Truth . . . that is all ye need to know:

THE LEGACY OF REGINA v. WRAY

D. W. ROBERTS*

Vancouver

Few areas of criminal law are as productive of controversy, at trial and on appeal, as that concerned with confessions and the rules as to their admissibility. And that controversy involves much more than specific questions about whether a statement made by an accused was inculpatory or exculpatory, a question now of no moment,[1] or whether it was freely or voluntarily made, or finally whether or not it was made to a person in authority. Until recently, at least, that controversy and concomitant uncertainty, extended to the very rationale of the exclusionary rule, that is, the basis for excluding confessions made in unacceptable circumstances.

The law is of course well established that confessions must be voluntary before they are admissible in evidence. But although voluntary has generally been accepted by our courts to mean "that it [the statement] has not been obtained from him [the accused] either by fear of prejudice or hope of advantage exercised or held out by a person in authority",[2] a number of cases, in Canada as well as elsewhere, (which are later discussed in this article) have held, or would appear to have held, that a judge may exercise a discretion to exclude a confession even though not induced by threats or promises in the special sense stated by Lord Sumner in *Ibrahim* v. *R.*,[3] as quoted above. That the latter view or line of cases would seem to rest on a different rationale than that underlying the voluntary aspect of the exclusionary rule would seem obvious. Yet, although the courts have seldom examined the shape and form of these underlying principles, case by case they have been determined none the less culminating in the recent decision of the Supreme Court of Canada in *R.* v.

* D. W. Roberts, of the Faculty of Law, University of British Columbia and of the British Columbia Bar, Vancouver.

[1] *Piche* v. *The Queen* (1970), 11 D.L.R. (3d) 700, [1970] 4 C.C.C. 27, 12 C.R.N.S. 102 (S.C.C.).

[2] *Ibrahim* v. *The King,* [1914] A.C. 599, at p. 609 (P.C.).

[3] *Ibid.*

Wray.[4] In the majority judgment of Mr. Justice Martland in that case there is no direct reference to the rationale of the confession-exclusionary rule, but a conclusion on that subject, as will be argued, is logically inescapable.

Before examining that conclusion and its implications for Canadian criminal law it would be useful to take as a starting point the articulation of the principles for excluding confessions developed in cases, texts and treatises both in Canada and elsewhere. Against that background the impact of *Wray* will be more clearly appreciated.

I. *Principles of Exclusion.*

The most frequently asserted principle upon which a confession is treated as sometimes inadmissible is that "under certain conditions it becomes untrustworthy as testimony".[5] In fact Professor Wigmore liked that principle well enough to maintain that "exclusion is not correctly rested on certain other possible and occasionally plausible theories".[6] He then went on to state unequivocally that "a confession is not excluded because of any illegality in the method of obtaining it or in the speaker's situation at the time of making it",[7] and that "a confession is not rejected because of any connection with the *privilege against self incrimination*".[8]

That Wigmore should fail to appreciate the extension of constitutional privileges in the United States to pre-trial investigation and interrogation, as advanced by *Escobedo* v. *State of Illinois*[9] and *Miranda* v. *State of Arizona*,[10] is certainly understandable. But it is curious that in regard to the evidentiary rules as they then were that he should rest exclusion of confessions on the narrow ground of untrustworthiness alone—curious because not all the cases supported him and because in strictness of theory the rationale of untrustworthiness was not immune to challenge.

Certainly most judges when they do refer to the rationale of the exclusionary rule refer only to the "unreliability" of a confession that is involuntarily obtained.[11] As Cross, on *Evidence*,

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[4] (1970), 11 D.L.R. (3d) 673, (1970), 11 C.R.N.S. 235, [1970] 4 C.C.C. 1.

[5] Wigmore, On Evidence (3rd ed., 1940), Vol. III, p. 246.

[6] *Op. cit., ibid.*, p. 248.

[7] *Op. cit., ibid.*, p. 249.

[8] *Op. cit., ibid.*

[9] (1964), 84 S. Ct. 1758 (U.S.S.C.).

[10] (1966), 86 S. Ct. 1602 (U.S.S.C.).

[11] See *e.g. R.* v. *Viau* (1898), 7 Que. Q.B. 362 (C.A.); *R.* v. *Doyle* (1886), 12 O.R. 347; *R.* v. *Todd* (1901), 13 Man. R. 364, 4 C.C.C. 514 (C.A.); *R.* v. *Benjamin* (1917), 53 Que. S.C. 160, 32 C.C.C. 191, 41 D.L.R. 388. These cases, and countless others, are in accord with this observation by Pollock C.B., in *R.* v. *Baldry* (1852), 2 Den. C.C. 430,

has put it "undoubtedly the possibility that a confession which was not voluntary would be untrue has been uppermost in the mind of the judges".[12] The result of this concern, together with other concerns to be mentioned later, was the positive rule of English criminal law expressed by Lord Sumner in *Ibrahim*:[13]

> . . . no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear or prejudice or hope of advantage exercised or held out by a person in authority.

In Canada, Lord Sumner's statement of the law was followed by the Supreme Court of Canada in *Boudreau* v. *The King*[14] and in *R.* v. *Fitton*.[15] In *Fitton*, Chief Justice Pickup of the Ontario Court of Appeal relied on a phrase of Rand J., in *Boudreau* that confessions must not have been "improperly instigated or induced or coerced"[16] and held that the rule of exclusion was thus wider than the rule expressed by Lord Sumner in *Ibrahim*.[17] Thus in *Fitton*, where the accused on a murder investigation was questioned and not given a caution, his conviction was set aside by the Court of Appeal and a new trial ordered. However, the Supreme Court of Canada on appeal restored the conviction and held that *Boudreau* did not "modify the rule of law as stated by Lord Sumner".[18]

This then being the statement of the rule of confession-exclusion, in Canada at least, in regard to the underlying rationale of untrustworthiness, three observations might be made. First, confessions may be quite untrustworthy for reasons foreign to "fear of prejudice or the hope of advantage exercised or held out by a person in authority" and yet if one is to follow that test of admissibility, attributed to Lord Sumner in *Ibrahim*,[19] they are nevertheless admissible. Second, to insist that the voluntariness of a statement in the sense just stated is (or was) the only test of admissibility or exclusion ignores a whole line of cases which

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169 E.R. 568: "The law does not presume that it is untrue, but rather that it is uncertain whether a statement so made is true."

[12] (3rd ed., 1967), p. 447.

[13] *Supra*, footnote 2.

