officers highlight embarrassing levels of ignorance in respect of securing scenes, searching, and in identifying and preserving evidence.<sup>191</sup>

It may be inferred from Shepherd's criticism that PEACE training has contributed very little to the development of competent, investigatively sound policing.<sup>192</sup> A critic like Shepherd, from a law-and-order stance, would like to retain a more blatantly adversarial policing role. But this criticism may be misplaced. If PEACE training is not working, then this may point to an inadequacy in the training program and not necessarily the method itself. It may also be that Sheppard is suggesting that the police are especially incapable and ill-suited for employing the type of nuance and sophistication PEACE depends upon.

Some English and Welsh criminal defence lawyers agree with Shepherd's position, but for different reasons. Ed Cape, a solicitor, produced a 1995 manual to guide other lawyers on how to represent clients under the PEACE regime.<sup>193</sup> He suggested that lawyers, present in the interview room, should step in in situations where the interviewer appears to be attempting to "...build rapport with the suspect"<sup>194</sup> by asking personal questions.<sup>195</sup> Cape advised lawyers to remind the officer that "Code C, paragraph 11.1A says that the interview is for the purpose of questioning a suspect about an offence."<sup>196</sup> "Should the officer continue to use such tactics"<sup>197</sup> "the solicitor advise their clients not to answer questions."<sup>198</sup> Cape's concern appears to be that

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<sup>191</sup> *Ibid.* at 14.

<sup>192</sup> *Ibid.*

<sup>193</sup> E. Cape, *Defending Suspects at Police Stations* (London: Legal Action Group, 1995).

<sup>194</sup> *Supra* note 13 at 48.

<sup>195</sup> *Ibid.*

<sup>196</sup> *Ibid.*

<sup>197</sup> *Ibid.*

<sup>198</sup> *Ibid.* This advice would be given notwithstanding the adverse presumption for a refusal to answer questions, discussed above.

the PEACE methodology is simply a different, and perhaps more subtle or sneaky, way of tricking the suspect into giving a confession.

### **Peace Model: The Trojan Horse?**

The Reid Institute's criticism of the PEACE model, that its lack of effectiveness at extracting confessions has required English legislators to supplement incentivization within the interrogation proper (i.e. maximization and minimization, for example) with incentives to confess that have been imposed externally.<sup>199</sup> This may be correct, though there is some uncertainty due to a lack of opportunity to collect data on the effectiveness of PEACE at getting confessions with an existing right to silence. The concern here is it may be that investigative interviewing techniques, like the PEACE method, will not enable officers to get confessions so long as the right to silence is in place, and once it is adopted, the elimination of the right to silence may follow.

On how the right to silence might be eliminated in Canada, should PEACE be introduced here, we have to briefly re-visit the state of law in Canada.

The Canadian common law, following *Hebert* and as reinforced by *Singh* effectively holds that a person has the right to assert a right to silence, but does not in fact have an automatic right to silence upon having made that assertion. A suspect must be resilient and resist police imposed pressures to make a statement. In *Singh*, the Court held that the police did not violate the right to silence even though they persisted in questioning the accused after he indicated, on 18 separate occasions, that he did not want to make a statement.<sup>200</sup>

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<sup>199</sup> *Supra* note 146 at 2.

<sup>200</sup> the Law Times quoted a source who reported that some police officers reacted to the decision by indicating that they would not stop questioning a suspect even he asserted the right 1,000 times! Right to silence the 'next battleground', Law Times, available at: <http://www.lawtimesnews.com/20050808142/Headline-News/Right-to-silence-the-39next-battleground-39>

In Canada, there is a residual exclusionary discretion held by judges but it is comparatively rarely resorted to in light of the test on admissibility that is already provided at *voir dire*. Judges have the authority to exclude evidence under section 7 of the *Charter* where it is found that the admission of that evidence would compromise the fairness of a trial, or if the probative value of the evidence would be outweighed by its prejudicial effect.<sup>201</sup> In England, the exclusionary remedy that exists for misconduct is much narrower.<sup>202</sup> In Canada there are Charter considerations that must be adhered to relating to fairness and the doctrine of oppression as well. Nevertheless, Reid tactics and the necessity of police interrogators to ‘play-it-close-to-the-line’ in order to get suspects to waive the right to silence or to confess or make an inculpatory statement, leads to a number of statements being excluded, and frustrates convictions, that, from a police point of view, should have been obtainable. I contend that from a policing perspective the police surely realize that these tactics make their detainees susceptible to the making of false confessions and there are good reasons to tone down police trickery and move away from Reid tactics. Though there may be exceptions, police do not likely take any great delight in having to resort to trickery and deceit to get confessions; rather they do so out of the perception that it is an investigative necessity.

Already police in some Canadian jurisdictions have expressed receptiveness to investigative interviewing. The Memorial University Faculty of Science, in Newfoundland, partnered with the Royal Newfoundland Constabulary (RNC) in 2010 to introduce the method, and Dr. Brent Snook has trained six police trainers in its use.<sup>203</sup> Dr. Snook, “has continued to build his relationship with the RNC since, and has recently worked with his students and with

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<sup>201</sup> See: *R. v. Harrer*, [1995] 3 S.C.R. 562; *R. v. Terry*, [1996] 2 S.C.R. 207; *R. v. Hebert*, [1990] 2 S.C.R. 1991.

<sup>202</sup> Ryo Ogiso, “The Exclusionary Rule in Criminal Procedure. A comparative study of the English, American and Japanese approaches.” 37 *Amicus Curiae* Sep/Oct 2001 28 at 32.

<sup>203</sup> “MUN teaches PEACE to RNC”, Memorial University Gazette, available at: <http://www.mun.ca/gazette/issues/vol41no9/mun.php>.

Inspector John House to do research on the agency's interviewing styles."<sup>204</sup> Moreover, the method was introduced to listeners on CBC's morning radio program *The Current* on April 7, 2010, wherein it was portrayed by its proponents as more humane, and by its opponents as insufficiently effective.<sup>205</sup> The move in Newfoundland to implement PEACE training was prompted by the findings of the Lamer Inquiry that there was a culture of "tunnel vision" amongst the Province's police that had contributed to the wrongful convictions of Gregory Parsons and Randy Druken.<sup>206</sup>

The difficulty with introducing PEACE as an ethical alternative to Reid in response to humanitarian concerns about what transpires in an interview room, and even as a safeguard against wrongful convictions, is that once it has been implemented it will be demonstrated to be inadequate in short-order when the police fail to get the number of confessions that they were previously able to. On the other hand, returning to the 'bad old days' of Reid and police deception and trickery will not be possible from a political perspective. Reid will be associated with false confessions, wrongful convictions and miscarriages of justice – it is difficult to move from a state of greater human rights to a state of lesser human rights without someone sounding the alarm and creating a political liability for legislators.

When confronted with this problem, it will be natural for criminal justice professionals to look once again to the United Kingdom, and ask why the PEACE model is getting a similar number of confessions there as the Reid Technique is getting in North America. At this point, someone will realize that shortly after introducing PEACE, the right to silence was legislatively

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<sup>204</sup> *Ibid.* and accompanying text.

<sup>205</sup> *The Current*, April 7, 2010, available at: <http://www.cbc.ca/thecurrent/episode/2010/04/07/april-07-2010/>

<sup>206</sup> CBC News, "N.L. Police Revise Interviewing Style", April 20, 2010, available at: <http://www.cbc.ca/canada/newfoundland-labrador/story/2010/04/20/nl-rnc-peace-420.html> ; *The Lamer Commission of Inquiry Pertaining to the Cases of Ronald Dalton, Gregory Parsons, Randy Druken* (St. Johns, Office of the Queen's Printer, 2006).

guted by adding the adverse inference. The next step may be to proceed in a similar fashion in North America. Thus, the PEACE method, though it may sound appealing for its ethical considerations and its appeal to greater humanity, may in fact pose a substantial threat to the integrity of our criminal justice system. It may serve to further erode the already precarious right to silence in Canada. Critics may argue that this concern is misplaced because it would not be constitutional to dismantle the right to silence, and doing so would require the Supreme Court to overturn its previous rulings in *R. v. Chambers*<sup>207</sup> and *R. v. Noble*.<sup>208</sup>

I wish to respond to this anticipated criticism by stating that although the right to silence in Canada is constitutionalized in section 7 of the *Charter*, the government could legislate a change in section 4(6) of the *Canada Evidence Act*,<sup>209</sup> to the effect that an adverse inference may be drawn from an accused's silence. This approach would insulate the government from the argument that there has been a constitutional violation of the right to silence, because the constitutional right will still remain in effect. However, for all practical purposes it is rendered meaningless.

If such a change happens, there may be a *Charter* challenge to the new legislative change to the *Canada Evidence Act*. If confronted with such *Charter* challenge to this hypothetical legislation, the Court may very well draw a distinction between the right to silence and the use that may be made of the exercise of that right. Given *Chambers*, *Noble*,<sup>210</sup> *Mills*,<sup>211</sup> *O'Connor*,<sup>212</sup> and other cases, it is not always easy to predict the outcome of balancing *Charter* rights and competing policy interests.

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<sup>207</sup> *R. v. Chambers*, [1990] 2 S.C.R. 1293.

<sup>208</sup> *R. v. Noble*, [1997] 1 S.C.R. 874, 114 C.C.C. (3d) 385, 6 C.R. (5th) 1.

<sup>209</sup> *Canada Evidence Act*, R.S. 1985, C-5.

<sup>210</sup> *Supra* note 208 at para. 53.

<sup>211</sup> *R. v. Mills* (1999), 139 C.C.C. (3d) 321, 248 N.R. 101, 28 C.R. (5th) 207.

<sup>212</sup> *R. v. O'Connor*, [1996] 2 W.W.R. 153, [1995] 4 S.C.R. 411, 44 C.R. (4th).

For a more recent example of such unpredictability, one may look at the Supreme Court's ruling in *R. v. Nedelcu*.<sup>213</sup> In *Nedelcu* the Supreme Court, for all practical purposes, limited the applicability of section 13 of the *Charter*. The issue in *Nedelcu* was whether the accused could be cross-examined at his criminal trial on a prior inconsistent statement he made during a discovery examination for a civil proceeding flowing from the same incident. At his criminal trial, Nedelcu provided detailed testimony on events leading up to the accident which was the subject matter of both the criminal and civil proceedings against him. However, prior to that, at his discovery, he had stated that he had no recollection of the events pertaining to the accident.

The trial judge permitted the Crown to cross-examine Nedelcu on the flagrant inconsistencies in his evidence. He was convicted. The Ontario Court of Appeal overturned the conviction and the case reached the Supreme Court of Canada.

The Supreme Court, held in an earlier ruling, *R. v. Henry*,<sup>214</sup> that section 13 of the *Charter* forbids the use of all compelled prior testimony in subsequent proceedings. However, in *Nedelcu*, the majority made a distinction between incriminating and non-incriminating evidence. The Court held that compelled testimonial evidence used to incriminate the accused is still not admissible (as per *Henry*). Therefore, as per section 13 of the *Charter*, the use of prior incriminating testimony is still inadmissible. However, the Court in *Nedelcu* took the position that this restriction does not necessarily apply to non-incriminating prior testimony. It is my position that the Supreme Court's distinction between incriminating and "non-incriminating" evidence amounts to a superficial distinction between self-incrimination and credibility and such a distinction becomes even more troublesome when one considers the fact that at trial the Crown

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<sup>213</sup> *R. v. Nedelcu*, 2012 SCC 59, [2012] 3 S.C.R. 311.

<sup>214</sup> *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609.



urged the Judge to consider the flagrant inconsistencies in the two testimonies as positive evidence of the defendant's guilt.<sup>215</sup>

The case of *R. v. Nedelcu* is alarming, not only because it limits the scope of section 13 of the *Charter*, but also because it is conceivable that in the future, the Supreme Court may apply the same approach to the right to silence and hold that there is a distinction between the right to remain silent and any permissible adverse inferences that the trier of fact may draw from such silence. This would not be consistent with the Supreme Court's own rulings in *Chambers* and *Noble*; however, when one looks at how the Supreme Court resiled from its own ruling in *Henry*, it would not be too far-fetched to suggest the possibility that the Court may similarly distinguish positions established in earlier right to silence rulings with and reduce the ambit of the protection provided by that right.

