Horvath v. The Queen: Reflections on the Doctrine of Confessions

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Rigid formulas can be both meaningless to the weakling and absurd to the sophisticated or hardened criminal; and to introduce a new rite as an inflexible preliminary condition would serve no genuine interest of the accused and but add an unreal formalism to that vital branch of the administration of justice.  

I. INTRODUCTION

Within the criminal process, the rules of substantive law and of evidence have very different, yet highly complementary roles to play. The substantive law is of primary importance in formulating and establishing the circumstances and conditions under which criminal sanctions will be imposed upon individuals. On the other hand, the supportive task of the law of evidence is to determine which facts will be placed before the court in deciding whether such circumstances and conditions exist. In striving to meet this expectation, the law of evidence has been deeply influenced and fashioned by the dictates of policy. There has been general agreement that, in the interests of a fair trial, certain relevant facts should be inadmissible. As a result, the rules that have developed are not simply the product of ineluctable logical analysis, but "originate in the instinctive suggestions of good sense, legal experience and a sound, practical understanding."
Although policy may be "the secret root from which the law draws all the juices of life," the preference in the law of evidence for policy over logic does not mean that the need to articulate and develop rules rationally should be ignored. Sound and efficacious legal rules presuppose rigorous and conscious reflection on the implications and goals of any proposed scheme. Furthermore, policy is a protean concept: it is constantly forced to accommodate itself to changing circumstances and to reflect the resulting shift in objectives and purposes. Unfortunately, due to the restricting force of precedent, many judges are reluctant, if not unable, to abandon or reformulate established rules. Consequently, rules often remain active long after the policies to which they initially gave effect have changed or been reversed. Thus it is axiomatic that, if a rule of policy is to flourish and to retain its utility, it must be constantly adapted to demands of the contemporary milieu.

The rule governing the admissibility of confessions is "a rule of policy" and has evolved over a period of two hundred years; "it is a judge-made rule and does not depend on any legislative foundation." As such, it exhibits the full range of strengths and weaknesses associated with the common law and judicial rule-making. The recent case of Horvath v. The Queen illustrates this process. The three judgments delivered by the Supreme Court of Canada display the variety of approaches taken to the interpretation of the rule excluding confessions and provide an excellent vehicle for analyzing the development of that exclusionary rule. It is beyond the scope of this comment to present a critical account of the theoretical framework and objectives of the system of evidentiary rules within which this exclusionary rule functions.

However, the comment is intended to introduce and to criticize the Anglo-Canadian law on the admissibility of confessions, using the Horvath decision to focus on contentious issues and to highlight the irrationality and inconsistency of the existing rule.

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7 Confessions have always posed problems for the courts. The modern approach to the admissibility of confessions was first proposed by Mansfield C.J. in R. v. Rudd (1775), 1 Leach Cr. C. 135 at 138, 168 E.R. 160 at 161 (K.B.): "the instance has frequently happened, of persons having made confessions under threats or promises: the consequence as frequently has been, that such examinations and confessions have not been made use of against them on their trials." In the formative stages of the common law, there appears to have been no restriction upon the reception of confessions, whether induced by threats, promises or even by torture. The term "confession" referred to the conclusive quality of the evidence rather than to its admissibility. A confession was viewed as a plea of guilty with the consequence that further evidence was not necessary to determine the guilt of the accused. For a discussion of the early history of the reception of confessions, see Wigmore, Evidence in Trials at Common Law, Vol. 3 (4th ed. Boston: Little, Brown & Co., 1970) at 291-98; and Lowell, Judicial Use of Torture (1897), 11 Harv. L. Rev. 220.
10 In a later and more comprehensive paper, the authors hope to provide a thorough and searching analysis of the doctrine relating to confessions as part of an overall scheme of the rules of evidence and to explore the possibilities for reform in this area.
II. THE DEVELOPMENT OF THE DOCTRINE

The evolution of the exclusionary rule relating to confessions is divisible into two distinct phases. The first and formative stage is characterized by the willingness of judges to respond to the changing pattern and tempo of prevailing attitudes and concerns. Within this period, individual cases can only be interpreted validly from an historical perspective. This phase culminates in the crystallization of an exclusive rule, the classic formulation of which is found in the judgment of Lord Sumner in *Ibrahim v. The King.*

The second and applicative stage consists of a line of cases in which the courts have grappled with the precise ambit of the *Ibrahim* rule and strained to apply it to the increasingly sophisticated and innovative methods and tactics employed in the detection of crime and the interrogation of suspects. As Wigmore has observed, “from [1914] on, the history of the doctrine is merely a matter of the narrowness or broadness of the exclusionary rule.” In short, the courts have treated the rule with a deference that is more suited to legislative pronouncements and, in the process, have hindered the evolution of the common law.

The first clear and explicit judicial airing of the modern statement of the rule and its rationale was delivered in 1783 in *R. v. Warwickshall,* where Nares J. stated:

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

The rationale was clearly testimonial untrustworthiness. Confessions would be excluded if they had been extracted by methods resulting in statements that were unreliable as affirmations of guilt. At this point, history and principle merged and the law was “perfectly rational.” However, during the first half of the nineteenth century, the courts were prepared to look beyond the exclusive notion of testimonial untrustworthiness and to incorporate a more abstract and ill-defined notion of fairness to the accused. Partly to alleviate

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11 Although the evolution of the rule itself may be viewed in this way, it is arguable that the rationale for the rule is not amenable to such an analysis. Throughout the development of the doctrine, the notion of trustworthiness has held a central position; see text accompanying notes 121-24, infra.
12 *Supra* note 6, at 599 (A.C.), 874 (All E.R. Rep.), 174 (Cox C.C.).
13 Wigmore, *supra* note 7, at 297. It should be noted that Wigmore was of the opinion that this development had, in fact, commenced in 1783.
14 (1783), 1 Leach Cr. C. 298, 168 E.R. 234.
15 *Id.* at 299-300 (Leach Cr. C.), 234-35 (E.R.).
16 Wigmore, *supra* note 7, at 297.
the harshness of the existing rules of criminal procedure and partly to compensate for the poor social conditions of the period, confessions were looked upon as a most suspicious form of evidence and were frequently excluded upon proof of the most trivial inducements. Although this trend benefited accused individuals, the rash of isolated rulings stunted the growth of a sound philosophical foundation for the admissibility of confessions. At the expense of rational development, principle was diluted by the ephemeral dictates of social and historical expediency.

The decision of the English Court of Criminal Appeal in R. v. Baldry in 1852 put a check upon this attitude of “liberalism run wild.” Indeed,

17 There was a vast number of capital crimes for petty property offences and the accused was not permitted to give evidence on his own behalf or to have counsel defend him. Also, there was no right of appeal in criminal cases. As Wigmore observes: “In view of the apparent uselessness of the rule which practically told the accused person: ‘You cannot be trusted to speak here or elsewhere in your own behalf, but we shall use against you whatever you may have said,’ it was entirely natural that the judges should employ the only makeweight which existed for mitigating this unfairness and restoring the balance, namely, the doctrine of confessions;” see Wigmore, supra note 7, at 300.

18 This point is well brought out by Stephen:

[I]t must be remembered that most persons accused of crime are poor, stupid and helpless.... An ignorant, uneducated man has the greatest possible difficulty in collecting his ideas, and seeing the bearing of the facts alleged. He is utterly unaccustomed to sustained attention or systematic thought, and it often appears ... if the proceedings on a trial, which to an experienced person appear plain and simple, must pass before the eyes and mind of the prisoner like a dream which he cannot grasp.


Although social conditions have improved considerably since the early nineteenth century, there still exists today a similar disparity between the faculties of the average criminal and the resources available to the police force. As Field noted recently on the accused’s right to silence: “my worry is over the people actually being charged today... the ignorant, suspicious, frightened, highly suggestible people who are simply not able to face up to police questioning;” The Right to Silence (1970), 11 J.S.P.T.L. 76 at 79.

19 The words of Hotham B. in R. v. Thompson (1783), 1 Leach Cr. C. 325, 168 E.R. 248, are indicative of the prevailing judicial attitude: “It is almost impossible to be too careful upon this subject.... I must acknowledge that I do not like confessions unless they appear to have been made voluntarily and without any inducement. Too great a charity cannot be preserved on this subject.... ”


21 (1852), 2 Den. 430, 169 E.R. 568.