[14] [1949] S.C.R. 262, 7 C.R. 427, 94 C.C.C. 1, [1949] 3 D.L.R. 81.

[15] [1956] S.C.R. 958, 24 C.R. 371, 116 C.C.C. 1, 6 D.L.R. (2d) 529.

[16] *Supra*, footnote 14, at p. 269 (S.C.R.).

[17] See, *Fitton* v. *R.*, [1956] O.R. 696, at p. 714, 115 C.C.C. 225, 24 C.R. 125.

[18] *Supra*, footnote 15, at p. 985 (S.C.R.); see also Rand J., at p. 963 (S.C.R.), and Nolan J., at p. 974 (S.C.R.).

[19] In *Ibrahim* there is recognition, at least, of a broader basis for exclusion, *i.e.*, the discretion of the trial judge. See, *infra*. Although this recognition is ignored by the Supreme Court of Canada in *Boudreau* and *Fitton*, it would seem to be the basis for a number of other cases in Canada before *Wray*, discussed *infra*.

have held that confessions may be excluded in the discretion of the trial judge if they have been improperly obtained.[20] Cross on *Evidence* states categorically that "confessions obtained in breach of the Judges' Rules are liable to be rejected at the judge's discretion".[21] Indeed, Lord Sumner in *Ibrahim* made specific reference to this very basis for excluding a confession and far from doubting it recognized it by the following passage:[22]

> . . . if as appears even on the line of authorities which the trial judge did not follow, the matter is one for the judge's discretion, depending largely on his view of the impropriety of the questioner's conduct and the general circumstances of the case, their Lordships think, as will hereafter be seen, that in the circumstances of this case his discretion is not shewn to have been exercised improperly.

Thus in England, and in Canada before *Wray*, to adopt the words of A. Gotlieb in his most useful article *Confirmation by Subsequent Facts:* "It seems difficult if not impossible, to say that the Rules operate. . . . (d) only to exclude untrustworthy confessions."[23]

Third, the principle of untrustworthiness is not generally in the law of evidence, with, of course, the principal exception of the hearsay rule, a basis for the exclusion of evidence. Here of course, the hearsay rule is avoided by confessions coming within its admissions exception. In theory the test of admissibility is "relevance" and all problems in the nature of credibility and reliability are a matter of weight. Thus any exclusion of confessions on the basis of untrustworthiness can be regarded as artificial and not theoretically well founded. In support of this view, if such is needed, one may turn again to Lord Sumner in *Ibrahim* where he observed that:[24]

> . . . logically these objections (the questioning of a prisoner in custody by a person in authority) all go to the weight and not to the admissibility of the evidence. What a person having knowledge about the matter in issue says of it is itself relevant to the issue as evidence against him. That he made the statement under circumstances of hope, fear, interest or otherwise strictly goes only to its weight. In an action of tort evidence of this kind could not be excluded when tendered against a tortfeasor, though a jury might well be told as prudent men to think little of it. Even the rule which excludes evidence of statements

[20] See *infra.*

[21] *Op. cit.*, footnote 12, p. 446; see also p. 451 where he states in regard to the Judges Rules: "[Though] . . . the matter [questioning the suspect by police] has been clarified by the Judges Rules, . . . it must be repeated that, provided they are voluntary within the principles which have been discussed, statements obtained in breach of the Rules are not inadmissible as a matter of law although they may be rejected in the judge's discretion; moreover the judge has a discretion to reject confessions which were obtained unfairly, even though they were voluntary and obtained without a breach of the Rules."

[22] *Supra,* footnote 2, at p. 614.

[23] (1956), 72 L.Q.Rev. 209, at p. 225.

[24] *Supra,* footnote 22, at p. 610.

made by a prisoner, when they are induced by hope held out, or fear inspired, by a person in authority, is a rule of policy.

Another principle sometimes advanced as underlying the exclusion of confessions is an application of the privilege against self-incrimination. Professor Wigmore asserted that it is different from the untrustworthy doctrine because the former, if strictly applied to confession-exclusion, "aims to exclude self-incriminating statements which are true".[25] However, the fatal flaw in Wigmore's outright rejection of this principle, it is submitted, stems from his premise that the foundation of exclusion of confessions is the principle of testimonial untrustworthiness.[26] Having embraced that doctrine, he could then assert as logic that whereas the privilege-rule is concerned to exclude true statements the confession-rule is concerned to exclude those which are false; it is in reality a meaningless tautology. It would seem in fact that the privilege against self-incrimination has had some influence on exclusion of confessions—even if only a limited effect.[27] Certainly, as suggested by A. Gotlieb, "similar notions of justice may be operating in each sphere",[28] and in logic, its application would seem to be with those confessions tinged with coercion, of whatever form, stemming from the revulsion of the ordinary courts to Star Chamber proceedings.[29] That influence was most recently considered by Cartwright C.J., in his dissenting judgment in *Wray* where he observed:[30]

> If, . . . the exclusion of an involuntary confession is based also on the maxim *"nemo tenetur seipsum accusare"* the truth or falsity of the confession does become logically irrelevant. It would indeed be a strange result if, it being the law that no accused is bound to incriminate himself and that he is to be protected from having to testify at an inquest, a preliminary hearing or a trial he could none the less be forced by the police or others in authority to make a statement which could then be given in evidence against him. The result which would seem to follow if the exclusion is based on the maxim would be that the involuntary confession even if verified by subsequently discovered evidence could not be referred to in any way.

A third and final rationale for rejecting confessions has already been suggested, that is, the notion of fairness in the admin-

[25] Wigmore, *op. cit.*, footnote 5, p. 250.

[26] *Op. cit., ibid.*, pp. 248, 249; see *supra.*

[27] See G. D. Nokes, Self-incrimination by the Accused in English Law (1964-66), 2 U.B.C. L. Rev. 316, at p. 320.

[28] *Op. cit.*, footnote 23.

[29] See Leonard W. Levy, Origins of the Fifth Amendment (1968), for a full treatment of the development of the privilege against self-incrimination in response to Star Chamber proceedings.