With an awareness that avenues may exist to gut the right to silence, it is possible that the PEACE method of investigative interviewing could be a vehicle by which such a result might be arrived at. In other words, should the PEACE method be introduced in Canada, and if this results in a reduction in the number of confessions secured, then to remedy this problem, the government may move to emulate the British government's 1994 decision to undermine the right to silence through legislation.<sup>216</sup> Such a possible development in Canada may be a natural progression of the introduction of PEACE. Alternatively, it is an interesting conjecture that opponents of the right to silence could use PEACE as a pretext to eliminate the right to silence in Canada. The proximity in time between the introduction of PEACE in the U.K. in 1992 and the

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<sup>215</sup> Frank Addario, case comment on *R. v. Nedelcu*, (2012) SCC 59, (2012) The Twelve-Minute CIVIL LITIGATOR 2012 at 9-3.

<sup>216</sup> *The Criminal Justice and Public Order Act*, *supra* note 145, ss. 27-31. See also: Gregory O'Reilly, "England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice" (1994) 85 J. Crim. L. & Criminology 402 at 404, where O'Reilly states: "The new law purports to control crime by curtailing the right to silence, forcing suspects to confess, and thereby increasing convictions".

abolition of the right to silence a mere two-years later may give encouragement to the opponents of the right to silence that such a result could be achieved in Canada. In this sense, PEACE may in fact be a Trojan Horse.<sup>217</sup>

Is the sort of investigative interviewing contemplated by PEACE a kind of Trojan Horse? We can see from the English experience how proponents of crime control, and in particular, the Conservative Party and law enforcement associations had been trying to eliminate the right to silence for two decades before it was finally achieved.<sup>218</sup>

On how the right to silence might be eliminated in Canada, should PEACE be introduced here, the experience in England, the birthplace of PEACE, is at least partly instructive. Going back to the nineteen-seventies, reports commissioned by the British government indicate that there was already, at that time, a debate over the existence of the right to silence, with a contingent of opponents, including certain politicians and police, calling for the elimination of the right.<sup>219</sup> There was a report published by the Criminal Law Revision Committee (CLRC) in 1972 suggesting that adverse inferences be drawn from an accused person's refusal to answer

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<sup>217</sup> One may recall the story of the Trojan Horse. After unsuccessfully laying a 10-year siege on Troy, Greek forces build a wooden horse in order to pay "tribute" to the admirable resistance of the defenders of the city. The people of Troy, despite warnings by some, brought the horse into the city to celebrate their "triumph" over the Greeks. But at night fall, when the Trojans were in a deep, drunken sleep, 30 Greek soldiers emerged out of the belly of the horse and they opened the gates of the city for the Greek forces who were hiding under the cover of the night to enter and ransack the city. - Homer, *The Odyssey* trans. by Samuel Butler (Cambridge, Mass.: Orange Street Press Classics, 1998) ; Virgil, *The Aenid* trans. by J.W. McKail (London: MacMillan & Co., 1885). The story of the Trojan Horse is recounted briefly in *The Odyssey* by the Greek writer Homer, and centuries later in greater detail in *The Aenid* by the Latin writer Virgil.

<sup>218</sup> O'Reilly, *supra* note 216 at 423.

<sup>219</sup> *Ibid.* at 403 & n. 9 & 423.

questions under police interrogation or to testify at trial.<sup>220</sup> This report was commissioned under a Conservative Party.<sup>221</sup>

The main reason for the recommendation that an adverse inference be drawn from silence was the idea that the right to silence "...unduly favoured the defence, and in particular, favoured the guilty."<sup>222</sup> As a person who is innocent, it was thought, "...would certainly want to say something to exculpate him or herself."<sup>223</sup>

The CLRC report was effectively 'shelved' temporarily in England,<sup>224</sup> however the Republic of Singapore, an authoritarian, *de facto* one-party state, adopted the recommendations of the CLRC in 1976<sup>225</sup> and "curtailed the right"<sup>226</sup> that it had inherited from the English common law by way of its colonial status.<sup>227</sup> It is noteworthy to mention that shortly after the 1972 publication of the CLRC's report, the U.K. Parliament shifted to Labour (from 1974 until 1979), after which the Thatcher government came into office.<sup>228</sup>

Whereas Lee Kuan Yew's government of Singapore may have enthusiastically embraced the crime control initiatives of the CLRC, there was resistance to adopting the proposed changes in democratic England;<sup>229</sup> the Royal Commission on Criminal Procedure (The Phillips Commission) did not accept the proposals made nine-years earlier by the CLRC in a 1981

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<sup>220</sup> *Ibid.* at 424; Ed Ratushny, *Self-Incrimination in the Canadian Criminal Process* (Toronto: Carswell, 1979) at 265. "While the accused might still refuse to answer to police questioning, evidence of his refusal could be introduced into evidence at his trial. Adverse inferences could then be drawn against the accused for his failure to mention, at the earlier stage, any fact which he subsequently relies upon at his trial. The drawing of inferences would be permitted not only on the question of guilt but also in "determining whether there is a case to answer."

<sup>221</sup> O'Reilly, *ibid.*

<sup>222</sup> *Supra* note 1 at 665.

<sup>223</sup> *Ibid.* As Zander reports: "The Committee asked rhetorically, "why would an innocent person want to be silent?"

<sup>224</sup> *Ibid.*

<sup>225</sup> O'Reilly, *supra* note 216 at 424.

<sup>226</sup> *Ibid.*

<sup>227</sup> *Ibid.*

<sup>228</sup> *Supra* note 1 at 665.

<sup>229</sup> O'Reilly, *supra* note 216 at 424.

report.<sup>230</sup> The Phillips Commission Report noted that eliminating the right to silence would increase the number of “...innocent people making inculpatory statements,”<sup>231</sup> whereas the guilty would still in a substantial number of cases remain silent because doing so and risking the adverse inference would be more advantageous than making a statement.<sup>232</sup> Furthermore, using “...a suspect’s silence as evidence against him or her”<sup>233</sup> is against the “...central element of the accusatorial system:”<sup>234</sup> that the onus of proof rests with the prosecution and is meant “...to be discharged without any assistance from the accused.”<sup>235</sup>

The Police and Criminal Evidence Act of 1984 (PACE) introduced a number of reforms that constrained the behaviour of police during investigations.<sup>236</sup> The recommendations of the 1981 Commission provided the foundation for the Conservative government’s legislative reforms in PACE (they were adopted by the Conservative government); accordingly neither the PACE Act nor its Codes interfered with the existing right to silence.<sup>237</sup> The PEACE investigative interviewing model, though it came along much later, is necessarily the child of the legal constraints imposed on interrogators as a result of the PACE legislation, although the genesis of PEACE has its own story which we shall touch on momentarily. Following the PACE reforms, the status of the right to silence was incorporated in the police caution,<sup>238</sup> which was

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<sup>230</sup> *Ibid.*

<sup>231</sup> *Supra* note 1 at 665.

<sup>232</sup> *Ibid.*

<sup>233</sup> *Ibid.*

<sup>234</sup> *Ibid.*

<sup>235</sup> *Ibid.* at 666; See also the following rulings from the Supreme Court of Canada on this issue: *R. v. Chambers* (*Supra* note 191); *R. v. Lifchus*, [1997] 3 S.C.R. 320; *R. v. Noble* (*Supra* note 210).

<sup>236</sup> The PACE reforms consisted of giving suspects a right to free legal advice at interview, that interviews should be recorded and suspects should be cautioned before questioned. See sections 53 (1), 60 (1) and 61 (6)(b) of *The Police and Criminal Evidence Act 1984 (PACE)* (*Supra* note 145).

<sup>237</sup> *Supra* note 1 at 666.

<sup>238</sup> *Ibid.*

codified in PACE Code C, and remained true to the historical position<sup>239</sup> that “the suspect need not say anything at all, but anything said will be taken into account.”<sup>240</sup>

Three years after the enactment of PACE, in 1987, the Home Secretary under Margaret Thatcher’s Conservative Government, “...Douglas Hurd, revived the debate when he argued in his Police Foundation lecture that the right to silence did not protect the innocent, whose interests were best served by answering police questions.”<sup>241</sup> He pointed out that there is a need for a “...public debate about the right to silence,”<sup>242</sup> notwithstanding its effective settlement a few years prior with the 1981 Phillips Commission report and the 1984 enactment of PACE wherein the traditional position was confirmed.<sup>243</sup> According to O’Reilly, the general feeling among commentators was that the Home Secretary’s proposals were made “in response to police pressures to make interrogation easier.”<sup>244</sup> Thus, with PACE in place, and a concession towards humane treatment given, it was now possible to argue that the legal protection of accused persons as exemplified by the pretrial and trial rights to silence should be eliminated. Things did not change immediately however.

Parliament initially imposed restrictions on the right to silence in Northern Ireland in 1988,<sup>245</sup> “...nearly two years after Hurd’s remarks.”<sup>246</sup> The elimination of an effective right was

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<sup>239</sup> *Ibid.*

<sup>240</sup> *Ibid.* It is noteworthy that in the United Kingdom, the judicial approach to the exclusion of evidence has been far more limited than in Canadian courts. In *R. v. Sang*, [1980] A.C. 402 (H.L.), Lord Diplock stated: “It is no part of a judge’s function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. If it was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with.” *R. v. Kuruma*, [1955] A.C. 197 (P.C.), Lord Goddard C.J. stated: “No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused ... If, for instance, some admission of some piece of evidence, e.g., a document had been obtained from a defendant by a trick, no doubt the judge might properly rule it out.” The interpretation of these holdings by the English courts, has been to provide only an extremely narrow judicial discretion to exclude.

<sup>241</sup> O’Reilly, *supra* note 216 at 424 -425.

<sup>242</sup> *Supra* note 1 at 666.

<sup>243</sup> *Ibid.*

<sup>244</sup> O’Reilly, *supra* note 216 at 425.

<sup>245</sup> *Ibid.*

made, nominally, in response to terrorist attacks, but was in fact made to apply uniformly across all criminal offences.<sup>247</sup> It was a necessary measure, the Government argued,<sup>248</sup> because “the right to silence was seriously hindering the government’s ability to convict terrorists.”<sup>249</sup>

Moreover, in the same year Hurd stated that he also intends to limit the right to silence in England and Wales,<sup>250</sup> hence, he commissioned the Home Office Working Group to devise a plan for restricting their right to silence.<sup>251</sup> The Group issued its report in July 1989 supporting<sup>252</sup> “...the use of adverse inferences”<sup>253</sup> for a refusal to speak.<sup>254</sup>

Very soon after the 1989 report was released, however, there were several high-profile miscarriages of justice including the wrongful convictions of the Guildford Four, and the Birmingham Six, which led to the creation of the Royal Commission on Criminal Justice (The Runciman Commission).<sup>255</sup> The plan to eliminate the right to silence in England and Wales was made impossible due to public opinion following those exonerations, cases in which coerced “confessions” figured prominently.<sup>256</sup>

The Commission was tasked with “...fundamental reappraisal of the structures of criminal justice in England and Wales,”<sup>257</sup> with a particular focus on minimizing convictions of innocents.<sup>258</sup> One of the “major problems”<sup>259</sup> to be addressed by the Commission was “false

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<sup>246</sup> *Ibid.* at 403 & 423.

<sup>247</sup> *Ibid.* at 425.

<sup>248</sup> *Ibid.*

<sup>249</sup> *Ibid.*

<sup>250</sup> *Ibid.* at 426.

<sup>251</sup> *Ibid.*

<sup>252</sup> *Ibid.*

<sup>253</sup> *Ibid.*

<sup>254</sup> *Ibid.*

<sup>255</sup> *Ibid.*

<sup>256</sup> *Ibid.*

<sup>257</sup> *Field & Thomas, supra* note 24.

