

**MIRANDA IS NOT ENOUGH:  
A NEW JUSTIFICATION FOR DEMANDING  
“STRONG CORROBORATION” TO A CONFESSION**

*Dr. Boaz Sangero\**

INTRODUCTION

Following research conducted in recent years—some of it regarding evidence obtained through DNA testing—no doubt remains that, in reality, innocent persons are convicted of crimes and that, in a significant number of these cases, wrongful convictions are solely based on the out-of-court confessions of accused persons obtained by police interrogators.

This Article discusses existing law regarding confessions and convictions based on confessions. While this body of law deals in a relatively satisfactory manner with the fear that the confession is involuntary (primarily, through *Miranda* rules), unfortunately, it does not adequately address the serious fear of false confessions.

The Article is designed to try and convince lawmakers of the necessity for a requirement of “strong corroboration” (objective, tangible and significant evidence, extrinsic to the accused person and linking him to the offense), in order to considerably reduce the grave risk that innocent persons who have confessed will be convicted. It should be emphasized that the conclusions reached in this article are not limited to those legal systems presented as examples. The intention here is to provide a theoretical and practical basis for a requirement of strong corroboration, which, in my opinion, is most desirable in all legal systems.

This Article will proceed as follows: We shall first examine the grave risk of convicting innocent persons within the context of new studies recently conducted on this subject (Part I). Following this, we

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\* Ph.D., 1994 (Hebrew University of Jerusalem); Senior Lecturer and Head of the Criminal Law and Criminology Department, Academic College of Law (Ramat Gan, Israel). I would like to thank Dr. Rinat Kitai and Attorney Neil Zvail for their comments on the draft of this article.

will focus on the danger of false confessions (Part II) and convictions based on false confessions (Part III). Next, we shall examine the effect of the rules governing confessions on the nature of the police investigation (Part IV). The heart of the Article entails a discussion regarding the weight of the confession and an attempt to convince lawmakers of the need for a requirement of “strong corroboration” in all cases, even when law enforcement officials have not employed improper methods of interrogation (Part V). Before concluding, there will be a discussion of the documentation of interrogations through the use of video and its implications (Part VI). In the Epilogue, a call is issued to lawmakers to enact legislation, within the context of the laws of evidence, which would establish a requirement for “strong corroboration” as an essential condition for convicting a person on the basis of a confession.

#### I. THE DANGER OF CONVICTING THE INNOCENT

There is no greater injustice than the conviction of an innocent person. This injustice is not only towards the person wrongfully convicted and his family and friends, but also towards society as a whole, since the real criminal remains free to commit crime. In the past, many have doubted the existence of such a phenomenon. Although it has, in fact, been acknowledged, and studies have been published verifying its existence, the skeptics have remained doubtful.

In England, a conservative approach has prevailed, denying the existence of a significant phenomenon in which innocent persons are convicted.<sup>1</sup> This approach suffered mortal blows with the disclosure of the wrongful convictions of the Birmingham Six and the Guildford Four<sup>2</sup>—Irish individuals who had fallen victim to overzealous, “predatory” British investigators. In 1993, following the disclosure of these cases, the report of the Runciman Commission was published,<sup>3</sup> and the English approach to this subject was drastically altered. Thus, for example, as one of the lessons drawn from these cases—and at the recommendation of the Runciman Commission—an independent non-governmental public body was established in England, called the

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<sup>1</sup> Regarding this approach—while expressing reservations about it—see, e.g., JUSTICE IN ERROR 16 (Clive Walker & Keir Starmer eds., 1993).

<sup>2</sup> See *R. v. McIlkenny*, (1991) 93 Crim. App. 287 (U.K.); *Inquiry Ordered on Guildford Four*; *Parliament*, THE TIMES, Oct. 20, 1989.

<sup>3</sup> THE ROYAL COMMISSION ON CRIMINAL JUSTICE: REPORT PRESENTED TO PARLIAMENT (July 1993), Chairman: Viscount Runciman of Doxford CBE FBA (hereinafter: “Runciman Commission Report”).

Criminal Cases Review Commission (CCRC). The role of this body is to examine cases in which a claim is raised that an innocent person has been convicted. It conducts independent investigations and, each year, transfers dozens of selected cases to the courts for retrial. In a considerable number of these cases, convicts have been acquitted and released from prison.<sup>4</sup>

In the United States, many studies have been published demonstrating the existence of a phenomenon in which innocent persons are convicted. Several of the main studies are by: Bedau and Radelet<sup>5</sup>; Rattner<sup>6</sup>; and Leo and Ofshe<sup>7</sup> (this last study focuses specifically on convictions based on false confessions).

As stated above, the considerable research demonstrating the existence of a phenomenon in which innocent persons are wrongfully convicted has failed to shake the beliefs of some of the skeptics; that is, until the advent of genetic testing and the bright spotlight of DNA. This is the most significant turning point in the attitude regarding the subject under discussion. In 1992, Barry Scheck and Peter Neufeld founded the Innocence Project at Yeshiva University's Benjamin N. Cardozo School of Law. They supervised law students in the Sisyphean task of locating forensic evidence in dusty storerooms and arranged DNA testing for prisoners claiming their innocence. It should be noted and emphasized that it is not possible to conduct such testing in every case. It is only possible to do so in the relatively few cases where evidence still exists—such as semen stains on clothing—that has been adequately preserved and can be compared to a DNA sample taken from the prisoner. An additional condition imposed by the founders of the Innocence Project was that the prisoners sign a form consenting that all findings would be made public—even if the DNA tests were to prove their guilt.

The findings have been astonishing: since the inception of the Innocence Project in 1992 and up until the present, over 180 prisoners,

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<sup>4</sup> For a detailed survey of the manner in which the commission operates, see Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241 (2001); see also Criminal Cases Review Commission Home Page, at <http://www.ccrcc.gov.uk/> (last visited Feb. 22, 2007) (links to the commission's informative annual reports).

<sup>5</sup> Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

<sup>6</sup> Arye Rattner, *Convicting the Innocent, When Justice Goes Wrong* (1983) (unpublished Ph.D. dissertation, Ohio State University) (on file with author); Arye Rattner, *Convicted but Innocent: Wrongful Conviction and the Criminal Justice System*, 12 LAW & HUM. BEHAV. 283 (1988).

<sup>7</sup> Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998).

convicted of rape or murder and sentenced to life imprisonment or death, have been acquitted on the basis of the DNA tests performed within the framework of the Project. This represents approximately two thirds (!) of the cases examined. In many instances, the tests performed have even led to the exposure of the true perpetrator. In a considerable number of the cases (over a quarter), convictions were based solely on the false confessions of defendants, which had been extracted by police interrogators.<sup>8</sup>

The Innocence Project findings carry tremendous significance. Whereas, in the past, it was possible to remain skeptical even in the face of studies indicating the conviction of innocent persons and to continue denying the existence of the phenomenon, it is currently not a question of whether or not errors actually exist, but rather of how often they occur, how they can be minimized, and what needs to be done when they are discovered. The central question that this Article addresses is how to minimize miscarriages of justice while paying attention to the fact that the possibility to convict someone based on a confession alone is a major factor in the conviction of innocent persons.<sup>9</sup>

## II. THE RISK OF FALSE CONFESSIONS

At least in the past, courts have tended to view the confession of an

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<sup>8</sup> See BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000). This book by the founders of the Innocence Project reports on and analyzes the first sixty-five cases of acquittal. For a more current picture, see the website of the Innocence Project at <http://www.innocenceproject.org/> (last visited July 16, 2006), which reveals that in over a quarter (35) of the first 130 cases (up to the present, there have already been 182 acquittals), the cause of the wrongful conviction was a false confession; see also Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333 (2002); Elizabeth V. Lafollette, *State v. Hunt and Exculpatory DNA Evidence: When Is a New Trial Warranted?*, 74 N.C. L. REV. 1295 (1996); David DeFoore, *Postconviction DNA Testing: A Cry for Justice from The Wrongly Convicted*, 33 TEX. TECH. L. REV. 491 (2002); Karen Christian, *"And the DNA Shall Set You Free": Issues Surrounding Postconviction DNA Evidence and the Pursuit of Innocence*, 62 OHIO ST. L.J. 1195 (2001).

<sup>9</sup> Additional factors adding to the risk that innocent persons will be wrongfully convicted are: the gap between factual truth and legal "truth"; the adversarial system; a misguided view of the role of police investigators and prosecutors, which leads to the concealment of exculpatory evidence or even the fabrication of inculpatory evidence; the avoidance by police to investigate other avenues of evidence; the mistakes of witnesses, juries and judges; prejudice and malice; inadequate counsel; misleading circumstantial evidence; misleading forensic evidence; mistaken identification. These and other factors have been discussed in Boaz Sangero & Mordechai Kremnitzer, *Retrial—Reality or Dream? Defeat of Justice by Finality of Proceedings*, 1 ALEI MISHPAT 97, 106-11 (1999); see also *supra* notes 3-8; CONVICTING THE INNOCENT: THE STORY OF A MURDER, A FALSE CONFESSION, AND THE STRUGGLE TO FREE A "WRONG MAN" (Donald S. Connery ed., 1996).

accused person (extracted by police interrogators) as a trump card—namely, as very strong evidence that is (and should be) enough to sustain a conviction. The reasoning was that a voluntary confession is the result of the strongest feelings of guilt.<sup>10</sup> Accordingly, the confession has been crowned the “queen of evidence.”<sup>11</sup>

As stated above, many studies have indicated the existence of a phenomenon of false confessions. However, we should open this discussion by presenting the revealing findings of the aforesaid Innocence Project. For, henceforth, it is no longer a matter of mere speculation that allows skeptics to continue questioning the existence of the phenomenon. There is now unequivocal proof that many suspects and defendants have made, and even been convicted on the basis of, false confessions. According to the findings of the Innocence Project, from among the first 130 cases in which genetic testing proved the falsity of confessions, in over a quarter (35) the conviction was based on a confession.<sup>12</sup> In order to totally comprehend the significance of the Innocence Project findings, it should be noted that when genetic testing leads to the identification of an individual as the perpetrator of a specific offense, science is only providing us with a statistical estimate. However, when such testing rules out a given person (the convicted prisoner)—and, assuming that the test was conducted properly—we are talking about a one hundred percent certainty that this individual was not the perpetrator.<sup>13</sup>

It should be remembered that in only a small number of cases where the claim of a wrongful conviction is raised do the necessary physical conditions exist for the purpose of conducting a genetic test. Accordingly, from the instances in which DNA testing has proven a

<sup>10</sup> The King v. Warickshall, (1783) 168 Eng. Rep. 234 (K.B.).