[30] *Supra,* footnote 4, at p. 241 (C.R.N.S.). Cartwright C. J., further explains the application of this principle in *Piche* v. *The Queen, supra,* footnote 1, at p. 29 (C.C.C.) pronounced the same date — June 26th, 1970 — as the judgments of that court in *Wray.*

istration of justice coupled with discouragement of improper police practices. It is true that this rationale does not square with the concept of admissibility of evidence based on relevance, which treats illegally obtained evidence as being only a matter of weight;[31] yet, on the other hand, it has been suggested that "this is a sphere in which compromise appears to be inevitable"[32] and since there is a competing principle that a judge in a criminal trial has an over-all duty to ensure that justice is done,[33] it is not unexpected that the concept of fairness and discouragement of improper police methods should be advanced. Certainly the rationale, despite being weak in theory, has received support in the cases. In *R.* v. *Voisin* it was said that the rules should be enforced by police authorities "as tending to the fair administration of justice".[34] That very principle was applied in *Chalmers* v. *H. M. Advocate*[35] to exclude an accused's statement and in *R.* v. *Barker*[36] to exclude facts subsequently discovered through a confession unfairly obtained. Further, there is the case of *Ibrahim* itself,[37] and those Canadian cases of *R.* v. *Anderson*,[38] *R.* v. *Murakami*,[39] *R.* v. *Dreher*,[40] and *R.* v. *Gilles*,[41] dealt with later, which have recognized, in dicta at least, that whether or not a trial judge admits a confession or excludes it is a matter for the exercise of his discretion. Further, on occasion, appellate courts have referred to the judge's function on voir dire in determining the admissibility of a confession as one in which he has to exercise

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[31] See *Kuruma* v. *The Queen*, [1955] A.C. 197, [1955] 1 All E.R. 236.

[32] Cross, *op. cit.*, footnote 12, p. 448.

[33] That principle is so commonly accepted or assumed it would seem pointless to cite authority for it. But it is clearly the basis for innumerable policy decisions by a trial judge such as: separate trials of two or more accused; separate trials on two or more counts in an indictment; ordering delivery of particulars; refusing to permit the prosecution to re-open its case; allowing evidence to be called in rebuttal or allowing the recall of witnesses; disallowing unfair or prejudicial questions on cross-examination, *etc.* See generally, Crankshaw's Criminal Code of Canada (7th ed., 1959), pp. 963-964.

[34] [1918] 1 K.B. 531, at p. 539, 13 Cr. App. R. 89, 26 Cox C.C. 224 (C.A.).

[35] [1954] S.L.T. 177.

[36] [1941] 2 K.B. 381. In this case documents evidencing fraud were obtained by a promise of immunity from prosecution. On such a prosecution the court concluded that the situation was precisely the same as if a confession were brought into existence by an inducement or promise. The documents were thus excluded, even though, apart from confessions, the clear rule was that evidence though illegally obtained was admissible.

[37] *Supra*, footnote 2, at p. 614.

[38] [1942] 2 W.W.R. 302.

[39] (1951), 12 C.R. 12.

[40] (1952), 5 W.W.R. (N.S.) 337.

[41] [1966] 2 C.C.C. 219. See also *R.* v. *Rodney* (1918), 42 D.L.R. 645, 30 C.C.C. 259, 43 D.L.R. 404; *R.* v. *Kooten*, [1926] 1 W.W.R. 178, 35 Man. R. 461, 46 C.C.C. 159, [1926] 4 D.L.R. 771; and *R.* v. *Price* (1931), 3 M.P.R. 303, 55 C.C.C. 206, [1931] 3 D.L.R. 155 (N.B.C.A.).

his discretion.[42] While it would seem that in most cases the appeal courts have meant no more by that than simply that the trial judge has to determine whether or not a particular confession was voluntarily made within the rule of Lord Sumner in *Ibrahim*, the use of the term "discretion" to describe that decision-making function has, intentionally or unintentionally, given added weight to the unfairness rationale.[43]

Finally the question of fairness and control of improper police methods in obtaining confessions is central to the constitutional approach to exclusion developed in the United States in *Escobedo* and *Miranda*. To speak of one's constitutional rights having been violated where a conviction is based, in whole or in part, on an involuntary confession, regardless of its truth or falsity,[44] is to incorporate matters of fairness, respect for human dignity and natural rights in a democratic society into a constitutional framework. In view of the decision in *Wray* by the Supreme Court of Canada, perhaps the constitutionality of pre-trial interrogation, similar to the constitutional basis for exclusion of confessions in the United States, is the only sphere open for the operation of the fairness doctrine.[45]

II. *Nothing but the Truth . . . Regina* v. *Wray*.

In March of 1968 in the township of Otonabee in the county of Peterborough, Ontario a service station operator was robbed and killed by a rifle shot. In early June of that year the accused Wray was taken into custody and after lengthy interrogation signed a statement, which if admitted into evidence, would have been evidence on which the jury could have convicted him of the charge of non-capital murder. On this aspect of the case after a lengthy voir dire "the learned trial judge ruled that the statement signed by the respondent [accused] was legally inadmissible as it was not voluntary". This ruling was not challenged on appeal either before the Ontario Court of Appeal[46] or the Supreme Court of Canada.[47] Although the judgments of both courts do not contain the full statement signed by Wray or any reference to the techniques employed in obtaining it, yet those techniques or methods must have been quite beyond acceptable limits since the Court

[42] See *e.g.*, Anglin J., in *Prosko* v. *The King* (1922), 63 S.C.R. 226, 37 C.C.C. 199, 66 D.L.R. 340, at p. 238, followed by Alta C.A. in *R.* v. *Murakami, supra,* footnote 39.

[43] *Cf.*, Rand J., in Supreme Court of Canada decision in *R.* v. *Murakami,* [1951] S.C.R. 801, at p. 803 where he criticized the use of the word "discretion" as being inappropriate.

[44] This is of course the very basis of *Miranda, supra,* footnote 10, at p. 1630.

[45] See, *infra.*

[46] (1970), 9 C.R. N.S. 131, [1970] 3 C.C.C. 122.

