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Jenny McEwan

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JENNY MCEWAN*

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To some observers, the attitude of the law of England and Wales towards illegally obtained evidence represents a sensible and practical compromise between two moral positions; to others, a dangerous moral incoherence. Whichever view is adopted, it is clear that the existing approach offers little in the way of guiding principle. In a major recent case the highest appeal courts were presented with a set of difficult questions to which existing precedent supplied no clear answer.

In *A v. Secretary of State for the Home Department*, a number of appellants objected to a series of decisions by the Home Secretary that appellants should be refused entry to the country, detained on the

* Professor of Criminal Law, University of Exeter, United Kingdom.

grounds that they were suspected of terrorism, or both.[1] The appellants claimed that the evidence against them had been obtained by torture, not of themselves, but of other suspects held and interrogated in a variety of countries around the world.[2] Such denunciations were, they argued, unreliable and inadmissible as evidence.[3] Nevertheless, the Special Immigration Appeals Tribunal (SIAC), whose function was to decide each case ab initio rather than consider the reasonableness of the minister's decision, relied partly on the disputed evidence.[4] The minister's decisions were upheld.[5] The appeals from the SIAC involved a number of awkward but intriguing issues: the initial decision had been taken as part of an executive, rather than a judicial, function; no criminal court had been involved; the courts were not being asked to consider a confession made by a defendant in a trial; and any improprieties in investigations were not attributable to agents of the government.[6]

The Court of Appeal held that although for the State to take advantage of such actions by its own servants would be an abuse of process, this was not the case in relation to the transgressions of agents of other states.[7] The House of Lords disagreed.[8] To Lord Bingham, the argument was not about the law of evidence but of constitutional principle.[9] Lord Bingham stated, "English common law has regarded torture and its fruits with abhorrence for over 500 years, and that abhorrence is now shared by over 140 countries which have acceded to the Torture Convention."[10] Evidence so obtained is "unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice."[11] However, information extracted by torture could legitimately inform police investigation or other executive activity. The difference between the two functions is not entirely clear. Lord Nicholls noted that in particular circumstances executive action can have at least as significant an impact upon an individual as prosecution in the criminal court; for example, deportation could have long-term consequences for the subject.[12] Yet, with ever-

1. [2004] EWCA (Civ) 1123, (2005) 1 W.L.R. 414, 414, *rev'd*, [2005] UKHL 71, [2006] 2 A.C. 221 (H.L. 2005) (appeal taken from U.K.).
2. *Id.* at 414.
3. *Id.* at 443.
4. *Id.* at 434, 441.
5. *Id.* at 419.
6. *Id.* at 414.
7. *Id.* at 415.
8. A v. Sec'y of State for the Home Dep't (No 2), [2005] UKHL 71, [2006] 2 A.C. 221 (H.L. 2005) (appeal taken from U.K.).
9. *Id.* at 270 (Lord Bingham).
10. *Id.* at 269.
11. *Id.* at 270.
12. *Id.* at 277 (Lord Nicholls).

deepening rhetoric, he made the case for a distinction between the two processes. It would be "absurd," he argued, to reject evidence obtained by torture if it might save lives:

> If the police were to learn of the whereabouts of a ticking bomb it would be ludicrous for them to disregard this information if it had been procured by torture. No one suggests the police should act in this way. Similarly, if tainted information points a finger of suspicion at a particular individual: depending on the circumstances, this information is a matter the police may properly take into account when considering, for example, whether to make an arrest.
>
> In both cases the executive arm of the state is open to the charge that it is condoning the use of torture. So, in a sense, it is. The government is using information obtained by torture. But in cases such as these the government cannot be expected to close its eyes to this information at the price of endangering the lives of its own citizens.[13]

However, once the decision falls under the review of a court of law, "the honour of our courts and our country" becomes an issue.[14] Although the decision to deport or detain may have been an executive one at the outset, the scrutinizing role of the SIAC was a judicial function. The tribunal may not allow tainted evidence to inform its proceedings, only partly because it is unreliable. Lord Hoffmann declared that the use of torture is dishonourable: "It corrupts and degrades the state which uses it and the legal system which accepts it."[15] Lord Hope cited Justice Jackson's dissenting opinion in *Korematsu v. United States*: "[O]nce judicial approval is given to such conduct, it lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[16] Since the purpose of the rule is not to discipline the agents of the State but to "uphold the integrity of the administration of justice," it is irrelevant that in the present case the agents of a different state were involved.[17]

13. *Id.* at 276.
14. *Id.* at 282 (Lord Hoffmann).
15. *Id.* at 279.
16. *Id.* at 287 (Lord Hope) (citing Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting)).
17. *Id.* at 281 (Lord Hoffmann).

