Western New England Law Review

Volume 42 *42*
Issue 2

Article 2

2020

CRIMINAL LAW—DOES A CONFESSION MATTER? A DEFENDANT'S CONFESSION AS IRRELEVANT TO PROVE HIS GUILT

Doron Menashe

Guy Alon

WESTERN NEW ENGLAND LAW REVIEW '

Volume 42 2020 Issue 2 '

CRIMINAL LAW—DOES A CONFESSION MATTER? A ' DEFENDANT'S CONFESSION AS IRRELEVANT TO PROVE HIS ' GUILT '

DORON MENASHE* & GUY ALON**

This Article presents a revolution in the rules of confessions and their admissibility. This article proposes to diverge from the dichotomous test of admissibility currently applied in the rules of evidence, concerning rejecting invalid evidence, in order to recognize the possibility of applying the blue pencil doctrine in the same manner. According to our suggestion, courts should partially recognize the admissibility of late confessions, despite the fact that the source of the late confession is an invalid confession previously given. Recently, Israel's Supreme Court has determined that a late confession given after an invalid confession is considered admissible.[1] *In other words, the court has decided to apply a relative nullification of improper practices by law-enforcement authorities and therefore, apply, in a new manner, the blue pencil doctrine, a doctrine that is usually used in contract law.*

This Article is dedicated to the theoretical and practical justifications to accept late confessions, emphasizing the rules of evidence as they exist in statute, as well as the question of incentivization of improper behavior by law enforcement authorities. The Article addresses the question of whether it is appropriate to acknowledge the American jurisprudence

* Doron Menashe is an Associate Professor in the Faculty of Law at the University of Haifa in Israel.

** Guy Alon, L.L.B. (magna cum laude) is a Direct Ph.D. Student in the Faculty of Law at the University of Haifa in Israel.

1. CrimC 932/16, State of Israel v. Ben-Uliel (June 19, 2018), Nevo Legal Database (by subscription, in Hebrew) (Isr.). This case will be referred to throughout as the *Duma* case.

principle, known as the "fruit of the poisonous tree" doctrine.[2] *As this article will describe below, our proposed solution would be to maintain the reliability of a late confession, in contrast to the American doctrine of fruit of the poisonous tree. Thus, this Article would present an alternative legal principle which may prove more fitting for this matter, in light of the principles of the rules of evidence in the Israeli legal system.*

INTRODUCTION

The rules of evidence in Israeli jurisprudence, as in its Anglo-American analogues, are undergoing a paradigm shift.[3] Until recently, the Israeli evidentiary model preferred the "judicial truth" over the "factual truth."[4] The Israeli Supreme Court's preference was prudently enforced. The Court applied strict rules of evidence with only a limited scope for judicial discretion. However, in a number of important verdicts, the Court's tenor has changed to a trend of nullification of the evidentiary rules. Today, the Israeli evidence law is much closer to the freedom of proof model (rather than strict evidence rules),[5] as expressed recently by the Court.[6] The freedom of proof model, does not include harsh formal

2. *See e.g.* Robert M. Pitler, *The Fruit of the Poisonous Tree Revisited and Shepardized*, 56 CAL. L. REV. 579 (1968).

3. *See generally* Alex Stein, *The Refoundation of Evidence Law*, 9 CAN. J. L. & JURIS. 279 (1996) (broadly discussing the lack of clarity concerning the rules of evidence at the beginning of this paradigm shift).

4. *See, e.g.*, HCJ 152/82 Elon v. State of Israel PD 36(4) 449 (1982) (Isr.). In this ruling, Justice Elon wrote, "Every legal system determines the judicial truth according to a system of norms which are observed and are binding within it." *Id.* In other words, the judicial truth is, in practice, the factual truth supplemented by the filter of the system of norms of the relevant rules. In any case, it is inconceivable that judicial truth does not dovetail with the system of norms which are observed and are binding in that legal system. This is a network of harsh rules which invalidates evidence lacking relevancy, admissibility, and the like.

5. For a discussion of freedom of proof, see Doron Menashe, *Judicial Discretion in Fact-Finding, Freedom of Proof, and Professionalism of the Courts*, *in* A THEORY OF EVIDENCE LAW 73 (Guy Sender ed., Perlstien-Genosar Publishers 2017) [Hebrew].

6. Courts have ruled this way consistently, starting in the late 1980s and the early 1990s. *See, e.g.*, CrimA 23/85 State of Israel v. Tubul, PD 42(4) 309 (1988) (Isr.); CrimA 4390/91 State of Israel v. Haj Yihya, PD 47(3) 661 (1993) (Isr.); and CrimA 5614/92 State of Israel v. Messika, PD 49(2) 669 (1995) (Isr.) (where a mentally ill witness's testimony was admitted, in spite of the problem of admissibility inherent in it). This tendency has continued to develop in recent time. For contemporary rulings, see CrimA 864/12 Katsav v. State of Israel (May 13, 2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.); CrimA 7253/14 Finkelstein v. State of Israel (Nov. 11, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.); and CrimA 7679/14 Zahada v. State of Israel (Aug. 15, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.). The list grows daily.

rules. And thus, today, the vast majority of evidence is evaluated based on the weight of the evidence, rather than being evaluated on relevancy or admissibility, the "classic" rules of evidence.[7]

Many discussions in Israeli legal literature, as well as international legal literature,[8] have addressed the inherent difficulties in the freedom of proof approach.[9] The most significant and relevant difficulty for our purposes is embodied in the approach presented by Menachem Mautner.[10] According to Mautner, the tendency in evidentiary law to prefer freedom of proof over evidence rules is, in another manner, the preference of substance over procedure, with an emphasis on the values of the approach.[11] According to our approach, the tendency to prefer substance over procedure, as mentioned above, is still correct to this very day. That preference is expressed all the more so in the circumstances of the *Duma* case,[12] and in more detail: the more serious the crime is, and the more it significantly undermines the principles of society, the more flexible the rules of evidence must be—up to an absolute nullification of the existing rules of evidence.[13]