[47] *Supra,* footnote 4.

of Appeal described the statement as being "procured by trickery, duress and improper inducements . . . "[48] and Cartwright C.J., in the Supreme Court of Canada, observed that ". . . the nature of the investigation . . . was such as to reflect no credit on the authorities concerned".[49]

However in concluding his statement the accused when asked what happened to the gun answered "I threw it in the swamp . . . near Omomee"[50] and agreed to accompany the police and show them where it was.[51] He did just that and expert evidence linked up the fatal bullet with the recovered weapon.[52]

Now at the trial evidence of the discovery of the murder weapon and the accused's involvement in that discovery, that is, accompanying the police officers, directing them and pointing out the spot where the rifle was found was also rejected or excluded by the trial judge and the Court of Appeal affirmed this decision on the ground that ". . . a trial judge has a discretion to reject evidence even of substantial weight, if he considers that its admission would be unjust or unfair to the accused or calculated to bring the administration of justice into disrepute . . . ".[53] This judgment set the stage for an appeal to the Supreme Court of Canada since it was the first time, reported at least, that the rationale of fairness had been applied to exclude, not the confession itself, but the accused's involvement in facts discovered as a result of that confession. As to that precise question the leading authority was *R.* v. *St. Lawrence*[54] wherein Chief Justice McRuer of the Ontario High Court had held, in a case similar to *Wray*, that although the confession itself may be inadmissible "where the discovery of the fact confirms the confession—that is, where the confession must be taken to be true by reason of the discovery of fact—then that part of the confession that is confirmed by the discovery of the fact is admissible".[55] In *St. Lawrence*, McRuer C.J., then held that applying this rule the facts discovered as a result of the inadmissible confession could be put in evidence as well as the accused's involvement in that discovery in the following way:

1. It was admissible for the Det. Sgt. to say "that as a result of information received the accused was taken by the officers to . . ." (the place where the incriminating evidence was found).[56]

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[48] *Supra,* footnote 46, at p. 133 (C.R.N.S.).
[49] *Supra,* footnote 4, at p. 247 (C.R.N.S.).
[50] *Ibid.,* at p. 238.
[51] *Ibid.*
[52] *Ibid.,* at pp. 237 and 238.
[53] *Supra,* footnote 46, at p. 133.
[54] (1950), 7 C.R. 464.
[55] *Ibid.,* at p. 478.
[56] *Ibid.,* at p. 479.

2. It was admissible in evidence that the accused said "It should be about ten feet in".[57]
3. It was admissible in evidence for the Det. Sgt. to say "after we got to the Woodbine the accused and I were standing opposite the wire fence".[58]
4. It was admissible for the Det. Sgt. to say "I took the handcuffs off, got a ladder and started the search".[59]
5. It was admissible in evidence for the Det. Sgt. to say "He indicated to us where to place the ladder".[60]
6. It was admissible in evidence for the officer to tell the jury that "the accused did the physical act of pointing to a particular place and indicated what would be found there . . .".[61]
7. It was admissible in evidence for the Det. Sgt. to say "He pointed to a section of the fence, he said, 'This is the place here'".[62]

There were a few other statements of a similar nature admitted in *St. Lawrence*, but it ought to be made clear that statements or parts of the confession describing how the articles of evidence got where they were found, for instance, "I tossed them over",[63] were not admitted. Chief Justice McRuer held that the fact of finding an article in a certain place confirms only a statement by the declarant that he knew it was there not how it got there. As to the latter the learned judge held ". . . we are driven back to the inadmissible confession for proof . . . "[64] and therefore any such statement, whether part of the main confession or following upon it while accompanying police officers on a search, was as inadmissible as the inadmissible confession. It was this reasoning which the Court of Appeal in *Wray* declined to follow in upholding the exercise of discretion by the trial judge.

The other significant aspect of the Court of Appeal judgment (in *Wray*) concerns the expression of the doctrine of fairness in the language of doing something "calculated to bring the administration of justice into disrepute".[65] There is, of course, a strong suggestion of that concept in the rationale of fairness itself, but it is a concept (or a form of articulation) not previously advanced in Canada, at least not in regard to the law of confessions.[66]

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[57] *Ibid.* [58] *Ibid.*
[59] *Ibid.* [60] *Ibid.*, at p. 480.
[61] *Ibid.* [62] *Ibid.*
[63] *Ibid.*, at p. 479. [64] *Ibid.*
[65] *Supra*, footnote 46, at p. 133.
[66] See also *Connelly* v. *Director of Public Prosecutions*, [1964] A.C. 1254 not followed by Supreme Court of Canada in *The Queen* v. *Osborne* (1971), 15 D.L.R. (3d) 85 — as to the suggested discretion of a trial judge to enter a stay of proceedings said to be oppressive to the accused and hence bringing the judicial system into disrepute.

The Supreme Court of Canada, in judgments divided six to three, made short work of the Court of Appeal decision. Mr. Justice Martland, writing the majority opinion,[67] followed *R.* v. *St. Lawrence* and ordered a new trial—at which the Crown would undoubtedly place before the jury evidence of the accused's involvement in the discovery of the murder weapon. But the signal importance of this decision is not simply that McRuer C.J., in *St. Lawrence* should be followed, but that in doing so the Supreme Court of Canada discredited the fairness doctrine and any rationale for the exclusion of confessions other than that of untrustworthiness. And, one might add, this was done without the court, with the exception of Cartwright C.J., in his dissent,[68] ever addressing the subject directly.

The majority judgment begins by recognizing only one test of admissibility of evidence, that of relevance. Mr. Justice Martland endorsed the statement by Lord Goddard in *Kuruma* v. *The Queen*[69] in which the latter said "in their Lordships opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained".[70] Then dealing the death blow to the Court of Appeal decision and to the doctrine of fairness in connection with confessions generally, Martland J., held that ". . . it is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling, which can be said to operate unfairly . . ."[71] and be excluded by the exercise of the trial judge's discretion. And so the discretion to exclude evidence is confined to such matters as inflammatory photographs[72] or similar act evidence.[73] Obviously there is nothing tenuous or trifling about the relevance of a confession or the involvement of the accused in the subsequent discovery of tangible evidence indicated by that confession. On this point Martland J., stated clearly that ". . . my view is that the trial judge's discretion does not extend beyond those limits and, accordingly, I think with respect, that the definition of that discretion by the Court of Appeal in this case was wrong in law".[74]

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[67] *Supra,* footnote 4, at p. 248 (C.R.N.S.).
[68] *Ibid.,* at p. 241. [69] *Supra,* footnote 31. [70] *Ibid.,* at p. 203.
[71] *Supra,* footnote 4, at p. 254 (C.R.N.S.).
[72] See *e.g.,* the transcript of the *Truscott* trial *(The Queen* v. *Steven Murray Truscott,* 1959) reproduced, in part, in M. L. Friedland, Cases and Materials on Criminal Law and Procedure (3rd. ed., 1970), pp. 500-505 wherein the trial judge excluded a photograph of the deceased Lynne Harper; *cf. R.* v. *O'Donnell* [1936] 2 D.L.R. 517, 65 C.C.C. 299; see generally, Wigmore, *op. cit.,* footnote 5, Vol. IV, pp. 252-254.
[73] See *e.g., Noor Mohamed* v. *The King,* [1949] A.C. 182.
[74] *Supra,* footnote 4, at p. 256 (C.R.N.S.).