I. THE BACKGROUND

Confession evidence in criminal trials falls within territory competed over by a large number of possibly incompatible interests, including the human rights of the suspect and the protection of society. It has been said that the law considers reliability the most important requirement of confession evidence.[18] While the common law recognized that confessions obtained through coercion or promise of benefit were of little evidential value, English courts have done little in order to ensure the reliability of confession evidence and verdicts founded on confession evidence. At the same time, the elaborate structure of the Police and Criminal Evidence Act 1984 (PACE), and the Codes of Practice issued under its aegis, prompt the question of how the scheme for the regulation of police investigation is to be enforced.[19] Courts in England and Wales appear to regard the use of exclusionary rules of evidence to deter the police from unlawful practices as a separate, and less acceptable, matter from excluding evidence in order to preserve the moral integrity of the criminal justice system itself.

II. DISCIPLINING THE POLICE

The Phillips Report rejected the argument that it was necessary to exclude unlawfully obtained evidence as a sanction against improper police conduct.[20] The intended result would be best achieved by "contemporaneous controls and good supervision" and "effective arrangement for the investigation of complaints against the police," plus the usual civil remedy.[21] Judges have been consistent in their emphasis that deterrence of unlawful conduct is not an appropriate role for the rules of evidence. For example, in *R v. Mason*, police officers falsely told the defendant while he was being questioned that his fingerprints had been found on a piece of glass from the bottle used to start the fire under investigation.[22] They told his solicitor the same lie.[23] Lord Justice Watkins insisted that although the evidence should be excluded, it was no role of the court to

18. CRIMINAL LAW REVISION COMMITTEE, EVIDENCE (GENERAL) 11TH REPORT, 1972, Cmnd. 4991, at 35, para. 56. Mirfield suggests that the more extreme examples of exclusion of perfectly reliable confessions at common law were the result of a preference for generalized principles rather than scrutiny of the facts of each case. PETER MIRFIELD, CONFESSIONS 62 (1985).

19. Police and Criminal Evidence Act, 1984.

20. ROYAL COMMISSION ON CRIMINAL PROCEDURE, REPORT, 1981, Cmnd. 8092.

21. *Id.* at para. 4.118–4.119.

22. R v. Mason, (1987) 3 All E.R. 481, 481.

23. *Id.*

discipline the police; nevertheless, he thundered, "[W]e think we ought to say that we hope never again to hear of deceit such as this being practised on an accused person, and more particularly possibly on a solicitor."[24] Arguments are couched in terms of reliability or fairness rather than of discipline or deterrence. In *R v. Quinn*, Lord Lane C.J. said:

> [T]he function of the judge . . . is to protect the fairness of the proceedings. Normally proceedings are fair if a jury hears all the relevant evidence which either side wishes to place before it, but proceedings may become unfair if, for example, one side is allowed to adduce relevant evidence which the other side cannot properly challenge or meet, or where there has been an abuse of process, *e.g.* because evidence has been obtained in deliberate breach of procedures laid down in an official code of practice.[25]

Perceptionis of fairness, however, may be changing. In *Mason*, the confession was excluded under section 78 of PACE, which gives the court discretion to exclude if it considers that the admission of the evidence would have an adverse effect on the fairness of the proceedings.[26] Here the burden rests on the defense to convince the court that potential unreliability should prevent the confession from being admitted into evidence. The unfairness arose principally because, as a result of the deception, Mason's solicitor advised Mason to explain himself to the police, and therefore his right to silence was undermined.[27] The Court of Appeal considered that the function of the solicitor in the police station is ultimately to remind the suspect of his rights, and in particular of the right to silence.[28] A legal advisor who is misled cannot exercise this role. However, the right to silence itself has since been undermined by Parliament, through the provisions of the Criminal Justice and Public Order Act 1994, casting doubt on the reasoning in *Mason*.[29] The usefulness of access to legal advice on arrest is now a matter of debate. The case law on these provisions has produced the following situation: where the legal advisor recommends silence, failure to respond may