<sup>11</sup> Significant support for the questionable belief that the confession is the “queen of evidence” is attributed to Andrey Vyshinsky, Prosecutor General of the Soviet Union and the legal mastermind of Stalin’s Great Purge during the late 1930’s. See Harold J. Berman, *Introduction to SOVIET CRIMINAL LAW AND PROCEDURE: THE RSFSR CODES 92* (Harold J. Berman & James W. Spindler trans., 1966); *IDEAS AND FORCES IN SOVIET LEGAL HISTORY: A READER ON THE SOVIET STATE AND LAW 288* (Zigurds L. Zile ed., 1992); see also Stephen C. Thaman, *Miranda in Comparative Law*, 45 St. Louis U. L.J. 581, 581 (2001) (stating that “Historically, confessions of guilt have been the ‘best evidence in the whole world’”).

<sup>12</sup> <http://www.innocenceproject.org/> (last visited July 16, 2006).

<sup>13</sup> See *supra* note 8; see also Achikam Stoler & Yoram Plotsky, *DNA on the Witness Stand*, MED. & L. 143, 146, 152 (2001) (all translations provided by author) (“... [I]f there is a difference in part of the sequence, then it is impossible that the whole sequence would be identical. The answer is absolute and unequivocal, and it is not defined in terms of probability. . . . [Moreover, even] the negation of a family relation is absolute.”). See also Lafollette, *supra* note 8, at 1296 n.7 (“The inculpatory use of DNA evidence has been controversial because statistical analysis is used to declare a DNA ‘match’ . . . However, ‘[o]ne aspect of DNA testing, an exclusion, has never been at issue scientifically.’”) (citing Barry Scheck, *The Use of DNA Evidence in Death Penalty Cases*, 23 HOFSTRA L. REV. 639, 639-40 (1995)).

false conviction, it may be inferred that there are many more actual cases of wrongful conviction.

In their landmark study, Bedau and Radelet have also established the existence of the phenomenon of false confessions. Out of the 350 wrongful convictions examined by these two researchers, 49 entailed false confessions. Furthermore, in a considerable number of these cases (17), interrogees made false confessions voluntarily, without any illegitimate pressure having been exerted on them by police interrogators.<sup>14</sup> As I will try to show below, such cases demonstrate that it is not enough to address (in legislation and case law) the external factors leading to false confessions (illegitimate pressure exerted by interrogators), but rather, it is also necessary to consider the internal factors that prompt an individual to make a false confession.

Another noteworthy study—which presented findings regarding sixty cases of false confessions in the United States that were uncovered following the landmark judgment in *Miranda v. Arizona*<sup>15</sup>—is that of Leo and Ofshe.<sup>16</sup> As it is well known, this landmark decision held that, under the Fifth Amendment to the U.S. Constitution, the police must inform a suspect of his constitutional right to not answer questions put to him by his interrogators (the right to remain silent), of the fact that if he chooses to respond his answers are liable to be used as evidence against him, and of his constitutional right to meet with an attorney (private or court-appointed) prior to the interrogation and to request that his attorney be present during the interrogation itself.<sup>17</sup> Violation of the *Miranda* rules by the police leads to the exclusion of the interrogee's confession as evidence at trial.<sup>18</sup> Leo and Ofshe have shown that, even following the establishment of the *Miranda* rules, a significant phenomenon of false confessions, and wrongful convictions based on such confessions, still exists in the United States. It appears that although the police have (generally) made the transition from coercive interrogation to what scholars have termed a more sophisticated “psychological” interrogation, there are still a considerable number of false confessions.<sup>19</sup> Furthermore, it appears that, in and of itself, the fact that a suspect is informed of his rights does not eliminate the coercive atmosphere of a custodial interrogation.

It should be noted that, in response, Paul Cassell—the number one skeptic writing on this subject—attempts to place this phenomenon into

<sup>14</sup> See Bedau & Radelet, *supra* note 5, at 56-63.

<sup>15</sup> 384 U.S. 436 (1966).

<sup>16</sup> Leo & Ofshe, *supra* note 7.

<sup>17</sup> *Miranda*, 384 U.S. at 467-68.

<sup>18</sup> *Id.* at 468-69. For a detailed analysis of the *Miranda* rules, see: MCCORMICK ON EVIDENCE 218-26 (John W. Strong ed., 5th ed., Student ed., 1999) [hereinafter MCCORMICK].

<sup>19</sup> See Leo & Ofshe, *supra* note 7.

narrower dimensions, attributing most of the cases in which innocent persons are convicted (a phenomenon the existence of which even he is forced to admit) to the mental disorders of the defendants.<sup>20</sup> Cassell also tries to convince his readers that the danger of “lost confessions”—namely, confessions that are not obtained due to the *Miranda* rules and because of the concern for protection of the rights of suspects and defendants—is graver than the risk of convicting the innocent on the basis of false confessions. In his opinion, because not enough confessions are extracted from guilty persons, other—innocent—persons are convicted instead.<sup>21</sup> However, if we accept Cassell’s general assumption whereby the criminal justice system operates properly and, therefore, does not lead to many wrongful convictions, then we discover a logical flaw in his argument. If the system does indeed operate properly, then, on the one hand, why should it be assumed that, without a confession, a guilty person would be acquitted? For, even without a confession, it should be possible and necessary to obtain other evidence that would incriminate the guilty person. On the other hand—again, if the system is supposedly working properly—why should it be assumed that an innocent person would be convicted instead? Moreover, if the focus on extracting confessions from interrogees is ceased, then it may be inferred that fewer innocent persons would be convicted (even if not enough confessions would be extracted from the guilty).

Regarding Cassell’s opinion that the dimensions of the phenomenon in which innocent persons are convicted solely on the basis of confessions is insignificant—apart from the fact that this subjective assessment is inconsistent with the numerous objective cases that have come to light throughout the world in recent years—it should be remembered that this is not just an empirical, but also a normative, question. It is enough to observe that, in reality, such cases do indeed occur. And, even if the number of innocent persons who are convicted on the basis of false confessions is not high, each such individual is an end in himself and a world unto himself rotting away in jail. We must not ignore such individuals by pinning our hopes on statistics. Furthermore, the statistical picture is not particularly encouraging, since it is very reasonable to assume that, behind each case exposed, there are many more cases in which the truth does not come to light and an

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<sup>20</sup> See Paul G. Cassell, *The Guilty and the “Innocent”: An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL’Y 523 (1999).

<sup>21</sup> *Id.* at 526. Regarding Cassell’s attempt to argue that a significant number of confessions are “lost” as a result of the *Miranda* rules, see Paul G. Cassell, *Miranda’s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996). However, as Cassell himself notes, the overwhelming majority of scholars believe that this is not a significant number—see *id.* at 389.

innocent person has been wrongfully imprisoned. Finally, regarding Cassell's belief that most wrongful convictions based on false confessions result from the mental disorder of the defendant, even if this unsubstantiated belief were true, it is only proper that the law also protect those suffering from mental disorders, and that it prevent such individuals from being convicted for no fault of their own.

In England, the Runciman Commission reached the conclusion that a phenomenon of wrongful convictions based on false confessions does exist and that it demands attention. Therefore, it recommended legislative reform designed to cope with this danger, in regard both to the admissibility of and the weight accorded to the confession.<sup>22</sup>

In Israel, a commission of experts headed by Justice Eliezer Goldberg issued a report that may be considered a turning point in addressing the problem of false confessions.<sup>23</sup> According to the commission, a common reason for false confessions is the external pressure that interrogators exert on the interrogee. This does not just refer to cruel and abusive pressure designed to break the spirit of the interrogee. Each interrogee has his own personal breaking point. Even sleep deprivation, and certainly the denial of the use of a toilet, is liable to cause certain interrogees to confess to acts that they did not commit. The concern is particularly acute for interrogees who are not criminals and are not used to conditions of detention and interrogation. Other factors leading to false confessions relate solely to the interrogee himself. Sometimes it is a result of emotional pressure. Sometimes the confession is related to the problematic or immature personality of the interrogee.

The Goldberg Commission examined the existence of three main risk factors.<sup>24</sup> The first factor is the personality structure of the interrogee. This relates to interrogees who cannot differentiate between fantasy and reality; interrogees who wish to atone for past behavior that was forbidden (real or imagined); and interrogees with self-destructive tendencies. To quote Maimonides: "The court shall not put a man to death or flog him on his own admission . . . perhaps he was one of those who are in misery, bitter in soul, who long for death . . . perhaps this was the reason that prompted him to confess to a crime he had not

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<sup>22</sup> See Chapter 4 ("The 'Right of Silence' and Confession Evidence") of the Runciman Commission Report, *supra* note 3.

<sup>23</sup> REPORT OF THE COMMISSION FOR CONVICTIONS BASED SOLELY ON CONFESSIONS AND FOR ISSUES REGARDING THE GROUNDS FOR RETRIALS (1994) [hereinafter THE GOLDBERG COMMISSION REPORT] (all translations provided by author).

<sup>24</sup> *Id.* at 8. For a different classification, which includes four categories, see section 32 of the Runciman Commission Report, *supra* note 3. See also DAVID WOLCHOVER AND ANTHONY HEATON-ARMSTRONG, ON CONFESSION EVIDENCE (London, Sweet & Maxwell, 1996) pp. 99-104.



committed, in order that he be put to death.”<sup>25</sup> This risk group also includes the emotionally or mentally handicapped, minors, and persons who are under the influence of drugs or alcohol.

The second risk factor is the effect of the interrogation or detention on the interrogee. This relates to interrogees who wish to put an end to the interrogation due to mental exhaustion caused by the pressure of the interrogation, sometimes with the (mistaken) belief that afterwards—at their trials—their innocence will be proven. There are also situations in which the interrogee is willing to confess to a lesser charge than the offense he is suspected of having committed, for the sake of immediate advantage.

At this point it should be noted that, despite the presumption of innocence, conditions of detention are extremely harsh—sometimes even worse than prison conditions.<sup>26</sup> In her forthcoming article on conditions of confinement, Rinat Kitai writes as follows:

Conditions of pretrial detainees in custody are harsh all over the world . . . in some places also deplorable and humiliating . . . Many detainees are housed in old facilities that are inadequate for their needs. . . . Detainees may suffer from poor ventilation and lighting, a lack of direct sunlight, defects in food, and lack of sanitary facilities. Many jails suffer from severe overcrowding and often operate beyond their capacity . . . a small space with almost no privacy. The fact that the number of detainees occasionally exceeds the bed capacity, forces detainees to “sleep on mattresses spread on floors in hallways and next to urinals.”<sup>27</sup>

Under such harsh conditions of detention—and even before pressure is exerted by police interrogators (whether legitimate or illegitimate)—the reader should be asking himself whether it is really unlikely that he, or at least some of the people that he knows, would confess to a crime that he did not commit, if such a confession would lead to an immediate release from custody and save him the anguish of spending the night away from his family and friends in degrading physical conditions.

The third risk factor discussed by the Goldberg Commission regards a confession influenced by social pressures, such as the desire to cover up for the true perpetrator.

From the studies conducted in recent years it emerges that the

<sup>25</sup> MAIMONIDES, MISHNEH TORAH [Code of Jewish Law], Book of Judges, *Hilchot Sanhedrin* [Laws of the Sanhedrin] 18:6 (all translations provided by author).