Mr. Justice Martland's judgment is the decision of the Supreme Court of Canada in *Wray* and its effect on the law of confessions, though not directly stated, is logically inescapable. To be sure *Wray* is not directly concerned with the admissibility or exclusion of confessions but rather with the problem raised in *St. Lawrence*: the admissibility of a confession or part thereof, which though otherwise inadmissible, is confirmed in its truth by the subsequent discovery of tangible evidence. But if part or more of an otherwise inadmissible confession is made admissible because its truth is confirmed in this way, and if a trial judge has no discretion to exclude evidence of substantial probative value on any notion of unfairness or whatever, then it must follow that the only ground upon which a confession may be excluded from evidence is doubt as to its truth, and, if that doubt can be overcome, the confession is admissible. In Canada therefore, the rationale of Professor Wigmore of "untrustworthiness" has become indeed the only rationale.[75]

III. *The Effect of R. v. Wray.*

The decision of the Supreme Court of Canada in *Wray* is clear enough and normally, to say anything more about it, would be quite unnecessary. However, as indicated earlier, there are a number of cases, albeit mostly of lower courts, whose judgments simply do not square with *Wray* or the single rationale of untrustworthiness. These cases, and statements from cases, deserve mention if for no other reason than that they were ignored in *Wray* and are now clearly out of step with that decision and wrong in law.

The truth is that for some time the trial judge's discretion has been a vital part of the examination on voir dire of the admissibility of a confession. In *R. v. Anderson (No. 2)*[76] Sloan J.A., whose reasons were agreed with by Fisher J.A.,[77] stated:[78]

> While the law upon this subject is not as clear as one might wish, and the authorities are conflicting, in my view the general trend of more modern authority seems to indicate that, when a suspected person is interrogated by the police and afterwards charged with an offence because of admission elicited by that questioning, the exclusion of those inculpatory statements at his trial is a matter which must be left to the discretion of the trial judge to be decided upon the diverse and particular circumstances of each case. To say because the statement of the accused is proved to have been without fear of prejudice or hope of

[75] There may be some who will dispute there ever being any other rationale in Canada. For them perhaps the next part of this article will be at least a partial answer. The complete answer is, in my view, that in fact this subject has really never been fully considered in our courts.

[76] *Supra,* footnote 38.

[77] *Ibid.,* at p. 309.

[78] *Ibid.,* at p. 306.

> advantage it is therefore admissible against him in complete disregard of all other factors which a wise "rule of policy" might, under certain circumstances, consider as having exercised an improper influence or inducement upon the free mind of the confessor, is in my opinion to fetter unduly the discretion of the trial judge to exclude the statement.

In support of this statement Sloan J.A., relied on *Ibrahim*, among others,[79] and as we have seen certain observations by Lord Sumner in *Ibrahim* do support this view.[80] Further, in *Anderson (No. 2)* Sloan J.A., advanced the opinion that "the trial judge has a wider range of reasons for excluding a statement than he has for admitting it. This results from giving 'voluntary' a more extended meaning when excluding a statement . . . than when admitting it . . .".[81] Needless to say the confession in *Anderson (No. 2)* was rejected.

This last statement of Mr. Justice Sloan was approvingly referred to by MacDonald J.A., of the Alberta Court of Appeal in *R.* v. *Murakami*,[82] as indeed was the observation of Lord Sumner in *Ibrahim* regarding the other line of authorities wherein the question of exclusion is one for the trial judge's discretion.[83] In *Murakami* the Court of Appeal, later affirmed by the Supreme Court of Canada,[84] refused to allow the appeal by the Crown because the trial judge's decision in excluding the confession involved only a question of fact and not a question of law alone. In neither judgment of the Court of Appeal or the Supreme Court of Canada is there any rejection of the idea of a separate exercise of discretion by the trial judge (separate from the voluntary test) and further the basis for disallowing the appeal, that is, for being a a question of fact alone, may be said to indirectly embrace the separate discretion theory. If the basis for exclusion is one of voluntariness alone in the sense referred to in *Ibrahim*, then whether or not a particular confession satisfies the "voluntariness rule" is indeed a question of fact and therefore a question to be decided by the trial judge. But if the trial judge rejects a confession by giving voluntary "a more extended meaning"[85] then his decision involves much more than a question of fact; in substance a question of law is involved as to the very basis for excluding confessions. Thus, the insistence by appellate courts, including the Supreme Court of Canada, that the admissibility of

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[79] The others were: *Rex.* v. *Knight* (1905), 21 T.L.R. 310, 20 Cox. C.C. 711; *Rex.* v. *Booth* (1910), 5 Cr. App. R. 177; *Rex.* v. *Myles* (1922), 56 N.S.R. 18, 40 C.C.C. 84; *Rex.* v. *Price, supra,* footnote 41, *Rex.* v. *Minogue,* [1935] 3 W.W.R. 337, 50 B.C.R. 259, 64 C.C.C. 318; and *Rex.* v. *Thompson,* [1940] 3 W.W.R. 341, 75 C.C.C. 63.

[80] *Supra.*

[81] *Supra,* footnote 76, at p. 308.

[82] (1951), 12 C.R. 12.

[83] *Ibid.,* at pp. 16 and 17.

[84] [1952] S.C.R. 801.

[85] See Sloan J. A., in *Anderson (No.2), supra,* footnote 38, at p. 308.

confessions is not "a question of law alone"[86] but at most "a question of mixed law and fact"[87] has, where the question involved is in reality one as to the very rationale for exclusion, that is, the exercise of discretion, resulted, in considerable vitality being accorded to the concept of trial judge discretion and in turn to the fairness doctrine as a rationale for the exclusion of confessions. Interestingly enough, this very insistence may well be the reason why the Supreme Court of Canada never got around to considering the rationale for excluding confessions before *Wray;* a case approaching the subject obliquely, through subsequent discovery of evidence confirming an inadmissible confession, was required to raise the question.

The discretion concept was continued in Alberta in *R.* v. *Dreher.*[88] In that case the Alberta Court of Appeal once again approvingly referred to the observations of Sloan J.A., in *Anderson (No. 2)*[89] and following *Murakami* refused a Crown appeal where the trial judge exercised his discretion to exclude a confession because the appeal did not involve a question of law alone.[90] In that case MacDonald J.A., stated:[91]

> It cannot be said that because no threat was made or no hope of advantage was held out the statement of an accused becomes admissible in evidence regardless of other circumstances which may have exercised an improper influence on her mind.