Erle J. was of the firm opinion that "in many cases where confessions have been excluded, justice and common sense have been sacrificed, not at the shrine of mercy, but at the shrine of guilt." In that case, a murder suspect had confessed immediately after being cautioned. In a forceful judgment, Baron Parke left no doubts that he thought that there had "been too much tenderness towards prisoners" and held that the confession had been rightly admitted into evidence. In reacting against the previous coordinated approach to the problem, the Court took a realistic stance and emphasized the need to balance the right of an accused person to a fair and unprejudiced trial against the communal interest in securing the conviction of the guilty. Furthermore, the Court redirected attention to the neglected problem of articulating the actual rationale upon which the rule was based. Although they were stated in rudimentary terms, most of the rationales offered in subsequent cases as the basis for the rule can be identified in the arguments and judgments in Baldry. While counsel for the accused argued that the law distrusts confessions because "it suspects that it does not get at the truth as to the way in which they are obtained," Lord Campbell C.J. preferred to hold that it was not a question of trustworthiness, but "rather that it would be dangerous to receive such evidence and that for the due administration of justice it is better that it should be withdrawn from the consideration of the jury." Although the reliability of the statement remains a critical factor in determining its admissibility, Baldry takes the first steps in moving away from trustworthiness as the sole criterion of admissibility and seeks to introduce a composite rationale.

The move towards a more definite rule was consolidated in R. v. Fennell. Voluntariness was accepted as the cornerstone of the rule; "a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." This statement was expressly affirmed by Mr. Justice Cave in R. v. Thompson. Whereas the judgment in Fennell gave no indication of the purpose alleged to be behind the rule, Cave J. in Thompson takes a solid stance:

I always suspect these confessions which are supposed to be the offspring of peni-

\[\text{Supra note 21, at 446 (Den.), 574 (E.R.).}\]
\[\text{Id. at 445 (Den.), 574 (E.R.).}\]
\[\text{Id. at 434 (Den.), 570 (E.R.). To support this view, Mr. Mills referred to one of Blackstone's typically apothegmatic statements: "even in cases of felony, at the common law they are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favour, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature, of being disproved by other negative evidence;" 4 Bl. Comm. 357.}\]
\[\text{Id. at 432 (Den.), 569 (E.R.).}\]
\[\text{[1881], 7 Q.B.D. 147, 44 L.T. 687, 14 Cox C.C. 607.}\]
\[\text{Id. at 151 (Q.B.D.), 688 (L.T.), 609 (Cox C.C.).}\]

This case is also authority for the proposition that the burden of proof is on the prosecution to prove affirmatively, beyond reasonable doubt, that the confession was obtained voluntarily.
Confessions Rule

tenance and remorse, and which nevertheless are repudiated by the prisoner at the
trial. It is remarkable that it is of very rare occurrence for evidence of a con-

fession to be given when the proof of the prisoner's guilt is otherwise clear and
satisfactory; but when it is not clear and satisfactory, the prisoner is not infre-
quently alleged to have been seized with the desire born of penitence and remorse
to supplement it with a confession—a desire which vanishes as soon as he appears
in a court of justice.30

"Voluntariness" became the touchstone of the admissibility of confessions.
Moreover, "voluntariness" would not be given its ordinary meaning of the
exercise of will or free choice. It was to acquire a special and closely circum-
scribed legal meaning.

The first phase of the evolution of the rule ends and the second phase
begins with the seminal decision of the Judicial Committee of the Privy
Council in Ibrahim v. The King.31 Although this case gave rise to the classic
formulation of the rule that still dominates the law today, modern commen-
tators and judges treat the case in a cursory manner,32 thus making the egress-
jious error of isolating the rule from its historical context and the particular
facts of the case. Indeed, without oversimplifying, it is arguable that the con-
fusing and lamentable state of affairs that has arisen can be attributed to the
longstanding failure to regard the Ibrahim rule as a product of the common
law process that has the same degree of impermanence and flexibility as
similar rules of judicial origin.

The facts in Ibrahim are not typical. A soldier was charged and con-
victed of the murder of an officer of his regiment in Canton. The Supreme
Court of Hong Kong sentenced him to death. He appealed to the Privy Coun-
cil on jurisdictional grounds but he also questioned the admissibility of cer-
tain statements made by him to his commanding officer ten or fifteen minutes
after the murder had been committed.33 The appellant argued that his con-
fession was inadmissible because it was involuntary and had been obtained
by pressure of authority and fear of consequences; it was the answer of a man
in custody to a question put by a person in authority. In delivering the opin-
on of the Privy Council, Lord Sumner made the hallowed statement:

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 shown
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 exer-
cised or held out by a person in authority. The principle is as old as Lord Hale.34
[Emphasis added.]

30 Id. at 18 (Q.B.), 380 (All E.R.), 25 (L.T.), 647 (Cox C.C.).
31 Supra note 6, at 599 (A.C.), 874 (All E.R. Rep.), 174 (Cox C.C.).
32 A recent and refreshing exception to this practice can be found in the dissenting
C.A.).
33 While in custody, the officer asked the accused: "Why have you done such a
senseless act?" The accused replied: "Some three or four days he has been abusing me;
without a doubt I killed him." Supra note 6, at 608 (A.C.), 876-77 (All E.R.), 179-80
(Cox C.C.) per Lord Sumner.
34 Id. at 609-10 (A.C.), 877 (All E.R. Rep.), 180-81 (Cox C.C.). The reference
to Lord Hale is questionable. As Wigmore notes, the principle, in fact, dates from 1775
with Rudd, supra note 7, at 297.
Apart from confirming the admissibility of the accused's statements, Lord Sumner's formulation of the rule and his opinion as a whole are indicative of the confusion surrounding the perceived rationale of the rule and the reliance on such a restricted notion of "voluntariness."

In discussing the appellant's claim that the statements that he had made were inadmissible, Lord Sumner noted that such a claim was of very recent origin, resulting from the establishment of a modern police force. Also, in purely logical terms he insisted that such objections "all go to the weight and not to the admissibility of the evidence."35 Relying on *Warwickshall* and *Baldry*, Lord Sumner emphasized that the exclusionary rule was one of policy, but he did not proceed to give any express indication of what that policy was. However, in referring to the early nineteenth century cases, he did observe that "when judges excluded such evidence, it was rather explained by their observations on the duties of policemen than justified by their reliance on rules of law."38 Nevertheless, Lord Sumner made it clear that the admissibility of a confession was a matter of judicial discretion:

The matter is one for the judge's discretion, depending largely on his view of the impropriety of the questioner's conduct and the general circumstances of the case... Having regard to the particular position in which their Lordships stand to criminal proceedings, they *do not propose to intimate what they think the rule of English law ought to be*, much as it is to be desired that the point should be settled by authority, so far as a general rule can be laid down where circumstances must so greatly vary.39 [Emphasis added.]

Since 1914, the test of "voluntariness" has become entrenched within the common law and the courts have laboured under the difficulty of adapting this fixed rule of policy to the manifold and changing circumstances of modern society. Although Anglo-Canadian courts have repeatedly followed and applied the *Ibrahim* rule, it is virtually impossible to identify or trace any general pattern or direction in the plethora of pronouncements on the substance and function of that rule. Freedman has written that "there are few aspects of law which reveal so sharp a conflict in fundamental thinking and basic philosophy as the problem of the admissibility of confessions in a criminal case."40 The growth of such a large and conflicting body of case law can be largely explained by the efforts of the judges to apply the rule without regard to its perceived rationale and by the absence of a clearly articulated statement of that rationale. The situation is exacerbated by the fact that cer-

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35 Id. at 610 (A.C.), 878 (All E.R. Rep), 181 (Cox C.C.). He actually continued and stated that: "in an action of tort, evidence of this kind could not be excluded when tendered against a tortfeasor, though a jury may well be told as prudent men to think little of it." This can be compared with the observations of Parke B. in *Baldry*, supra note 21, at 445 (Den.), 574 (E.R.), where he states that, "whether it would not have been better to have allowed the whole to go to the jury, it is now too late to inquire."