24. *Id.* at 485.
25. R v. Quinn, [1990] Crim L.R. 581, 583. *Cf.* Lam Chi-ming v. R, [1991] 2 A.C. 212, 222 (P.C. 1991) (appeal taken from H.K.) (Lord Griffith) ("[I]t would make a grave inroad upon [the privilege against self-incrimination] if the police were to believe that if they improperly extracted admissions from an accused which were subsequently shown to be true they could use those admissions against the accused for the purpose of obtaining a conviction.").
26. *Mason*, (1987) 3 All E.R. at 481.
27. *Id.* at 483, 484.
28. *Id.*
29. Criminal Justice and Public Order Act, 1994, §§ 34–37 (Eng.).

nevertheless be taken as evidence of guilt, if the advice was not the primary reason for the silence. Thus, if the reason for the silence is, in the opinion of the finder of fact, that the defendant had no answer because he is guilty, an inference of guilt may be drawn.[30] If the solicitor explains to the trial court the reason for his advice, such as that the police did not disclose their evidence to him at the interview, he waives his lawyer-client privilege and may be asked questions about admissions his client made to him.[31]

Hence it may no longer be possible to regard the right to silence as a key element in the fairness of the investigative process leading to trial. Fairness is, in any event, an elusive concept. The jurisdiction of England and Wales has, like the United States, generated its own case law on fairness in terms of "virtue-testing," where government agents offer inducements to commit crime.[32] In some of the English cases, the importance of the reliability of evidence is stressed, but the spectre of crime, which is truly state-created, produces sufficient outrage to suggest that a case should be stayed for abuse of process.[33] Despite the vagueness of the fairness principle, in *A v. Secretary of State for the Home Department* the House of Lords stressed that the fairness of process, rather than the deterrence of illegitimate methods of interrogation and investigation, is the courts' primary concern.[34] Hence it was not significant that any torture employed at any stage had occurred outside the United Kingdom.

III. RELIABILITY?

The provisions of PACE itself clearly envisage the exclusion of confession evidence even where it is entirely reliable. Section 76A(2)(b)[35] provides that a court must exclude a confession that was or may have been obtained by oppression or "in consequence of anything said or done which was likely . . . to render unreliable any confession which might be made by him in consequence thereof," unless the prosecution proves to the court beyond reasonable doubt that "the confession, notwithstanding

30. R v. Condron, (1997) 1 W.L.R. 827, 827; R v. Beckles, [2004] EWCA (Crim) 2766, (2005) 1 All E.R. 705, 718–19.

31. R v. Bowden, (1999) 4 All E.R. 43, 48.

32. *E.g.*, Jacobson v. United States, 503 U.S. 540 (1992); Hampton v. United States, 425 U.S. 484 (1976); United States v. Russell, 411 U.S. 423 (1973); Sorrells v. United States, 287 U.S. 435 (1932).

33. Attorney General's Reference (No 3 of 1999), [2001] 2 A.C. 91 (H.L. 2000) (appeal taken from U.K.).

34. [2005] UKHL 71, [2006] 2 A.C. 221, 228, 233 (H.L. 2005) (appeal taken from U.K.).

35. Section 76A deals with confessions by the co-accused.

that it may be true, was not obtained as aforesaid."[36] There have been cases where it has become clear that the confession was indeed true, as where an accused admitted guilt at the voir dire held to ascertain the admissibility of the confession.[37] Here, neither the confession nor the admission of guilt at the voir dire is admissible. In *R v. Brophy*, the House of Lords argued that to allow the admission of guilt made in the absence of the jury to be given in evidence at the substantive trial would curtail the freedom an accused person ought to enjoy to give evidence at the voir dire of any improper means used by the police during questioning.[38] This principle was applied to the question of cross-examining the accused on discrepancies between what was said at the voir dire and subsequent testimony during the substantive trial.[39] In *Wong Kam-Ming v. The Queen*, it was held that prosecution counsel can take no advantage from an admission of guilt at the voir dire.[40]