<sup>26</sup> For a survey of detention conditions in the United States and their incompatibility with the presumption of innocence, see Rinat Kitai-Sangero, *Conditions of Confinement—The Duty to Grant the Greatest Possible Liberty for Pretrial Detainees* (forthcoming, 43(2) CRIMINAL LAW BULLETIN (2007)).

<sup>27</sup> *Id.* (citing *Rhodes v. Chapman*, 452 U.S. 337, 355 (1981)).

reasons for false confessions are extremely varied, some of them even bizarre: people have made false confessions in order to avoid the burden of a trial (for minor offenses), because of a fear of the death penalty, in order to cover up for friends, as a result of mental disease and in order to gain financial reward for their families from a criminal organization. There are those who have confessed with the hope that in this way their names would not appear in the newspapers. There are those who have confessed in order to get quickly to an exam at the university or to an important game of chess. There are those who have confessed because of the fear that they would be exposed as adulterers. There are those who have confessed because they were too drunk to remember what happened. There have been those who have confessed as a joke and even to impress a girlfriend. There was even one case in which a person confessed, while in prison, to a murder that he did not commit, in order to prove that a wrongful conviction was possible—and he succeeded. Reality is often stranger than fiction.<sup>28</sup>

I have chosen to conclude my discussion of the danger of false confessions with the instructive remarks of former Israeli Supreme Court Justice Dalia Dorner, which were expressed within the context of a dissenting opinion:

The confession of an accused person is suspicious evidence, even if it was made without external pressure having been exerted on the accused. For, without other conclusive evidence, which could prove the defendant's guilt even in the absence of a confession, in many cases a confession is an irrational act, and taking the irrational step itself of making a confession raises a suspicion regarding the veracity of the confession. This suspicion is not merely theoretical, but rather it has been proven several times by human experience.<sup>29</sup>

In my opinion, not only is the confession *not* the “queen of evidence,” but rather, it is the “*empress of wrongful convictions*.”<sup>30</sup>

<sup>28</sup> See Bedau & Radelet, *supra* note 5, at 58-63; Runciman Commission Report, *supra* note 3; THE GOLDBERG COMMISSION REPORT, *supra* note 23; the research by Rattner, *supra* note 6. Another central cause of false confessions is the suspect's misguided belief that after having initially made a confession, which was extracted from him by police interrogators through the use of improper methods, additional confessions are meaningless. Sometimes the suspect is tricked into believing this and then, subsequent to the deception, he makes additional confessions that are *facially* valid, since they did not entail any further use of improper methods—see Peter Mirfield, *Successive Confessions and the Poisonous Tree*, CRIM. L. REV. 554 (1996). However, see and compare the new ruling handed down on this subject in *Missouri v. Seibert*, 542 U.S. 600 (2004). See also Charles J. Ogletree, Commentary, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1840 (1987).

<sup>29</sup> Cr.F.H 4342, 4350/97 Israel v. Al Abid; Al Abid v. Israel 51(1) P.D. 736, 836 (all translations provided by author). It should be noted that, unfortunately, this view of an accused person's confession as suspicious evidence—in my opinion, very correct—is not characteristic of many judges.

<sup>30</sup> See GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A

### III. THE DANGER OF CONVICTIONS BASED ON FALSE CONFESSIONS

#### A. American Law

##### 1. General

American law addresses the danger of coerced, involuntary confessions in a relatively satisfactory manner. Unfortunately, as I will show below, the arrangements provided by American law do not adequately cope with the danger of false confessions (which may be voluntary) and the wrongful convictions based on such confessions.

##### 2. Voluntariness, in General, and *Miranda* Rules, in Particular

It is a basic rule of evidence law that hearsay is inadmissible in court. However, as an exception to the exclusionary rule regarding hearsay evidence, it is accepted in American law that a confession is admissible in court.<sup>31</sup> Thus, the matter under discussion—the exclusion of an involuntary confession—is an exception to the exception.

The central doctrine regarding confessions in American law was laid down in the landmark decision of *Miranda v. Arizona*.<sup>32</sup> In this judgment, the approach was taken whereby, in principle, a custodial interrogation entails a violation of the privilege against self-incrimination established in the Fifth Amendment to the U.S. Constitution. Recognizing the fact that coercive pressure is inherent to custodial interrogation, the Court concluded that “without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely,”<sup>33</sup> stressing that “the modern practice of in-custody interrogation is psychologically rather

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HANDBOOK 158-216 (2003).

<sup>31</sup> See, e.g., RONALD N. BOYCE & ROLLIN M. PERKINS, CRIMINAL LAW AND PROCEDURE—CASES AND MATERIALS (8<sup>th</sup> ed., 1999); MCCORMICK, *supra* note 18, at 211.

<sup>32</sup> 384 U.S. 436 (1966); see also BOYCE & PERKINS, *supra* note 32, at 218-226. The *Miranda* ruling was confirmed in *Dickerson v. United States*, 530 U.S. 428 (2000). For a very detailed critique of the *Miranda* rules, and a proposal to nullify them, see JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW (1993). For a collection of two dozen articles dealing with the *Miranda* ruling, see THE *MIRANDA* DEBATE: LAW, JUSTICE AND POLICING (Richard A. Leo & George C. Thomas III, eds., 1998).

<sup>33</sup> *Miranda*, 384 U.S. at 467.

than physically oriented.”<sup>34</sup> The Court further noted that “[u]nless 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>35</sup>

Under the *Miranda* ruling, police interrogators must advise the suspect of his rights, as follows:

1. You have the right to remain silent;
2. Anything you say can (and will) be used against you in court;
3. You have the right to consult with a lawyer and to have the lawyer with you during interrogation; and
4. If you cannot afford an attorney, one will be appointed for you prior to any questioning if you so desire.

According to the *Miranda* ruling, a confession obtained while infringing these rights is a violation of the Fifth Amendment to the U.S. Constitution and, therefore, inadmissible in court. Furthermore, there are other rules that, in rare cases, may lead to the exclusion of involuntary confessions that have been obtained in violation of the Constitution.<sup>36</sup>

The *Miranda* rules do seriously address the problem of involuntary confessions. However, as Leo and Ofshe,<sup>37</sup> for example, have demonstrated, even following the establishment of these rules, the phenomenon of false confessions continues in the United States and innocent persons are still convicted on the basis of such confessions.<sup>38</sup> First of all, a considerable number of interrogees choose to waive their rights (the right to remain silent and the right to a defense attorney), and this waiver is valid. Secondly, according to American case law, the trickery of police interrogators, and even the use of deceit during the course of the interrogation, are not prohibited and, in any case, do not render the confession inadmissible.<sup>39</sup> Thirdly, as I will demonstrate below, American law does not seriously address the danger of a confession that is albeit voluntary, but still false.

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<sup>34</sup> *Id.* at 448.

<sup>35</sup> *Id.* at 458.

<sup>36</sup> See MCCORMICK, *supra* note 18, at 226-42.

<sup>37</sup> See Leo & Ofshe, *supra* note 7; see also Laurie Magid, *The Miranda Debate: Questions Past, Present and Future*, 36 HOUS. L. REV. 1251 (1999) (book review).

<sup>38</sup> See Amanda L. Prebble, *Manipulated by Miranda: A Critical Analysis of Bright Lines and Voluntary Confessions under United States v. Dickerson*, 68 U. CIN. L. REV. 555, 578-79 (2000); Mandy DeFilippo, *You Have the Right to Better Safeguards: Looking Beyond Miranda in the New Millennium*, 34 J. MARSHALL. L. REV. 637, 639-40 (2001).

<sup>39</sup> See Prebble, *supra* note 38, at 583; see also Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105 (1997); Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME L. & SOC. CHANGE 35 (1992).

### 3. Corroboration Requirement

American law only appears to provide a rule that adequately copes with the fear that a confession—even if voluntary—is false. Under this rule, in order for a person to be convicted on the basis of a confession, the confession must be corroborated by other evidence introduced at trial. Such rules have been established in many American jurisdictions, sometimes in legislation and sometimes in case law.<sup>40</sup> Therefore, it would seem that American law already has the type of requirement for which this Article is arguing the need. However, an examination of the exact content of the American corroboration requirement demonstrates that it does not serve the purpose for which it is intended.

As I will show in detail below, the proposed requirement for strong corroboration has two central objectives: the first is to eliminate the fear of a false confession (even when voluntary) and the second is to direct police investigators not to limit themselves to the interrogation of a suspect and the attempt to extract a confession, but rather to use sophisticated investigative techniques and to make an assiduous effort to locate objective, tangible evidence extrinsic to the suspect. Such evidence may not necessarily lead to the conclusion that the suspect is the perpetrator: it is possible that it will rule him out as a suspect and perhaps even direct suspicion at another person.

The traditional American formulation of this requirement dictates that there be some evidence other than the confession tending to establish the *corpus delicti*. It does not require that this additional evidence prove the *corpus delicti* beyond a reasonable doubt. Hence, only “slight” corroborative evidence is required.<sup>41</sup>

*Corpus delicti* literally means “the body of the crime.” The requirement existing in American law only relates to the actual commission of the offense, and not to the fact that the accused person is the individual who committed it. Ordinarily, in a criminal trial, the prosecution must prove three main elements: (1) the occurrence of the injury or harm constituting the crime; (2) that this injury or harm was done in a criminal manner; and (3) that the accused was the person who inflicted the injury or harm.<sup>42</sup> Whereas Wigmore maintains that the *corpus delicti* only refers to the first of the three elements mentioned above, most American courts have defined it as including both the first

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<sup>40</sup> See, e.g., the survey in MCCORMICK, *supra* note 18, at 212; see also Corey J. Ayling, Comment, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 WIS. L. REV. 1121 (1984).

<sup>41</sup> MCCORMICK, *supra* note 18, at 214.

<sup>42</sup> *Id.*

and the second element. Accordingly, the corroborating evidence must tend to indicate the harm or injury constituting the offense and that this harm or injury was the result of criminal activity. However, it does not need to show that the accused was the guilty party.<sup>43</sup>

Indeed, a requirement for evidence of the actual commission of the crime—in addition to the confession—could disprove some false confessions and wrongful convictions. It also saves the legal system from the immense embarrassment caused when a person is convicted and then, subsequently, it becomes clear that a crime was not even committed—such as when a person is convicted of murder and it is later revealed that the “victim” is still alive. However, this only represents a small minority of the cases of false confessions and wrongful convictions. In the overwhelming majority of cases, the police possess strong evidence that a crime was indeed committed, and the central question regarding confessions must be whether or not the suspect is the person who actually committed the offense. And it is this very question that the American corroboration requirement does not address at all. In this manner, as stated above, it enables the conviction of innocent persons who have confessed—and, as studies show, will continue to confess—to crimes that have indeed been committed, not by them, but rather by offenders who have not been caught.