36 Supra note 14.

37 Supra note 21.

38 Supra note 6, at 611 (A.C.), 878 (All E.R. Rep.), 182 (Cox C.C.).

39 Id. at 614 (A.C.), 880 (All E.R. Rep.), 184 (Cox C.C.).

tain judges maintain that relating policies to rules falls outside their judicial function. For instance, MacFarlane J.A. has taken the view that "it is the rule so formulated which must guide the courts rather than an attempt to apply what may be thought to be the reason for the rule." In even starker terms, Lord Salmon has stated:

The question as to whether the rule ... is based on “the reliability principle” or “the disciplinary principle” ... is possibly an important philosophical question but ... it is only of academic interest. It does not touch the effect or undoubted validity of the rule. [Emphasis added.]

Such sentiments are to be deplored. They not only represent a myopic view of the functioning of the common law, but they are also mistaken about the practical impact of the rationale behind the rule.

In the sixty-five years that have elapsed since Ibrahim, the English courts have been engaged primarily in an objective, external and technical inquiry into the nature of the inducement held out. The exclusionary element has centred around the probable effect of the inducement rather than upon the actual effect of a particular inducement on a particular accused. Any question of causation has been ignored. However, during the 1960's, for instance, see the following cases where a so-called "inducement" led to the exclusion of a confessory statement: R. v. Northam (1967), 52 Cr. App. R. 97, 111 Sol. J. 965 (C.A.) (affirmative answer to question from housebreaking suspect as to whether a similar offence could be taken into account held to be an inducement); R. v. Zavekas, [1970] 1 All E.R. 413, [1970] 1 W.L.R. 516, 114 Sol. J. 31 (C.A.) (affirmative answer to the question “If I confess, will I get bail?” held to constitute an inducement); R. v. Smith, [1959] 2 Q.B. 35, [1959] 2 All E.R. 193 (soldiers paraded after stabbing incident with no dismissal until culprit found held to invalidate a subsequent confession); R. v. Cleary (1963), 48 Cr. App. R. 116, 108 Sol. J. 77 (C.C.A.) (words used by father in presence of police officer held to constitute an inducement); R. v. Richards, [1967] 1 All E.R. 829, [1967] 1 W.L.R. 653, 51 Cr. App. R. 266, 111 Sol. J. 254 (C.A.) (police officer told suspect that it would be better for him to tell what happened); Sparks v. The Queen, [1964] A.C. 964, [1964] 1 All E.R. 727, [1964] W.L.R. 566, 108 Sol. J. 154 (P.C.) (suggestion by Bermudan police that a statement might lead to a military rather than a public trial); R. v. Moore (1972), 56 Cr. App. R. 373, [1972] Crim. L.R. 372 (C.A.) (exhortation by father to confess); and R. v. Williams (1968), 52 Cr. App. R. 439 (Cent. Cr. Ct.).

The seed of the "oppression" concept can be traced back to the words of Lord Coleridge C.J. in Fennell, supra note 27, at 151 (Q.B.D.) [not reported in L.T. or Cox C.C.], where he said that, in addition to threats, promises or violence, a confession would be excluded if obtained by "the exertion of any improper influence." The first modern statement of the concept can be found in the judgment of Lord Parker C.J. in Callis v. Gunn, [1964] 1 Q.B. 495 at 501, [1963] 3 All E.R. 677 at 680, 48 Cr. App. R. 36 at 39, where he states that it is:

A fundamental principle of law that no answer to a question and no statement is

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the courts began to inquire into the actual circumstances, including the state of mind of the accused, in which the confession was made. The concept of "oppression" was expressly incorporated into the law by the House of Lords in *Commissioner of Customs and Excise v. Harz.* However, the Court did not deal with the purposive basis for such an addition to the exclusionary rule. Although Lord Reid mentioned that the exclusionary rule rested on the accused's privilege against making self-incriminating statements, there was no express reference to the need to control police conduct. Finally, in the recent case of *D.P.P. v. Ping Lin,* the House of Lords made it clear that the *Ibrahim* rule was an exclusive one and "ought not to be extended or whittled down." The test is one of fact and the trial judge should apply the *Ibrahim* rule in a common sense manner to all of the facts of the case "instead of a search being made through the reported cases in order to find a decision on roughly similar facts."

The Canadian experience follows much the same unsatisfactory pattern, but with greater judicial confusion and misunderstanding. Furthermore, the Canadian situation is tainted by the fact that the Supreme Court has been presented with numerous opportunities to sweep away the confusion and to arrive at a settled statement of the law. Moreover, the Canadian courts have been extremely reticent about articulating or adumbrating the policy that underlies and supports the rule. Any development of the confessions doctrine admitable unless it is shown by the prosecution not to have been obtained in an oppressive manner and to have been voluntary in the sense that it has not been obtained by threats or inducements.

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47 *Supra* note 18. The definition adopted was that contained in the Judges' Rules, 1964, Principle E.: "It is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary in the sense that it has not been obtained from him by fear of prejudice or hope of advantage exercised or held out by a person in authority, or by oppression."

48 *Id.* at 820 (A.C.), 184 (All E.R.), 306 (W.L.R.), 158 (Cr. App. R.).

49 *Supra* note 42.

50 *Id.* at 600 (A.C.), 182 (All E.R.) per Lord Hailsham.

51 *Id.* at 604 (A.C.), 186 (All E.R.) per Lord Kilbrandon.


53 It is extremely difficult to discover any judgment in which the question of the underlying rationale of the *Ibrahim* rule has been fully canvassed and, as Dubin J.A. recently noted, "the philosophical basis for the rule excluding confessions ... has not been clearly resolved;" *R. v. Rothman,* *supra* note 32, at 385.
Confessions Rule has been marked by sporadic bursts of activity followed by periods of relative calm. During the bouts of judicial intervention, the courts have often backed themselves into intellectual cul-de-sacs and then had to engage in a series of suspect manoeuvres to extricate themselves. As Professor Ratushny has observed, “no sooner is one problem clarified than another arises. What appears to have settled is often ‘up-for-grabs’ again.”

From the myriad of cases since 1914, it is possible to identify two separate, yet related approaches to the concept of “voluntariness.” Although the Ibrahim rule has received widespread judicial endorsement, the courts have fluctuated between a wide and a narrow interpretation of the rule. Some courts have construed the rule restrictively. They have endowed the concept of “voluntariness” with a limited legal meaning and have taken the reference to “fear of prejudice” and “hope of advantage” as amounting to an exhaustive definition. Other courts have taken a more expansive and less inhibited approach. They have taken such considerations to be merely illustrative of “voluntariness” and have preferred to undertake a general review and assessment of the surrounding circumstances. This broad approach represents an attempt to treat the admissibility of confessions within the true spirit and intendment of Lord Sumner’s opinion and not to become captive to the linguistic shackles of the Ibrahim rule. However, despite this aversion to a mechanistic and unthinking approach to confessions, the great weight of authority supports an uncluttered and rigorous interpretation and application of the Ibrahim rule.


65 Ratushny, Self-Incrimination in the Canadian Criminal Process (Toronto: Carswell Co., 1979) at 99.

66 See, generally, Del Buono, supra note 52.


Behind such a strict interpretation of the *Ibrahim* rule lies the desire of the courts to interfere as little as possible with police activities and an unwillingness to utilize the exclusionary rule as a disciplinary device. In short, the Canadian courts have been concerned primarily with the reliability of the confession rather than with the circumstances in which it was made. This attitude is seen most clearly in the decision of the Supreme Court of Canada in *R. v. Wray*. The Court held that that part of an inadmissible confession confirmed by the discovery of subsequent facts is admissible. Moreover, the Court also held that the trial judge does not have a discretion to exclude evidence that is otherwise admissible, on the ground that it is unfair to the accused or brings the administration of justice into disrepute. Consequently, the Canadian courts have allowed the scales to tip in favour of the rigorous and unhampered pursuit of the guilty.