The Criminal Law Revision Committee argued that reliability was the dominant common law principle; hence, evidence discovered as a result of a confession obtained by threats or promises should be admissible, even though the confession itself was not.[41] The common law position was restated in section 76A(4) of PACE: "The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence . . . of any facts discovered as a result of the confession."[42] The provision echoes the decision in *R v. Warwickshall*, where the defendant made an inadmissible confession that indicated that stolen goods were to be found in her bed.[43] They were indeed found there, and the evidence that they had been was held to be admissible.[44] The moral ambivalence of *Warwickshall* and section 76 of PACE has practical consequences which are probably becoming more significant with advances being made in forensic science. Physical evidence obtained from an inadmissible confession will not in every case be discovered in a

36. Police and Criminal Evidence Act, 1984, c. 60, § 76A(2)(b).
37. *See, e.g.*, Wong Kam-Ming v. The Queen, [1980] A.C. 247 (P.C. 1978) (appeal taken from H.K.); R v. Brophy, [1982] A.C. 476 (H.L. 1981) (appeal taken from N. Ir.).
38. [1982] 2 A.C. at 481. This argument, however, was held not to apply if the admissions made at the voir dire are entirely gratuitous, such as when they are made out of bravado. *Id.*
39. *Wong Kam-Ming*, [1980] A.C. at 248.
40. *Id.* at 247–48.
41. CRIMINAL LAW REVISION COMMITTEE, *supra* note 18, at 35, para. 56.
42. Police and Criminal Evidence Act, 1984, c. 60, § 76A(4).
43. (1783) 1 Leach 262, 263, 168 Eng. Rep. 234, 234.
44. *Id.*

location connected with the defendant and thereby incriminate him. But as DNA collection and matching becomes more sophisticated, links between that evidence and the defendant are becoming easier to establish. There is an incentive for the unscrupulous investigator to extract information from the suspect using illicit methods of interrogation.

Clearly, the issues of fairness and the moral integrity of the criminal justice system are complex ones. For a confession remains inadmissible notwithstanding that the facts appear to confirm it as accurate. Under *Warwickshall*, and now section 76A(5) of PACE, the court may not be told even in general terms that the defendant had indicated where the incriminating articles might be found.[45] An ambivalent attitude to reliability may be perceived in that, while courts will exclude improperly obtained confessions notwithstanding that they are true, surprisingly little attention is paid to the accuracy of verdicts reached on the basis of confession evidence. English law has made few concessions to the results of research into the psychology behind an innocent person confessing to the police. Although it is clear that the experience of being held on arrest and questioned by police is inevitably intimidating and stressful,[46] courts seem to have little sympathy for defendants who cannot cope.[47] The confession will not necessarily be excluded from evidence. Section 76A(2)(b) of PACE applies only when something was "said or done" to the suspect that could have rendered the confession unreliable; therefore, a confession obtained in consequence of anxiety alone or even illness falls outside its scope, unless the police have behaved improperly.[48] A defense argument that such a confession should be excluded, therefore, can be made only under section 78 of PACE.[49]

The discretionary nature of section 78 of PACE inevitably renders trials somewhat unpredictable. We see similar cases producing different results in *R v. Kilner* and *R v. McKenzie*.[50] In *Kilner*, the defendant had a low IQ, epilepsy, and became hysterical when he found himself in difficulties.[51] There had been no misconduct by the police, but the

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45. Police and Criminal Evidence Act, 1984, c. 60, § 76A(5). It is possible that an officer witness might try to suggest a connection between an inadmissible confession and the discovery of physical evidence by close juxtaposition of the two in his testimony, as in, "I interviewed the defendant. I immediately proceeded to the churchyard and dug underneath the third tree on the left."

46. *See, e.g.*, BARRIE IRVING & LINDEN HILGENDORF, POLICE INTERROGATION: THE PSYCHOLOGICAL APPROACH 28–34 (1980).

47. *See, e.g.*, R v. Fulling, [1987] Q.B. 426 (C.A. 1987).