The question of whether or not a crime was actually committed is meaningless if it is discussed in respect to a person who was not even involved in the incident. When the wrong person is in custody, the proof that a crime was committed does not indicate anything about the involvement or guilt of this individual.

We should examine a misguided approach—limiting the corroboration requirement to proof of the *corpus delicti*—that exists not only in American legislation and case law but in the writings of scholars as well. Thus, for example, Wigmore believed that the corroboration requirement is unnecessary, while McCormick has explained that, in light of various doctrines—in particular, those based on the Fifth Amendment to the U.S. Constitution, the *Miranda* rules and the requirement that the confession be voluntary—rules are no longer necessary for the purpose of guiding police investigators (such as the corroboration requirement).<sup>44</sup> In my opinion, this approach is mistaken. *Miranda* rules—and the like—indeed reduce the fear that police interrogators will exert physical pressure on suspects that prompt them to make involuntary confessions. However, even methods of psychological interrogation are liable to result in involuntary

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 213-14 (including Wigmore’s position).

confessions. Indeed, the *Miranda* rules are designed to also deal with this fear, however, as stated, informing a suspect of his rights is not enough to eliminate the fear. Furthermore, even a voluntary confession is liable to be false—as demonstrated in the aforementioned studies. And finally, if the goal is not just to prevent investigators from abusing interrogees (which is indeed an important, but limited, objective), but to also direct them to use sophisticated techniques and to make an assiduous effort to conduct a proper investigation aimed at locating objective, tangible evidence extrinsic to the suspect (such as forensic evidence), then, not only is the corroboration requirement desirable, but it is even essential.

In order to complete the picture it should be noted that, following the Supreme Court decision in *Opper v. United States*,<sup>45</sup> American law also provides an alternative approach to the corroboration requirement whereby, instead of evidence supporting the *corpus delicti*, it is necessary to present “substantial independent evidence which would tend to establish the trustworthiness of the statement.”<sup>46</sup> As explained in McCormick’s book,<sup>47</sup> this requirement is even weaker than the already weak requirement that a confession be corroborated in regard to the *corpus delicti*. However, the advantage that McCormick attributes to the “trustworthiness approach” is that it is a flexible approach and that it establishes a requirement that the prosecution is able to meet even when it is unable to comply with the *corpus delicti* rule.

First—and this is the central point—if I succeed below in my attempt to convince the reader that a requirement for strong corroboration is necessary in order to eliminate the fear of wrongful convictions based on false convictions, then it will be shown that the “advantage” that McCormick’s book speaks of is, in fact, a disadvantage.

Second—and parenthetically—McCormick’s argument is unconvincing. According to this argument:

[M]odern statutory criminal law has increased the number and complexity of crimes. Simply identifying the elements of the *corpus delicti* thus provides fertile ground for dispute. Requiring that the corroborating evidence tend to establish each element once the *corpus delicti* is defined may pose an unrealistic burden upon the prosecution. . . .<sup>48</sup>

However, in the same book from which the above quotation is taken, when previously describing American case law, it is written that

<sup>45</sup> 348 U.S. 84 (1954); see also MCCORMICK, *supra* note 18, at 215.

<sup>46</sup> *Opper v. United States*, 348 U.S. 84, 93 (1954).

<sup>47</sup> MCCORMICK, *supra* note 18, at 215-16.

<sup>48</sup> *Id.* at 216.

“[a] growing number of courts, however, are abandoning the strict requirement that the corroborating evidence tend to prove all elements of the *corpus delicti*.”<sup>49</sup> Furthermore, the decision by the court regarding exactly what elements are required for the relevant offense—whether this is an ancient offense or a modern offense—is, in any case, necessary; and it is dictated by substantive criminal law, even before the law of evidence enters into the picture.

## B. *English Law*

### 1. General

Similar to American law, English law has also made an attempt to seriously cope with the danger of a coerced, involuntary confession.<sup>50</sup> Unfortunately, as I will show below, English law does not truly address the danger of false confessions (which may be voluntary) and the wrongful convictions based on such confessions, since there is no requirement whatsoever that a confession be corroborated and, therefore, a person may be convicted solely on the basis of a confession.

### 2. Voluntariness, in General, and Section 76 of the Police and Criminal Evidence Act 1984, in Particular

English law has discussed various rationales for the requirement that a confession be voluntary and for the exclusion of a coerced confession.<sup>51</sup> One possible rationale is, of course, that such a confession is unreliable.<sup>52</sup> However, two additional rationales have been postulated to support the exclusion of involuntary confessions. The second rationale is based on the privilege against self-incrimination—in other words, it entails a defense of the individual’s right not to be pressured by law enforcement officials into condemning himself.<sup>53</sup> The third rationale, which has been coined “the disciplinary principle,” refers to the attempt to deter improper police practices. As Lord Hailsham has stated, in *Wong Kam-Ming v R.*:

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<sup>49</sup> *Id.* at 215.

<sup>50</sup> For a monograph on confessions in English law, see PETER MIRFIELD, *SILENCE, CONFESSIONS AND IMPROPERLY OBTAINED EVIDENCE* (1997).

<sup>51</sup> Regarding these rationales in American case law, see Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 313 (1998).

<sup>52</sup> See, e.g., CROSS & TAPPER ON EVIDENCE 606-09 (9<sup>th</sup> ed., 1999).

<sup>53</sup> See, e.g., *R v. Sang* [1980] A.C. 402, 436, [1979] 2 All E.R. 1222, 1230.



[A]ny civilised system of criminal juris-prudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions.<sup>54</sup>

Lord Griffiths's opinion in *Lam Chiming v. R.*, which encompasses all three rationales mentioned above, is presented as the "last word" in English case law on this issue.<sup>55</sup>

The statutory provisions currently governing English law regarding confessions, may be found in section 76 of the Police and Criminal Evidence Act 1984 (hereinafter: the "PACE Act"). Given the importance of this section to the subject under discussion, it is appropriate to cite the conditions laid down in some of its provisions:

76.(1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section;

(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained –

(a) by oppression of the person who made it; or

(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

. . .

(8) In this section "oppression" includes torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture).

It has been proposed that these provisions be analyzed under four headings: oppression, unreliability, causation and burden of proof. <sup>56</sup>

<sup>54</sup> See *Wong Kam-Ming v. R* [1980] A.C. 247, 261, [1979] 1 All E.R. 939, 946. For a critique of the disciplinary approach, see, e.g., Lord Diplock's opinion in *Sang*, *supra* note 53. For strong support of the disciplinary approach and its application in Australia and Canada, see CROSS & TAPPER, *supra* note 53, at 608.

<sup>55</sup> *Lam Chi-Ming v. R* [1991] 2 A.C. 212, 220, [1991] 31 All E.R. 171, 179; CROSS & TAPPER, *supra* note 53, at 609.

<sup>56</sup> See CROSS & TAPPER, *supra* note 53, at 617-23.

Regarding the first element—oppression—despite the fact that this term is (partially) defined in section 76(8) of the PACE Act, interpretive difficulties have arisen in English law:

It is clear from the context that more than mere incarceration or interrogation in a police station is required to constitute oppression. The difficulty is to know exactly how much more. It seems that if a deliberately unpleasant and uncomfortable technique is used in order to sap the will of the suspect it will be held inherently oppressive.<sup>57</sup>

As to the second element—unreliability—it should be noted that section 76(2)(b) explicitly refers to “circumstances existing at the time.” Furthermore, it seems that the correct interpretation of the provision is that potential unreliability is sufficient and that actual unreliability is not required.<sup>58</sup> Finally, this is an objective test. Therefore, it is irrelevant that police interrogators are unaware of the factors leading to the potential unreliability and that they have acted in good faith.<sup>59</sup>

Regarding the third condition—causation—this is a question of fact regarding the relation between acts by the police and the interrogative conditions that they have created, on the one hand, and the confession, on the other hand.<sup>60</sup> In my opinion, while causation is relevant to the question of unreliability, and perhaps even to the privilege against self-incrimination—namely, to the voluntariness of the confession—it is not relevant to the disciplinary principle aimed at educating the police to operate solely by legal means. Such a disciplinary approach could justify the exclusion of a confession even in the absence of the element of causation. However, English law—as reflected in section 76 of the PACE Act—requires causation as an essential condition.<sup>61</sup>

As to the final element—the burden of proof—following the common law, section 76(2) of the PACE Act also provides that the standard imposed on the prosecution is to prove beyond a reasonable doubt that the confession was voluntary. In my opinion, this position, taken by English law, is very desirable, and not at all obvious, since American case law, in contrast, has held that the U.S. Constitution only requires that the voluntariness of the confession be proven by a preponderance of the evidence.<sup>62</sup>

Given the centrality of the confession in the conviction of accused

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<sup>57</sup> *Id.* at 618.

<sup>58</sup> *Id.* at 619 (including case law from New Zealand and Victoria, Australia).

<sup>59</sup> *Id.* at 620.

<sup>60</sup> *Id.* at 621-23.

<sup>61</sup> It should be noted that causation is also required in American law. *See, e.g.,* MCCORMICK, *supra* note 18, at 216.

<sup>62</sup> *See* *Lego v. Twomey*, 404 U.S. 477 (1972); *see also infra* note 69 and the accompanying text.

persons, and given the terrible danger that the innocent will be convicted on the basis of false confessions, it is proper to require that the voluntariness of the confession be proven beyond a reasonable doubt before it is relied upon for a conviction. Thus, for example, if the prosecution has succeeded to convince the judge that there is a 60% (or even 80%) probability that the confession was voluntary, this also means that there is a 40% (or 20%) possibility that it was involuntary. Therefore, such a confession must not be relied upon and such “evidence” should be rejected.

The effect of section 76 of the English PACE Act is that an involuntary confession—for which the conditions of the provision have been complied with—is inadmissible in court as evidence of the truth of its content.

Apart from the central provisions of section 76 of the PACE Act regarding confessions, English legislation provides rules concerning the interrogation of suspects, which also refer—among other things—to the warning that must be given to the suspect and the access to legal counsel that must be provided. Indeed, the English lawmaker has not gone as far as the American *Miranda* rules, which we have discussed above. However, it is possible to exclude a confession if the English rules in this matter have been violated; and this is also the case pursuant to section 78 of the PACE Act, which is a general provision granting the court discretion to exclude evidence (as opposed to section 76, which only deals with confessions, and which enables the mandatory exclusion of a confession by rule, and not by discretion).<sup>63</sup>

To complete the picture, it should be noted that English law also ~~relates to deals with~~ special populations with a greater potential for making involuntary and false confessions, including: juveniles, the mentally ill, the mentally handicapped, persons incapacitated by alcohol or drugs, non-English speakers, and the deaf. Regarding a suspect or defendant belonging to one of these categories, special cautionary measures must be taken and special conditions of interrogation must be implemented, for if the authorities do not comply with these requirements the confession is liable to be excluded pursuant to section

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<sup>63</sup> See CROSS & TAPPER, *supra* note 53, at 629-35. Section 78 of the PACE Act states as follows:

- (1) In any proceedings 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 in which the evidence was obtained, the admission of the evidence would have such an adverse effect upon the fairness of the proceedings that the court ought not to admit it.
- (2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.