### III. A STRANGE AND PUZZLING STORY

It would be an exaggeration to pretend that three cases amount to a trend, but a trilogy of recent Supreme Court of Canada decisions suggests that there is a revival of concern about the circumstances in which confessions are obtained and increasing reluctance to look solely towards the trustworthiness of the statement. In *Erven v. The Queen*, it was decided that holding a *voir dire* was necessary in almost every case. In the leading judg-

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59 This unwillingness is well brought out in a statement by the Quebec Court of Appeal: "It would be a lamentable thing, if the police were not allowed to make inquiries, and if statements made by prisoners were excluded because of a shadowy notion that if the prisoners were left to themselves they would not have made them": *R. v. Prosko* (1921), 33 Que. K.B. 497 at 503, 40 C.C.C. 109 at 113-14.


61 In arriving at this decision, the Court relied upon the *dicta* of McRuer C.J.H.C. in *R. v. St. Lawrence*, [1949] O.R. 215 at 228, 93 C.C.C. 376 at 391 (Ont. H.C.), and Mr. Justice Judson stated that "the theory for the rejection of confessions is that if they are obtained under certain conditions, they are untrustworthy;" *R. v. Wray*, *id.* at 296 (S.C.R.), 692 (D.L.R.), 20 (C.C.C.). In his dissenting judgment, Martland J. preferred solely on the accused's privilege not to answer self-incriminating questions; *id.* at 279 (S.C.R.), 679 (D.L.R.), 6 (C.C.C.).

62 In a very recently decided case, a majority of the House of Lords held that, although the trial judge has a discretion to exclude evidence when its prejudicial effect outweighs its probative value, the trial judge has no discretion to exclude evidence simply because it was obtained by improper or unfair means: *R. v. Sang*, [1979] 2 All E.R. 1222, [1979] 3 W.L.R. 263.


64 In *Erven*, the issue was whether a *voir dire* is a requirement in all cases in which a statement made by an accused person is tendered by the prosecution. There were three judgments delivered: one by Dickson J., with Laskin C.J.C., Spence and Estey JJ. concurring, in which it was held that a *voir dire* is a requirement in all cases; a second judgment by Pratte J., in which Beetz J. concurred, which held that in the particular case a *voir dire* should have been held; and finally, the dissenting judgment of Mr. Justice
ment, Dickson J. stressed the need to safeguard the rights of the accused and maintained that "only in this way can fairness to the accused be assured." In Ward v. The Queen, the Court unanimously held that the refusal by the trial judge to admit statements by the accused was a question of mixed fact and law, which precluded the Crown from appealing under section 605(1)(a) of the Criminal Code. Dismissing the appeal on technical grounds, Spence J. gave a broad interpretation to the Ibrahim rule and took the view that there should be "investigation of whether the statements were freely and voluntarily made even if no hope of advantage or fear of prejudice could be found in consideration of the mental condition of the accused at the time he made the statements." This re-focusing of the inquiry to be conducted in determining the admissibility of confessions was given further confirmation in the final case of the trilogy, Horvath v. The Queen. However, the Court was far from unanimous in both its decision and the reasoning adopted. With respect to the doctrine of confessions, the judgments are particularly revealing and span the whole spectrum of approaches to the problem. Consequently, the decision warrants a full and critical analysis.

The facts of the case are complex and merit a detailed examination. Horvath, a seventeen-year-old youth, was charged with the murder of his mother who had been found lying on her bed on the late afternoon of June 16th, 1975. Her head had been repeatedly beaten with a blunt instrument. Within twenty minutes of the arrest, interrogation of the appellant began. This may be referred to as the "first interview" and was conducted by two RCMP officers. One officer, then the other, questioned the appellant in a rapid and furious manner. The session, throughout which the appellant denied having killed his mother, lasted for nearly three hours, without intermission, and continued into the early morning of June 17th. The trial judge found that this interview had taken place in a hostile atmosphere and excluded the statement that had been given. There was no appeal by the Crown against this finding.

After the interview the appellant was left in his cell, in a comfortable condition, until the following morning when, after a visit to his home to change his clothes, he was taken to the RCMP Headquarters in Vancouver. Shortly after noon, he was introduced to Staff Sergeant Proke, a polygraph operator and skilled interrogator. Thus began the "strange and rather puzzling story." Ritchie, with whom Martland and Pigeon JJ. concurred, which held that a voir dire was not a necessity in all cases, including the one with which they were concerned.

This issue has troubled the courts on numerous previous occasions. Indeed, as recently as the case of Powell v. The Queen, [1977] 1 S.C.R. 362, 66 D.L.R. (3d) 443, 9 N.R. 361, 28 C.C.C. (2d) 148, the Court, in a judgment delivered by de Grandpré J., held that the accused could expressly waive the requirement of a voir dire.

65 Supra note 63, at 943 (S.C.R.), 105 (N.S.R.), 97 (C.C.C.).
67 Id. at 40 (S.C.R.), 201 (W.W.R.), 506 (C.C.C.).
68 Supra note 9.
69 Id. at 396 (S.C.R.), 17 (D.L.R.), 401 (C.C.C.) per Spence J.
From shortly after noon until 4:16 p.m., the appellant was interviewed by Sergeant Proke. The examination was, in the words of the trial judge, “the most skillful example of police interrogation that has ever come to my attention in 36 years as a lawyer and a judge.” In marked contrast to the hostile nature of the “first interview,” Sergeant Proke employed what can best be described as a psychological approach. He ingratiated himself with the appellant and gained his confidence, hoping that he would disclose his part in the events of the previous day. This “second interview” was conducted in a room equipped with one-way glass, permitting observation of the interrogation from an adjoining room, and was recorded by means of a listening device. From the tape-recording of the interview it was possible, in the opinion of the Court, to divide the session into three distinct phases.

During the first part of the interview, Sergeant Proke questioned Horvath for about two hours and elicited certain information as to his whereabouts on the day of the crime, but no reference was made by the appellant to the death of his mother. He was then left alone for a little under ten minutes. Proke had gone into the observation room unknown to the appellant, and, while alone, Horvath swore to avenge his mother’s death. This was the first in a series of three monologues.

Sergeant Proke then returned and resumed his questioning in the same vein as before. About 3:15 p.m. he left for the observation room again and the appellant delivered his second soliloquy in which he confessed to having killed his mother. He claimed to have killed her by hitting her over the head several times, but only after a request by her to do so. On Sergeant Proke’s return, at about 3:25 p.m., Horvath repeated the confession to him. This oral declaration was termed the “second statement.” The appellant agreed to repeat what he had just told Sergeant Proke to the officers in charge of the investigation. On being left alone for a third time, the appellant, in a very brief monologue, begged his mother’s forgiveness for having disclosed the incident and her request for him to kill her. Proke then returned with two other officers and, between 4:25 p.m. and 5:45 p.m., Horvath repeated his statement to them which resulted in a written signed confession, referred to as the “third statement.”

At trial, on the request of the Crown, a voir dire was held to determine the admissibility of the “third statement.” The appellant gave no evidence on the voir dire. In addition to the evidence given by the police officers involved, the Crown called a psychiatrist, Dr. Stephenson. At the trial judge’s request, the psychiatrist listened to the tape recording of the whole of the “second interview” and prepared a report for the consideration of the Court which was admitted, by consent, in evidence. Thus, the tale took its “strange and rather puzzling” course.

Dr. Stephenson’s evidence was crucial to the outcome of the case. His thesis was that, by means of his interrogation technique, Sergeant Proke had

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70 Id. at 384 (S.C.R.), 7 (D.L.R.), 391 (C.C.C.) per Martland J., quoting Gould J.
71 Id. at 396 (S.C.R.), 17 (D.L.R.), 401 (C.C.C.) per Spence J.
caused the circumstances surrounding the murder to surface in the appellant's mind. Dr. Stephenson's central observation was that the Sergeant's voice, intentionally or otherwise, had taken on an hypnotic quality and had placed Horvath in a light hypnotic state which continued throughout the first two monologues. Sergeant Proke denied any deliberate attempt to hypnotize Horvath. The result was that the appellant was in a dreamy state of altered consciousness, but still capable of relating to his environment and communicating meaningfully. Although Dr. Stephenson believed that Horvath could not be forced to do or say anything to which he had not already given tacit consent, he admitted that a person in a light hypnotic trance would be more susceptible to suggestion than would be a person in a normal state of consciousness, and that the repression of the painful memories in the first soliloquy had been involuntary. According to Dr. Stephenson, however, the appellant had wished to unburden himself of those memories and, when these had been brought out by Sergeant Proke's questioning techniques, their recounting was, essentially, a voluntary act, even though the mild hypnotic state continued until the end of the second soliloquy. Dr. Stephenson's conclusion, therefore, was that the appellant's answers had been voluntary and that when he had recounted his mother's death wish and all that had followed he had been merely telling "the truth as he saw it," being in "full and voluntary control of his faculties." 72

The issue to be determined by the trial judge, therefore, was whether the second and third statements made by the appellant were admissible in evidence. More specifically, the Court had to decide whether a confession became inadmissible due to the accused being under hypnosis immediately prior to making it. At the trial, Gould J. ruled that the evidence of these statements should be excluded. He found, as a fact, that Sergeant Proke had brought about in the appellant "a state of total emotional disintegration." 73 However, he did not exclude the evidence on that ground. Instead, he was of the opinion, regarding the "second statement," that "had Dr. Stephenson not given the evidence of an hypnotic state, [Gould J.] would have, with some misgivings, admitted this statement. . . . It is the factor of hypnotism which has tipped the balance against admission in this case." 74 The "third statement" was excluded because it followed from the second, and was vitiated on the same ground. 75

On appeal by the Crown to the British Columbia Court of Appeal, it was held unanimously that the statements were admissible and that Gould J.