48. Police and Criminal Evidence Act, 1984, c. 60, § 76A(2)(b); R v. Goldenberg, (1989) 88 Crim. App. 285.

49. Police and Criminal Evidence Act, 1984, § 78.

50. R v. Kilner, [1976] Crim. L.R. 740; R v. McKenzie, (1993) 1 W.L.R. 453.

51. [1976] Crim. L.R. 740, 740.

confession was not admitted in evidence.[52] In contrast, the trial judge in *McKenzie* did not exclude the defendant's confession under section 78 of PACE.[53] McKenzie had been arrested on suspicion of arson, which he duly admitted in his interview.[54] Unprompted, he then went on to confess to twelve murders, ten of which the police did not believe he had committed.[55] He was nevertheless tried for the remaining two murders although there was no other evidence to implicate him.[56] On hearing the confession evidence, the jury convicted him of manslaughter.[57] The defense appealed.[58] In the Court of Appeal, Professor Gudjonsson gave expert evidence to the effect that the defendant, who was thirty-eight years old, had an IQ of between 73 and 76 and had a guilt obsession due to having been sexually abused as a child.[59] The defendant had a suggestible and compliant personality of a kind to undermine the reliability of confessions made.[60] McKenzie's manslaughter convictions were quashed.[61]

The Court of Appeal considered that the confessions to murder should have been excluded under section 78 of PACE, but went further in declaring that in any trial where the prosecution case rests wholly upon a confession made by a defendant who suffers from a significant degree of mental handicap and the confession is unconvincing to the point where a properly directed jury could not properly convict upon it, the judge should exclude the confession, and in view of the lack of any other evidence of guilt, stop the case altogether.[62] Expert evidence on the reliability of the confession will be heard in relation to defendants with a personality disorder or learning difficulties.[63]

In Gudjonsson's typology of a false confession, a confession which is unprompted and entirely false, as were at least some of McKenzie's

52. *Id.*
53. (1993) 1 W.L.R. at 454.
54. *The Practitioner: NLJ Law Reports—R v. McKenzie*, 142 NEW LAW JOURNAL 1162 (1992).
55. *Id.*
56. *Id.*; GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY 243 (1992); *McKenzie*, (1993) 1 W.L.R. at 454, 455.
57. *The Practitioner*, *supra* note 54, at 1162; GUDJONSSON, *supra* note 56, at 245–46; *McKenzie*, (1993) 1 W.L.R. at 453.
58. *McKenzie*, (1993) 1 W.L.R. at 454.
59. *The Practitioner*, *supra* note 54, at 1162; GUDJONSSON, *supra* note 56, at 244.
60. *The Practitioner*, *supra* note 54, at 1162.
61. *McKenzie*, (1993) 1 W.L.R. at 455.
62. *Id.*
63. R v. Ward, (1993) 2 All E.R. 577, 578.

admissions of murder, is "voluntary."[64] Highly publicized crimes are usually the target for voluntary confessions.[65] For example, "[w]hen Charles Lindberg's baby was kidnapped and murdered in 1932, more than 200 people offered unsolicited confessions."[66] This kind of behaviour may be motivated by a desire for notoriety, or to relieve a general feeling of guilt, or may reflect an inability to distinguish fact and fantasy.[67] Judith Ward claimed to be a member of the Irish Republican Army (IRA), and drew the attention of police officers to this supposed connection every time she got the opportunity.[68] In the aftermaths of IRA bombings she was sometimes to be found at the scene screaming abuse at the police.[69] She confessed to planting a bomb that blew up a coach on a motorway.[70] At her trial, she claimed that she could not remember making the admission, and that in any event it was not true.[71] She was nevertheless convicted, and spent several years in prison.[72] Her appeal against conviction was allowed, partly because of expert testimony that she was a hysteric, unable to distinguish fantasy from reality.[73]

The majority of false confessions, according to Gudjonsson, are "coerced-compliant," motivated by the desire to escape from a highly stressful situation.[74] The immediate gain, frequently nothing more than the need to establish some short-term certainty of future events, becomes a more powerful influence on the subject's behaviour than the more uncertain long-term effects of the confession, even if the allegation concerns a serious offense.[75] Wagenaar also found that false confessions commonly involve the suspect taking an apparently easy way out, not anticipating the long-term consequences, perhaps thinking it will be possible to retract later.[76] Other instances include suspects having to take the only way out because the pressure means they simply cannot carry on, and suspects simply being outwitted by the questioner—a likely