78 of the PACE Act.<sup>64</sup> In light of the aforementioned studies regarding false confessions—which have demonstrated that there are especially vulnerable populations at risk—I believe it extremely important that persons belonging to these categories be given special attention in legislation.

### 3. Evidence Sufficiency: Lack of a Corroboration Requirement

As we have just seen, similar to American law, English law reasonably addresses the possibility that a confession is involuntary. However, like American law, English law does not truly deal with the danger of false confessions (which may be voluntary) and the wrongful convictions based on such confessions. In this regard, the situation in English law is even worse than that of American law: there is no corroboration requirement whatsoever for confessions—not even the minimum requirement of corroboration for the *corpus delicti* that has been described above. Therefore, a confession may be the single piece of evidence upon which a conviction is based.<sup>65</sup>

A royal commission examining this exact question<sup>66</sup> did not see fit to propose the establishment of a corroboration requirement for confessions, sufficing with a recommendation that the judge give a warning to the jury to take great care and to look for supporting evidence.<sup>67</sup>

I will attempt below to respond to arguments raised against a requirement for strong corroboration to a confession—primarily, the argument that society would be compelled to set criminals free when no corroboration is found for their confessions. However, at this stage, I would like to express my opinion that a warning to the jury (just like the warning that the judge should give to himself in a non-jury trial) is not a serious solution to the grave problem that we are discussing. In every criminal trial—where the fate of an individual is hanging in the balance—such warnings are obviously appropriate. However, there is

<sup>64</sup> CROSS & TAPPER, *supra* note 53, at 636.

<sup>65</sup> See, e.g., L. Andrew & T. Choo, *Confessions and Corroboration: A Comparative Perspective*, CRIM. L. REV. 867, 868 (1991).

<sup>66</sup> See MICHAEL McCONVILLE, CORROBORATION AND CONFESSIONS: THE IMPACT OF A RULE REQUIRING THAT NO CONVICTION CAN BE SUSTAINED ON THE BASIS OF CONFESSION EVIDENCE ALONE (Royal Commission on Criminal Justice, Research Study No. 13—HMSO, London, 1993). See also CROSS & TAPPER, *supra* note 52, at 606. See also WOLCHOVER & HEATON-ARMSTRONG, *supra* note 24, at 17-35.

<sup>67</sup> A majority of the Runciman Commission also reached a similar conclusion, see *supra* note 3. This is also the desirable solution according to Rosemary Pattenden, *Should Confessions be Corroborated?* 107 L. Q. REV. 317, 338-339 (1991).

an inner tension—bordering on a contradiction—between a warning to the jury by the judge against convicting on the basis of a confession alone, and an instruction by the same judge informing them that they are clearly authorized to convict the defendant solely on the basis of his confession. Furthermore, the confession is a unique type of evidence that blinds both juries and judges, because they tend to attribute tremendous, conclusive weight to such evidence. Given the accepted view of the confession as the “queen of evidence,” a warning is not enough. Only a requirement for additional evidence that strongly corroborates a confession could significantly reduce the terrible danger that innocent persons would be convicted on the basis of false confessions.

### C. *Israeli Law*

#### 1. Voluntariness

Section 12(a) of the Israeli Evidence Ordinance [New Version], 1971<sup>68</sup> provides that “[e]vidence of confession by the accused that he has committed an offense is admissible only when the prosecution has produced evidence as to the circumstances in which it was made and the court is satisfied that it was *free and voluntary*” (emphasis added). Israeli case law has established that the prosecution must prove voluntariness beyond a reasonable doubt.<sup>69</sup> This is a desirable rule.

Israeli judges have been divided in their opinions on how to construe this “free and voluntary” requirement. The wording chosen by lawmakers is not easy to interpret. On the one hand, it can be said that a sane person who confesses to a crime is always influenced by external factors as well, and, therefore, his confession is not entirely “free.” On the other hand, it can also be said that a sane person who confesses is always capable of choosing whether or not to confess—even when pressure is being exerted on him—and, therefore, in any case, his confession is “free and voluntary.” It is clear that the intention is not to a lack of control as defined by substantive criminal law (the possibility to choose alternative behavior), since control, in this broader sense, still exists even when a person is being threatened with a weapon and ordered to act in a certain manner. And yet, it is also clear that the requirement is not referring to a choice that is entirely free of all

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<sup>68</sup> Israeli Evidence Ordinance, 5731-1971, 2 LSI 198 (Isr.) (all translations provided by author).

<sup>69</sup> CrimA 38/49 Kandil v. Attorney General, 2 P.D. 810, 824-825. Compare this to an identical rule in English case law and a different, and undesirable, rule in American case law, *supra* note 62 and the accompanying text.

influence, since the very fact that a person is in custody (even if he has been informed of, and waived, his rights to remain silent and to consult with a defense attorney), or even just detained for an interrogation, has a huge influence on the interrogee's choices.<sup>70</sup>

Considering this quandary, it is no wonder that Israeli judges have often struggled with the question of how to interpret the "free and voluntary" requirement of the aforesaid statute, leading to the development of three different schools of thought in Israeli case law.<sup>71</sup> The first approach is the *constitutional-educational approach*, whereby, if it is determined that the interrogators have employed improper methods against the interrogee, the confession will be excluded without any further need to examine whether or not it is true despite the use of improper methods.<sup>72</sup> The second approach is the *reliability approach*, according to which the only question is factual: did the improper methods break the will of the interrogee and cause him to make a false confession?

An ideological dispute exists between these two extreme approaches over the proper way to protect the rights of interrogees: should these rights be protected even if it is at the cost of allowing criminals to escape the force of the law? A third approach<sup>73</sup> is an *intermediate approach*, in which a balance has been struck as follows: confessions that have been obtained through measures that are extremely improper, such as severe physical abuse, would be excluded regardless of the question of their veracity; in other cases (improper methods of interrogation that are not extreme), the second approach mentioned above would apply, namely, there would be a factual examination of the reliability of the confession.

Another ruling that is relevant to the issue under discussion—and which, in my opinion, is undesirable—states that the "free and voluntary" requirement is designed to protect the suspect only from external pressure exerted by figures of authority, and not from internal pressure.<sup>74</sup>

The last word on this issue in the case law of the Israeli Supreme Court can be found in the *Yisascharof* judgment, handed down by an

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<sup>70</sup> See *Miranda v. Arizona*, 384 U.S. 436 (1966) (a confession obtained under conditions of detention is not voluntary in the absence of proper safeguards.) This is a more correct position.

<sup>71</sup> *CrimA 168/82 Mooadi v. Israel*, 38(1) P.D. 197; *CrimA 183/78, 191/79 Abu Midjam v. State of Israel*, 34(4) P.D. 533.

<sup>72</sup> Regarding this approach in American law, see: BOYCE & PERKINS, *supra* note 31, at 1360; MCCORMICK, *supra* note 18, at 213-14.

<sup>73</sup> This approach has apparently been adopted in the leading judgment in the *Mooadi* case, *supra* note 71. I have used the word "apparently" because this judgment may also be interpreted in a different manner, whereby there was no majority for this approach.

<sup>74</sup> *CrimA 85/56 Watad v. Attorney General*, 10 P.D. 935, 937.

expanded panel of nine justices during the writing of this Article.<sup>75</sup> In this decision, a confession that had been obtained without advising the suspect of his right to consult with an attorney was excluded—in the spirit of the *Miranda* rules—whereas the Court also stated that other violations of the rules applying to police interrogations could lead to the exclusion of confessions, in particular, and other evidence, in general (by discretion, and not by mandatory rule).

## 2. Additional Slight Evidence (Minimal Corroboration)

The Israeli Supreme Court has established a rule whereby, in order to convict a person on the basis of a voluntary confession, the prosecution must introduce additional evidence—literally translated from Hebrew as “something in addition.”<sup>76</sup> Thus, following an examination of its admissibility (under the three aforesaid approaches), the court examines the weight of the confession by applying two tests: the first test is internal (“self weight”) and examines the “signs of truth” arising from the confession itself; the second test is external—the aforesaid requirement for “something in addition.” This requirement is designed to eliminate the fear of relying on an unreliable confession that was given as the result of internal pressure.

If the requirement for “something in addition” is designed to eliminate the fear that an accused person has confessed due to internal pressure, then evidence deriving from the accused himself, such as signs of guilt in his statements and behavior, should be insufficient. However, in Israeli case law, for some reason, the Supreme Court has in fact seen this evidentiary requirement as having been complied with from indications that the accused has entangled himself in a web of lies, from his proposal to serve as a state witness, from his reenactment of the crime, etc.—in other words, the Court has been satisfied with additional evidence that is “light as a feather.”<sup>77</sup> Such a minimal requirement for additional evidence does not serve the role intended for it: to verify the truth of the confession. Moreover, case law states that it is not even essential that the interrogee has revealed details of the crime to his interrogators that they were unaware of prior to the interrogation,

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<sup>75</sup> CrimA 5121/98 Yisascharof v. Chief Military Prosecutor (May 4, 2006) (not yet reported). It should be noted that the Israeli Supreme Court usually sits as a panel of three justices and is only expanded for questions of the utmost importance.

<sup>76</sup> CrimA 3/49 Andlersky v. Attorney General, 2 P.D. 589, 592 (all translations provided by author).

<sup>77</sup> CrimA 428/72 Ben Lulu v. Israel, 28(1) P.D. 270.

so that such details will also suffice as “something in addition.”<sup>78</sup>

It has been proposed that two separate questions be examined.<sup>79</sup> The first question is whether or not there is a real chance that a confession would be admitted as evidence in court when the interrogee has confessed to something that he did not do. If it is, then the second question that needs to be asked is what the chances are that the defendant would be acquitted following the admission of such a confession. Unfortunately, the answer to the second question is clear. The chances of an acquittal are close to zero. Seemingly, the court possesses the tools to examine the weight of the confession—the test of internal signs of truth and the test of compatibility between the confession and external reality (“something in addition”). However, these tests do not serve their purpose—to verify the truth of the confession. If police interrogators have extracted a confession from an innocent interrogee, it can be assumed that they would have put words in his mouth (or written down a statement themselves that they have made him sign) creating a confession with internal signs of truth and some sort of external support—even if only “light as a feather”—and that this will be sufficient. Hence, if the false confession is the result of internal factors related to the interrogee himself, then the requirement for “something in addition” is not an adequate safeguard in dealing with the risk that an innocent person may be convicted.