73 Id. at 384 (S.C.R.), 7 (D.L.R.), 391 (C.C.C.) per Martland J., quoting Gould J., who was careful to indicate that the phrase was his own and not that of Dr. Stephenson, the psychiatrist.

74 Id.

75 The law in Canada on the question of whether an improper inducement renders all subsequent confessions inadmissible is that, before subsequent confessions can be admitted, it must be demonstrated by clear and positive evidence that the inducement had ceased to be operative: see R. v. Wishart (1954), 13 W.W.R. 447, 110 C.C.C. 129 (B.C.C.A.); and R. v. Thompson (1974), 26 C.R.N.S. 144 (N.S.C.A.).
had erred in refusing to admit them. MacFarlane J.A., delivering the judgment of the Court, relied upon the cases of *Ibrahim v. The King*; *Boudreau v. The King*, and *R. v. Fitton* to support the proposition that the function of the trial judge is to determine whether the Crown has proved beyond a reasonable doubt that a statement made by an accused person was voluntary in the sense that it had not been obtained from him by hope of advantage or fear of prejudice exercised or held out by a person in authority. The trial judge had, therefore, applied the wrong test in excluding Horvath's statements. The Court of Appeal took the view that the decision as to the weight to be attached to such statements was within the exclusive province of the jury. Accordingly, Gould J. had exceeded the scope of his function and the appeal was allowed.

Horvath appealed from this decision to the Supreme Court of Canada which, by a majority of four to three, allowed the appeal and restored the acquittal. Three judgments were delivered in disposing of the appeal and each one took a very different approach to the *Ibrahim* rule. In a dissenting judgment, Mr. Justice Martland adopted a traditional stance and gave the *Ibrahim* rule a very narrow scope of operation. Mr. Justice Spence disapproved of such a restrictive interpretation and favoured a broader reading of the rule to include the notion of "oppression" which he achieved by a redefinition of the word "voluntary." Finally, Mr. Justice Beetz went a step beyond Spence J. He looked to the policy behind the rule and attempted to translate that rationale into contemporary terms, with emphasis on the problem of hypnosis. Accordingly, each major approach to the *Ibrahim* rule is represented and all the basic arguments are canvassed.

Martland J. delivered a dissenting judgment with which Ritchie and Pigeon JJ. concurred. He took a restrictive position and relied upon the traditional statement of the exclusionary rule relating to the admissibility of confessions as enunciated by Lord Sumner in *Ibrahim*. Martland J. concluded that the British Columbia Court of Appeal had correctly stated the law applicable in Canada in determining the admissibility of statements made by an accused person to a person in authority. He maintained that *Fitton* decided that the rule of exclusion was exhaustively defined in *Ibrahim* and that there was neither a necessity nor power within the court to broaden further the scope of the rule. Because the trial judge had found as a fact that there had been no oppression in obtaining the "second statement," Martland J. decided that the present case did not provide an appropriate opportunity to consider the inclusion of the word "oppression" and he expressly approved

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76 Also present were McLean and Bull J.J.A.
77 Supra note 6.
78 Supra note 57.
79 Id.
80 Supra note 34.
81 Supra note 57.
82 Supra note 6.
83 Supra note 9, at 391 (S.C.R.), 12-13 (D.L.R.), 396 (C.C.C.).
84 See supra note 45.
the decision of the English Court of Appeal (Criminal) in *R. v. Isequilla.*

In that case, it had been held that in order to exclude a statement, there must have been "some conduct on the part of authority which is improper and unjustified." However, Martland J. did not mention that this condition for exclusion was rejected decisively by the House of Lords in the more recent case of *D.P.P. v. Ping Lin* as complicating and restricting the clear application of the general principle. Therefore, it is doubtful whether Martland J.'s interpretation represents English law on the matter. In the instant case, there was no attempt by the Crown to introduce evidence of the statements made while the appellant was in the hypnotic trance. Indeed, Martland J. made it clear that they could not have been admitted. The only admissible statements were those made while Horvath was in "full and voluntary control of his faculties." Therefore, there was no question of the post-hypnotic statements being tainted and thereby rendered inadmissible by the prior hypnotic state of the appellant. Consequently, the dissentents would have dismissed the appeal.

Apart from adopting a traditional and mechanistic approach to the issue, Mr. Justice Martland's dissent is inconsistent and confusing. At the heart of his judgment lie two incompatible and conflicting arguments: the *Ibrahim* rule is the sole determinant of the issue of the pretrial statements by the accused to a person in authority and there ought to be a separate rule dealing with statements obtained from an accused while he is in an hypnotic trance. In arriving at these conclusions, Martland J. pursued a fallacious line of reasoning. He observed that, had the Crown sought to introduce the statements made by the appellant while he was still in an hypnotic trance, the trial judge would have refused to admit them. However, as Martland J. correctly notes, the trial judge would have taken this course not because of the existence of threats or promises made by persons in authority, "but because the appellant, at the time those statements were made, was not in a condition which would make it safe to admit them." Having decided that no question of "tainting" could arise because the circumstances that would give rise to such a claim had ceased to exist, Martland J. continues:

> There is no evidence of threats or inducement which led to the making of a statement. The objection to the possible admission of the statement made while in a light hypnotic state is not against the conduct of persons in authority when that statement was made. The objection would arise because of the condition of the accused at that time which would make the statement involuntary... The condition of the accused, in a light hypnotic state, which would have excluded the statement then made, no longer continued at the time the statements, in issue in this case, were made.

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86 Id. at 721-22 (W.L.R.), 82 (All E.R.).
87 Supra note 42.
88 See the observation of Lord Morris, *id.* at 594 (A.C.), 177 (All E.R.), and of Lord Hailsham, *id.* at 602 (A.C.), 184 (All E.R.).
89 Supra note 9, at 391 (S.C.R.), 13 (D.L.R.), 397 (C.C.C.).
90 Supra note 72.
91 Supra note 9, at 392 (S.C.R.), 13 (D.L.R.), 397 (C.C.C.).
92 *Id.* at 392 (S.C.R.), 14 (D.L.R.), 398 (C.C.C.).
In taking such a stance, Martland J. not only advances contradictory arguments, but also fails to offer any precedential support for the existence of a special rule dealing with confessions made under hypnosis. He is content to rely on the premise that it would be unsafe to admit confessions made under such circumstances. It can only be assumed that in reaching this conclusion, Martland J. was thinking in terms of the untrustworthiness of the statement. Moreover, despite his arguments to the contrary, he does concede that the element of hypnosis is critically important in determining which rule or formulation of the rule is applicable. It becomes apparent that his real disagreement with the judgment of Beetz J. is not based on principle, but on a different conclusion about which statements of the appellant had been made under the influence of hypnosis. Viewed in this light, the judgment of Martland J. provides little guidance in arriving at a rational and efficacious rule for the admissibility of confessions.