---

7. Behind this normative decision—whether to follow the view which supports evidentiary rules or the view which supports the freedom of proof—lies a great deal of theoretical debate. It is important to note that the approach of those who oppose it deals first and foremost with the suspicion of a radical development which will bring about too much discretion in determining facts. *See* Alex Stein, *Hearsay Statements as Evidence in Criminal Trials: Is and Ought*, 21 MISHPATIM 325, 325–351 (1992) [Hebrew]. Similarly, in the Haj Yihya case, the view is expressed that it is necessary to have evidentiary brakes as formal obstacles designed to prevent arbitrariness. *See* CrimA 4390/91, Haj Yihya, PD 47(3) 661. Beyond what is needed, we will note that unlike the tests of relevancy and admissibility which are binary, the plane of weight is not binary and is always subject to interpretation. Since this interpretation changes from one judge to another, as we have seen in their rulings, no one can dispute that the judges in Israeli courts use discretion to determine facts. *See* AHARON BARAK, JUDICIAL DISCRETION 502 (Papyrus, 1987) [Hebrew] *translated in* AHARON BARAK, JUDICIAL DISCRETION (Yadin Kaufmann, trans., Yale University Press 1989).

8. *See generally*, JOHN D. JACKSON & SARAH J. SUMMERS, THE INTERNATIONALIZATION OF CRIMINAL EVIDENCE: BEYOND THE COMMON LAW AND CIVIL LAW TRADITIONS (2012).

9. *See e.g.*, Eliahu Harnon, *Time for a Revolution in Evidentiary Law?*, 12 MISHPATIM 575, 585–87 (1982) [Hebrew].

10. *See* Menachem Mautner, *The Decline of Formalism and the Rise of Values in Israeli Law*, 17 TEL AVIV U. L. REV. 503 (1993) [Hebrew].

11. *Id.* at 547–49.

12. *See* CrimC 932/16, State of Israel v. Ben-Uliel (June 19, 2018), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (the *Duma* case).

13. This is mostly expressed in cases in which there are national security concerns (with an emphasis on General Security Service interrogations and convictions in military courts, even though this does not represent the full extent of the applications). *See infra* Part I (further discussing this assumption and its basis).

According to our approach, cases such as *Duma* merely illustrate the difficulty which exists on the evidentiary plane and with the courts' conception of the rules of evidence. This Article proposes using an alternative legal rule to moderate judicial leeway, in proposing a suitable model. Part I of this Article presents the ruling in the *Duma* case. The *Duma* case illustrates the weakness of the Israeli Evidence Law and the Israeli doctrine of inadmissibility in their attempts to invalidate confessions made unlawfully. Part II elaborates on the methodical incentivization of the law enforcement authorities and demonstrates how the weaknesses of Israeli Evidence Law and of the case law doctrine of inadmissibility empower law enforcement authorities to create a real incentive to confess. Part III deals with a theoretical evidentiary analysis in light of the court ruling in *Duma*, considering whether this ruling is consistent with the theoretical basis of the rules of evidence. Part IV will present our proposed model in order to cope with rulings such as *Duma*.

I. SUPREME COURT'S RULING IN THE DUMA CASE

"[H]istory amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence . . . ."[14] Recently, the Israeli Supreme Court ruled in matter concerning a "price-tag" attack carried out in the Palestinian village of Duma in the West Bank,[15] in which three members of the Dawabshe family were killed and another child was critically injured.[16] Due to the severity of the attack, and out of the immediate need to solve this crime and to prevent any similar attacks, the General Security Service (*Sherut Bitachon Kelali,* known colloquially as the "Shin Bet" or "Shabak") used measures which severely violated the fundamental rights of the defendants before they had confessed. Considering this violation, the Court ruled that their statements were inadmissible, and therefore the described confession was disqualified. Nevertheless, in the same breath, the Court ruled that a subsequent confession by one of the defendants, given in different circumstances (and probably not under the same duress), would be considered admissible, despite the fact that the source of the later

14. Haynes v. Washington, 373 U.S. 503, 519 (1963).

15. For further review of the meaning of "price-tag" actions, *see generally* Ori Nir, *Price Tag: West Bank Settlers' Terrorizing of Palestinians to Deter Israeli Government Law Enforcement*, 44 CASE W. RES. J. INT'L L. 277 (2011).

16. *See* CrimC 932/16, State of Israel v. Ben-Uliel §§ 1–3 (June 19, 2018), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (the *Duma* case).

confession was, as noted, the initial, inadmissible confession that had been produced by duress.

The admissibility of late confessions forces us to confront the ancient question found in the critical determination of the United States Supreme Court in *Haynes v. Washington*, which deals with the evidentiary power of confession. This Article will raise and answer the question of whether it is appropriate to allow law enforcement authorities to "extort" (as the quotation goes) a confession,[17] when the authorities could and should be required to obtain independent evidence.[18]

Setting aside the questions that the ruling raises, this Article will deal with the specific ruling of the Honorable Court. The Article intends to discuss whether it is reasonable for the Court to determine factually "that the subsequent confessions made, starting from the first documented interrogation (thirty-six hours after the conclusion of the interrogation of necessity), and concluding prior to the second interrogation of necessity, were of the free will of Defendant 1."[19]

First and foremost, the Authors must note that according to their approach, it is inconceivable to rule that confessions made thirty-six hours after one harmful interrogation and before another interrogation, may be considered "free and voluntary," and therefore admissible.[20] Prior to our discussion regarding the concrete ruling in the *Duma* case, this Part will consider the current case law regarding the admissibility of evidence when there is a concern about the degree of freedom and willingness of the defendant who is confessing. Similarly, this Part will analyze whether the ruling in the *Duma* case is proportional to, or dovetails with, the common application of the law.