<sup>258</sup> *Ibid.*

<sup>259</sup> *Ibid.*

confessions.”<sup>260</sup> There was only one academic on the commission: Professor Michael Zander.<sup>261</sup>

A cynical view of the Commission’s work in the wake of the exonerations of the aforementioned wrongfully convicted has been expressed as follows: “Whatever the parties’ intentions, the Government effectively defused a political crisis about the imprisonment of the innocent by setting up a Royal Commission that was only in part directed at that issue – nifty footwork indeed.”<sup>262</sup> Some pressure groups, such as the Legal Action Group charged that “the Commission was being directed by the Home Office away from the issue of miscarriages towards questions of ‘administrative expediency,’”<sup>263</sup> and “there was talk of capture by a Home Office and legal profession agenda.”<sup>264</sup>

The Runciman Commission canvassed issues that had come to the forefront in the media as a result of the recent exonerations, such as the video-recording of confessions as a requirement for admissibility and a requirement that confession evidence be corroborated.<sup>265</sup> On the specific issue of the right to silence, the Commission reached the same conclusion as the 1981 Commission:

No change was recommended to limitations of prosecution and judicial comment on a suspect’s failure to answer questions during interrogation (right to silence). The Commission’s basic judgement was that ‘the safeguards under PACE are comprehensive and, while not foolproof, are substantially sound.’ The implicit assumption seems to have been that problems revealed by the miscarriages of justice cases had been largely addressed by PACE and that only minor adjustment was required.<sup>266</sup>

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<sup>260</sup> *Ibid.*

<sup>261</sup> *Ibid.* at 2.

<sup>262</sup> *Ibid.*

<sup>263</sup> *Ibid.*

<sup>264</sup> *Ibid.*: For example, the authors note, that “Key figures in the legal establishment were already prefiguring some of the principal recommendations of the Commission: the Lord Chief Justice, Lord Taylor, Barbara Mills, the Director of Public Prosecutions (DPP), and the Director of the Serious Fraud Office were recommending greater pre-trial defence disclosure evidence to the prosecution; the DPP and the Attorney-General were arguing for the abolition of the defendant’s right to a jury trial in cases triable either way. None of these key measures is aimed at avoiding false convictions; they were not widely anticipated or discussed in the media when the Commission was set up. The agenda had shifted decisively.”

<sup>265</sup> *Ibid.* at 5.

<sup>266</sup> *Ibid.*

The Runciman Commission voted 9-2 in favour of retaining the right to silence,<sup>267</sup> however, unlike the 1981 Commission, they advanced only the argument that more innocents would be found guilty under the pressure of having to make a statement to avoid an adverse inference,<sup>268</sup> and in the conclusion they steered clear of the argument that the right to silence is fundamental to the accusatorial system.<sup>269</sup>

When the Runciman Commission report was received, it was met with public controversy and academic debate.<sup>270</sup> The Director of Public Prosecutions,<sup>271</sup> "...the Attorney-General, and the Director of Serious Fraud Office were most supportive of the report, favouring the restrictions on jury trial, greater defence disclosure, and less automatic prosecution disclosure as well as the plea-bargaining proposals."<sup>272</sup> "The Association of Police Officers (ACPO) and the Police Federation issued statements supporting the main lines of the Commission's recommendations, with one Senior Scotland Yard officer saying 'at least the playing field is a little more level,'"<sup>273</sup> and "[t]he President of ACPO, John Burrows, said that the police felt that many of their points had been taken up, particularly on the value of genetic testing, though he *regretted the retention of the right to silence*".<sup>274</sup> Thus, the police continued their push, in line with the agenda of the governing Conservatives, for the elimination of the right to silence.

In 1991, in response to high profile miscarriages of justice, including the exoneration of the wrongfully convicted Guildford Four,<sup>275</sup> the Home Office and the Association of Chief

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<sup>267</sup> *Supra* note 1 at 667.

<sup>268</sup> *Ibid.*

<sup>269</sup> *Ibid.*; U.K., The Royal Commission on Criminal Justice, *Report* (London: HMSO, 1991) at 54 (Chair: Viscount Runciman of Doxford).

<sup>270</sup> *Field & Thomas*, *supra* note 24 at 5.

<sup>271</sup> *Ibid.*

<sup>272</sup> *Ibid.*

<sup>273</sup> *Ibid.* at 5-6.

<sup>274</sup> *Ibid.* at 6. The emphasis denoted by an italic font in this sentence is mine.

<sup>275</sup> *Supra* note 13 at 23.



Police Officers had created a Working Group<sup>276</sup> with key stakeholders on “investigative interviewing,”<sup>277</sup> to create and implement an interview methodology and a training program that was consistent with PACE and would guard against false confessions.<sup>278</sup> The Association of Chief Police Officers developed an officer training course and the Home Office published a study of an evaluation of that training, that was largely favourable, as early as 1993.<sup>279</sup> Thus, there was a move towards a less aggressive style of interrogation at the instigation of the police and the government. In the evaluation report, it was noted that “officers were frequently nonplussed when faced by a suspect who persisted in exercising the right to silence,”<sup>280</sup> and that officers often appeared “unsure about what behaviour was appropriate under the provisions of the Police and Criminal Evidence (PACE) Act 1984.”<sup>281</sup>

The dilemma of the early nineties appears to have been that if objectionable police interrogation tactics were allowed (or resorted to notwithstanding their prohibition), then false confessions and wrongful convictions were a danger – in light of the high profile exonerations of the wrongfully convicted that happened in the late eighties, and the public backlash that followed,<sup>282</sup> it is reasonable to assume that the police and the government could not permit such an approach to continue.<sup>283</sup> A PEACE training program would provide an ethical alternative

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<sup>276</sup> Barry J. McGurk, Michael J. Carr & Debra McGurk, “Investigative Interviewing Course for Police Officers: An Evaluation” (1993) Police Research Series: Paper No. 4, London: Home Office Police Department at iii. See also *Supra* note 25.

<sup>277</sup> *McGurk, Carr & McGurk, ibid.* at iii and v.

<sup>278</sup> *Baldwin, Ibid;* and *McGurk, Carr & McGurk, ibid.*

<sup>279</sup> *McGurk, Carr & McGurk, Ibid.*

<sup>280</sup> *Ibid.* at 4.

<sup>281</sup> *Ibid.*

<sup>282</sup> The Campaign to Free the Birmingham Six, for example, was spearheaded by then-Labour MP Chris Mullin, who raised issues related to the case in the House of Commons from 1987 onwards: U.K., House of Commons, *House of Commons Debates (Hansard)*, 11 June 1987 to 17 December 2004) (Hon. Chris Mullin), online: <<http://hansard.millbanksystems.com/people/mr-chris-mullin/>>.

<sup>283</sup> A. Ashworth, *The Criminal Process* (Oxford: OUP, 1998) at 11; Hannah Quirk, “Identifying Miscarriages of Justice: Why Innocence in the U.K. is not the Answer” (2007) 70(5) MLR 759 at 772. Ashworth described the case of the Birmingham Six as being ‘catalytic’. Quirk notes that despite the fact that very few of the miscarriage of justice cases created any legal precedents, “...they had a profound impact upon the criminal justice system” (p. 773)

inasmuch as it was inside the framework of PACE, and it would further assist to allay concerns of an outraged public.<sup>284</sup> It may be that PEACE not only served the function of providing a new training platform, but that it was a necessary public relations tool aimed at rebuilding trust with a concerned British public.

When the PEACE model was devised, and it was decided that there would be a move away from “persuasive interviewing”<sup>285</sup> towards, what was touted as an “ethical alternative”,<sup>286</sup> training manuals began to be distributed to officers the following year.<sup>287</sup> Professor Michael Zander describes it as follows:

The Runciman Royal Commission on Criminal Justice was set up in 1991 as a result of great concern about some spectacular miscarriage of justice cases, some of which will have perhaps come to your notice. The three main cases all involved the IRA: the *Macguire Seven*, the *Guildford Four*, and the *Birmingham Six*. The police, in particular came in for a real pasting as a result of those cases. They felt defensive about the way they were being portrayed, and the way they had in fact behaved. As part of their reform program the police devised a new system they called “investigative interviewing.”<sup>288</sup>

The Association of Chief Police Officers ““instigated the design of a training course” in investigative interviewing”<sup>289</sup> “[i]n the light of concerns which have been expressed about the way in which police officers conduct interviews with suspects.”<sup>290</sup>

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and they were a “compelling reform tool” (pg. 773). She further notes that the 1981 Royal Commission on Criminal Procedure and PACE and the Royal Commission on Criminal Justice and ultimately the Criminal Cases Review Commission were established in response to miscarriage of justice cases.

<sup>284</sup> *Supra* note 147. Snook et al. write: “Several high-profile wrongful convictions cases in the United Kingdom (e.g., Guildford Four, Birmingham Six) resulted in close scrutiny of investigative practices associated with those miscarriages of justice. One of the issues that garnered much attention was the system of interviewing tactics used to elicit confessions. It was determined that the overly manipulative and coercive nature of interrogation practices contributed to the wrongful convictions. The British response was to introduce substantive reforms, including implementation of the PEACE model of interviewing (*Supra* note 9 at 219), Substantive reforms, culminating in the adoption of the inquisitorial (non-manipulative or coercive) interviewing method PEACE in 1992.” See also *supra* note 13 at 23.

<sup>285</sup> *Schollum, ibid.* at 43.

<sup>286</sup> *Ibid.* at 20 and 43.

<sup>287</sup> *Ibid.*

<sup>288</sup> *Supra* note 1 at 663.

<sup>289</sup> *McGurk, Carr & McGurk, supra* note 278 at 4.

<sup>290</sup> *Ibid.*

The Home Office's Police Research Group published an additional research paper in 1993 called "Officer's Perspectives on Investigative Interviewing"<sup>291</sup> notes that "...the vast majority [of officers] saw interviews as the most important part of any investigation,"<sup>292</sup> and that it was a "commonly held view ... that interviews were often the only way of getting the information required,"<sup>293</sup> particularly where there was only circumstantial evidence,<sup>294</sup> but that "some officers voiced the view that interviews were 'getting harder'; many suspects were seen as 'more professional' and as using the right to silence to avoid possible charges. These changes were clearly a source of frustration for a substantial number of officers."<sup>295</sup> More generally, it was noted in that Home Office sponsored report that "After examining 400 video recordings of interviews conducted by constables and sergeants, Baldwin concluded that 'interviewing suspects causes some police officers serious difficulty and, even in the simplest cases, they contrive to make exceedingly heavy weather of it.'"<sup>296</sup>

It appears that investigative interviewing was in place as a Home Office priority prior to the elimination of the right to silence, and PEACE was the training program developed. After the reforms to interviewing and interrogation were in place, we see the elimination of the right to silence.<sup>297</sup>

In 1993 "...the Royal Commission on Criminal Justice released"<sup>298</sup> two reports that suggested that the right to silence "should be retained,"<sup>299</sup> and indicated that eliminating the right

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<sup>291</sup> Janet E. Stockdale, "Management and Supervision of Police Interviews," in Police Research Group, *Police Research Series: Paper No. 5*, (London: Home Office Police Department, 1993) at 6.

<sup>292</sup> *Ibid.* at 6-7.

<sup>293</sup> *Ibid.* at 7.

<sup>294</sup> *Ibid.*

<sup>295</sup> *Ibid.*

<sup>296</sup> *Ibid.* at 2.

<sup>297</sup> This point can be surmised, as the right to silence was eliminated in 1994, but PEACE was implemented prior to that in 1992. After the reforms to interviewing and interrogation were in place, within a two-year time span the right to silence was reduced to meaninglessness.

<sup>298</sup> O'Rielly, *supra* note 216 at 426.

would likely increase the number of wrongful convictions.<sup>300</sup> Despite these reports, the Home Secretary, Michael Howard, publicly declared the "...decision to limit the right to silence at the Conservative Party conference in October 1993"<sup>301</sup> "as part of a package of criminal justice reforms aimed at "getting tough" on crime."<sup>302</sup> He announced at the same conference that he has adopted the view of the Runciman commission's minority, and hence, rejected the majority's view.<sup>303</sup> Moreover, he said: "The so-called right to silence is ruthlessly exploited by terrorists. What fools they must think we are. It's time to call a halt to this charade. The so-called right to silence will be abolished."<sup>304</sup>

Howard's remarks provoked a vocal response from critics (which was ignored) charging that the decision<sup>305</sup> was made "...to pander to public fears about crime, save money"<sup>306</sup> and to placate English police,<sup>307</sup> who were upset about measures that had been taken to streamline the department.<sup>308</sup> As Stewart and Thomas describe this period:

All the penal lessons that had been painfully learned in the early '80s were lost in a scramble for a law and order rhetoric with popular appeal. Inconvenient evidence was simply ignored. In this process, the Runciman Commission was cannibalized: anything that could be presented as a contribution to cost-effective crime control became an urgent political priority.<sup>309</sup>

The elimination of the right to silence was the most significant feature of the first wave of Howard's crime control reforms.<sup>310</sup> John Major's Conservative government eliminated it in 1994, and enacted a law that would regard a suspect's refusal to answer questions during police

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<sup>299</sup> *Ibid.*

<sup>300</sup> *Ibid.*

<sup>301</sup> *Ibid.* at 423.