Even the accepted division of the Israeli trial into two phases—first, a pretrial hearing to determine the voluntariness and admissibility of the confession,<sup>80</sup> followed by the main trial, at the conclusion of which the weight of the confession is determined—operates to the detriment of the accused. It creates a tendency on the part of judges to rule confessions admissible during the pretrial phase, allowing them to rely on the second phase—the main trial—to resolve the question regarding the weight of the confession. Judicial rhetoric indicates that there is an assumption that the decision regarding admissibility is not critical, since the confession may subsequently be accorded little weight. In reality, the initial decision regarding the question of admissibility is almost always the final word. It is extremely rare that a defendant whose confession has been ruled admissible as evidence will be acquitted at trial.

Given this harsh picture regarding the possibility that innocent persons will be convicted on the basis of false confessions—a

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<sup>78</sup> CrimA. 183/78, 191/79 Abu Midjam v. Israel, 34(4) P.D. 533.

<sup>79</sup> Mordechai Kremnitzer, *Conviction on the Basis of a Confession Alone—Is There a Danger of Convicting Innocents in Israel?*, 1 HAMISHPAT 205 (1993).

<sup>80</sup> Similar to a “Jackson-Denno hearing” in American law. See Jackson v. Denno, 378 U.S. 368 (1964); MCCORMICK, *supra* note 18, at 240-41.



possibility that anyone dealing with this subject is well aware of—it is no wonder that the aforementioned Goldberg Commission<sup>81</sup> reached the unequivocal conclusion that a reform of Israeli law is required in this matter. However, unfortunately, the recommendations of the Commission<sup>82</sup> are insufficient and have not yet been adopted by the Israeli legislature.

#### IV. THE EFFECT OF THE RULES GOVERNING CONFESSIONS ON THE NATURE OF THE POLICE INVESTIGATION

Before we discuss the appropriate law for the rules governing confessions, it is essential that we address the tremendous effect—in my opinion, destructive—that these rules have on the nature of criminal investigations conducted by the police. Essentially, the police investigation following the apprehension of a suspect is mostly directed at obtaining a confession.<sup>83</sup> Furthermore, once the confession is obtained, the investigation usually ends.<sup>84</sup> My explanation for this is complicated and, briefly, as follows: *first*, the police operate under a misguided conception of the guilt of the suspect (in direct contrast to the presumption of innocence);<sup>85</sup> *second*, the confession is still considered to be particularly strong, almost conclusive, evidence;<sup>86</sup> *third*, the key measure of the success of the police (and, I am afraid, also of the success of the prosecution) and the major criterion for the promotion of investigators (and, I fear, also for the promotion of prosecutors) is still the high percentage of convictions; *fourth*, extracting a confession—

<sup>81</sup> THE GOLDBERG COMMISSION REPORT, *supra* note 23.

<sup>82</sup> The recommendations of the commission will be discussed in Part V below.

<sup>83</sup> See, e.g., Seth Goldberg, *Missouri v. Seibert: The Multifactor Test Should be Replaced with a Bright-Line Warning Rule to Strengthen Miranda's Clarity*, 79 ST. JOHN'S L. REV. 1287, 1292 (2005); HAIM COHN, *THE LAW* 475 (1992). In England, as well, a similar situation existed—at least during the period prior to the instructive Runciman Commission Report and the legislative reform enacted in the wake of its findings. See *supra* note 3, at 64.

<sup>84</sup> See Runciman Commission Report, *supra* note 3, at 64.

<sup>85</sup> Regarding this conception of the suspect's guilt whereby he deserves some sort of punishment, since (supposedly) it is unlikely that someone would be suspected of having committed a crime and be completely innocent, see the instructive description in MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 42 (Alan Sheridan trans., 1977); see also A.A.S. Zuckerman, *The Protection of the Accused from Miscarriage of Justice*, 31 ISR. L. REV. 590 (1997); Danny Ciraco, *Reverse Engineering*, 11 WINDSOR REV. LEGAL & SOC. ISSUES 41 (2001).

<sup>86</sup> In this matter, I fear that we have not progressed much since the Middle Ages. See, FOUCAULT, *supra* note 85, at 38. Regarding the modern view of the confession as very strong evidence, see DeFilippo, *supra* note 38, at 659, 664, 672-73; Julia C. Weissman, *Modern Confession Law After Duckworth v. Eagan: What's the Use of Explaining*, 66 IND. L.J. 825, 844 (1991); Goldberg, *supra* note 83, at 1292.

especially when some use of pressure is acceptable—is an easy and inexpensive approach in comparison with alternative methods of investigation;<sup>87</sup> *fifth*, the courts, which are usually not willing to exclude confessions provided that the formal *Miranda* rules are abided by,<sup>88</sup> are essentially sending a message to investigators that it is reasonable to focus on extracting confessions from suspects; *sixth*, judges, in fact, allow the police to use detention (in disgraceful conditions) or the threat of detention, as a means of exerting pressure on interrogees so that they will confess to crimes that they are suspected of having committed;<sup>89</sup> *seventh*, the confession may still be considered to possess extra-evidentiary value in addition to the excessive evidentiary value already attributed to it. Supposedly, by confessing, the accused is ritualistically accepting and submitting to all investigative and trial proceedings initiated against him, in particular, and submitting to the victorious society with which he is engaged in a duel, in general.<sup>90</sup>

Given the presumption of innocence,<sup>91</sup> it would be proper to limit the use of detention, insofar as possible, and, in the rare cases in which it is necessary, to detain suspects in conditions that are as comfortable as possible and which do not cause the detainee undue inconvenience.<sup>92</sup>

In my opinion, the frequent use of the annoying term “cooperation,” to describe the relationship between a detainee and his interrogators, is somewhat of an indication that detention is considered a legitimate tool for extracting confessions, and of the view of confessions as a key method for incriminating suspects. For some reason, a detainee is expected to “cooperate” with his interrogators

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<sup>87</sup> Regarding the influence of this factor on the manner of investigation during the Middle Ages, see FOUCAULT, *supra* note 85, at 38. Finally, in a book by John H. Langbein, I have found instructions from Middle Ages Germany regarding torture of suspects in order to extract confessions. The third direction in “The Wormser Reformation,” the code of law for the City of Worms, composed by 1498, reads as follows:

(3) How to conduct examination under torture. The law officers are instructed not to torture if there is an easier way to get at the truth; to use reason and restraint lest the investigation be worse than the crime; to try to delicit the factual details, not mere confession of guilt.

JOHN H. LANGBEIN, *PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE* 160 (1974). Have we made a significant progress since then?

<sup>88</sup> Regarding this point, see Goldberg, *supra* note 83; see also Gordon Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 HASTINGS L.J. 1, 151 (1986).

<sup>89</sup> In this last matter, we have progressed somewhat since the Middle Ages, when pressure was exerted on interrogees to confess not only through detention but also by means of torture. See, FOUCAULT, *supra* note 85, at 39.

<sup>90</sup> See the instructive description of this view during the Middle Ages in FOUCAULT, *supra* note 85, at 38.

<sup>91</sup> See Rinat Kitai, *Presuming Innocence*, 55 OKLA. L. REV. 257 (2002).

<sup>92</sup> See Kitai-Sangero, *supra* note 26. Appropriate conditions of detention should be based “on the model of country clubs.” *Rhodes v. Chapman*, 452 U.S. 337, 354 (1981).

against himself, as if he were an instrument for supplying self-incriminating evidence.<sup>93</sup>

How is it possible, therefore, to explain the frequency with which suspects make confessions to police interrogators and the frequency with which such confessions are admitted in court as evidence? For the confession is totally contrary to the interest of the suspect. It would seem that the main explanation is that conditions of interrogation and the questioning techniques that are employed deprive suspects of their ability to act rationally and, basically, entail a substantial violation of the right to remain silent and the privilege against self-incrimination, as well as an infringement of the right to dignity. It is also highly doubtful that it is possible to apply an interrogative method that focuses on obtaining confessions from suspects and, at the same time, to protect their fundamental rights. We are not just talking about torture, but also about “routine” interrogations that are supposedly conducted lawfully.<sup>94</sup>

The accepted conditions of interrogation and common questioning techniques have extremely far-reaching implications. A legal system that routinely allows defendants to be convicted solely on the basis of confessions while tolerating interrogative methods that entail the use of pressure tactics is, in effect, encouraging law enforcement officials to focus their investigative measures on the interrogee, instead of directing their efforts towards gathering other evidence. This is a phenomenon that carries grave implications for the general level of police investigations and the investigative ethos, as well as for the image and characteristics of the investigators, their education and their training. And, as long as investigations focus on the interrogees themselves, the greater the risk that illegal measures will be employed and that false confessions will continue to be elicited.<sup>95</sup>

We will now proceed to examine the desirable law regarding the weight of the confession and the additional evidence that should be required in order to verify its truth. This examination will be conducted while also keeping in mind the tremendous influence of the rules governing confessions on the nature of the police investigation.

#### V. THE WEIGHT OF THE CONFESSION—THE NEED FOR “STRONG CORROBORATION” AS A CONDITION FOR CONVICTING ON THE BASIS OF A

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<sup>93</sup> Perhaps an explanation for the expectation that the suspect will “cooperate” with his interrogators is to be found in the description by Foucault regarding the ritualistic consent and approval of the accused person to the proceedings that have been initiated against him. See FOUCAULT *supra* note 90 and accompanying text.

<sup>94</sup> Ariel Bendor, *Confessions as Evidence: Between Objects and Means*, 5 PLILIM 245, 253 (1996).

<sup>95</sup> See *Escobedo v. Illinois*, 378 U.S. 478, 488 (1964); Kremnitzer, *supra* note 79, at 215.

## CONFESSIOן

As we have seen in the previous sections of this Article, while a serious attempt has been made to deal with the fear of involuntary confessions—through *Miranda* rules and the like—Anglo-American law fails to seriously address the fear of false confessions and wrongful convictions based solely on confessions. As I have shown above, the American requirement for corroboration of the *corpus delicti* alone is insufficient, since it does not link the accused person to the offense—even if it was committed. The English requirement that the judge caution the jury is not a serious solution to the problem, since the same judge continues to instruct the jury that they may be satisfied with the confession in order to convict the defendant. Even the Israeli requirement for “something in addition” does not resolve this issue, since, if the confession is *prima facie* logical, then this additional evidence need only be “light as a feather,” which makes it ineffective in preventing the conviction of innocent persons.

The Goldberg Commission<sup>96</sup> acknowledged the fact that the existing situation is inadequate and proposed that a reform be carried out—but the recommended change is insufficient. The Commission failed to propose an unequivocal requirement for strong corroboration to a confession, recommending instead the establishment of a statutory rule stipulating that additional evidence be introduced, while giving the court the discretion to determine the required strength of such evidence in the specific case before it.

The Commission accepted a formula stating that there is an inverse correlation between the weight of the confession and the weight of the additional evidence. Thus, the lower the independent weight of the confession, the greater the weight of the additional evidence required—and the required additional evidence may even reach the level of strong corroboration. In this way, the Commission left the court with extremely broad discretion to determine for itself, on a case-by-case basis, the weight required of the additional evidence: “strong corroboration” or “something providing support” (an intermediate level) or “something in addition” (slight additional evidence).