17. *See* Haynes v. Washington, 373 U.S. 503, 519 (1963).

18. *See generally* Boaz Sangero, *The Necessity of Corroboration to Confession*, 4 ALEI MISHPAT 245 (2005) [Hebrew] (for the status of the evidence and the destructive potential embodied in relying on it). Israeli literature has even recognized the concern regarding incentivizing the investigative authorities to gather additional evidence. *See, e.g.*, Doron Menashe, *Innocent Silence—Critical Analysis of Milstien's Case,* 6 DIN UDVARIM 537, 540–42 (2012) [Hebrew].

19. CrimC 932/16 State of Israel v. Ben-Uliel (June 19, 2018) Nevo Legal Database (by subscription, in Hebrew) (Isr.) (The *Duma* case).

20. In Part II, we deal at length with interrogations of necessity and what occurs in them, further calling into question the "free and voluntary" nature of the confession. We must note that an objective interpretation of Section 12 of the Israeli Evidence Law is likely to raise many questions about the fundamentally "free and voluntary" nature of this confession. *See* EVIDENCE ORDINANCE [NEW VERSION] ch. A, art. A, § 12 (1971) [Hebrew].

A. ' *General Security Service Interrogations and Limitation of the Scope of Section 12 of the Israeli Evidence Law*

Section 12 of the Israeli Evidence Law sets out the legal rights of a suspect to remain silent and to maintain bodily integrity.[21] In practical terms, Section 12 requires that a confession be made when the suspect has the freedom to choose either to confess or not to confess. As time has passed, the reasons for invalidating confessions have grown more numerous. Thus, today, besides the concern of false confessions, the violation of the defendant's rights justifies (on its own) the inadmissibility of the confession.[22] Therefore, the use of any means of physical violence, as occurred in the *Duma* case, will invalidate the confession. In addition, even when another invalid tool is used, which prevents the suspect from exercising the right to remain silent or from taking any course of action other than confession, the resultant confession would be invalid. In this context, we should note explicitly that even if there are indications that this confession is in fact reliable, it would remain inadmissible and would be invalidated nonetheless. Thus, in the *Duma* case, the suspect demonstrated familiarity with hidden details at the scene, but his confession was nevertheless invalidated by the court.[23]

Despite the above-mentioned, and despite the fact that the appropriate principles are outlined in Section 12 of the Israeli Evidence Law, only a very limited number of these principles are applied in practice.[24] We must stress that these principles are most strongly circumscribed in interrogations conducted by the General Security Service.[25] Thus, a

---

21. *See* EVIDENCE ORDINANCE [NEW VERSION] ch. A, art. A, § 12 (1971) [Hebrew].

22. *See* Hagit Lernau, *False Confessions and False Convictions*, 11 ALEI MISHPAT 351, 358–60 (2014) [Hebrew].

23. *See* CrimC 932/16 State of Israel v. Ben-Uliel (June 19, 2018), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (the *Duma* case).

24. In our view, these principles are simply not applied. In other words, confessions made by defendants which are not free and voluntary, as well as those which impinge on defendants' rights, are accepted every day by courts throughout Israel, as the tendency of transitioning from admissibility to weight reorients the question from whether it is proper to convict in the given circumstances to a debate about the additional evidence required to achieve a conviction, despite the difficulties this raises. For such convictions, see CrimA 2869/09 Zinati v. State of Israel (Nov. 9, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.) and CrimA 5956/08 Sliman al 'Uqa v. State of Israel (Nov. 23, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

25. *See* Yotam Berger, *Despite Hundreds of Complaints of Shin Bet Torture,* HAARETZ (Dec. 2016), https://www.haaretz.com/israel-news/.premium-israel-never-investigated-cases-of-alleged-shin-bet-torture-1.5470546. *See also* Yotam Berger, *The Complaints Against*

thorough, in-depth survey of the interrogations in Shabak installations and their character raises many questions, considering the scope of the confessions that are deemed admissible in various courts.

The essential legal question of this Article is the status of the requirement for "free and voluntary" confession in the contemporary Israeli courtroom. Examining case law about confessions made after General Security Service interrogations leaves us with many concerns. Often the courts (the military courts in particular) tend to admit these confessions despite the inherent difficulties in doing so.[26]

Taking all the above into account, the obvious conclusion is that Section 12, which requires that any confession be free and voluntary, does not have the ability to prevent the admissibility of confessions which are neither free nor voluntary. Due to the limitation the authors have mentioned, as expressed by the *Duma* ruling, the protection offered by Section 12 is no longer relevant to the circumstances of the matter, and it cannot help to protect the defendant's rights from violations.