<sup>302</sup> *Ibid.*

<sup>303</sup> *Supra* note 1 at 667.

<sup>304</sup> *Ibid.*

<sup>305</sup> *O'Reilly, supra* note 216 at 426.

<sup>306</sup> *Ibid.* at 427.

<sup>307</sup> *Ibid.*

<sup>308</sup> *Ibid.*

<sup>309</sup> *Field & Thomas, supra* note 24 at 7.

<sup>310</sup> *Ibid.*

interrogation (and to testify at trial), as evidence of his guilt.<sup>311</sup> This was the Criminal Justice and Public Order Act (CJPOA),<sup>312</sup> the justification<sup>313</sup> for which was “to reduce the proportion of cases when the prosecution are ambushed by last minute changes in the defendant’s story.”<sup>314</sup>

The Major government, in enacting the law contradicted the findings of two publications by the British government’s own Royal Commission on Criminal Justice, only one year earlier, in 1993,<sup>315</sup> which suggested that those who are innocent have good reasons for remaining silent, and that the elimination of the right<sup>316</sup> “would not reduce crime.”<sup>317</sup> It also said that eliminating the right “...would increase the likelihood of false confessions and “erroneous convictions”<sup>318</sup> (i.e. wrongful convictions).<sup>319</sup> The Major government enacted the law in spite of these concerns.

Proponents of eliminating the right to silence made a number of arguments in favour of doing so. They asserted that: (i) the right to silence deprives the police of the valuable information that can be obtained if the accused is forced to talk<sup>320</sup> (ii) removing the right will allow the police to investigate the validity of the information provided by the accused and it would prevent the defence from raising last minute ambush defences;<sup>321</sup> (iii) under the new interviewing guidelines (PACE), the innocent are protected from aggressive interrogation, and they have access to counsel in the interview room. Hence, the innocent are not prejudiced or do

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<sup>311</sup> O’Reilly, *supra* note 216 at 402; *The Criminal Justice and Public Order Act*, (*Supra* note 145).

<sup>312</sup> *Supra* note 1 at 667.

<sup>313</sup> *Ibid.*

<sup>314</sup> *Ibid.*

<sup>315</sup> O’Reilly, *supra* note 216 at 403.

<sup>316</sup> *Ibid.*

<sup>317</sup> *Ibid.*; U.K., The Royal Commission on Criminal Justice, *Report*, *supra* note 271.

<sup>318</sup> O’Reilly, *ibid.*

<sup>319</sup> *Ibid.*

<sup>320</sup> Gareth Griffith, “The Right to Silence” NSW Parliamentary Library Research Service, Briefing Paper No 11/97 at 42.

<sup>321</sup> *Ibid.*

not face major risk by talking to the police;<sup>322</sup> (iv) a substantial number of guilty people “beat the charges” by keeping quiet;<sup>323</sup> and (v) that eliminating it will ultimately lead to a “more efficient system of criminal justice,”<sup>324</sup> among other reasons.<sup>325</sup> These arguments were also being made in 1993.<sup>326</sup>

As with England, there are those in North America who are calling for the elimination of the right to silence.<sup>327</sup> These persons include scholars, law enforcement personnel, and politicians of a conservative stripe. Moreover, in the American context, “...the United States Department of Justice advocated adopting a litigation strategy to urge the Supreme Court to allow adverse inferences from silence to remove a “shelter” for the guilty and provide an incentive for the accused to testify.”<sup>328</sup> It is possible that advocates of this view could find sympathy and support from the press, the public and from politicians,<sup>329</sup> in an environment that is receptive to crime control efforts.<sup>330</sup> It has been noted that the experience of England’s limitation on the right to silence “merits close study, especially in light of the potentially fundamental impact of such a change on the American system of justice.”<sup>331</sup>

The history demonstrates that trying to eliminate the right to silence taking a head-on approach failed numerous times. It failed in the early seventies when the idea was first introduced, it failed in the early eighties when the PACE reforms were enacted and the right was again put on the table, it failed in the late eighties when the Home Secretary announced a stated intention to reform it. Due to some high profile miscarriages of justice, the integrity of the entire

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<sup>322</sup> *Ibid.* at 42-43.

<sup>323</sup> *Ibid.* at 42.

<sup>324</sup> *Ibid.*

<sup>325</sup> *Ibid.*

<sup>326</sup> *Ibid.*; Meng Heong Yeo, “Diminishing the Right to Silence: The Singapore Experience”(1983) *Crim. L. Rev.* 89.

<sup>327</sup> O’Reilly, *supra* note 216 at 406.

<sup>328</sup> *Ibid.*

<sup>329</sup> *Ibid.*

<sup>330</sup> *Ibid.*

<sup>331</sup> *Ibid.* at 406-07.

criminal justice system was put into question, and the era of reform that followed created an opportunity to overhaul the system in numerous areas. By making other concessions, and specifically by designing a model of investigative interviewing to allay the concerns of the public, the Conservatives were on firmer ground when shortly thereafter they announced that they would be eliminating the right to silence.

It is clear from the behaviour of the British government in 1990's that it was adamant about abolishing the right to silence.<sup>332</sup> However, the public reaction to the well publicized miscarriages of justice in Guilford four and Birmingham six<sup>333</sup> forced the government to temporarily back away from its plans to abolish this right.<sup>334</sup> But the British government was not ready to give up and the intense pressure brought about by the police to abolish this right<sup>335</sup> continued to fuel the government's determination to go through with its plan.

The urgent desire to remove the right to silence was in fact caused by police reaction to the introduction and the implementation of PACE.<sup>336</sup> Professor Steven Greer who was writing in 1990, tells us that "the police have been in the forefront of the current abolitionist offensive in an attempt to recover ground perceived to have been lost as a result of PACE."<sup>337</sup> The crucial factor in the government's anti- right to silence campaign was the "...perception in some quarters of

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<sup>332</sup> Steven Greer, "The Right to Silence: A Review of the Current Debate" (1990) 53(6) Mod. L. Rev. 709 at 709.

<sup>333</sup> *Ibid.* at 724.

<sup>334</sup> *Ibid.* at 709. However soon the "...fear arose that guilty defendants were using the right to silence in conjunction with the new access to solicitors to escape convictions, and concerns shifted from protecting injustices in such cases as the Guilford Four and the Birmingham Six to protection of society." A.A.S. Zuckerman, *the Principles of Criminal Evidence*, (Oxford: Oxford University Press, 1989) at 326-327.

<sup>335</sup> Greer, *ibid.*

<sup>336</sup> *Ibid.* at 716.

<sup>337</sup> *Ibid.* See also Michael Zander, "Abandoning an Ancient Right to Please the Police" THE INDEPENDENT (London) Oct. 6, 1993, at 25 (editorial). Also Gregory W. O'Reilly states "...the police had continued to press for the abolition of the right in reaction to the PACE reforms of the 1980s." (O'Reilly, *supra* note 218 at 427).

the changing balance between police powers and the rights of the suspect as this operated under PACE.”<sup>338</sup>

Once the PACE reforms were introduced, the British government seized the opportunity to forcefully advance the argument that the increased rights of the suspects had altered the balance between the need to combat crime and the rights of suspects. Professor Mark Berger states this point in the following fashion:

At the same time that the legislative process of recasting the rules governing police interrogation and confession admissibility had seemingly run its course, the Conservative government of Great Britain concluded that the time was ripe to challenge the right to silence. The debate was reopened by the Home Secretary in a speech to the Police Foundation in July 1987. Initially the speech defended the increased right of access to a solicitor granted by PACE. But it went on to question whether changing circumstances had altered the balance between the interests of society as a whole and the rights of the criminal suspect.<sup>339</sup>

The judicial response to PACE package was a series of rulings that excluded statements obtained in breach of PACE regulations.<sup>340</sup> These rulings provoked a strong response on the part of the opponents of right to silence. The critics argued that PACE had changed the balance of power too far in favour of criminal suspects.<sup>341</sup> Moreover they also claimed that as a result of PACE there was a sharp increase in the number of defendants refusing to give statements to police.<sup>342</sup> Lord Chief Justice Lane echoed those sentiments in his judgment in the case of *Alladice*<sup>343</sup>:

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<sup>338</sup> *Supra* note 320 at 21.

<sup>339</sup> Mark Berger “Of Policy, Politics, and Parliament: The Legislative Rewriting of the British Right to Silence” (1994-1995) 22 Am. J. Crim. L. 391 at 406.

<sup>340</sup> David Feldman, “Regulating Treatment of Suspects in Police Stations: Judicial Interpretation of Detention Provisions in the Police and Criminal Evidence Act 1984” (1990) Crim L. Rev. 452. According to Zuckerman, “if the courts become convinced that by their promoting of the suspect’s right to consult a solicitor the police are unduly hindered in the investigation of crime, a reaction is bound to take place.” Zuckerman, *supra* note 336 at 327.

<sup>341</sup> Mike Redmayne, “English Warnings” (2008) 30(3) Cardozo Law Review 1047 at 1053.

<sup>342</sup> Peter Neyroud “Wrongs About a Right” POLICE REV., Apr. 8, 1994, at 17. Upon reviewing the studies done on British confession rates, after the implementation of PACE, Gisili Gudjonsson made the following findings:

The frequency with which suspects confess to crimes in England has fallen in recent years from over 60% to between 40 and 50%. This appears to have followed the implementation of the Police and Criminal Evidence Act (PACE), which came into force in January 1986. The reasons for this decrease seem to be associated with the increased use of solicitors by detainees, and changes in custodial interrogation and confinement procedures. The presence of solicitors during interrogation is most likely to discourage



It seems to us that the effect of section 58 is such that the balance of fairness between prosecution and defense cannot be maintained unless proper comment is permitted on the defendant's silence in such circumstances. It is high time that such comment should be permitted together with the necessary alteration to the words of the caution.<sup>344</sup>

According to Zuckerman "Judges and policemen became alarmed that the balance was tilting too much in favour of suspects. They started pressing for the curtailment of the right to silence precisely because it was becoming a realistic option for suspects. The fact of the matter is that the right to silence could be tolerated because only a very small minority of suspects could resist police demands for answers."<sup>345</sup> Professor Steven Greer coined a phrase for the arguments of these critics: he called them "exchange abolitionists"<sup>346</sup> The core argument of these critics is "...that provided defendants' other legitimate interests are adequately protected, only the guilty will seek to hide behind silence in police station."<sup>347</sup>

A segment of these detractors of the right to silence believed that "...PACE has already gone far enough in securing defendants' rights"<sup>348</sup> and that "...increased availability of legal advice in the post-PACE era in England and Wales has resulted in a significant increase in the use of the right to silence especially by experienced criminals charged with serious offences."<sup>349</sup>

Hence, "The new rights granting liberal access to solicitors and the willingness of courts to enforce them were one factor leading to new restrictions on the right to silence adopted a decade later."<sup>350</sup>

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suspects from confessing where the evidence against them is weak. (Gisili Gudjonsson, *The Psychology of Interrogations, Confessions and Testimony*, 1<sup>st</sup> ed., (London: Wiley, 1992) at 324.

<sup>343</sup> *R. v. Alladice* (1988) 87 Cr. App R. 380

<sup>344</sup> *Ibid.* at 385.

<sup>345</sup> A.A.S. Zuckerman "The Inevitable Demise of the Right to Silence" (1994) New Law Journal 1 at 1.

<sup>346</sup> *Supra* note 1 at 719.

<sup>347</sup> *Ibid.* at 719-720.

<sup>348</sup> *Ibid.* at 720.

<sup>349</sup> *Ibid.* See also the intense opposition of Irish Police Commissioner, Patrick Culligan to right to silence, when in 1994 he said that right to silence only benefited the "...cunning, professional, hardened criminal." P.O. Mahoney, "The Ethics of Police Interrogation and the Garda Síochána" (1997) 6 Irish Criminal Law Journal 46 at 53.