Unfortunately, the majority could not agree on the question of hypnosis. Mr. Justice Spence, with whom Estey J. concurred, placed no emphasis on the presence of hypnosis, but preferred to stress “the complete emotional disintegration of the appellant.” He interpreted the decision of the trial judge as being heavily based on the emotional collapse of the appellant and concluded that this was why the decision of the British Columbia Court of Appeal could not stand. However, such an argument is seriously undermined in view of Gould J.’s express statement that “it is the factor of hypnotism which has tipped the balance against admission.” In fact, the trial judge went on to state that he would have admitted the evidence were it not for the vitiating factor of hypnosis. Clearly, he regarded the issue of hypnotism as pivotal.

In handling the Ibrahim rule, Spence J. showed strong disapproval of the tendency to restrict “voluntariness” to a “narrow and confined” meaning. Instead, he maintained that Ibrahim and those cases that followed it:

have not and need not be considered to have reduced the words ‘free and voluntary’ in the test . . . to only meaning that the statement has not been induced by any hope of advantage or fear of prejudice and it is my view 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.

Spence J. placed great emphasis upon “the extraordinary circumstances which surround the statement made by the appellant in the present case” and he relied upon this fact to distinguish the decisions in Boudreau and Fitton which, he admitted, gave strong support to the narrow interpretation of the

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93 See text accompanying notes 109-11, infra.
94 Supra note 9, at 400 (S.C.R.), 20 (D.L.R.), 404 (C.C.C.).
95 Id. at 383 (S.C.R.), 7 (D.L.R.), 391 (C.C.C.).
96 Id. In the light of his judgment, “narrow and confining” might have been a more appropriate description.
97 Supra note 6.
98 Supra note 9, at 401 (S.C.R.), 21 (D.L.R.), 404-05 (C.C.C.).
99 Id. at 404 (S.C.R.), 23 (D.L.R.), 407 (C.C.C.).
100 Supra note 57.
101 Id.
Ibrahim rule. Thus, while he limits those cases to their facts he ignores the main distinguishing feature of the present case—the presence of hypnosis—for he is already committed to the view that such a consideration has no part to play in disposing of the appeal. His conclusion is that Fitton:

must be limited so as not to rule admissible statements made by the accused when not induced by hope of advantage or fear of prejudice but which are certainly not voluntary in the ordinary English sense of the word because they were induced by other circumstances such as existed in the present case.  

102 [Emphasis added.]

Applying this formulation of the rule to the facts of Horvath, Spence J. had no difficulty in finding that, following intensive questioning by "a skilled and proved interrogation specialist" leaving the seventeen-year-old appellant in a state of "complete emotional disintegration," an application of the rule must lead to the conclusion that "no statement made by that accused under those circumstances can be imagined to be voluntary."  

103 However, the trial judge had found as a fact that there had been no such oppression and that the tactics of the police were beyond reproach. Indeed, Gould J. expressed the view that his ruling was given "with very real regret that policework as skilful as this should end in frustration of its purpose."  

104 Further, Mr. Justice Spence never came close to stating the reasons for the inadequacy of the Ibrahim rule. He distinguished Boudreau107 and Fitton108 unconvincingly and simplistically and did not undertake a rational and much-needed development of the principles and policy involved. Furthermore, he mistook the trial judge's grounds for judgment. Accordingly, the judgment of Spence J. is unsatisfactory and contributes to the confusion in this area of the law.

The second judgment of the majority, delivered by Beetz J., with whom Pratte J. concurred, attempts to answer those problems raised by Spence J. and compensates for the shortcomings of the judgments of Martland and Spence JJ. Apart from exhibiting clarity and integrity of analysis that the other judgments lack, the decision of Mr. Justice Beetz deals directly with the element of hypnosis.  

109 Beetz J. conceded that, although Sergeant Proke had unwittingly induced an hypnotic state in Horvath, the interrogation tech-

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102 Supra note 9, at 408-(S.C.R.), 26-27 (D.L.R.), 410 (C.C.C.).
103 Id. at 410 (S.C.R.), 28 (D.L.R.), 412 (C.C.C.).
104 Id.
106 Supra note 9, at 383 (S.C.R.), 7 (D.L.R.), 391 (C.C.C.).
107 Supra note 57.
108 Id.
niques used, like polygraph tests or narcoanalysis treatment, presented "certain elements of artificiality, technicality and external intervention which are somewhat out of the ordinary and they should never be used without the subject's full and unequivocal consent." Horvath could not be taken to have consented in any way to the treatment and the inadvertent nature of the hypnotism "did not remove the objective element of moral violence involved in the process nor did it alter the impact on Horvath's mind."

Beetz J. strongly criticized Dr. Stephenson's use of the words "voluntary" and "involuntary" and suggested that they had been used in a medical, rather than a legal or ordinary sense. He took the view that nothing that the appellant had said while under hypnosis was voluntary, in the legal sense of that term. Such criticism is entirely justified. "Voluntariness" is the legal talisman of admissibility in these cases and, as such, must not be subjected to a variety of different meanings that would serve only to exacerbate the existing uncertainty. Beetz J., therefore, met the problem squarely and inquired into the correct scope of the concept of voluntariness. In this regard, he decided that the Ibrahim rule was not exhaustive, but that it was a judge-made rule that had to adapt to emerging circumstances and concerns. Although the rule is expressed negatively, the central and governing principle of voluntariness is a positive one and any extension of the rule, to be justified, must remain faithful to that principle. Taking a basic civil libertarian stance, Beetz J. argued that the morally violent intrusion by the police officer into the utmost privacy of a suspect's mind infringed the concept of "voluntariness" to the same extent as physical assault and clearly fell within the spirit of the Ibrahim rule:

[Unconsented hypnosis induced by a person in authority ought in my view to be added to the motives of exclusion mentioned in Ibrahim for it is covered by the principle which inspired the rule; the wording of the rule could not exhaust the fecundity of the principle.]

Although the phenomenon of hypnosis has been known to man for centuries, its use in the criminal process has not been fully explored; see Linett and Farr, The Use of Hypnosis in the Criminal Process (1979), 11 U.W.L.A. L. Rev. 25; Allen, Hypnotism and its Legal Import (1934), 12 Can. B. Rev. 81; and Spector and Foster, The Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible? (1977), 38 Ohio St. L.J. 567.

110 Supra note 9, at 422 (S.C.R.), 37 (D.L.R.), 421 (C.C.C.). It is interesting to note that a statement may be rejected where the accused was in a condition of intoxication at the time that the statement was taken: R. v. Washer, supra note 58; Costain v. The Queen (1960), 129 C.C.C. 348 (P.E.I.S.C.); R. v. Drewicki (1963), 41 C.R. 265 (B.C. Co. Ct.); R. v. Keen (1967), 58 W.W.R. 479, [1967] 2 C.C.C. 261 (B.C.S.C.); and R. v. Fex, [1973] 3 O.R. 242, 12 C.C.C. (2d) 239 (Ont. H.C.), [aff'd (1973) 1 O.R. (2d) 280 (Ont. C.A.). Leave to appeal to S.C.C. dismissed (1973) 1 O.R. (2d) 280n]; but see R. v. Pedersen, [1956] O.W.N. 212 at 215, 114 C.C.C. 366 at 370 per Gale J. (Ont. H.C.): "I should like to say that ... unless the consumption of alcohol renders a man susceptible to the influences which normally cause a statement to be inadmissible that which is said by a person in that condition is admissible in evidence although perhaps of little weight." However, it has been decided that where the accused's condition was affected by drugs, this was simply a matter of weight and not admissibility: R. v. Schwartz (1973), 13 C.C.C. (2d) 41 (Ont. C.A.). The drugs were self-administered and not provided by the police.

111 Id. at 422 (S.C.R.), 38 (D.L.R.), 421 (C.C.C.).

112 Id. at 426 (S.C.R.), 41 (D.L.R.), 425 (C.C.C.).
His conclusion was that the "second statement," occurring, as it did, about two or three minutes after Horvath had come out of the trance, was tainted by the inadmissibility of the "first statement." The "third statement" was also vitiated because its source could be traced back to the hypnotic state: "each stage of the process aroused the other in quick succession." These findings, coupled with Beetz J.'s expressed view that "the use of such interrogation techniques on unwilling suspects is a dehumanizing process and should . . . be proscribed," led to his decision to agree with the trial judge that the factor of hypnotism had tipped the balance against admission. As a result, he allowed the appeal.