B. *Weakness of the Israeli Inadmissibility Case Law Doctrine*

The weakness of Section 12, as noted above, compels us to use an alternative track to invalidate evidence which should not be admissible under these circumstances, of a confession extorted after an unconstitutional interrogation. The alternative track is found in the case law doctrine of inadmissibility. This doctrine was first established in the *Yissacharov* case.[27] The legal basis of this doctrine is accepted in the legal community as an important and positive development for the rights of suspects and defendants,[28] and is adopted worldwide. Henceforth, and

---

General Security Service Interrogators Pile Up, but No Investigations Are Opened, HAARETZ (July 12, 2016) [Hebrew], https://www.haaretz.co.il/news/politics/premium-1.3145349. This means that the authorities have been very conservative when it comes to complaints about the Shabak impinging on the rights of suspects. Thus, complaints of illegal torture in basements (usually leading to false confessions) do not lead to any investigations of the interrogators. *Id.*

26. *See e.g.*, CrimC 5338/09 Military Prosecutor v. Abu Alya (Dec. 15, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (where the defendant was detained in a tiny cell for a prolonged period of time, was prevented from sleeping, and was subject to other conditions of deprivation). The Court avoided discussing the question of whether the confession was free and voluntary in these circumstances. The only matter that it touched upon in its ruling was the lack of physical violence, and nothing more. *Id.*

27. CrimA 5121/98 Yissacharov v. Chief Military Prosecutor (May 4, 2006), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

28. *Id.* It is important to recall that the doctrine broadens the "free and voluntary" manner, so that now the question is not only about compulsion and violence; thus, improper psychological and mental forces would justify invalidation. *Id.*

after adopting the inadmissibility doctrine, the Israeli Supreme Court will have the ability to invalidate evidence based on juridical discretion and the need for moral impeccability both for the courts and for law enforcement authorities.[29]

At the same time, analysis of current case law in terms of Shabak interrogations and the status of confessions today suggests that the case law doctrine of inadmissibility does not provide sufficient protection from the violation of defendant's rights.[30] Furthermore, this Article goes further and mentions that, according to the Authors' view, the case law doctrine of inadmissibility has proven impotent in protecting the rights of defendants in practice.[31] The stated limitation dovetails with the broadening of the term "free and voluntary" in Section 12 of the Israeli Evidence Law in all dimensions of the case law, as the police follow in the Shabak's footsteps.[32] This is also expressed in the interrogation practices which have become more varied with the passage of time; harmful confessions are not disqualified, in most cases, by the doctrine.[33]

---

29. We should go back a bit to the tendency that existed in the 1980s, mentioned in the Introduction: a defined distinction between factual truth and judicial truth. For a broad discussion of the dilemma between factual truth and judicial truth, and the appropriate outline with which the court must operate, *see* DORON MENASHE, THE LOGIC OF ADMISSIBILITY OF EVIDENCE, 20–21, 141–43 (2008) [Hebrew].

30. *See, generally* Boaz Sangero, *An Exclusionary Rule for Evidence Obtained Unlawfully as Established in the Yissacharov Ruling—Good or Bad Tidings?*, 19 ISR. DEF. FORCES L. REV. 67 (2007) [Hebrew] (discussing the disappointment in the outcome of the *Yissacharov* case). *See also* Yuval Merin & Rinat Kitai-Sangero*, Miranda, Collins and Yissacharov*, *The Gap between the Ideal and the Real in the Yissacharov Ruling*, 37 MISHPATIM 429 (2007) [Hebrew].

31. This farfetched argument emerges from the fact that there are no hard and fast criteria in the doctrine that are inviolable. The doctrine demands no more or less than an analysis of the purity of the process in light of the evidence presented. In other words, with sufficient interpretation, every bit of evidence can be subjected to the case law doctrine of inadmissibility, as we will illustrate below.

32. It is worth noting that this tendency, in which the civilian law enforcement agencies adopt a practice originating with military law enforcement agencies, is not new. Thus, for example, the rules of search and seizure followed by the police have been extensively influenced by the rules of search and seizure followed by the military police. *See* Asaf Harduf, *When You Say Yes, What Do You Mean? Concerning Intimate Technology, Autonomy of the Suspect and Legal Opportunism: Searching a Mobile Phone with the 'Consent' of a Suspect—In Light of the Pelach and Kors Rulings*, 224 HASANEGOR 4, 5 (2015) [Hebrew].

33. As an aside, a significant number of the most important rulings of the Court about invalidating confessions have been issued in cases in which this invalidation has had no practical consequence. The *Yissacharov* case was adjudicated after the defendant had been discharged from the military, and he was not even present for the verdict. CrimA 5121/98 Yissacharov v. Chief Military Prosecutor (May 4, 2006), Nevo Legal Database (by subscription, in Hebrew)

To the Authors' great dismay, the courts tend to admit confessions that were extracted through interrogation practices which impinge on the defendants in an almost sweeping manner.[34] The courts have avoided acting as a system overseeing and restraining law enforcement authorities.[35] The discussion of the weakness of the case law doctrine of inadmissibility reaches its conclusion (chronologically and ideologically) in *Meiraz*, in which the Israeli Supreme Court's ruling reaffirmed the conviction of a senior public servant based on a confession extracted through interrogation practices that included continuous threats of harm.[36]

In addition, a thorough survey of the case law doctrine of inadmissibility, which in its first days was a significant development, demonstrates that it is effectively impotent when it comes to protecting defendants' rights. In other words, Israeli jurisprudence has no inviolable

(Isr.). The most significant invalidation of a confession due to improper conduct by law enforcement authorities has been in a case in which the appellants were the heirs of the defendant; from an operative point of view, the invalidation of the confession was therefore not particularly significant. *See* CrimA 1301/06 Estate of Yoni Elzam v. State of Israel, PD 63(2) 177 (2009) (Isr.). Beyond this, we must note that even in this exceptional case, the confession was thrown out due to the right to counsel not being honored; thus, the defendant did not receive full vindication. *See* CrimA 9956/05, Shai v. State of Israel PD 63(2) 742 (2009) (Isr.) (finding the defendant cleared of manslaughter charges but guilty of negligent homicide). On the other hand, the Court finds fit to acquit defendants due to the misbehavior of law enforcement authorities, which emerges more from the lack of weight being given to incriminating evidence and less from a desire to protect the defendants from improper practices. *See* CrimC 1051/03 State of Israel v. Zohar (Nov. 15, 2007), Nevo Legal Database (by subscription, In Hebrew) (Isr.). We must note that the *Yissacharov* case has never been mentioned or discussed in terms of the rights of the defendants from the standpoint of harsh interrogation tactics and the confessions produced by such means.