64. Gisli H. Gudjonsson & James MacKeith, *Retracted confessions: legal, psychological and psychiatric aspects*, 28 MED. SCI. & L. 187, 190 (1988).
65. Gisli H. Gudjonsson, *The Psychology of False Confessions*, 57 MEDICO-LEGAL J. 93, 101 (1989).
66. SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 89, 89 (1988).
67. Gudjonsson & MacKeith, *supra* note 64, at 190.
68. *Ward*, (1993) 2 All E.R. at 582–84, 587–88.
69. *Id.* at 584.
70. *Id.* at 587, 589.
71. *Id.* at 583.
72. *Id.* at 577.
73. *Id.* at 577, 578, 637.
74. GUDJONSSON, *supra* note 56, at 227.
75. Gudjonsson & MacKeith, *supra* note 64, at 191; Gudjonsson, *supra* note 65, at 101.
76. WILLEM A. WAGENAAR, PETER J. VAN KOPPEN & HANS F.M. CROMBAG, ANCHORED NARRATIVES: THE PSYCHOLOGY OF CRIMINAL EVIDENCE 109 (1993).

enough event in the atmosphere of police custody, which inflicts a form of sensory deprivation.[77] A third category of confession in the Gudjonsson typology is "coerced-internalised."[78] People who do not trust their own memory may begin to accept the suggestions of the police and become temporarily persuaded that they might have, or did indeed, commit the crime. Gudjonsson and MacKeith argue that interrogative suggestibility and compliance are enduring psychological characteristics relevant to erroneous testimony.[79] During police questioning, such traits may cause false admissions to be made, and these could form the basis of a conviction. Suggestibility is a tendency to accept uncritically information communicated during questions.[80] It is greatest in people of low intelligence.[81]

McKenzie provides a small safeguard against a false confession leading to a miscarriage of justice. The decision applies only where there is no other evidence to suggest that the confession is true.[82] Numerous cases where a false confession appeared to be confirmed by circumstantial or other evidence linking the suspect to the crime, some of which are described in Gudjonsson's book, suggest that it is relatively easy to find "supporting" evidence.[83] It is worrisome that courts do not appear to feel obliged to stop the case if, for example, this supporting evidence consists of no more than the level of detail in the confession. In *R v. Bailey* the suspect suffered from a serious learning disability.[84] She confessed to a friend, and then to police, that she was responsible for a fire in which an elderly woman died.[85] There was no appropriate adult[86] present at her interview with the police, who were not aware of Bailey's disability.[87] She later retracted the confession she had made to the police, but then confessed again in the presence of a solicitor and a social worker.[88] The prosecution

77. *Id.*
78. GUDJONSSON, *supra* note 56, at 228.
79. Gudjonsson & MacKeith, *supra* note 64, at 190.
80. *Id.*
81. WAGENAAR ET AL., *supra* note 76, at 110.
82. R v. McKenzie, (1993) 1 W.L.R. 453, 455.
83. Such as the notorious cases of the "Guildford Four" and the "Birmingham Six." GUDJONSSON, *supra* note 56, at 260–73.
84. *Special Jury Warning Required: Law Report R v. Bailey*, THE TIMES, Jan. 26, 1995, at 38, *available at* 1995 WLNR 4305364.
85. *Id.*
86. *Id.* The presence of an appropriate adult is a PACE Code of Practice requirement in relation to vulnerable suspects. Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, 2005, para. 11.15 (Eng.).
87. *Special Jury Warning Required*, *supra* note 84, at 38.
88. *Id.*

was allowed to go forward, despite the evidence of a learning disability, on the ground that she displayed such remorse and the later confession contained so much detail that the jury should consider it.[89]

Should the court decide that a particular confession is admissible, the defense is nevertheless entitled to put it to the finder of fact that the circumstances in which it was made render it so unreliable that it should be discounted.[90] To this end they may call on expert evidence as long as the accused does not occupy the category of the "normal" individual, whose likely reaction to interrogation the magistrates or jurors are apparently entirely capable of assessing for themselves.[91] Expert evidence on the reliability of the confession is allowed for defendants with a personality disorder or learning difficulties, but the judgment in *R v. Ward* refers to personality disorders "so severe as properly to be categorised as mental disorder[s]."[92] Moreover, even if expert evidence is heard in such a case, the jury should be directed that they do not have to accept it.[93] If a confession is allowed to go to the jury, there is a substantial risk that they will disregard the expert evidence and convict. The intuitive notion that confessions are strong evidence of guilt is difficult to dispel. Acquittals following confession evidence are rare.[94] Although mock jurors are likely to disregard confessions obtained after threats of violence from the police, they tend to act on those obtained in response to an offer of leniency, even if given an explanation of the relationship between hopes of advantage and involuntariness in law.[95]

In Scotland and Holland, as in many United States jurisdictions, no one can be convicted on the strength of a confession alone. Although the psychological literature appears to establish clearly that confessions are not reliable indicators of guilt, criminal justice systems rely heavily upon them. French legal culture does not recognise the psychology of false confessions at all.[96] Other systems are reluctant to change their practice.