"Improper influence" in that statement may be argued to mean improper in the sense of causing the statement to be involuntary in the terms expressed by Lord Sumner in *Ibrahim.* Yet it equally suggests considerations extraneous to that precise rule, and together with the endorsement in the various judgments in *Dreher* of the observations made by Sloan J.A., in *Anderson (No. 2),* would seem to further the discretion theory.

Finally, a more recent case on the subject is the decision of the British Columbia Court of Appeal in *R.* v. *Gillis.*[92] In that case the accused, after the holding of a preliminary hearing on which he was committed for trial, opened a conversation with a police constable, when being served a meal, in the following way:

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[86] See Criminal Code, R.S.C., 1970, cc. C-34-35, s. 584 which limits appeals by the Crown in cases of indictable offences to questions "of law alone".

[87] See *R.* v. *Eaton* (1957), 117 C.C.C. 375, at p. 387, 25 C.R. 320, where Davey J. A., of the B.C. Court of Appeal followed the Supreme Court of Canada in *Fitton, supra,* footnote 15, in holding that the admissibility of a confession "is at most a question of mixed law and fact".

[88] *Supra,* footnote 40.

[89] *Supra,* footnote 38, at pp. 306 and 308.

[90] *Supra,* footnote 40, at pp. 342, 350, 355, and 357.

[91] *Ibid.,* at p. 350.

[92] [1966] 2 C.C.C. 219.

> When I walked into the cell block with a tray of food, Gillis spoke to me, "that is what I get for associating with fellows like that", to which I made —
> The Court — Just a moment.
> A. To which I replied, "You know, Gillis, as far as I am concerned you are as guilty as sin".
> Q. "As far as I am concerned."
> A. "As far as I am concerned you are as guilty as sin."
> Q. Yes? A. And to this Gillis replied, "Sure I am guilty but you are going to have to prove it".
> Mr. Hinds: Q. Is that the full extent of the conversation? A. That is the full extent of the conversation.[93]

Mr. Justice Lord of the British Columbia Court of Appeal, who wrote the judgment of the court, upheld the decision of the trial judge in excluding the confession and applied the statements of Sloan J.A., in *Anderson (No. 2)* mentioned earlier. In doing so he noted that these statements were also quoted with approval in *Dreher*[94] and then approved of the trial judge's decision in this way:[95]

> I think it is clear from the learned trial judge's finding that the accused "felt he was under compulsion to answer" that he had regard for "factors which a wise rule of policy might . . . consider as having exercised an improper influence or inducement upon the free mind" of the accused. He had taken into consideration the following facts:
> (1) The stage in the proceedings when the statement was made, namely, the preliminary hearing had taken place and the accused was once again in custody.
> (2) Within an hour and a half after being committed for trial he is confronted with a statement by a person in authority that he is "guilty as sin". It may be that the accused made the first statement, but that does not excuse the officer's remarks.
> (3) He had conducted his own defence at the preliminary hearing and was without legal advice, and he had the further worry about getting bail.

In my opinion it is obvious that in that excerpt, Mr. Justice Lord was having regard to factors quite apart from fear of prejudice or hope of advantage. In supporting the notion of a "wise rule of policy", and in dismissing the appeal for the reasons stated, he was endorsing the principle that a trial judge may exclude a confession which, in the exercise of his discretion, was improperly obtained.

That there may be other cases supportive of the discretion theory it is unnecessary to determine. The point of it all is that these and any like cases,[96] and the very observations by Lord

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[93] *Ibid.*, at p. 220, excerpt from the constable's evidence at the trial.
[94] *Ibid.*, at p. 221.
[95] *Ibid.*
[96] For a typical example of remarks in *obiter dictum* which, intentionally or unintentionally, gave scope to the discretion theory, see: *R.* v. *Eaton, supra,* footnote 87 where Bird J. A., of the B.C. Court of Appeal, later

Sumner in *Ibrahim* concerning a discretion by the trial judge to exclude confessions improperly obtained, are no longer sound authority in Canada. They clearly violate the principle inherent in the majority judgment in *Wray,* that is, the single rationale of "untrustworthiness" in connection with statements obtained as a result of fear of prejudice or hope of advantage exercised or held out by a person in authority.[97]

A different aspect of the discretion concept which again, before *Wray,* was in conflict with, or at least stood apart from, any test of voluntariness in the special sense just stated, concerned statements made under the influence of alcohol. One of the earliest cases on this subject was *R.* v. *Washer*[98] where Chief Justice McRuer of the Ontario High Court decided that even though the requirements of voluntariness were met ". . . that does not mean . . . the statement must necessarily be held to be admissible. The question is always one of discretion resting on the trial judge . . .".[99] He then held that since a voluntary statement meant a statement made "in voluntary state of mind",[100] in the exercise of discretion the statement was to be excluded. Again in *R.* v. *Yensen*[101] McRuer C.J., in attempting to explain his earlier decision in *Washer,* treated impairment as creating an issue separate from voluntariness.

This trend in the cases continued in British Columbia in *R. ex rel Wickert* v. *Keen*[102] in which Mr. Justice MacDonald of the British Columbia Supreme Court held that the first element to be established by the prosecution is that the accused said words which "amount to his statement".[103] He then added: ". . . if, because of

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Chief Justice of that court, at p. 383 (C.R.), stated: "In my respectful opinion the learned Judge, in relation to the circumstances which led up to the statements, has correctly applied the principles laid down in *Boudreau* v. *The King, supra,* and the numerous other authoritative decisions then cited by him. It was 'within his discretion' if otherwise satisfied that the true test of voluntariness had been met, to admit the statements in evidence."

Following this reasoning it would equally have been within his discretion not to admit the confession.

[97] In fairness *R.* v. *Sigmund, Howe, Defend and Curry,* [1968] 1 C.C.C. 92, 60 W.W.R. 257 (B.C.C.A.), should not be ignored. In that case Davey J. A., in giving the courts judgment, reversed the trial judge in holding that he (trial judge) had no discretion to reject an exculpatory statement because it was obtained in an oppressive manner. However since this case predates *Piche* and is concerned with exculpatory statements, perhaps it does not diminish this pre-*Wray* thesis of "discretion" in connection with confessions, *i.e.,* involving only inculpatory statements.

[98] (1947), 92 C.C.C. 218.

[99] *Ibid.*

[100] *Ibid.,* at p. 219.

[101] [1961] O.R. 703, 36 C.R. 339, 130 C.C.C. 353, 29 D.L.R. (2d) 314.

[102] (1967), 50 C.R. 228, 58 W.W.R. (N.S.) 479, [1967] 2 C.C.C. 261.