34. The authors should note that deceptive interrogation practices have two determined limitations: (i) the deception cannot be of a type which violates the suspect's right against self-incrimination; and (ii) the deception cannot be one which impinges on the cause of justice. These two limitations must be analyzed, taking into consideration the circumstances of a given case. According to our approach, the limitations of case law on interrogation practices, much like the case law doctrine of inadmissibility, are quite weak and incapable of providing sufficient protection for defendants. Let us refer to the most significant case in this area, which constitutes the basis for contemporary case law, in which the Supreme Court declined to vacate a conviction based on evidence obtained by a police officer who had disguised himself as a clergyman (specifically, a rabbi). *See* CrimA 9808/06 Yaron Sankar v. State of Israel (July 29, 2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

35. As we illustrate the current tendency in case law, we must refer to the *reductio ad absurdum* of the recent Supreme Court ruling, CrimA 4109/15, Lior Meiraz v. State of Israel (July 9, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

36. *Id.*

element, as the discussion in its entirety is subject to the specific judge's discretion and interpretation.[37]

II. EXISTING LAW: EVIDENTIARY INCENTIVES FOR FALSE $ CONFESSIONS BY LAW ENFORCEMENT AUTHORITIES $

Setting aside the question regarding the status of the described confession and the justifications for the court's interpretation of it, it is relevant to deal, in a deeper manner, with the term "interrogation of necessity."[38] This necessity interrogation, and the confession given following it, would demonstrate for us the entire criminal process, based on this case study.

The "interrogation of necessity" is a term that was born in the Israeli General Security Service. Defining an interrogation as one of necessity is allowed in a ticking time bomb scenario, one constituting a substantial concern of harm to national security and creating an immediate need for information to foil an imminent act of terror.[39]

In the framework of this interrogation, it is possible, under certain circumstances, to withhold the right to counsel, without such an act invalidating the products of the investigation. The current approach is that an interrogation of necessity and its conditions constitute a proper balance between the rights of the suspect and the unique needs of this interrogation.[40] Unlike standard interrogations, which require honoring the right to counsel and guaranteeing more appropriate conditions for the defendant, interrogations of necessity constitute a sufficient reason for the courts to allow questioning under shameful conditions, which often are so indefensible as to give rise to arguments against the admissibility of any

37. It is worth noting that there is a certain potential harm for the innocent, as most of those weak suspects who would give a false confession are the same ones who would be weak defendants and not fully explore their rights to appeal, due to emotional or economic considerations.

38. For further review, see Paola Gaeta, *May Necessity Be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?*, 2 J. INT'L. CRIM. JUST. 785, 787–792 (2004).

39. *See* CrimA 1776/06 al-Sayed v. State of Israel (2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

40. *Id.*

evidence obtained under them.[41] In most, if not all, cases, the Court has rejected these arguments.[42]

The above descriptions lead us to the following hypothesis: due to the fact that case law inclines to admit borderline confessions (except under the most unusual of circumstances),[43] and due to the fact that no evidentiary sanction is placed upon law enforcement authorities, the authors find ourselves in a situation in which *there is a false incentive for defendants to make a false confession, and there is an incentive for law enforcement authorities to extract false confessions.*

We will base our argument on the *Duma* case. In the *Duma* case, the defendant gave multiple confessions, while only the first few confessions were made due to invalid means. In the *Duma* case, the Israeli Supreme Court ruled that the invalidation of an earlier confession does not necessarily imply that a later confession would be invalidated as well.[44] In fact, the Court has ruled that the fate of the later confessions should be determined by whether the impression left by the improper means on the suspect is still in force, leaving the suspect no other viable alternative to confession.[45]

This means that when considering the admissibility of a confession, the court must ask: what is the status of late confessions in light of the invalid means used against the suspect when the initial confessions were made? Hence, as the effect of the invalid means fades, and the suspect decides of his or her own free will to continue to confess, those later

41. *See, e.g.*, CrimC 31351-12-14 State of Israel v. Gabbay (2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.). It is important to note that despite the factual determination that the interrogators' testimonies should be given precedence, the authors may perceive a very blasé attitude towards violence on the part of the honored judge, as according to him, "Not every use of force is to be considered violence." *Id*. Regarding sleep deprivation and the mental stress of being placed in harsh circumstances, the judge determined that "the fact that the defendant found it difficult to sleep while in his cell due to the conditions of that location, bright lights and noise . . . [did] not constitute, on its own, the deprivation of sleep which would be an invalid technique likely to bring about a confession which is not free and voluntary." *Id.*

42. Thus, for example, the Supreme Court determined that as long as the interrogation techniques did not break his spirit or confuse his senses, his confession is "free and voluntary," as Section 12 dictates. *See* CrimA 7090/15 Khalifa v. State of Israel (2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

43. The authors must note that in extreme cases, the evidence is attributed less weight due to the scandalous behavior, even though it is almost never invalidated when such invalidation would lead to the defendant's release.

44. *See* CrimC 932/16, State of Israel v. Ben-Uliel §§ 32–34 (June 19, 2018), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (the *Duma* case).

45. *Id.*

confessions will prove admissible for all purposes, setting aside the interrogation's flaws.[46] Indeed, it appears that this procedure applies consistently to the crux of this issue—protecting the suspect's freedom to remain silent and to maintain bodily integrity, as well as exposing the truth and preventing false acquittals.