<sup>350</sup> Gordon Van Kessel, "European Perspectives on the Accused As a Source of Testimonial Evidence" (1997-1998) 100 W. Va. L. Rev. 799 at 831.

Likewise in North America, the assault on the right to silence has been a protracted one.<sup>351</sup> Will the interests calling for the elimination of that ancient right be assisted by the adoption of PEACE in North America? If there is a move away from police trickery and pressure tactics, particularly due to false confession related concerns, it is difficult to see how the police will be able to go back, if it turns out that a less aggressive approach fails to get

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<sup>351</sup> The following are examples of two notable academics advocating the elimination of the right to silence in the context of trial in Canada:

Steven Penney, "What's Wrong with Self-Incrimination? The Wayward Path of Self-Incrimination Law in the Post-*Charter* Era. Part I: Justifications for Rules Preventing Self-Incrimination" (2003-2004) 48 *Crim. L.Q.* 249 at 250: "I argue that there is in fact nothing *inherently* wrong with compelling self-incrimination and that the Court's preoccupation with preserving free choice has produced a self-incrimination jurisprudence that too often elides the legitimate interests at stake in the criminal justice process. Put simply, there is nothing wrong with denying criminal justice suspects the right to choose whether to respond to criminal accusations, as long as the state has sufficient grounds for suspicion, avoids cruel methods of inducing cooperation, and ensures that compelled evidence is reasonably reliable."

Ed Ratushny, (*Supra* note 220) at 343: "...there is every justification for expecting the accused to respond to the evidence against him at a criminal trial which respects the fundamental principles upon which our criminal process has been established."

Moreover, there appear to have been alarming developments in limiting the scope of the right to silence, as discussed in Chapter 3 at footnote 133. A more recent example of the right's curtailment can also be seen in the *Combating Terrorism Act*, R.S.C. 2013, c. C-9, s. 10. The amendments impact *Criminal Code* sections 83.28 to 83.3, specifically. These are the sections of the *Code* that create the Investigative Hearing regime for alleged terrorist offences. The legislation provides that, on the order of a Judge, persons may be compelled to attend a hearing before the Judge and answer questions put to them by an agent of the Attorney General regarding the commission or planned commission of acts of terrorism. An attendee is not permitted to refuse to answer questions put to him on the ground that the answer may tend to incriminate him or subject him to any penalty or proceeding. Any answer given may result in prosecution under section 132 (perjury) or 136 (giving contradictory evidence) in a later proceeding. These carry a sentence of up to fourteen years imprisonment where there is a conviction. Beyond this, evidence obtained cannot otherwise be used to incriminate the attendee.

More examples of the limitations of the right to silence in Canada can be cited. For instance:

- 1) Notice requirements of alibi evidence may arise solely from the testimony of an accused individual, meaning that, should an accused person testify that he/she was elsewhere at the time of the commission of the offence, he/she should provide advance notice of that evidence to the crown. Otherwise the trier of fact may be entitled to draw an adverse inference from the lack of timely notice (*R. v. Letourneau*, [1994] B.C.J. No. 265 (B.C.C.A.)). The failure of the accused person to testify in relation to alibi evidence may also lead to an adverse inference of guilt (*R. v. Noble*, [1997] 1 S.C.R. 874).
- 2) Under certain circumstances, the failure of the accused person to answer questions put to him by state agents may be admissible as part of the narrative between the accused and the police. However, the trial judge needs to instruct the jury that the purpose of introducing the evidence of the accused's silence is for narrative only and no inference of guilt can be drawn from it (*R. v. Turcotte*, [2005] 2 S.C.R. 519).
- 3) The failure of a trial judge to provide mid-trial instructions to the jury about the co-accused's counsel's invitation to draw an adverse inference from an accused's failure to testify, may not be deemed as sufficient grounds to order a new trial (*R. v. Prokofiew*, [2012] 2 S.C.R. 639).
- 4) Courts of Appeal are permitted to consider the failure of an accused person to testify at trial (*R. v. Leaney*, [1989] 2 S.C.R. 393 at 418).

confessions. They will then turn their sights on the right to silence, and they will be on much firmer footing in launching their assault upon it than they had been previously.

There is another important feature of PEACE that merits attention: the stylistic approach of the model. In a pithy phrase, the philosophy of PEACE might be summed up by the following adage: ‘you catch more flies with honey than with vinegar.’ Whereas the Reid tactics are a more obvious and direct way to extract confessions, the PEACE approach may lull a suspect into a false sense of security, by effectively obscuring the seriousness of the situation he is actually in through the officer’s efforts to portray himself as a sympathetic personality throughout the course of the interview. A police officer is no friend of a suspect; but PEACE might have suspects believe otherwise. By establishing rapport with the suspect, by taking the time to listen without interruption, seeking clarification of answers, and avoiding rationalization, projection and minimization, PEACE buys officers considerably more goodwill with their detainees than Reid will permit.

We should consider the implications of such an approach, beyond the fact that it is more pleasant and more humane. Certainly, from a public relations perspective, PEACE is a superior model to Reid, or other harder methods of interrogation. It should not surprise us that the PEACE model was developed in the wake of several high profile exonerations of individuals who were wrongfully convicted; it has many positive selling points, chief amongst them is that it is a less oppressive model. But let us not forget that the model was designed by the Home Office in heavy consultation with the Association of Chiefs of Police (ACPO), both of whom had been pushing for an effective elimination of the right to silence, to be replaced with an adverse inference. This was achieved, finally, in 1994. A few years previous to this, these stakeholders were sitting down together and developing an interview model that would assist to avoid

miscarriages of justice; as they were doing so, is it possible they might have had the right to silence in mind as well?

Let us look at what one of the major effects of PEACE may be, insofar as the congenial approach of officers and the less oppressive tactics that create a false sense of security or a false sense that the officer is there to help. If the PEACE approach obscures the adversarial nature of the relationship between the accused individual and the accusing state, and facilitates the impression in the mind of the accused that his interrogator is there to hear his story in a fair and impartial way, then he may be more inclined to speak to the officer. That is, he may be more inclined to waive his right to silence, and make a statement. After all the officer has been pleasant enough in his approach, wants to hear his side of the story and would like to give him the opportunity to clear everything up.

In the United Kingdom, the adverse inference has come in to ensure that the right to silence will be waived, and the accused will often be led to the choice to give a statement just to clear things up; to do otherwise will look particularly damaging in front of the jury. In the Canadian environment, where the right to silence continues to exist, battered by recent crime control judgments though it may be, PEACE may in fact be a skillful bait-and-switch tactic; that is, baiting a commitment to talk by carrying on pleasant and hope-inspiring impressionistic interactions (without ever explicitly holding out a hope of advantage). The switch happens when it occurs to the accused what a dire predicament he has put himself in by putting misplaced trust in the friendly seeming officer, who he will then realize was not in fact his friend and was not there to help him out in any way. A police caution may not be enough to mitigate this kind of risk. Research on the caution has shown that it "...is linguistically complex"<sup>352</sup> and difficult for

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<sup>352</sup> Timothy Moore & Karina Gagnier, "'You Can Talk if you want to': Is the Police Caution on the 'Right to Silence' Understandable?" (2008) 51 C.R. (6th) 1 at 4.

many persons to properly understand, and that perceptions of the relationship between the suspect and the detaining officer forged after the caution has been delivered may undermine the message that the caution seeks to convey.<sup>353</sup>

Recall that central tenet of the PEACE method is completely consistent with the Supreme Court of Canada's position on the scope of the right to silence laid down in *Hebert* and *Singh*. *Singh* cemented the rule that even when a suspect asserts his right to silence, the interrogating officer is under no duty to discontinue questioning him. To force the suspect to remain in the interrogation room, and to be questioned, coaxed, cajoled or otherwise harassed to answer police questions, is permissible under Canadian law. The PEACE method supports the exact same approach. As noted, police interviewers are not bound, according to the method, to accept the first answer given by suspect, questioning is not considered to be unfair merely because it is persistent, and even when the right to silence is exercised by a suspect the police still consider themselves to have a right to put questions to the suspect. Thus, the approach under PEACE is not a departure from Reid or from the parameters of current confessions law having regard to the right to silence; there is no obligation to respect the assertion of that right by a suspect.

The difference is in *how* PEACE interviewers go about getting a suspect to begin talking. During the Engage and Explain stage, the focus of the interviewer is on building rapport with the detainee, making him feel comfortable, and selling him the idea that the interviewer is someone who can be trusted. The law ensures that inducements must be avoided, but, as the saying goes, good manners cost nothing but are worth everything,<sup>354</sup> and this is how the interviewer inveigles the suspect to open up. In Reid, an interrogation is typically preceded by an interview. The

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<sup>353</sup> *Ibid.* at 24-25. Research by Moore & Gagnier, moreover, indicates that innocent participants would not be any less likely to give a statement to police if the caution, like the *Miranda* warning, said that statements could be used against them in evidence (p. 4-19).

<sup>354</sup> *Ord, Shaw & Green, supra* note 46 at 16.

interview is non-confrontational and non-accusatory in nature, whereas the interrogation stage of Reid, should it get that far, is characteristically different because it is confrontational and the interrogator exercises control over the suspect. In other words, the first stage of Reid is similar to what PEACE advocates purport to be the entirety of their model.

With respect to trying to have a stubborn suspect waive their right to silence, Reid relies on harder tactics, and in particular presenting the suspect with false evidence and posing behaviour provoking, baiting questions; PEACE eschews these tactics. It's not clear which method of persuading a non-compliant suspect to talk is more effective; PEACE did not coexist with the right to silence for a long enough time to be able to discern the degree of its effectiveness at prompting suspects to talk. But it is possible that putting the emphasis on the officer presenting himself as a sympathetic benefactor to the suspect who can help rather than emphasizing that the suspect is in grave trouble, may be a more effective way to prompt a statement. In truth, some measure of both will be required – Reid favours the use of fear more than PEACE, whereas PEACE favours the use of hope more than Reid.

Nevertheless, PEACE does resort to Conversation Management (CM) techniques in the interview proper, the goal of which is to exercise control over uncooperative detainees, and is incrementally closer to Reid than the cognitive interview, which is typically resorted to for compliant detainees.

Perhaps the PEACE model can be seen as a kind of Trojan Horse in yet another respect. By relying on rapport-building and sympathy, the PEACE model obscures the true relationship between the interviewer, a state agent, and the individual. The suspect is lured into a false sense of security and may, through the amicable presentation of the officer, come to believe that this is someone he can put trust in to help him out of a bad situation. This approach can assist to

prompt the suspect to waive the right to silence and put something on the record. Where the suspect is refusing to speak, lying or being evasive, a harder approach, conversation management may be resorted to; but the approach, here is to get the horse inside the fortifications – to get the suspect talking. Once he begins to speak, if he is lying, he will be creating a record of lies that is open to attack in the courtroom.

Proponents may recognize nothing objectionable about this duplicitous approach. The coercion is minimal, the much-maligned maximization and minimization tactics are not used, and it may be an effective way to get the suspect's side of the story. In fact the approach has been found to be far more effective than the domineering approach. Research has found a relationship between admission or denial and the suspects' ratings of police behaviour. It has been found that "participants who perceive humanitarian attitudes from their interviewers were more likely to admit crime"<sup>355</sup> and that "for those whose ratings indicated that they felt respected 'the odds of admission are 5.92 times greater, than those who did not feel respected.'<sup>356</sup> A dominating style is more likely than a respectful approach to result in suspect denials.<sup>357</sup>

However the statements that are given may be voluntary within the meaning of the common law confessions rule, but may not be based upon correct apprehension of the situation the detainee is in. If the treatment of the detainee by the officer leads the former to conclude he is being dealt with sympathetically, then he is the victim of inaccurate information. With information which is false, he cannot make an informed choice. A voluntary statement made on the basis of a misapprehension of the circumstances cannot be said to have been made because a

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<sup>355</sup> Rebecca Milne & Ray Bull, *Handbook of Psychology in Legal Contexts*, 2<sup>nd</sup> ed. by David Carson & Ray Bull, (John Wiley and Sons, Sussex: 2003) at 121.

<sup>356</sup> *Ibid.*

<sup>357</sup> *Ibid.*

meaningful decision to do so was reached; the statement was made because there was a kind of subtle misrepresentation at play.