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89. *Id.*

90. Wong Kam-Ming v. The Queen, [1980] A.C. 247, 248, 259 (P.C. 1978) (appeal taken from H.K.).

91. R v. Ward, (1993) 2 All E.R. 577, 639–41.

92. *Id*. at 641.

93. *Expert Evidence on Those Who Make False Confessions: Law Report R v. O'Brien*, THE TIMES, Feb. 16, 2000, at 25, *available at* 2000 WLNR 3122803.

94. JOHN BALDWIN & MICHAEL MCCONVILLE, CONFESSIONS IN CROWN COURT TRIALS: RESEARCH STUDY NO. 5, at 19 (1980); Ralph Underwager & Hollida Wakefield, *False Confessions and Police Deception*, 10 AM. J. OF FORENSIC PSYCHOL. 49, 54–55 (1992).

95. Saul M. Kassin & Lawrence S. Wrightsman, *Confession Evidence*, *in* THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 67, 84–85, 87 (Saul M. Kassin & Lawrence S. Wrightsman eds. 1985).

96. Jacqueline Hodgson, *Codified Criminal Procedure and Human Rights: Some Observations on the French Experience*, 2003 CRIM. L. REV. 165, 178.

Wagenaar argues that this is because confessions intuitively appear to be reliable.[97] Also, there is often a good fit between the prosecution narrative and the confession. Yet, that may be because the police are employing the narrative at the time they decide whom to interview. Denials will be disregarded because they do not fit. In Wagenaar's study, seven disputed confessions were retracted, but were treated as if their diagnostic value was as high as before the retractions.[98] He concludes:

> To beat the confession, the retraction needs to be a narrative containing at least *three* components or sub-stories: (a) one which explains why the initial confession was made although being false; (b) one offering a likely alternative suspect and explaining why that other person did it and/or why the suspect himself could not have done it, and (c) one that explains why the prosecution's story, that the defence counsel persuaded the defendant to retract his confession, is not true.[99]

Most retractions fail all three criteria.[100]

IV. NO MATTER HOW POISONED THE TREE

When *A v. Secretary of State for the Home Department* came before English judges, they had little to guide them but the ambiguous and contradictory legal approach of criminal courts to improperly obtained confession evidence.[101] Despite Lord Bingham's declaration that the issue before the House of Lords was a matter of constitutional principle rather than of the law of evidence, their Lordships' decision bears a remarkable resemblance to the latter body of doctrine.[102] Despite the abhorrence shown for five hundred years by English law for torture "and its fruits,"[103] there was no enthusiasm amongst some of their Lordships to exclude physical evidence obtained in consequence of an inadmissible confession, no matter how brutal the method of interrogation:

97. WAGENAAR ET AL., *supra* note 76, at 114.
98. *Id.* at 112, 114.
99. *Id.* at 114.
100. *Id.*
101. [2005] UKHL 71, [2006] 2 A.C. 221 (H.L. 2005) (appeal taken from U.K.).
102. *Id.* at 270.
103. *Id.*

> As for the rule that we do not necessarily exclude the "fruit of the poisoned tree," but admit relevant evidence discovered in consequence of inadmissible confessions, this is the way we strike a necessary balance between preserving the integrity of the judicial process and the public interest in convicting the guilty.[104]

Although section 76A(4) of PACE did not apply to the case, and arguably neither did the common law, Lord Hoffman at any rate would be content to follow *Warwickshall* and allow into evidence, before any court or tribunal, evidence obtained as a result of torture.[105] Shunning the dangerously thin air of the highest of moral high grounds, Lord Hoffman considered such physical evidence not only reliable, but conveniently, not to "carry enough of the smell of the torture chamber to require its exclusion."[106] Whether such views are supported by other members of the House is not clear; the common law has yet to decide whether fairness to the accused, or the need to protect the moral integrity of the state, prevents us from taking advantage of the indirect fruits of torture.

104. *Id.* at 280 (Lord Hoffmann).
105. *Id.*
106. *Id.*