This Article asks whether it is conceivable that after the first invalid confession, the effects of the invalid means fade, yet the suspect voluntarily continues to confess because he or she assumes that the initial confessions will be admissible at trial. This is not an unreasonable scenario, in light of the nullification of the rules of evidence in Israeli jurisprudence.[47] This scenario also emphasizes the tendency in case law that dogmatically pursues admissibility in a broad and expansive manner.

Today, in practice, the Israeli courts hardly ever dismiss a confession given by the defendant,[48] and the suspect may very well assume (and his attorney would often state explicitly), that a given confession is always taken into account, no matter the circumstances.[49] Beyond those mentioned above, there are additional reasons for the suspect to make a late confession.

One such reason is that confession before the police usually improves the conditions for the suspect significantly, in both the pre-trial proceedings and at trial itself.[50] In addition, the suspect is likely to be concerned that even if the later confessions will be made without resorting

---

46. The authors should mention that these principles are not always applied in case law. *See, e.g.*, CrimC 1051/03, State of Israel v. Zohar (Nov. 15, 2007), Nevo Legal Database (by subscription, In Hebrew) (Isr.). There, the interrogation of a foreign worker, Valentine Tokila, led to conviction that was not immediately invalidated.

47. *See* 1 GABRIEL HALLEVY, THEORY OF THE LAW OF EVIDENCE 178–81 (2013).

48. The authors believe that the best example given is the *Duma* case. *See* case cited *supra* note 1.

49. Let us go further and note that many times these issues arise in Shabak interrogations, where the suspect is not afforded the right to counsel, as in fact occurred in the Duma case at issue here.

50. Turning "state's witness" is the classic legal model for incriminating testimony offered as part of plea bargain with the prosecution, as laid out in Israeli Evidence Law:

> A court shall not convict an accused person on the strength of the single testimony of an accomplice unless it finds something supporting it in the evidence; however, where the accomplice is a state's witness, his testimony shall require corroboration; for this purpose, "state's witness" means an accomplice who testifies on behalf of the prosecution after a benefit has been given or promised him.

EVIDENCE ORDINANCE [NEW VERSION] ch. A, art. A, § 54 (1971) (Isr.). However, this is insufficient, as defendants receive benefits in exchange for their confessions. Thus, we must stop implementing this rule and abusing defendants.

to any invalid means, the police will in any case engage in further invalid and illegal interrogation practices, either to elicit additional confessions or in order to obtain other evidence, whether true or false.

One may describe this situation as "Situation A": Utilitarian False Confession. In this framework, the incentive for the defendant is to make a false confession.[51] Situation A is one situation in which a confession is made due to invalid means and the suspect understands (either practically or after consultation with counsel) that only in the most extreme circumstances are confessions thrown out, even if they have been extracted in an invalid manner. Facing such a reality, the suspect has no reason, after having already given at least one false confession, to refrain from doing so again, as this will improve his or her conditions and prevent the application of invalid duress and other measures which had previously been used when he or she did not initially confess.

However, even if there is still an incentive not to give an additional false confession (e.g., for reasons of conscience), it may still be that the practical, immediate considerations will overwhelm, in most cases, those conscientious reasons. This is Situation A, in which the false confession is utilitarian and wholly advantageous. There is nothing to lose, as the defendant has already made a confession, which will in all likelihood be deemed admissible, in the defendant's estimation.

Counterarguments to the article's claim, as mentioned above, would be based on the claim that we cannot definitely state that the defendant has been in Situation A—that is, that the defendant really did assume that the court would deem his or her false confession admissible. Since one cannot know if the defendant was indeed in such a predicament, one cannot determine if Situation A, Utilitarian False Confession, applies. Indeed, this claim presents quite a challenge. In fact, the article's claim may very well be dealing with a mixed bag: a group of defendants, some of whom are guilty and some of whom are not, some of whom have assumed that their earlier confessions would be admissible, and some who have assumed that there is a certain chance of their earlier confessions being thrown out. In terms of this group, it is difficult (at least, more difficult) to claim that there is no difference between the possibility that an innocent person will confess again and the possibility that a guilty person will confess again. Nevertheless, this issue raises at least a

51. For a broad discussion of the incentives for suspects and defendants to volunteer evidence, see Doron Menashe & Limor Riza, *Probative Incentive for Inducing Cooperation Between Suspects and the Prosecution*, 25(3) MECHKEREI MISHPAT 845 (2010) [Hebrew].

reasonable doubt about the incentive for confession. This calls for an in-depth analysis of the matter in order to obviate any reasonable doubt.

Consider another situation, beyond Situation A. The law enforcement authorities, aware of the course of events described above, intentionally take this method, that is, carry out improper investigations and subsequently conduct lawful investigations. The authors will call this "Situation B": Scheme to Extract a Utilitarian False Confession (from the viewpoint of game theory).[52] This scenario is defined by a chain of events in which the maximal utility for the defendant would be achieved by false confession, and thus the dominant strategy for the defendant (in accordance with our game theory) would be to give a false confession.[53] Afterwards, as in the *Duma* case, we may conduct an additional interrogation, this time lawfully, and extract the same confession.

III. QUESTIONS REGARDING THE THEORETICAL BASIS FOR ADMITTING A LATE CONFESSION—RELEVANCE

Setting aside the court's rulings from the positivist viewpoint and the pragmatic ramifications of accepting late confessions, this article aims to address a question which, for some unknown reason, has vanished from the court's rulings, an inviolable condition for evidence to be considered admissible. Our question touches on the following: is the admission of the later confessions, given the fact that the earlier confessions are null and void, relevant to the circumstances of the matter? This question has yet to be addressed in legal literature, and it investigates the relation between the late confession and the requirements of relevancy in the Israeli evidence law; namely, whether it is admissible and has to do with the issues at hand.