The friendly approach of PEACE is insidious because it will not be shocking or flagrant enough to raise oppression; it won't be distorting or psychologically deteriorating so as to raise operating mind issues and it won't appear as explicit enough an inducement to render the statement legally involuntary on that basis either. Thus, when skillfully deployed, this tactic can prompt legally voluntary statements because it is so subtle. But there is the risk that the statements were made on the basis of an inaccurate perception of the situation the suspect found himself in, and allowed the police to get a confession they would not been able to had they used less obfuscation in their approach.

Another significant point that should be made about the PEACE model is that the effect of PEACE training may have a limited impact upon the way actual interviews are carried out. In 1997, "...a senior police officer in England"<sup>358</sup> reported "...research demonstrating a belief among police officers that the main aim of an interview with a suspect was still to obtain a confession."<sup>359</sup> In research conducted by forensic psychologists on PEACE trained interviewers in England, it has been discovered that police officers' evaluations of interviewing skills differs from the assessments of forensic psychologist experts;<sup>360</sup> whereas police officers' evaluations are largely confession driven, forensic psychologists focus on 28 distinct "interviewing skills"<sup>361</sup> which are benchmarks of good interviewing.<sup>362</sup> In a study conducted by Holmberg and Christianson, persons in prison for murder and sexual offences were asked to give their

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<sup>358</sup> *Ibid.* at 119.

<sup>359</sup> *Ibid.*

<sup>360</sup> *Ibid.*

<sup>361</sup> *Ibid.*

<sup>362</sup> *Ibid.*



judgments and perceptions<sup>363</sup> of the “behavior/manner/attitudes of the police officers who had interviewed them during the investigation.”<sup>364</sup> The data indicated that only a few of the English interrogators<sup>365</sup> were perceived<sup>366</sup> “...as having shown a great personal interest”<sup>367</sup> and in “having tried to create a personal conversation,”<sup>368</sup> or were seen “as highly sympathetic or empathetic.”<sup>369</sup> Few had seen the interviewers “...as having shown a very positive attitude towards them as human beings.”<sup>370</sup> On the other hand, few perceived “...their interviewers as aggressive and explicitly confrontational.”<sup>371</sup> Most, however, said “...that they experienced the police interviewers to display impatience, condemning attitude, and a lack of empathy.”<sup>372</sup> It may be that the PEACE training does not work as well as it might.

## **Conclusion**

I propose, with respect to PEACE, that we keep an open-mind, surmise where problem areas are likely to arise, and empirically check our hypotheses against gathered data where it is available. We can say with some confidence that there are significant problems associated with the use of the Reid Technique. Forensic psychological research (discussed in chapter 4) has demonstrated as much. Let us now treat the proposed “ethical alternative” as a working model that is subject to review, revision and ongoing improvement, rather than as the “silver bullet” that it is often touted as. If we are truly committed to discovering ethical alternatives, as we say we are, then let us take the *a priori* “ethical” interviewing model, PEACE, as a *starting point* and as a means-to-an-end, rather than an end-in-itself. Let us allow our ethical alternative to be

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<sup>363</sup> *Ibid.* at 120.

<sup>364</sup> *Ibid.*

<sup>365</sup> *Ibid.*

<sup>366</sup> *Ibid.*

<sup>367</sup> *Ibid.*

<sup>368</sup> *Ibid.*

<sup>369</sup> *Ibid.*

<sup>370</sup> *Ibid.*

<sup>371</sup> *Ibid.*

<sup>372</sup> *Ibid.* at 121.

tempered by considerations of efficacy, practicality, competing values, whether it is executable, etc; and then improve upon it accordingly as necessity dictates, or scrap it altogether and replace it with something else if the model cannot be made practicable. Realization of the PEACE dividend in the realm of interview and interrogation may not be as simple as bringing together a quorum of scholars, bureaucrats, police officials, and politicians to fashion an interview and interrogation policy anew.<sup>373</sup> Let us improve interview and interrogation incrementally and in a considered way based upon scientific research and a careful consideration of our values in the sphere of criminal justice. It would be a mistake to succumb to the binary logic that says “if not Reid then PEACE”; instead, let’s treat interview and interrogation as being like a management problem. The methodology that we settle upon should be the one that gives us the most (i) effective results, (ii) with respect to realizing our values, and (iii) in consideration of the current operating interview and interrogation legal-environment inclusive of constraints, enjoinders and permissible behaviours.

We have now discussed the PEACE model. While it is not yet possible to say whether PEACE is less dangerous for eliciting false confessions than Reid, this does seem plausible. However, in the United Kingdom, where PEACE is used, the right to silence has effectively been eliminated. This is cause for concern because PEACE seems as though it is designed to be successful in an environment without an effective right to silence. The fear is that if PEACE is introduced in North America, the effective elimination of the right to silence through a modification to the *Canada Evidence Act* may follow.

It is argued that Reid and PEACE create problems in the procurement of confessions because they, for various reasons, undermine the voluntariness of the suspect who is the target of them. We now turn to an alternative mode of questioning which could replace these interrogation

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<sup>373</sup> As the United Kingdom’s Home Office did in 1992.

methods: in-court examination by a magistrate. It is argued that such a system, provided the proper protections are built in, could ensure that any and all statements given would be truly voluntary. This would drastically reduce the risk of false confessions, and accordingly, reduce the number of wrongful convictions. Judicial examination is discussed in the next chapter.

## **CONCLUSION: REFORMING INTERROGATION AND CONFESSIONS LAW IN CANADA: The Judicial Model**

We have now given the subject of interrogation and confession thoroughgoing treatment. It is the position here that the current range of practices on offer are problematic as they raise the probability of inducing false confessions. It is argued that there is a better way to go about collecting statements from suspects.

The current environment is problematic in several respects. The law of voluntariness is exceptionally permissive of police trickery and deception, and therefore lends itself to abuse.<sup>1</sup> In the interrogation room setting, some precautions are required to be taken according to the law, but in other areas, corners may be easily cut. As has been discussed, higher Canadian courts do not, in principle, have any problem with the Reid Technique of interrogation, insofar as any given interrogator is able to stay within “voluntariness” and *Charter* limits recognized by the courts.<sup>2</sup> These limits mean no *quid pro quo* inducements that overwhelm the will of the subject are allowed to be made by persons in authority,<sup>3</sup> but otherwise what degree of inducement falling short of overwhelming the will of the subject will qualify a statement as being excludable from evidence is less settled, and ultimately left to the discretion of individual judges.<sup>4</sup> Furthermore, police trickery, deception and other forms of abuse will not necessarily give rise to an exclusionary remedy unless they “shock the conscience” of Canadians,<sup>5</sup> and police oppression is similarly tightly circumscribed.<sup>6</sup> The law permits a great deal of

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<sup>1</sup> *R. v. Oickle* [2000] 2 S.C.R. 3.

<sup>2</sup> *R. v. Barrett*, (1993) 13 O.R. (3d) 587, 82 C.C.C. (3d) 266.

<sup>3</sup> *R. v. Spencer*, 2007 SCC 11, [2007] 1 S.C.R. 500.

<sup>4</sup> *R. v. Hebert*, [1990] 2 S.C.R. 151.

<sup>5</sup> *Supra* note 1.

<sup>6</sup> *Ibid.*

leeway to investigators in their efforts to obtain incriminating statements from suspects and accused persons. It is argued that the techniques that are on offer are necessarily a response to the loose constraints of the legal environment in which they were devised.

### **The Nature of Police Interrogation:**

According to Ratushny, there is a kind of hypocrisy that is built in to the system of interrogation.<sup>7</sup> With respect to custodial interrogations we have the popular Reid technique, on the one hand, and the proposed ethical alternative, the PEACE model, on the other. The Reid Technique has come into existence in our current environment, and when it is properly used it fits within the parameters of the confessions rule. The PEACE model was developed, ostensibly, in response to several miscarriages of justice that occurred in the United Kingdom. PEACE, unlike Reid, makes use of techniques that are considered to be based in sound psychology, and purports to eschew the manipulative tactics that characterize the Reid Technique. In the United Kingdom, very soon after PEACE was introduced, the right to silence was effectively eliminated through legislation. It is unclear whether PEACE can operate effectively with an entrenched right to silence. The reason for this is that there is no reliable data available describing rates of confession in an environment with a fully articulated right to silence and the PEACE method.

Between Reid and PEACE then, we have two choices, which appear to leave much to be desired. But there is a third way. Implementing it will require legislative

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<sup>7</sup> Ed Ratushny, *Self-Incrimination in the Canadian Criminal Process* (Toronto: Carswell, 1979) at 252-53. Ratushny argues that “there is a hypocrisy to a system which defines a person’s rights and obligations in its laws and then depends upon the ignorance of those same laws to ensure that they are largely ineffective in their practical application.”

Ratushny further claims that, “there is a hypocrisy to a system which provides [protections to suspects], but allows them all to be ignored at the pre-trial stage where interrogation frequently occurs in secret”, (and since Ratushny wrote with only a brief telephone contact with counsel).” (at 253).

change and, perhaps judicial support, as well. That alternative is to revive judicial examination of the accused and implement it in place of police interrogation.

### **Canvassing the Alternatives:**

For the most part, the ideas for improvements are about creating some type of balance between police and suspect in the interrogation room<sup>8</sup> “...by making legal advice equally available to all.”<sup>9</sup> The point of the right to counsel is to make<sup>10</sup> the “...accused to be aware of his position in law before making the serious decision whether or not to make a statement to police.”<sup>11</sup> Issues relating to<sup>12</sup> the “...effectiveness of the warning and the difficulty of weighing the credibility of conflicting accounts have led to further recommendations that detailed logs be kept by the police of every step in the incarceration and interrogation, and that statements be recorded.”<sup>13</sup> The other alternative would be to ensure that no statements are admissible unless<sup>14</sup> given in the “presence of counsel.”<sup>15</sup>

I agree with professor Ratushny that these proposed solutions do not provide a concrete solution to problems associated with custodial interrogations.<sup>16</sup> Essentially, counsel can only advise an accused to keep silent and not to answer any questions.<sup>17</sup> But police interrogation is filled with so many dangers<sup>18</sup> “...that it would take exceptional

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<sup>8</sup> *Ibid.* at 272.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.* at 273.

<sup>18</sup> *Ibid.*

circumstances for competent defence counsel to advise his client to abandon”<sup>19</sup> the right to silence.<sup>20</sup> The pressing issue here pertains to the very real possibility an accused may make incriminating utterances that would seal his fate at his/her trial. According to Ratushny the ideal time to answer, if at all, “...is at trial, after the specific charge is known and the Crown’s full case has been presented and tested by cross-examination.”<sup>21</sup>

The limited role of counsel at this stage essentially amounts to a<sup>22</sup> “...simple direction to say absolutely nothing to the police.”<sup>23</sup> The same could be achieved by making all statements to the police inadmissible, and there would be no need to worry about<sup>24</sup> whether section 10(b) was rightly administered or whether the accused properly understands his right to silence.<sup>25</sup> If the accused “...is entitled to the protection of remaining silent, then why not make the protection fully effective”<sup>26</sup> by excluding statements made to the police?<sup>27</sup>

If the right of police to take statements was eliminated “there would be no need to expect the judiciary to make discretionary decisions”<sup>28</sup> on admissibility,<sup>29</sup> there would be

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<sup>19</sup> *Ibid.*.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.* I should point out that I disagree with Ratushny’s assertion that an accused person should be compelled to testify at his/her trial.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.* At the time Ratushny was writing, there was no section 10(b), but instead he says “...there would be very little need to be concerned about making counsel available at this initial stage.” – *Ibid.*

<sup>26</sup> *Ibid.* Note: The author had a question mark at the end of this quotation.

<sup>27</sup> George Dix, “Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions” (1975) Wash. U. L. Q. 275 at 330. Professor Dix argues that “intentional deception” (p. 277) by state agents in procuring a confession is “manifestly inappropriate” (p. 277) and that accused persons should have “the same opportunities” (p. 330) and knowledge base before they confess as they do before pleading guilty in court (p. 330).

<sup>28</sup> *Supra* note 7 at 273.