[103] *Ibid.,* at p. 236 (C.R.); This phrase was borrowed from the judgment of Kerwin C. J., in *McKenna* v. *The Queen,* [1961] S.C.R. 660, at p. 663 where he stated: "It is not a case where a trial judge considered that the words used by an accused did not, because of his condition, amount to his statement."

the degree to which he was under the influence of alcohol, this is not established, it is the end of the matter."[104]

Now, of course, the view expressed in these cases stands quite apart from "untrustworthiness" that is dependent upon fear of prejudice or hope of advantage exercised or held out by a person in authority. As well it would seem that untrustworthiness generally is not in issue here, because this test developed in connection with statements made to persons in authority. Thus, if it has a connection with any rationale for the exclusion of confessions it is with the theory of discretion. In any event it would seem to be quite in conflict with *Wray*. In fact, however, its demise or discredit is not wholly due to *Wray,* although that would be enough, but was determined by the British Columbia Court of Appeal in *R.* v. *Oldham*.[105] In a decision less than three months before *Wray*, and like *R.* v. *Sigmund*,[106] another case of that court clearing the ground for *Wray,* McFarlane, J.A., in delivering the court's judgment held that *R. ex rel Wickert* v. *Keen* and like cases were wrongly decided[107] and that a trial judge could not exclude a confession on the ground that the accused was intoxicated when the statement was made. He emphasized that:[108]

> The judge decides the question of admissibility, *i.e.,* of relevance and, where appropriate, voluntariness in the special legal sense explained in *Boudreau* v. *The King, supra*; the tribunal of fact then determines the weight to be given to the evidence which is admitted.

Continuing, in suggesting the basis of the majority judgment in *Wray*, he added:[109]

> . . . there may be cases of trial by judge and jury where evidence of a statement by a drunken man is tendered and in which the trial judge may, if he sees fit in his discretion, properly take evidence of the circumstances in the absence of the jury. This will, however, be only for the purpose of deciding whether he should exclude the statement on the principle enunciated by the Judicial Committee in *Noor Mohamed* v. *The King* . . . (citations) and applicable where "it would be unjust to admit evidence of a character gravely prejudicial to the accused, even though there may be some tenuous ground for holding it technically admissible".

Without belaboring the point, it was observed earlier that confessions could hardly be regarded in terms of relevance as "tenuous"[110] and therefore would never fall within this sphere of discretion left to the trial judge. However, as we have seen, the reasoning of

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[104] *Ibid.*, at p. 236 (C.R.).
[105] (1970), 11 C.R. N.S. 204, reversing MacDonald J., in (1970), 10 C.R. N.S. 133.
[106] *Supra,* footnote 97.
[107] *Supra,* footnote 105, at p. 208.
[108] *Ibid.*, at p. 207.
[109] *Ibid.*, at p. 208.
[110] See *supra.*

Mr. Justice McFarlane has now been confirmed by *Wray*.

One final result, perhaps anomaly is a better word, of *Wray* concerns an earlier decision of the Supreme Court of Canada in *DeClercq* v. *The Queen*.[111] In that case the Supreme Court of Canada concluded a controversy centering on the question of whether or not an accused who had taken the witness stand on a voir dire to determine the admissibility of his out-of-court statement could be asked whether that statement was true. Mr. Justice Martland, again writing the majority judgment, held that while the inquiry on a voir dire is directed to the issue of voluntariness and not as to the truth of the statement, an inquiry as to the statement's truth was relevant "to the weight to be given to the evidence on the issue as to whether or not it was voluntary".[112] Therefore, following *R.* v. *Hammond*[113] and *R.* v. *La Plante*,[114] it was decided that questions as to the truth of the statement could be put to the accused on cross-examination if he decided to give evidence on voir dire.

To continue, it is clear in *DeClercq* that since the admissibility of the truth-inquiry on voir dire is related strictly to the question of weight or credibility of the accused's evidence on the voluntariness issue, an affirmative answer by him does not *ipso facto* cause his confession to be admitted into evidence. In strictness that decision is still one to be made by the judge by determining whether or not the confession was voluntarily made in the special sense previously mentioned. Of course some criticism may be levied against this "logic" as reflecting an air of unreality,[115] yet without doubt that is the theory of *DeClercq*.

The difficulty with that theory is that it would appear to be in fundamental conflict with the theory of *Wray*. If the only rationale for the voir dire inquiry is Wigmore's thesis of "untrustworthiness", which, as I have argued is the inescapable conclusion of *Wray*,[116] then once that concern has been laid to rest a confession then becomes admissible—or at least that part of it which is confirmed to be true. So, just as in the case of subsequently discovered evidence where an otherwise inadmissible confession or part thereof becomes admissible because it is true, where an accused on voir dire admits that his confession or part thereof is true that too should then be automatically admissible—because it is true. The anomaly of holding otherwise was noted by Cart-

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[111] [1969] 1 C.C.C. 197, [1968] S.C.R. 902, 4 C.R. N.S. 205, 70 D.L.R. (2d) 530.

[112] *Ibid.*, at p. 205 (C.C.C.).

[113] (1941), 28 Cr. App. R. 84.

[114] [1958] O.W.N. 80.

[115] See dissenting opinion of Hall J., in *DeClercq*, *supra*, footnote 111, at pp. 218-219 where this very criticism is made.

[116] See *supra*.

wright C.J., in his dissenting opinion in *Wray*[117] in referring to the dictum of former Chief Justice Robertson of the Ontario Court of Appeal in *R. v. Mazerall*,[118] as follows:[119]

> It would be a strange application of a rule designed to exclude confessions the truth of which is doubtful, to use it to exclude statements that the accused, giving evidence upon this trial, has sworn to be true.