A. *Situation A: The Utilitarian False Confession*

As we apply the theoretical basis to the circumstances of the case, this Article will analyze the stated situations from a legal point of view. Let us begin with Situation A, in which the suspect who has already given a false confession has an incentive to make another false confession. In this

52. *See* MAYA BAR-HILLEL & URIEL PROCACCIA, THE ECONOMIC APPROACH TO LAW 108–11 (2012) (providing an economic analysis of the dilemma, as well as its final resolution).

53. *Id.* at 110–11. Finally, let us note yet another possibility for the second confession: the sunk cost fallacy. Here, the defendant may view the initial confession as a sunk cost, irretrievable, and thus choose to follow the same course of action. In this sense, the unlawful extraction of a confession creates an incentive (i.e., a behavioral inclination) for the defendant to cling to his or her false confession. *Id.*

situation, the causal link between the illegal act and the extraction of the confession is severed. In that point, the suspect understands that there is no reason in avoiding giving an additional confession, and therefore he has no true choice with regard to substantial ramifications or utility. This situation cannot invalidate the confession based on Section 12 of the Israeli Evidence Law.[54] Nevertheless, though this argument has not yet been expressed in case law or legal literature, we may still argue for the inadmissibility of this confession in certain circumstances (henceforth, the "conditions of inadmissibility").

This Article maintains that despite the later confession (setting aside the motivations for that later confession), this confession is not admissible. To the authors' dismay, the Court and prevailing legal discussion in general has ignored an additional threshold criterion mandated by the Israeli Evidence Law—the requirement of relevancy.[55] The requirement of relevancy is often forgotten in the legal discussion of confessions. Evidence is admissible if, and only if, it is relevant and not excluded by another provision of the Israeli Evidence Law.

Nevertheless, when this article is talking about confessions, it appears that their relevancy—their evidentiary power—always applies. In other words, a confession on its own brings about the presumption by both sides of the proceeding, and by the court itself, that the confession is relevant to the circumstances of the matter. The sole question is whether the confession can be invalidated despite its relevancy. The central justification for this is the common denominator which exists in every legal confession—namely, an act which is decidedly against one's own interest. Case law reveals that "an innocent person does not incriminate himself or herself," which is the inverse of the Talmudic rule, "One does not incriminate oneself."[56]

At the same time, and despite the problematic status of the defendant's confession, the rationales employed by the Court are not valid

54. Israeli Evidence Ordinance [New Version], No Legal Frontiers (1971), http://nolegalfrontiers.org/israeli-domestic-legislation/evidence/evidence019ed2.html?lang=en.

55. *See* EVIDENCE ORDINANCE [NEW VERSION] ch. A, art. A, § 1 (1971) (Isr.) ("Subject to the provisions of this Ordinance, any person may be summoned to give evidence which is admissible and relevant to the case.").

56. The authors must emphasize that this Talmudic principle means that one *cannot* incriminate oneself (i.e., that a confession is utterly inadmissible in criminal law). However, Israeli case law has taken the opposite position, that a confession is presumed to be admissible. For a full analysis of this, see Boaz Sangero & Mordecai Halpert, *Nevertheless, Reversing the View of a Confession*, 27 MECHKEREI MISHPAT 529, 531–33 (2011) [Hebrew].

in the circumstance of Utilitarian False Confession, as presented.[57] In Situation A, the suspect acts out of self-interest (or, at least, what the suspect identifies as self-interest). Due to this, such a confession (as long as it does not have any other indicator of reliability, nor does it seem that further legal proceedings will yield any such indicators) is simply inadmissible, as it does not have any relevancy or probative value. An example of this is an extremely laconic confession or a confession based on perishable details from the scene, or those which can be neither proven nor disproven. This article will deal with this from a Bayesian viewpoint in Section III.C.[58]

B. ' *Situation B: Police Scheme to Extract a Utilitarian False Confession*

In Situation B, as long as the above conditions of inadmissibility apply, the confession must in any case be irrelevant. The authors' claims to the confession's lack of relevance due to the fact that the confession of the suspect, given under these circumstances, does not raise or lower the probability that he did commit the offense.

In addition, such scheme and its attendant actions fulfill the requirement for a causal link between improper means and the making of a confession. If so, without any connection to its irrelevancy, the confession would be subject to disqualification by Section 12 of the Israeli Evidence Law.[59]

We must note that even if the above conditions do not apply (for example, even if there is an element of reliability of the confession), and even if it concludes hidden details from a particularly strong type, the confession is still disqualified according to the abovementioned Section 12, which as stated does not adopt a test of reliability.[60] Does the test of reliability allow for a blue pencil doctrine, that is, recognize the

---

57. *See, e.g.*, Criminal Further Hearing 4342/97, State of Israel v. El Abid, 51(1) PD 736 (1997) (Isr.) ("The wisdom of the heart dictates to us that no person would incriminate himself or herself when he or she is innocent.") (Cheshin, J.). This is an absolute reversal of Jewish law, assuming that there is no reason for self-incrimination by the innocent; therefore, any confession must have substantive weight (in contrast to Jewish law, where any confession by the defendant is disqualified).

58. For an example of the application of Bayes' Theorem from the viewpoint of the two-world model, see Doron Menashe & Eyal Gruner, *Hypotheses of Innocence, the Proper Test: Should They Be Admitted, Rejected or Ascribed Less Weight if the Defendant Fails to Raise Them?* 11 DIN UDVARIM 273, 304–09 (2018) [Hebrew].

59. *See* EVIDENCE ORDINANCE [NEW VERSION] ch. A, art. A, § 12 (1971) (Isr.).

60. *See id.*

admissibility of confessions even though they have been given subsequent to invalid confessions? In other words, and in a similar way to the blue pencil doctrine's application in the contract law field,[61] this article intends to claim that a relative nullity is possible, even in the manner of unlawfully extorted confessions. This article will address that inquiry in Part IV.