The more I have studied this subject, the stronger my belief that any added evidentiary requirement other than “strong corroboration” should be avoided like the plague. The lower standards of additional evidence—“something in addition” and “something providing support”—represent mere lip service and do not serve their purpose, which, in my opinion, is twofold. The first objective, which is given

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<sup>96</sup> THE GOLDBERG COMMISSION REPORT, *supra* note 23.

greater emphasis in discussions of the subject, is to support the veracity of the confession; and the second objective—also very important, in my opinion—is to direct police investigators to avoid focusing solely on the interrogee in their attempt to extract a confession, but rather to investigate and search for external, objective, tangible evidence.

Strong corroboration should be defined as independent evidence derived from a source extrinsic to the source of the evidence that requires corroboration, relating to a central question upon which the trial revolves and tending to implicate the accused person in the commission of the offense.<sup>97</sup> If we return for a moment to the aforementioned analysis by McCormick,<sup>98</sup> then the corroborative evidence must relate to all three elements: (1) the occurrence of the injury or harm constituting the crime; (2) that this injury or harm was done in a criminal manner; and (3) that the accused was the person who inflicted the injury or harm. In my opinion, the emphasis should be placed on the third element, which is not required at all by American law. If there is a fear that the interrogee has made a false confession, then only independent evidence linking the accused person to the commission of the criminal offense—namely, only “strong corroboration”—can eliminate this fear.

And if the fear (and, I do have such a fear) is that—nearly two decades after the inception of the DNA revolution of the Innocence Project—judges still view the confession as the “queen of evidence,” failing to acknowledge its other role as the “empress of false confessions,” then it is clear that leaving it to the discretion of the judge to decide the necessity of strong corroborative evidence leads to the perpetuation of an already bad situation. “Bad,” since a real danger exists that innocent people will be convicted.

Many jurists and judges have been educated and have operated according to the traditional approach that views the confession as the “queen of evidence.” In light of the numerous disclosures worldwide regarding false confessions and wrongful convictions, they currently need to undergo a radical shift in mindset that entails an assimilation of the lessons to be drawn from such disclosures. It is hard to expect a

<sup>97</sup> See, e.g., CROSS & TAPPER, *supra* note 52, at 235-243; *CrimA Israel v. Yehudai*, 39(4) P.D. 197. From WOLCHOVER & HEATON-ARMSTRONG, *supra* note 65, at 24:

In English law the term ‘corroboration’ has a technical meaning. In *Baskerville* [1916] 2 K. B. 658 it was held that in order to be corroborative the evidence must be independent evidence which affects the accused by connecting or tending to connect him with the crime by confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it.

In my opinion, such a corroboration should be demanded regarding confessions.

<sup>98</sup> See the text accompanying *supra* note 42.

judge, who is used to convicting defendants (almost) solely based on their confessions, to limit his discretion, on his own, by imposing a requirement of strong corroborative evidence that has not been clearly established in legislation. In this sense, the formula adopted by the Goldberg Commission, stating an inverse correlation between the weight and force of the additional evidence necessary to support a confession and the weight and force of the confession itself, is a total failure. In other words: only when the judge believes that the confession is weak would he require significant additional evidence; and when the confession appears to be strong, the judge would continue to be satisfied with additional evidence that is “light as a feather.” However, in fact, it is when the confession appears to the judge to be strong that external corroboration is most important—in order to avoid the possibility that an innocent person will be convicted. For, when the judge believes that the confession is strong, he is certain to convict a defendant on its basis. Therefore, according to the formula proposed by the Goldberg Commission, the corroboration requirement is limited to those extremely rare cases in which it is actually unnecessary—when the judge has already decided to give little weight to the confession. And logic tells us that, in such cases, the danger of a conviction is already low. On the other hand, in the greater majority of cases—where the judge views the confession as strong and reliable evidence—additional evidence that is “light as a feather” would be sufficient to convict.

At this point, it should be noted that, contrary to the mistaken belief of many, research indicates that police investigators, prosecutors, judges and juries (and probably, all of us) are unable to distinguish between a true confession and a false confession. Thus, for example, in a study with the catchy title, “I’d Know a False Confession if I Saw One,” the following interesting findings were revealed: (1) Police investigators do not identify false confessions any better than students; the only differences are that the investigators are very sure of themselves—even when they are wrong—and that they operate under a misguided conception of the guilt of the suspect and, therefore, are biased and inclined to believe false confessions, while tending to disbelieve denials; (2) Both police investigators and students are unable to distinguish between true confessions and false confessions, so much so that, when there are an equal number of true and false confessions, the same results could have been achieved by simply flipping a coin.<sup>99</sup>

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<sup>99</sup> See 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, 29 LAW & HUM. BEHAV. 211 (2005). And see the references to additional studies with similar findings, *id.* at 212, 222. See also Leo & Ofshe, *supra* note 7, at 482 (in 73% of the cases in

Seemingly—if they were capable of distinguishing between true confessions and false confessions—it could be assumed that police investigators, prosecutors, judges and juries would “screen out” the false confessions, and convictions would only be based on true confessions. However, since this is not the case, a person should not be convicted solely on the basis of a confession, and independent, strong corroboration, linking the defendant to the crime, should be required in order to justify a conviction.

The central argument raised against the requirement for strong corroboration is that sometimes there is no corroborative evidence at all, in which case a guilty person is liable to be acquitted at trial. First of all, the reality is that there is a high rate of conviction in criminal trials; therefore, the possibility that, on occasion—very rarely, in my opinion—a guilty person would be acquitted, is not a serious threat that should cause us to lose any sleep. In a study conducted at the initiative of the English Runciman Commission, it was determined that corroborative evidence exists in the overwhelming majority of cases and that, in a considerable number of those cases where it has not been found, the police would have been capable of finding such evidence if only they had been required to do so.<sup>100</sup> It is the conviction of innocent persons that should cause us to lose sleep. The benefit of the proposed revision would be tremendous: a requirement for strong corroboration would prevent a substantial portion of the cases in which innocent persons are convicted.

Secondly, if police investigators, and the prosecutors who are supposed to guide them, knew that without strong corroboration there would be no conviction, then they would make a greater effort to conduct a proper investigation, instead of focusing on extracting confessions from suspects, in which case objective, external, tangible evidence would be found. In this day and age, given the progress of science, in general, and innovations in the field of forensic science, in particular, such evidence can and should be located. The days of the Inquisition are over, never to return.

As stated above, the police investigation following the apprehension of a suspect is mostly focused on extracting a confession. Furthermore, once the confession is obtained, the investigation usually ceases. Only a requirement for strong corroboration would effectively make it clear to investigators that their role is not limited to eliciting confessions. The individual is not a tool for supplying self-

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which accused persons were tried on the basis of a false confession, defendants were convicted); see also Ciraco, *supra* note 85, at 4-9.

<sup>100</sup> See Runciman Commission Report, *supra* note 3, at 65; see also McCONVILLE, *supra* note 66; WOLCHOVER & HEATON-ARMSTRONG, *supra* note 66, at 28.

incriminating evidence. He is not supposed to “cooperate” with his interrogators. In this matter, it would be proper to adopt the noble approach of Jewish law, whereby “a person may not incriminate himself”—at least not without strong corroborative evidence. In Jewish law, a person is (legally) incapable of incriminating himself, since the confession is inadmissible as evidence.<sup>101</sup>

Maimonides has made it clear that the confession is inadmissible as evidence due to the fear that, even if it was not made as a result of external pressure, it is still possible that internal pressure has led to a false confession.<sup>102</sup> On this subject, his eloquent words, written in a different context, are often cited: “. . . it is better and more satisfactory to acquit a thousand guilty persons than to put a single innocent man to death.”<sup>103</sup> However, in my opinion, this quote is misleading in the present context. It creates the impression that if a person were not convicted solely on the basis of his confession then the trial would result in an acquittal. This is not necessarily so. If, indeed, we are speaking about a true confession, then it is very reasonable to assume that, in the vast majority of cases, external, objective, tangible evidence would be found to sustain a conviction.

Here, it is important to remember that we are dealing with a situation in which the interrogee admits to having committed the crime. If, under normal circumstances—in the absence of a confession—it is perhaps difficult to obtain evidence, then, when a confession is obtained, it can be expected that this task is much, much easier. In such a case, the investigators could tell the confessing individual that they do not believe him (or that there is no legal way to accept his confession without corroborating evidence) and ask him to point them to objective, extrinsic evidence. In which case there are three possibilities: *first*, if this is a true confession, it is hard to believe that the true perpetrator is unable to direct investigators to extrinsic evidence (such as the weapon with which the crime was committed).

*Second*, if—despite the fact that he has confessed—the interrogee is unable to point to any corroborating evidence whatsoever, this is a

<sup>101</sup> Regarding the position of Jewish law in this matter, see AARON KIRSCHENBAUM, SELF-INCRIMINATION IN JEWISH LAW (1970); Irene M. Rosenberg & Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination*, 63 N.Y.U. L. REV. 955 (1988).

<sup>102</sup> See the quotation by Maimonides in the text accompanying *supra* note 25. Additional explanations for the rule that “a person may not incriminate himself” are: that it is “a powerful device against any attempt to extort confessions from the mouths of accused persons through means of coercion or enticement,” RABBI ADIN STEINSALTZ, MADRIKH LA-TALMUD: MUSGE YESOD VE-HAGDAROT [TALMUD FOR EVERYONE] 122 (1984) (all translations provided by author); and the danger that the court will be blinded by a confession and give it too great a weight. RABBI SHYMON SHKOP, COMMENTARY ON TRACTATE KETUBOT 18:2:5 (1956).

<sup>103</sup> MAIMONIDES, SEFER HA'MITZVOT [BOOK OF COMMANDMENTS], Negative Commandment 290 (all translations provided by author).



strong indication, in my view, that it is most probable that this is a false confession. As stated above, in one of her opinions, Israeli Justice Dalia Dorner has written that “the confession of an accused person is suspicious.”<sup>104</sup> This is a poignant remark. I would say that the confession of an accused person who is unable to point investigators to corroborating evidence is very, very suspicious, and that it is forbidden to convict a person solely on the basis of such a confession.

A *third possibility*—from the world of reality—is that the suspect confesses and then retracts his confession and, therefore, is unwilling to continue “cooperating” with investigators (against himself), so that they are deprived of the possibility that he will direct them to corroborating evidence. A confession that a suspect retracts is also, in my opinion, a suspicious confession. Thus, for example, the chances are greater that the interrogee did not give it freely and voluntarily. Therefore—without strong corroboration—a person should not be convicted on the basis of such a confession.

It should be remembered that in modern criminal law (in sharp contrast to the days of the Inquisition) we must limit convictions to those cases in which guilt is proven beyond a reasonable doubt, namely: close to one hundred percent certainty.<sup>105</sup> The very fact that it is impossible to find any tangible evidence whatsoever to prove that an individual has committed a crime (apart from his own statements, which he has even retracted) raises a reasonable doubt demanding an acquittal.