IV. AN AGENDA FOR A RATIONAL INQUIRY

The judgments in Horvath provide a microcosm of the difficulties that judges must face in determining the admissibility of confessions. Such difficulties are caused by the limitations and restrictions of an analysis wedded to the Ibrahim formula. An interpretation and application of the Ibrahim rule was central to each opinion. Each judge felt the need to justify his decision by reference to it and each had difficulty applying it in order to reach the result that he thought the facts demanded. Clearly, Mr. Justice Martland believed that the evidence should have been admitted. He was able to achieve this result by adopting a strict application of the Ibrahim rule. However, his judgment was unable to absorb the impact that hypnosis would have had on the formulation of the rule and he was forced to find, as a matter of fact, that the hypnotic state no longer existed. Mr. Justice Spence, realizing that a strict application of the Ibrahim formula would lead to the admission of the statements into evidence—a conclusion that he was clearly unwilling to sanction—was forced to redefine "voluntary" in wider terms than "hope of advantage or fear of prejudice."

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113 Id. at 431 (S.C.R.), 45 (D.L.R.), 429 (C.C.C.).
114 Id. at 434 (S.C.R.), 47 (D.L.R.), 431 (C.C.C.).
115 It is only possible to speculate as to the real reasons for this position, but it is suggested that the whole tone of Spence J.'s judgment is motivated by a desire to avoid the apparent impropriety of admitting evidence obtained from a highly suggestible seventeen-year-old youth, of unstable personality, under the circumstances obtaining in this case; see supra note 9, at 410 (S.C.R.), 28 (D.L.R.), 412 (C.C.C.). In this context, it is illuminating to compare the approach of some of their Lordships in the House of Lords in D.P.P. v. Ping Lin, supra note 42. In this case, statements made by a Chinese heroin dealer regarding his own liability and the identity of his supplier were held to be admissible. The appellant contended that his confession was inadmissible on the basis that it was induced by a hope of advantage in that he had been led to believe that, if he led the police to his supplier, the judge would bear this in mind when passing sentence upon him. Lord Hailsham was of the clear opinion that: "Quite obviously, perverse and unacceptable as such a result would be, it is a contention which must be examined seriously in the light of the [Ibrahim] rule...." [Emphasis added.]; id. at 599 (A.C.), 182 (All E.R.). The House of Lords ultimately found themselves able to admit the statements on a strict application of Ibrahim. It is submitted that the Ibrahim rule lends itself to this sort of judicial manipulation. The House of Lords was clearly of the opinion that Ping Lin was guilty of the offence as charged and that he wished to use the Ibrahim rule to his advantage to avoid conviction on technical grounds—a conclusion that it was not prepared to permit. Thus, their Lordships were able to achieve their desired result by sanctioning a strict application of the rule even though two of them might still have
Only Mr. Justice Beetz perceived the true nature of the problem and made a valiant attempt to escape from the restrictiveness of *Ibrahim* by looking to the principle behind the rule.

The problem for each judge, therefore, can be traced to the lack of a clear statement of the rationale for the rule by which such formulations could be justified. Without the security of a reasoned foundation, the different approaches were merely perpetuating and, at times, exacerbating the confusion inherent in this branch of the law of evidence. To avoid further confusion there must be a return to first principles and a concerted effort to construct a rational doctrine for the admissibility of confessions that fulfills the practical requirements of the contemporary environment. Before such an ambitious project can get under way, an agenda must be drawn up that sets out the crucial problems to be examined and overcome if such an undertaking is to be brought to a sound and successful conclusion.

A worthwhile starting-point for such a venture is the notion of judicial discretion, whose place within the *Ibrahim* rule is well established.116 In another context, Professor Ronald Dworkin has suggested that “discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restrictions.”117 Without distorting the reasoning behind this simile, it is instructive to draw an analogy between this observation and the situation in which the courts have found themselves in their efforts to accommodate the *Ibrahim* formula to the changing circumstances surrounding police interrogation of suspects. The courts feel enclosed by *Ibrahim*. They seek to justify their decisions with reference to its scope and its wording; they appear to believe that it prevents them from developing new approaches that will not only lead to just and consistent decisions in the cases before them but that will also be based upon rational and purposive considerations. The result has been that the search for a clearly articulated rationale has been abandoned for the safer, more pedestrian, approach of treating a judge-made rule with reverence usually accorded a statute. To return to Dworkin’s simile, the “hard case”118 in a question concerning the admissibility of a confession may excluded the statements as evidence had the confession not been made before the inducement had been held out; see the observations of Lord Kilbrandon, *id.* at 604 (A.C.), 186 (All E.R.), and of Lord Salmon, *id.* at 607-08 (A.C.), 188-89 (All E.R.). The difference in *Horvath* is that, at least for Spence J., *Ibrahim*, in its traditional formulation, gave him no such assistance in his attempt to exclude the statements and, as a result, he was committed to a redefinition of the rule.


118 A “hard case” is, by definition, a case where the law is uncertain before the judge speaks. See, generally, Dworkin, *id.* at 81 ff.
be compared with the hole in the centre of the doughnut. *Horvath* is a classic example of such a “hard case.” Its unusual facts give rise to a situation that Lord Sumner, in formulating the *Ibrahim* rule, never had in his contemplation. Therefore, judicial statements to the effect that the rule should not be broadened or narrowed merely gloss over the real problem and, in effect, miss the point. Consequently, there is an urgent need to eliminate the “hole” and to reassess this area of the law with a view to formulating a test that, unlike the one laid down in *Ibrahim*, is not predicated on the existence of the “hole.” “Voluntariness” is the touchstone of legal admissibility of such statements, and yet the rule that seeks to give effect to this principle limits the definition of “voluntariness” so as to create a gap in the rule, whose usefulness is thereby severely limited. *Ibrahim* demands the existence of the hole but offers no indication as to how it can be filled. Accordingly, any fresh analysis must ensure that such a defect is eradicated and not inadvertently retained.

Before leaving this particular difficulty, it is revealing to examine the reasons for the courts’ feeling this magnetic and obsessive compulsion to return to *Ibrahim* in every case. The primary reason, of course, is the precedential force of the decision itself. The case has stood as the leading authority on the subject, virtually unquestioned and unaltered, for sixty-five years. However, the numerous decisions of the Supreme Court of Canada and the pronouncements of the House of Lords during that time indicate that all is far from certain. Moreover, in *Horvath* itself, the Supreme Court of Canada decided against admissibility only by the narrowest of margins and, even then, the majority disagreed amongst themselves as to the correct test to be applied. It would appear, therefore, that the traditional formulation of the *Ibrahim* rule has long since outlived its usefulness. Indeed, the numerous attempts by the courts to keep the rule in line with new and emerging circumstances have been dismal failures and have resulted in obfuscation rather than elucidation of the rule. In effect, the courts have indulged in a fruitless semantic exercise and, in the process, have been forced to distort the facts of cases in order to fit them into the verbal strait-jacket of the *Ibrahim* rule. It is high time that such contortions were halted. In Dworkinian terms, the doughnut has now gone stale and a new recipe is required which will not permit the existence of such a hole.