<sup>29</sup> We should also remember the inherent unfairness in the procedure governing *voir dres*. As many practitioners in criminal law would acknowledge *voir dres* on admissibility of statements often comes down to credibility contests between an accused person and officers, and this contest is usually won by officers. As Mr. Justice Morand stated “To a very large extent in criminal cases and to a lesser, but

no conflict of interest in the officer whose job it is to get a statement administering a proper warning,<sup>30</sup> there would be no need for officers to lie in their evidence about the taking of statements to ensure that the confession is admissible,<sup>31</sup> and courts would<sup>32</sup> not “...be placed in the difficult position of having to assess the credibility of police officers in relation to the taking of statements.”<sup>33</sup>

Compared to the elimination of police interrogation, the other recommendations such as video or audio recording interrogations<sup>34</sup> “...with the resulting need for transcripts seem awkward and convoluted.”<sup>35</sup> These practices clearly lead to increasing “...the number, length and complexity of *voir dire*.”<sup>36</sup>

### **Judicial Examination**

The revival of judicial examination<sup>37</sup> may sound at first like an unconventional idea; however permit me to explore it and make a case for why it would make for a better policy for the taking of statements than either police interrogation like the Reid Technique, or police investigative interviewing like the PEACE method.

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significant, extent in civil cases, the proof of the facts depends upon evidence given by the police. There is a natural tendency among Judges, as among the public generally, to accept the sworn testimony of a police officer, particularly when it contradicts the words of a person whose credibility is suspect by the very reason of his involvement with the law.” The Royal Commission Into Metropolitan Toronto Police Practices, The Honourable Mr. Justice Donald Morand, Commissioner, 1976, Digitized in 2010 at page 123. Given this sad reality, many defence counsel do not put their clients on the stand in order to challenge the police version of events. Thus, this seriously impairs their prospects of establishing violations of their client’s constitutional rights or raising a reasonable doubt in the voluntariness of their client’s statement.

<sup>30</sup> *Supra* note 7 at 274.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.* See also discussion of videotaping statements in Chapter 2, footnote # 85.

<sup>36</sup> *Ibid.*

<sup>37</sup> Currently, the only time that judicial examination occurs in our system takes place at the end of the preliminary inquiry, where the presiding Judge at the conclusion of the Crown’s case, asks the accused if he wishes to say anything in response to the evidence. The accused individuals also routinely, through counsel, decline the invitation to respond to the allegations.



The first task is to describe what judicial examination is. Most generally, this model would involve Justices of the Peace, or some other judicial official, asking an accused to make a statement regarding the Crown's allegations against him, in open-court, at his appearance for bail, within 24 hours of his arrest. The accused would be asked to make a statement directly and without the benefit of counsel speaking on his behalf, but he would also be free to assert and effectively exercise his right to silence, indicate as much to the court and refrain from providing any reply to the Justice of the Peace's questioning. Upon such an assertion, questioning would stop. If the accused provided an explanation, it would be the prerogative of the presiding judicial official to conduct an examination in search for the truth. It will be important to clearly define what the nature and scope of this examination should consist of, and this is a matter to which we shall return momentarily. One principle feature of such a system would be that the accused could provide a piecemeal explanation; that is, he could choose to answer some questions while asserting a right to silence with respect to others. This assertion of the right would not be held against him and the portions over which the right was asserted could be edited from the statement that would make its way before a jury. This is consistent with the general rule that holds that it is permissible at the defence's request to have a statement edited if the portions in question would be prejudicial to the accused and excluding those portions that would not undermine the integrity of the statement taken as a whole.<sup>38</sup> Potentially exculpatory statements made by the accused would be required to be admitted along with the rest of the statement if the Crown sought to adduce it; however, as always, the Crown would retain the right to decide whether the statement

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<sup>38</sup> *R. v. Grewall*, [2000] B.C.J. 2386 at para. 36, where it was decided that courts are entitled to redact statements if the probative value is exceeded by the prejudicial effect. *Grewall* was cited approvingly by the Ontario Superior Court of Justice in *R. v. Minoose*, 2010 ONSC 7175 at para. 21.

should be adduced or not, with the customary editing for prejudice at the request of the defence being applied in the usual way. Each of the system's components merit further elaboration; let us go through each step from detention to judicial examination.

Upon the detention of a suspect, police have the opportunity to create a record of the interactions that they have with this person. Currently, the most significant contact that they potentially will have is during the custodial interrogation of the suspect. These interactions, according to the judicial examination model, should be kept off-the record, in the sense that they will not be permitted to be adduced as evidence against the accused at his trial. Thus, the statements an accused person makes to police following his custodial detention, but prior to his presentment in court, would not be admissible into evidence.

This rule could potentially be applied to statements made during the pre-detention phase of the investigation of a suspect as well, however, a discussion of why that may be a good or bad idea is beyond the consideration of this piece.

Questioning of a suspect will not be permitted at law at all, and any information obtained, or for that matter volunteered to the police at this stage will be the subject of an automatic exclusionary rule and will be inadmissible.

Police may still be tempted to question a suspect for the purpose of obtaining derivative evidence from him. If it is discovered and established that evidence has been procured in this way, the evidence so procured would be subject to potential exclusion. Moreover, a failure on the part of police to respect the bright-line rule that custodial interrogation is forbidden may give rise to a court challenge.

As stated, the current requirement is to bring an individual to a show cause hearing for bail within 24 hours of his or her arrest.<sup>39</sup> What the system of judicial examination would require is that the accused be presented before a judicial officer, most probably a justice of the peace, not only for his show cause hearing, but additionally (and prior to the show cause hearing) to be given the opportunity to make a voluntary confession if he or she should choose to do so.

As a safeguard against any intimidation, persuasion, abuse or other such incentivization of the accused by police, while in custody, to give an inculpatory statement to the presiding judicial official, it would be mandatory that the last person the accused speak with prior to entering the courtroom for his examination and show cause hearing would be a defence lawyer. Defence lawyers would be provided the opportunity, instead of having a single pre-interrogation phone call, as the current law specifies, to meet with their client in the cells at the courthouse prior to his presentment, and to provide the client with legal advice on his forthcoming examination, as well as take the opportunity to undo any inducements, or other impediments to voluntariness that may have been impressed upon the accused during the time that he was in police custody.

The accused would then be brought before the court for his examination. No lawyers or police investigators would be permitted in the courtroom. The court would contain the justice of the peace, court staff, such as the reporters and clerks, the duty officer, and the accused. This would ensure that the accused would feel no pressure that may interfere with the voluntariness of his statement from either the Crown prosecutor or

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<sup>39</sup> *Criminal Code of Canada*, R.S.C. 1985, c. C-46, s. 503(1)(a).

the police, and that the defence lawyer of the accused would not have the opportunity to intervene to prevent his client from answering questions.

The presiding judicial official would be provided with a synopsis explaining the charges and the substance of the allegations against the accused. The content of the synopsis would be read to the accused. Following this, the justice of the peace would be required to confirm with the accused that he had received his right to counsel prior to the presentment, and would advise the accused of his right to remain silent. He would also explain to the accused the implications of providing a statement: namely, that whatever he says may be used in evidence against him, however any attempt to introduce the statement into evidence would be at the discretion of the Crown prosecutor, such that anything exculpatory that the accused should say in his defence may not come out on the record at his trial, and that anything incriminating that he should say in making a statement, the Crown would be free to use against him.

Following the judicial caution the accused would be asked if he would like to take the opportunity to respond to the Crown's allegations against him.

In the event that the accused indicated that he did not want to make a statement in response to the allegations, the questioning would cease, and the accused would be traversed to another courtroom in order to commence his/her bail hearing before a different judicial official. In the event that the accused did make a statement, it would be given on the record in open court. The presiding judicial official would then be permitted to engage the accused in questioning on the content of his statement in light of the Crown's allegations. In either situation, whether the accused person gives a statement or not, his bail hearing would be held before a different judicial official.

The rules for judicial examination would be circumscribed so as to limit the questions asked to open-ended ones, to the exclusion of leading questions. It would also be strictly prohibited for the judicial officer to resort to deception, manipulative or abusive tactics in order to persuade the accused to make a statement or alter the content of his answer. This would ensure fairness, and it would ensure the voluntariness of the statement. The accused could additionally exercise his right to silence in response to certain questions posed from the bench while choosing to answer others, with portions of the tape where he refused to answer a question edited at the request of the defence. Such a system has a historical precedent<sup>40</sup>. However the problem with the system historically was that judicial officers were very abusive in nature to the accused and more importantly to the rights of the accused.<sup>41</sup> Persons would be called before officials without any specific allegation of wrongdoing and would be subjected to a broad range of questions.<sup>42</sup> Moreover, a refusal to be sworn and submit to examination would result in severe punishment; that principle which says an accused person cannot be compelled to testify in their own trial was not established until the second half of the seventeenth century.<sup>43</sup>

Examination by judicial officers developed in the context of the preliminary hearing.<sup>44</sup> The office of justice of the peace was created by statute in 1327,<sup>45</sup> and at that

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<sup>40</sup> "The judicial examination system has a historical precedent. Prior to the invention of modern day police forces, it was the responsibility of a magistrate to question an accused upon presentment before him, typically at the trial itself, which would proceed rapidly following arrest" - Alfred H. Knight, *The Life of the Law* (New York: Crown Publishers Inc., 1996) at 63.

<sup>41</sup> From the opinion of the justices to the Commons, "in what cases the Ordinary may examine any person *ex officio* upon oath": *Of Oaths before an Ecclesiastical Judge Ex Officio* (1606), 12 Co. Rep. 26, 77 E.R. 1308. "[L]ay-men for the most part are not lettered, wherefore they may easily be inveigled and entrapped and principally in heresy and errors of faith".

<sup>42</sup> *Supra* note 7 at 172; From the opinion of the justices to the Commons, "in what cases the Ordinary may examine any person *ex officio* upon oath": (*Ibid.*).

<sup>43</sup> *Ibid.* at 133.

<sup>44</sup> Silas E. Halyk, "The Preliminary Inquiry in Canada" (1967) 10 Crim. L.Q. 181 at 181.

<sup>45</sup> *Ibid.*

time “no legal duty was imposed”<sup>46</sup> to “conduct preliminary examinations;”<sup>47</sup> the magistrate “...was a royal officer armed with police powers”<sup>48</sup> who was responsible for “...committing suspects for formal accusation.”<sup>49</sup> In the 16th century, further statutory enactment established that judicial officials must conduct an “...examination of any prisoner brought before them charged with or suspected of a felony.”<sup>50</sup> The examination procedure “...was strictly inquisitorial, the accused being fully questioned as to all the circumstances surrounding the offence suspected.”<sup>51</sup> When the rule against self-incrimination took shape, the examination was gradually abandoned.<sup>52</sup> It first became standard practice and precedent for judicial officers to advise “... an accused that he need not make any statement,”<sup>53</sup> and if they did “..it could be used against them in later proceedings.”<sup>54</sup> It also came to be considered improper to try to extract an involuntary statement from accused person.<sup>55</sup> The formal repeal of all inquisitorial examinations and the enshrining of the judicial inquiry was legislated in 1848 by the *Indictable Offences Act*,<sup>56</sup> wherein it was explicitly forbidden that judicial officers should go beyond their

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<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid* at 182.

<sup>51</sup> *Ibid*; See also E.M. Morgan, “The Privilege Against Self-Incrimination” (1949) 34 Minn L.R. 1 at 18. According to Morgan, “From the middle the sixteenth century to the middle of the nineteenth, the accused was subject to a preliminary examination before committing magistrates and expected to answer. He was not warned that he need not answer; and, indeed, any refusal to answer, whether of his own initiative or on advice of another, was reported and stated by the magistrate in his testimony at the trial.”

<sup>52</sup> *Halyk, ibid.* at 183.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.* at 185.

<sup>55</sup> *Ibid.* The gradual shift that occurred from an inquisitorial inquiry to judicial proceedings was precipitated by “...reforms in the magistracy itself and the development of an efficient police system” (*Halyk* p. 184) following the *Metropolitan Police Act of 1829* (10 Geo. IV, c. 44).

<sup>56</sup> *Halyk, ibid.* at 184; See also 11 & 12 Vict. c. 42, s. 18. (*The Indictable Offences Act*).

neutral adjudicative role to participate in the examination of accused persons or otherwise participate in their prosecution.<sup>57</sup>

I am not proposing a return to a system that is identical to the one that existed in England prior to 1848. As described above, any return to examination by a judicial officer would have ample safeguards built in to avoid the abuse of process that this system seemed to have represented in earlier times. Crucially, unlike in earlier times, the presumption of innocence and the right to silence would remain fully intact during these in-court examinations, and the accused would face no adverse inference against him for declining to respond to the Crown's allegations or for declining to answer questions put to him from the bench.