It is possible that one could draw a distinction between confirmation by tangible evidence, as in *Wray*, and confirmation by oral evidence on voir dire, as in *DeClercq*, but to foreclose that argument it is submitted that any such distinction is untenable. To adopt the words of McRuer C.J. in *St. Lawrence*, where an accused admits on voir dire that his confession is true the court is not "driven back to [the] inadmissible confession for proof [of that] . . ."[120] but can rely on his affirmation under oath. Any hesitation in accepting that affirmation is simply an evidentiary problem which can be put aside, as in *Hammond*,[121] by asking further questions of the accused to ensure that he understood what he was saying. As to drawing any distinction based on the procedure of the voir dire itself, it would be pertinent to refer to certain observations on that subject by Davey C.J., of the British Columbia Court of Appeal in *R.* v. *Milner*:[122]

> There is some confusion over this matter of a *voir dire*. *"Voir dire"* is not a technical term. It is a convenient term to designate the evidence taken in the course of a trial to determine whether a piece of evidence (usually it is a confession, but it need not be; it may be secondary evidence; it may be other evidence which can be admitted only under special circumstances), should be admitted; and the hearing is held to try the objection which is taken to that evidence and to see whether it is admissible or not. There is no mystery about that.
>
> The reason why, in some cases, the evidence has to be called over again on a continuance of the trial is because the trial is a jury trial. The jury are tryers and finders of the facts. The evidence on the voir dire is frequently, but not necessarily, taken in the absence of the jury. So that evidence, unless it is repeated in the presence of the jury, is not evidence upon which they can make the essential findings of fact.
>
> But that same difficulty does not exist where the trial is before a judge sitting alone. There, the judge is the tryer of the fact; he hears the evidence which is given on the voir dire; the voir dire is part of the trial and, regardless of the finding of the learned trial judge in those circumstances on the admissibility of the evidence, any evidence which is given on the voir dire is given as in the course of the trial itself and. if it is relevant, it is admissible in favour of or against the parties.

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[117] *Supra*, footnote 4, at p. 241.
[118] [1946] O.R. 762, [1946] O.W.N. 814, 86 C.C.C. 321, [1946] 4 D.L.R. 791.
[119] *Ibid.*, at p. 787 (O.R.).
[120] *Supra*, footnote 54, at p. 479.
[121] *Supra*, footnote 113, at p. 85.
[122] (1970), 72 W.W.R. 572.

> Of course, it goes without saying that the evidence on the voir dire must be confined to what is material to and admissible on the question to be decided upon it.[123]

One must conclude therefore, in my opinion, that the decision of the Supreme Court of Canada in *DeClercq* stands in opposition to that court's later decision in *Wray,* and but for that later decision would, unwittingly I am sure, seem to suggest a rationale for excluding an involuntary confession other than the danger of its being untrue, a suggestion which would seem to form the very basis of the dissenting opinion of Cartwright C.J., in *Wray*.[124] However, in view of the majority opinion in *Wray*, it would seem that that argument is simply too late.

Conclusion

The foregoing analysis may be summarized in this way. Although before the *Wray* decision some doubt may have existed in Canada about the underlying principles in excluding confessions improperly obtained, that doubt has now been removed. The clear effect of *Wray* is the acceptance of Wigmore's doctrine of "untrustworthiness" as the sole rationale. The combination of that doctrine together with the rule of voluntariness in the special sense referred to by Lord Sumner in *Ibrahim* has made it quite clear that a trial judge has no discretion, whether it be couched in terms of fairness to the accused, or control of police methods of interrogation, or concern for the maxim *nemo tenetur seipsum accusare,* or even concern as to a confession's trustworthiness apart from voluntariness, to exclude a confession. Further, it is equally clear from *Wray* that even though a confession is considered to be involuntary, if it, or any part of it, is confirmed to be true by subsequent evidence then that part of it so confirmed is admissible. The earlier decision of the Supreme Court of Canada in *DeClercq* is, in my view, out of step with this reasoning and may well be reviewed. Another alternative, of course, would be to review the *Wray* decision itself and the whole question of the basis for excluding confessions; needless to say that possibility would seem to be extremely unlikely.

The unfortunate part about the development of the law in this area, if one can be so direct, is that it has occurred without any explicit examination or discussion by the courts, and in particular by the Supreme Court of Canada, of the fundamental principles involved. It is as though in *Wray* and in *DeClercq*, and in other cases,[125] the Supreme Court of Canada were saying that questions of

[123] *Ibid.,* at p. 573.

[124] *Supra,* footnote 4, at p. 241.

[125] The decision of the Supreme Court of Canada in *Piche* v. *The Queen, supra,* footnote 1, delivered some few months before *Wray,* is another

a fundamental nature about the policy of criminal law were not involved; and yet, in my view as I have argued in this article, they have been determined nevertheless. In this context it is important to remember, as we were reminded by Lord Sumner in *Ibrahim*, that ". . . even the rule which excludes evidence of statements . . . induced by hope held out or fear inspired, by a person in authority, is a rule of policy".[125a]

What the future may hold for the development of the law of confessions is of course impossible to ascertain. It may be that our law will simply proceed apace following the *Wray* decision. On the other hand it is possible, but no more than that, that a constitutional basis for exclusion of confessions, grounded on the Canadian Bill of Rights,[126] may develop in Canada similar to that which developed in the United States and articulated in the *Escobedo* and *Miranda* decisions. Certainly we have not made an auspicious beginning in the light of decisions of our courts in *R.* v. *Steeves,*[127] and *R.* v. *O'Connor.*[128] Yet, on the other hand, it will be remembered that those cases were decided in the early history of the Bill of Rights, before the full impact of *Escobedo* and *Miranda*, and before *Wray*, that is, before it was clear in Canada that the rules of evidence for the exclusion of confessions could not be employed in a policy way to protect the individual from abusive methods of police interrogation. The merits of such a policy is of course too large a topic to be canvassed here, but the point which might be made is that that position was, in general, the state of the law in the United States before *Escobedo* and *Miranda.*[129] To conclude then, the constitutional framework for such a policy has by no means, in my opinion, been ruled out in Canada.

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example. In that case the court held that the determination of voluntariness applied equally to exculpatory statements even though it seems clear that the Crown's purpose in adducing the statement was not for its value as a truthful statement but for its value in attacking credibility as an inconsistent statement. Indeed this is always the Crown's purpose in seeking admission of an accused's exculpatory statement. One might ask then that if the only rationale for exclusion is concern with a statement's "untrustworthiness", why exclude it when it is being offered for a non-truth purpose?

[125a] *Supra,* footnote 2.

[126] S.C., 1960, c. 44.

[127] [1964] 1 C.C.C. 266, 42 C.R. 234, 42 D.L.R. (2d) 335 (N.S.S.C.).

[128] (1966), 48 C.R. 270, [1966] S.C.R. 619, [1966] 4 C.C.C. 342, 57 D.L.R. (2d) 123.

[129] It is of course a gross over-simplification of American law to suggest that the "constitutional" or "due process" arguments regarding confessions were not advanced until *Escobedo* and *Miranda;* indeed they were, and in many instances accepted, at least by federal courts. But their full acceptance is marked by these two famous cases. See generally, for an excellent treatment of the law of confessions — both in the United States and elsewhere (including Canada): Developments in the Law — Confessions (1966), 79 Harv. L. Rev. 935.