The first task in any rational rebuilding of the doctrine of the admissibility of confessions is to decide upon and articulate the policy that the doctrine is seeking to implement and promote. Such an endeavour is fraught with difficulty and demands the utmost clarity and sophistication of analysis. Fortunately, the theoretical framework assembled and so successfully employed by Herbert Packer, although ignored by scholars in the field of judicial evidence, provides a suitable tool for such an inquiry. Briefly, Packer ex-

119 Supra note 9, at 426 (S.C.R.), 41 (D.L.R.), 424 (C.C.C.).
120 See, for example, the observations made in *R. v. Fitton*, supra note 57; and *D.P.P. v. Ping Lin*, supra note 42.
121 See supra notes 52 and 43.
amines the detention and interrogation stage of the criminal process through the use of two analytical models. Under a “Crime Control Model,” he postulates that the police would be left to their own devices in obtaining information from a suspect and that any statement made by the accused would be admissible into evidence against him. Packer argues that “criminal investigation is a search for the truth and anything that aids the search should be encouraged.”\(^2\)

The primary objective is to promote police efficiency and to protect society. Under a “Due Process Model,” he suggests that a suspect would never be permitted to be detained simply for the purpose of interrogation and that any statement made by a suspect while detained would only be admissible if, having been informed of and actively encouraged to take advantage of his rights, the suspect made such a statement spontaneously and unprompted. In this way, the police are deprived of any incentive to encourage suspects to confess:

The rationale of exclusion is not that the confession is untrustworthy, but that it is at odds with the postulates of an accusatory system of criminal justice in which it is up to the state to make its case against a defendant without forcing him to co-operate in the process, and without capitalizing on his ignorance of his legal rights.\(^1\)

The models are framed in extreme terms and take a functional approach to the problem. Although certain conceptual difficulties are skirted,\(^2\) such an analytical framework presents the available alternatives in a stark, yet realistic light. It focuses upon the tension at the very heart of the problem that has to be resolved if a sound and practical solution is to be achieved. Consequently, it is crucial that any proposed rule possess the necessary flexibility to allow the police to interrogate suspects with as little interference as possible and to preserve, in practice as well as in theory, the rights conferred by the law upon suspects. It must strike that elusive balance between societal and individual justice. However, in seeking such an arrangement, the danger in reaching a compromise that erodes these demands and simply frustrates their aims is to be constantly guarded against. In broad Kantian terms, any proposed solution must result in an optimal state of affairs in which the fullest facilitation of the claims of one is permitted to the extent that it is compatible with the fullest preservation of the claims of the other.

Having agreed upon the policy that the doctrine is seeking to implement, it is essential to explore the particular quality and character of a confession as a piece of evidence and to gain an informed appreciation of its relation to other types of evidence. Although making this suggestion appears to be stress-

\(^{123}\) Id. at 189. This does not mean that abuses of this freedom would go unchecked. Internal disciplinary procedures would be stressed and there would be a sophisticated programme of administrative management to ensure that resources were used efficiently. Also, the fact that certain methods of interrogation would be unacceptable to the triers of fact who would not be prepared to rely on evidence so obtained would act as an indirect control.

\(^{124}\) Id. at 121.

\(^{125}\) This approach does not take into account the fact that any inquiry must at some stage grapple with the central and complex concepts of trustworthiness and the privilege against making self-incriminating statements.
ing the obvious, it is a sad and inexcusable fact that most modern commentators have failed to examine this aspect of the nature of confessions. Such an omission has put the whole doctrine on an insecure footing and accounts for much of the conceptual confusion that shrouds the problem of confessions. The general approach has been to classify confessions as a broad exception to the hearsay rule and, in certain instances, to treat confessions as an entirely separate species of evidence. Although both of these approaches can claim a certain degree of validity, they fail to convey and reflect the involved evidentiary pedigree of confessions. A rigorous study must be made, in terms of logic and policy, of the precise nature of the relationship between a confession and hearsay statements and between a confession and admissions. An especial concern of any discussion must be the impact of the introduction of "authority" into the picture. As the shadow cast by authority over the evidence is at present of primary significance, detailed scrutiny, employing juristic and sociological research, is necessary for the formulation of a doctrine that provides sufficient safeguards against the type of harmful influence that such authority is perceived to exert. Unfortunately, this subject has previously received scant attention.

After tracing and clarifying the evidentiary pedigree of confessions, the form and substance of any separate rule to govern the admissibility of confessions will begin to take shape. However, the formulation of any rule must satisfy two requirements if it is to perform its function. It must be expressed positively and should not, as the Ibrahim rule does in "typical legal fashion," be expressed in negative terms. As the rule makes confessions prima facie inadmissible, it is necessary to know in what circumstances it will become admissible rather than in what circumstances it will remain inadmissible. Second, the formulation of the rule must address and make clear the causal basis of the doctrine. That is, it must indicate whether the test to be applied is subjective, looking to the particular suspect, or objective, looking to the conduct of the interrogator, or a combination of both. Although the rule is intimately connected to the policy and rationale underlying the control of police conduct, the courts have been extremely reluctant to enter this de-

\[126\] It will come as no surprise to learn that Wigmore cannot be caught by such an allegation. In a characteristic no-stone-left-unturned approach, Wigmore gives the problem a thorough and painstaking analysis; see, supra note 7, at 290 ff.

\[127\] See Phipson, supra note 43, at 337 and, to a lesser extent, Cross, supra note 43, at 482 ff.


\[129\] Although not based on an extensive analysis of the problem, there have been suggestions to dispense with the requirements of a "person in authority;" see Criminal Law Revision Committee, Eleventh Report, Evidence (General) (Cmnd. 4991, 1972) at para. 58 and the observations of Viscount Dilhorne in Deokinanan v. The Queen, [1969] 1 A.C. 20 at 33, [1968] 2 All E.R. 346 at 350, [1968] 3 W.L.R. 83 at 91, 52 Cr. App. R. 241 at 250 (P.C.).

\[130\] Supra note 9, at 424 (S.C.R.), 39 (D.L.R.), 423 (C.C.C.).
bated. Concessions have been made to particular classes of suspect, but there is little evidence that the courts are prepared to take into account the institutional realities of the criminal justice system and to examine individual responses to particular police methods. The crucial question to be resolved in this objective-subjective controversy is succinctly posed by Welsh S. White:

Should the courts focus primarily upon the police conduct itself and attempt to measure its likely effect upon a typical person who is in the suspect's position or should the courts focus exclusively on the *actual* impact of the police conduct upon the particular suspect who is before the court?

V. CONCLUSION

There is considerable agreement amongst academics and practitioners as to the significance of a confession, especially its potentially conclusive impact upon the outcome of any criminal proceedings in which it is admitted as evidence. Indeed, the observation can be made that a confession, once admitted, becomes the focal point of the trial and has a considerable effect upon the remainder of the proceedings. Consequently, the conditions and circumstances in which a confession becomes admissible must be closely circumscribed and must be the product of a thorough and rational inquiry; "in history and in principle, statements in the nature of confessions of guilt by an accused person stand somewhat apart and call for a separate treatment in the law of evidence." The difficulty of such a task is compounded when the widely opposed views of the intrinsic quality of a confession are con-

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131 An elusive straw in the wind may be grasped from certain opinions expressed in the House of Lords in *D.P.P. v. Ping Lin, supra* note 42. Lord Morris, *id.* at 595 (A.C.), 178 (All E.R.), and Lord Hailsham, *id.* at 601 (A.C.), 183 (All E.R.), favour some degree of subjective causal inquiry, whereas Lord Kilbrandon, *id.* at 604 (A.C.), 186 (All E.R.), and Lord Salmon, *id.* at 607 (A.C.), 188 (All E.R.), opt for an objective approach to the whole issue.

132 These include juveniles, young girls and mentally retarded persons; see McWilliams, *supra* note 52, at 243-46.


134 A confession alone is sufficient to support a conviction and does not require corroboration. There is no legal duty on a trial judge to warn the jury of the danger of convicting on such evidence: *R. v. Kelsey*, [1953] 1 S.C.R. 220, 105 C.C.C. 97.

135 From the point at which the confession is admitted into evidence, the defence must strive to counteract the adverse impact of such evidence on their case. Of course, the jury does not have to accept the truth of the confession simply because the trial judge determines that the confession is voluntary and it is for them to decide what weight to attach to it: *R. v. Orel*, [1944] 3 D.L.R. 590, [1944] 2 W.W.R. 378 (Sask. C.A.); *R. v. McLaren*, [1949] 2 D.L.R. 682, [1949] 1 W.W.R. 529, 93 C.C.C. 296 (Alta. C.A.). Also, the defence is not prevented from putting before the jury any evidence that it introduced on the *voir dire*.

136 Wigmore, *supra* note 7, at 286.
The thesis of this comment has been that the confusion abounding in this area of the law can be eradicated only by an analysis that returns to first principles. Until such an analysis is attempted, decisions such as Horvath will proliferate and the unsatisfactory state of the law will persist. A new and responsive treatment is required.

For instance, while some commentators have maintained that a confession is the "best evidence," Gilbert, The Law of Evidence (6th ed. London: W. Clark & Sons, 1801) at 123; others have considered it "the weakest and most suspicious of all testimony." Bernard-Chapdelaine v. The King (1933), 56 Que. K.B. 52 at 62 per Tellier C.J.