There are compelling reasons to move in the direction of implementing the system of judicial in-court examination. Such a system, if implemented, would to a large extent insulate statements from challenges of admissibility, and this would in turn yield some positive benefits. It would do this because it would effectively expunge many of the contradictions from the law of confessions and the admissibility of statements, and replace it with a system where the statements would be, with clarity, truly voluntary, both within the meaning of the legal concept of voluntariness, and in a more expansive sense, as well.

The driving force behind threats or promises made to an accused person by a person in authority, as well as deception, trickery, oppression and other potential forms of unfairness during custodial interrogation, would be removed when the goal of police to procure confessions was eliminated. Moreover, it would also reduce the likelihood of more severe forms of police abuse of persons taken into custodial detention, which,

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<sup>57</sup> *Halyk, ibid.* at 185.

though by no means common, are nevertheless not unheard of, including beatings.<sup>58</sup> In the absence of any confession that may result from such transgressions having any evidential value to the Crown, the police will have no particular incentive to engage in them.

There will likely be cost savings in other areas of the criminal justice system as well, should the in-court examination by a judicial officer be made to replace police interrogation.

From a policing perspective, the budgetary advantages would include substantially lower costs associated with training officer's to extract statements and it would also free up many hours for officers to do other investigative work.

From the perspective of the courts, the amount of judicial resources required and court time per case would also be reduced. This is because there will be fewer lengthy challenges to admissibility that eat up valuable court time, for which courtrooms must be reserved and staff members including judges, clerks and reporters must be paid. Legal Aid resources devoted per file will also reduce, because it is costly and time consuming for defence counsel to prepare and argue applications on the admissibility of evidence. It will no longer be required that government-funded legal aid organizations fund these applications in as many cases, because the nature of the proposed rules of judicial

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<sup>58</sup> According to Skolnick and Leo, at least in the American context, "since the 1960s, and especially since *Miranda*, police brutality during interrogation has virtually disappeared in America. Although one occasionally reads about or hears reports of physical violence during custodial questioning, police observers and critics agree that the use of physical coercion during interrogation is now exceptional." – (Jerome H. Skolnick & Richard Leo, (1992) "The Ethics of Deceptive Interrogation," 11 *Crim. Just. Ethics* 3 at 3). For one such exceptional example, one may look to the case of *R. v. Singh*, 2013 ONCA 750, [2013] O.J. No. 5727, where the Ontario Court of Appeal upheld the finding of the trial judge that police used torture to extract statements from the two accused persons. Based on this finding, the Ontario Court of Appeal overturned the conviction of the appellant for armed robbery and ordered the stay of the charges. The authors also assert that "psychological persuasion and manipulation have replaced physical coercion as the most salient and defining features of contemporary police interrogation. Contemporary police interrogation is routinely deceptive." - Jerome H. Skolnick & Richard Leo, (1992) "The Ethics of Deceptive Interrogation," 11 *Crim. Just. Ethics* 3 at 3.



examination will largely insulate statements given in-court from challenges for admissibility.

There may be further savings at the appellate court level, as well, since a fair number of rulings on challenges for admissibility are appealed.

Perhaps most importantly, in-court questioning will almost certainly reduce the number of false confessions and wrongful convictions. The proposed system eliminates the subtle creation of incentives by officers that can lead all too easily to coerced-compliant confessions, where a detained suspect makes a 'rational choice' based upon the (misrepresented) information available to him, that notwithstanding his factual innocence, the hopelessness of the situation suggests that his best option is to confess to the truth of the allegations against him. By drastically reducing the chance that an innocent suspect will conclude that it is in his best interests to confess, one cause of false confessions will have been addressed. Additionally, with respect to persons who are of weak mind or unsound mind, the screening system of having a lawyer in place prior to in-court examination, as well as the fact that there is no coercion or deception from the JP will provide protection against uttering a false confession to these individuals.

The result of cutting down on false confessions, and by extension, wrongful convictions will yield additional benefits to confidence in the administration of justice and will promote the image of a judicial system with integrity. The more false confessions and wrongful convictions that there are, the more public confidence in the police and in the justice system becomes eroded. Thus, it is a worthwhile goal to take steps to reduce such occurrences. By the same token, reducing the opportunity of the police to engage in trickery and deception during the course of their investigations, will

also serve to bolster their reputation in the public eye, and instill greater public confidence in that institution.

### **Addressing Criticisms:**

Critics will argue that the judicial model of examination is too favourable to due process imperatives, at the expense of crime control concerns.<sup>59</sup> There is the concern that there would be a substantial cost in terms of potentially guilty individuals escaping responsibility in a system with the safeguards for the accused that the judicial model has.

There are situations where the police have only reasonable and probable grounds to arrest suspects but do not have sufficient evidence to get a conviction. In these situations the use of the suspect as an evidentiary resource is invaluable to police investigations.

But despite the accuracy of the criticism that there will be more guilty suspects who will go free, it is worth the price. This is for two reasons.

The first reason is because the system of judicial examination will drastically reduce the number of false confessions that are made. The adage that it is better to let ten guilty men go free than to send one innocent man to prison may be trite wisdom,<sup>60</sup> but it is wisdom nonetheless.<sup>61</sup> From the wrongful convictions exonerations discussed in

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<sup>59</sup> See, for example, Steven Penney, "What's Wrong with Self-Incrimination? The Wayward Path of Self-Incrimination Law in the Post-*Charter* Era - Part I: Justifications for Rules Preventing Self-Incrimination" (2003) 48(2) *Crim. L. Q.* 249 at 263. "I should make it clear that I am not advocating for a system of mandatory judicial questioning to replace police interrogation. That proposal has its flaws, not the least of which is the fact that it is likely to produce far less self-incriminating evidence than police interrogation."

<sup>60</sup> William Blackstone, *Commentaries on the Laws of England 1760* (Philadelphia: J.B. Lippencott, 1893). "It is better that ten guilty persons escape than that one innocent suffer".

<sup>61</sup> As Lord Devlin described it: "If the success of a system of criminal prosecution is to be measured by the proportion of criminals whom it convicts and punishes, the English system must be regarded as a failure... When a criminal goes free, it is as much a failure of abstract justice as when an innocent man is convicted...but an injustice on the one side is spread over the whole of society and an injustice on the other is concentrated in the suffering of one man...Since we know that the ascertainment of guilt cannot be made infallible and that we must leave room for a margin of error, we should take care to see that as far as

Chapter 5, we know that innocents have been sent to prison following false confessions. With the absence of coercion and manipulative psychological tactics, and a right to silence that will be respected in court, there is little risk of suspects being railroaded or duped into making a false confession. The elimination of false confessions as a significant contributor to wrongful convictions should be reason enough to reform pre-trial questioning procedures.

But there is also a second reason. A system of judicial examination will ensure that the confessions that are made, are truly voluntary ones. The confessions rule is designed only to allow voluntary statements into evidence. But as has been discussed, in light of the realities of custodial interrogation, the rule is failing. This is because the police are allowed to trick suspects into confessing and also because of the coercive nature of police interrogations.

If the desired test for admissibility is truly voluntariness, then what could be better than implementing a system that ensures that statements are voluntary, as judicial examination does? Any state action that coerces an individual to furnish evidence against himself or herself in a proceeding where the state and the individual are adversaries violates the principle against self incrimination. Coercion entails the denial of free and informed consent. Where police trickery is involved, there can be no informed consent. Thus, the situation arises where detainees are making involuntary confessions.

These confessions, as we know, may be unreliable and false. That has historically been the reason why the doctrine of voluntariness exists. On the other hand,

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humanly possible, the margin is all on the side of the defence.” Patrick Devlin, *The Criminal Prosecution in England* (Oxford: Oxford University Press, 1960) at 113.

they may be true confessions, but even if they are, they were still gathered by an abuse of state power.

The concern of the confessions' rule are twofold: to ensure reliable statements, and to ensure a process which is not abusive to suspects. The in-court system of judicial examination does a superior job of ensuring these two concerns than a system of custodial interrogations with a confessions rule to provide protections to suspects. The concerns of whether the confession was threatened or promised by some form of *quid pro quo* from a police officer are absent when the examination of the accused is done on the record, in court. There is also no need to worry about oppressive circumstances; the entire procedure, again on-the-record, is transparent and reviewable. Finally, with the Crown having the obligation to disclose the charges and the strength of the case against the accused before any confession is made, we can truly say that there was informed consent to the procurement of any resulting confession.

### **Implementation**

The question immediately arises: should a move towards judicial examination be made by the courts, or by the legislature. It would appear, that the legislature is the most appropriate place for the change to originate, and as argued by professor James Stribopoulos, there may be several reasons why courts are poorly suited to the implementation of due process oriented reforms.<sup>62</sup> First, courts are limited "...by the cases and parties that happened to come before them,"<sup>63</sup> and as such may not be able to

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<sup>62</sup> James Stribopoulos, "Packer's Blind Spot: Low Visibility Encounters and the Limits of Due Process versus Crime Control" in Francois Tanguay-Renaud & James Stribopolous eds., *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational and International Criminal Law* (Oxford: Hart, 2012) at 193.

<sup>63</sup> *Ibid.* at 213.

deal with issues “in a comprehensive and prospective way.”<sup>64</sup> Second, “...judges are generalists”<sup>65</sup> who often lack the “...expertise to choose between”<sup>66</sup> “...specialized policy options.”<sup>67</sup> Third, constrained by the nature of the “...adjudicative process,”<sup>68</sup> the courts are not well-placed “...to ascertain the sort of relevant social facts that are essential for the development of sound policy.”<sup>69</sup> Fourth, courts cannot “...monitor the effects”<sup>70</sup> of the rules they create and make timely modifications to the rules as the policy-effects may require.<sup>71</sup> And finally, courts usually deal with people who are “...guilty,”<sup>72</sup> and this may “...not encourage the broader perspectives”<sup>73</sup> that would be required for change to be initiated in the first place.<sup>74</sup>

Legislatures, on the other hand can build a comprehensive statutory regime, that takes into account the nuances required of such a system, and can make modifications to it as required over time. A legislature can design a system from start to finish, whereas courts would be more likely to implement reforms “piecemeal”<sup>75</sup> on a case-by-case basis. It would therefore take a significant amount of time, as well as trial-and-error for a regime of judicial examination to replace custodial interrogation by police.

Another advantage of leaving the development of judicial examination to the legislature is that it is within the competence of the legislature to enact an outright ban on statements taken in custodial interrogations. Such a ban is a necessary precondition for

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<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid* at 214.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.* at 216.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.* at 213.

the system proposed. Such a ban could not realistically be left to the courts, since it would require the mass-use of the judicial discretion, to exclude all statements taken by police of suspects in custody.<sup>76</sup> *Stare decisis* simply would preclude this from ever happening.

### **A Final Word**

It is my position that the laws of confession should be about protecting certain fundamental values such as privacy, human dignity, moral autonomy, fairness and protecting the innocent. Ultimately the laws of confession touch upon a very important normative question: How far can a liberal state go in conscripting an individual to incriminate himself/herself? The search for an answer to this question has traditionally forced courts and politicians to try to strike a balance between conflicting concerns of fairness to the individual as opposed to the state's need to combat crime. The answer to this question defines the boundaries of the relationship between the state and individual in the context of criminal law. However the answer has proven to be very fluid and it constantly changes from one historical era to next. At the moment the status of our confessions laws are such that the due process values have been relegated to a place of secondary importance. This is unfortunate, since fairness to an accused person and the protection of the innocent against false confessions should always be the primary consideration.

In this thesis I have attempted to show that the extensive literature on false confessions from forensic psychology and other legal research raise the terrifying prospect that false confessions are a real problem and our confessions laws are to a large extent trapped in an 18<sup>th</sup> century mentality. Hence these laws are not capable of

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<sup>76</sup> *Ibid.* at 214-215.

adequately dealing with this problem. It is hoped that the future generation of judges in the Supreme Court and our politicians take the initiative to equip themselves with the latest knowledge in forensic psychology and legal research on the phenomena of false confessions and show the necessary leadership to resurrect the principle of fairness to its proper place of predominance.

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