In reality, there are also cases in which the accused person claims that he never even confessed to the crime he is accused of having committed, but rather a confession has been attributed to him by a police officer or a jailhouse snitch (who may have acted despicably<sup>106</sup>), or that a particular statement that he made is being construed as a confession (and, sometimes, even his silence in the face of an accusatory statement<sup>107</sup>). Such a “confession” is also very suspicious and demands strong corroboration.

Today, as a result of the findings uncovered in recent years, the famous words of Justice Arthur Goldberg, in *Escobedo v. Illinois*,<sup>108</sup> seem more appropriate than ever: “. . . a system of criminal law enforcement which comes to depend on the ‘confession’ will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.”

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<sup>104</sup> See *supra* note 29.

<sup>105</sup> *Coffin v. United States*, 156 U.S. 432, 453, 460-66 (1895).

<sup>106</sup> See, e.g., SCHECK, NEUFELD & DWYER, *supra* note 8, at 126-57.

<sup>107</sup> See MCCORMICK, *supra* note 18, at 237-39.

<sup>108</sup> *Escobedo v. Illinois*, 378 U.S. 478, 488 (1964).

A significant advantage of the requirement for strong corroboration is that it achieves two important objectives—to verify the truth of the confession and to direct law enforcement officials to conduct a proper investigation—and this applies in all cases: when there is a fear that external pressure has been exerted on the individual who has confessed; when there is a fear that internal factors have compelled a suspect to provide a false confession; and when there is a fear that the confession results from both external pressure and internal factors.

Another proposal that remains to be addressed is that a requirement for strong corroboration be established as a general, but qualified, requirement. According to this proposal, a defendant would not be convicted on the basis of his confession unless the evidentiary material provides strong corroboration. However, in special cases, and for reasons that are to be recorded, the court may convict in the absence of corroboration and suffice with a lower standard of additional evidence.<sup>109</sup>

This is like entrusting the cat to guard the milk, albeit, with a special rule: he must not routinely drink the milk, but rather only in the rare instances when he is truly hungry. Since a conceptual change is currently required among judges, whereby, instead of viewing the confession as the “queen of evidence,” they should begin to view it as “suspicious evidence”—or, at least, as normal evidence that should not be relied on blindly, but rather treated cautiously—it is essential to adopt a requirement for strong corroboration *in all cases*, instead of granting the judge the leeway to apply an exception to the rule. For when the judge tends to believe the confession, he will be naturally inclined to rely on it even without corroboration. The confession is a type of evidence that blinds judges, who tend to attribute exaggerated weight to it.<sup>110</sup> Establishing a rule that requires strong corroboration while leaving an exception for the exercise of judicial discretion will not lead to the necessary conceptual revolution.

The reference in the aforementioned proposal to “special cases” is excessively vague. What are the “special cases” that the proposal is referring to? The examples provided in the minority position of the Goldberg Commission Report—“that the offense was committed a long time ago and its commission was not known; a manner of commission that conceals supporting signs”—do not offer a clear picture but rather

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<sup>109</sup> THE GOLDBERG COMMISSION REPORT, *supra* note 23, at 64 (the minority position of Prof. Krennitzer).

<sup>110</sup> An examination of developments over the years indicates that the excessive weight given to certain types of evidence is constantly being discovered too late. This is the case with, for instance, eyewitness testimony as well as with confessions. See Kassin, Meissner & Norwick, *supra* note 99, at 213.

leave an escape hatch, I fear, for all those cases in which the judge believes the confession but where corroborative evidence has not been presented. Furthermore, it is possible to anticipate a (tautological) argument raised by the prosecution, whereby the very fact that supporting signs have not been found shows that this is a “a manner of commission that conceals supporting signs.”

Another proposal that has been raised is to expand the definition of corroboration to also include evidence, documented through electronic means, of the fact that the accused person has provided details about the offense that could only be known by someone who participated in the commission of the crime and that he has not been fed these details by other sources.<sup>111</sup> This proposal, as well, is inadequate. First of all, such a rule continues to direct police investigators towards obtaining confessions, when our goal should be to direct them towards the search for other evidence. Second, as illustrated above, in order for it to achieve its objectives, the additional evidence must be completely independent and not derive from statements made by the accused himself. Indeed, the proposal does require that these details have not been fed to the accused by other sources. However, we can never know this for sure unless the electronic documentation is continuous from the moment that the suspect is taken into custody until he actually makes the confession (including periods of time during which he is not being interrogated—that is to say, twenty-four hours a day). And that is not all. Usually, the confession does not just come out of the blue, but is rather the result of an intricate process of “negotiation” between the interrogee and his interrogators. During the interrogation, the interrogee is absorbing much information from his interrogators—information that they are transmitting to him both consciously and unconsciously—so that it is difficult, and even impossible, to distinguish between what information has been provided to the interrogee during the interrogation and what he knew in advance.<sup>112</sup>

Finally, as to the fear underlying the proposed exception to the rule—the acquittal of guilty persons in those few cases where the confession is true and, yet, there is still no corroborating evidence—the criminal justice system already exhibits a willingness to accept the rare acquittal of guilty persons as demonstrated by the actual exclusion of confessions obtained in violation of principles such those established by the *Miranda* rules. This is a worthwhile price to pay for the important

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<sup>111</sup> THE GOLDBERG COMMISSION REPORT, *supra* note 23, at 64.

<sup>112</sup> Indeed, the Runciman Commission avoided recommending a general corroboration requirement. However, three of its members believed that such a requirement should be established and that (in the matter under discussion) the “special knowledge” of the accused person should not be sufficient. Runciman Commission Report, *supra* note 3, at 68.

goal of avoiding the possibility that innocent persons will be convicted on the basis of false confessions.<sup>113</sup>

## VI. DOCUMENTING INTERROGATIONS ON VIDEO

As Justice Louis Brandeis wrote: “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman”<sup>114</sup>

In recent years, several legal systems have established a duty to document interrogations on video, or—at the very least—to make an audio recording.<sup>115</sup> In view of the acceptability of investigative methods that focus on obtaining confessions from suspects, it is hard to exaggerate the importance of documentation on video, and of the presence of the defense attorney as an observer during the course of the interrogation.<sup>116</sup> This is especially the case if it is established in legislation that a confession not documented as required would be inadmissible as evidence in court.<sup>117</sup>

Documentation of the interrogation, in general, and of the confession, in particular, is very important. It should be remembered that both the interrogee and the abusive police interrogator have an interest in concealing the truth regarding the nature of the interrogation, each for his own reasons. First of all, documentation provides the court with a much more reliable tool for the purpose of evaluating the confession, regarding both the pressure exerted on the interrogee as well as the need to distinguish between information that was obtained from the suspect himself and information that was fed to him—whether consciously or unconsciously—by police interrogators. Second, documentation, like the presence of the defense attorney as an observer during the interrogation, has a positive influence on the manner in

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<sup>113</sup> To close this section, it should be noted that the Scottish legal system included a requirement that is close to the corroboration requirement. See Runciman Commission Report, *supra* note 3, at 62-63. However, over the years the requirement became weak. See WOLCHOVER & HEATON-ARMSTRONG, *supra* note 66, at 24-28; I. D. Macphail, *Safeguards in the Scottish Criminal Justice System*, CRIM. L. REV., Mar. 1992 at 144, 148-152.

<sup>114</sup> LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 62 (1933).

<sup>115</sup> See, e.g., regarding English law, CROSS & TAPPER, *supra* note 52, at 633. Such legislation was recently enacted in Israel. See Criminal Procedure Law (Interrogation of Suspects), 2000, S.H. 468.

<sup>116</sup> The presence of a defense attorney is already a common practice in American law, although most interrogees waive this right. See *Miranda v. Arizona*, 384 U.S. 436 (1966); *Edwards v. Arizona*, 451 U.S. 477 (1981); Rinat Kitai, *A Custodial Suspect's Right to the Assistance of Counsel—The Ambivalence of Israeli Law Against the Background of American Law*, 19 BYU J. PUB. L. 205 (2004).

<sup>117</sup> See *supra* note 115. In the absence of legislation on this matter, perhaps it is possible to apply the “Evidential Damage Doctrine.” See ALEX STEIN, *FOUNDATIONS OF EVIDENCE LAW* 167-72 (2005).

which the interrogation is conducted, and on the physical and emotional integrity as well as the self-confidence of interrogees. Third, documentation of the interrogation—along with the presence of the defense attorney—can transform the right to remain silent and the privilege against self-incrimination from mere lip service into tangible rights.<sup>118</sup>

For the sake of accuracy, the documentation of the interrogation and the confession, on video, is obviously preferable to an audio recording alone.<sup>119</sup> It allows the viewer a sort of (passive) presence during the interrogation and, in this way, the court is much more capable of discerning the truth. Such documentation also enables public scrutiny over police methods of interrogation. The experience of countries employing this practice demonstrates that the interrogator—who is aware that the interrogation is to be fully recorded—is better prepared for the interrogation, the quality of which is improved as a result.<sup>120</sup>

Indeed, I myself strongly support the documentation of interrogations and the requirement that a defense attorney be present during the course of the interrogation, as described above. However, I have reached the conclusion that there is also a danger in the excessive enthusiasm with which documentation is currently received—by academics as well as by law enforcement officials—as if it provides a complete answer to the problem of wrongful convictions based on false confessions, rendering other solutions, in general, and the requirement for strong corroboration, in particular, unnecessary. First of all, documentation does not give us any indication as to whether or not the confession is true. At most, it can demonstrate that the interrogee was not abused when he made his statements. But what if the false confession was motivated by internal, rather than external, factors? The problem remains unresolved. Sufficing with documentation while waiving the requirement for strong corroboration would indeed prevent some wrongful convictions based on false confessions, but it would also strengthen other false confessions, thus ensuring some wrongful

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<sup>118</sup> Regarding additional support for documenting interrogations, see Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 681-82 (1996) (arguing that “substantive due process requires that we legally mandate the electronic-recording of custodial interrogations in all felony cases.”).

<sup>119</sup> The most frequent excuse raised by the police in their traditional opposition to documentation is a lack of funds. However, in this day and age, video equipment is no longer expensive. Furthermore, despite the necessary budget, savings can be expected as a result of a reduction in the need for legal hearings to decide the question of the voluntariness of the confession. Finally, it is not necessary to transcribe the entire interrogation from its outset, but rather sufficient to transcribe only the confession and make the recording of the whole interrogation available to the defense attorney.

<sup>120</sup> THE GOLDBERG COMMISSION REPORT, *supra* note 23, at 32.



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requirement with the power to generate a truly positive change and to significantly reduce the terrible danger that innocent persons will be convicted on the basis of their confessions: “strong corroboration”—objective, tangible and significant evidence extrinsic to the accused person, linking him to the commission of the crime.