C. ' *Bayesian Analysis of Late Confessions Based on the Two-World Model*

According to Bayes' Theorem,[62] in order to determine whether evidence is relevant to the circumstances of the matter, the one must determine if the given event's occurrence increases (or decreases) the likelihood of an event's occurring.[63] Bayes' Theorem is significant, as it analyzes the probability of guilt after the addition of new information (i.e., additional evidence or confession). For this article's inquiry, it must ask two additional questions.

First, does the defendant's confession under shameful conditions and torture increase, on its own, the probability that a crime has been committed? This Article maintains that a confession made under the stated circumstances neither increases nor decreases the probability of guilt, as a consequence of the shameful conditions to which the suspect has been subjected.[64] In other words, the probability of a confession after interrogation by the General Security Service is not influenced by innocence or guilt, nor does it influence the probability of innocence or guilt. Based on the Bayesian model for admissibility and Section 1 of the Israeli Evidence Law,[65] we are talking about a confession that is irrelevant—and therefore inadmissible.

---

61. *See, e.g.*, Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672 (2008).

62. Thomas Bayes et al., *An Essay Towards Solving a Problem in the Doctrine of Chances*, 53 PHIL. TRANSACTIONS 370 (1763). We must note that despite this essay's age, it is still valid and applicable today. *See, e.g.*, BRADLEY P. CARLIN & THOMAS A. LOUIS, BAYES AND EMPIRICAL BAYES METHODS FOR DATA ANALYSIS (Chapman and Hall/CRC eds., 3rd ed. 2010).

63. For an in-depth analysis of the theorem, as expressed in Israeli legal literature, see Ron A. Shapira, *The Probabilistic Model of the Law on Evidence—Part One: Traditional Criticism*, 19 IYUNEI MISHPAT 205, 206–08 (1995) [Hebrew].

64. These shameful conditions in their own right apparently justify the disqualification of the confession by law. At the same time, as we have seen above, case law often reserves the rule of disqualification of confessions which are not free and voluntary for exceptional circumstances; it even broadens the rubric of "free and voluntary," as we noted in Section I.A.

65. *See* EVIDENCE ORDINANCE [NEW VERSION] ch. A, art. A, § 1 (1971) (Isr.).

Second, we come to the question at the heart of this Article: does an additional confession, made under reasonable conditions and no torture, increase the probability that the one offering this confession has in fact committed a crime? This Article maintains, in opposition to the *Duma* case, that even such a confession is irrelevant under these circumstances.[66] In order to illustrate the analysis, we present the following formula.[67]

1. ! *G* signifies the eventuality of guilt, while *Not-G* signifies lack of guilt.
2. ! *C* signifies the Confession.
3. ! *P(a)* is the standard indication of the function of the probability of each event. Thus, *P(c)* is the probability that the defendant will confess.
4. ! *P(B/A)* is the standard indication of conditional probability of event B assuming that event A occurs or has occurred. For our purposes, *P(C/G)* is the probability that a confession will be made, assuming that the defendant is indeed guilty of having committed the crime.
5. ! *O(A)* refers to the odds of event A.[68]

$$O(G/E) = O(G) \times \frac{P(E/G)}{P(E/not-G)}$$

According to the theorem, the odds of the defendant's guilt, given the existence of certain evidence—O(G/E), the *a posteriori* odds of guilt—are influenced by a number of factors.

66. It should be noted that we are talking about the subjective facet of Bayes' Theorem (i.e., the calculation of Bayes' Theorem is based on subjective considerations). The analysis is based on specific knowledge that the defendant has in reaching a decision. The simple man on the street who is asked whether he will confess to a crime he has not committed cannot be compared to a defendant who is sitting in a jail cell. The difference in subjective *a priori* probabilities justifies a different Bayesian analysis. For more on the subjective Bayesian analysis, see J. Pfanzagl, *Subjective Probability Derived from the Morgenstern-von Neumann Utility Concept*, *in* ESSAYS IN MATHEMATICAL ECONOMICS 237–51 (Martin Shubik ed., Princeton Univ. Press 1967).

67. For the Bayesian analysis which inspired this, see Doron Menashe & Shai Otzari, *What is the Weight of a Confession? Re-Evaluating the Bayesian Weight of Criminal Confession*, *in* A THEORY OF EVIDENCE LAW 386, 392–94 (Guy Sender ed., Perlstien-Genosar Publishers 2017) [Hebrew].

68. The term "odds" refers to the probability of an event divided by the total probability ($\frac{P(A)A}{1-P(A)}$).

First of all, there is O(G): the *a priori* odds of guilt, or the odds of the defendant's being guilty before considering the weight of any additional evidence. This is the formula for the odds of guilt:

$$O(G) = \frac{P(G)}{P(not - G)}$$

Second, there is the ratio of the evidence's feasibility (i.e., the ratio between the probability that such evidence would exist among guilty persons and the probability that such evidence would exist among innocent persons). The formula for the feasibility of evidence is as follows:

$$O(G/not\ G) = \frac{P(E/G)}{P(E/not - G)}$$

Thus, in order to determine the odds of the defendant's guilt in light of all of the evidence uncovered, the fact-finder must determine the *e* odds of guilt and analyze the ratio of the feasibility of the evidence. Afterwards, the fact-finder can determine the facts using Bayes' Theorem, updating the odds of guilt.

Now, let us demonstrate how this applies to the circumstances of the *Duma* case. Let us assume that we are looking to prove that X committed a price-tag attack. For the purpose of disposition, there is a one-in-four chance that X has in fact committed the crime (*a priori* odds of guilt). Therefore, the *a priori* odds of guilt in these circumstances would be twenty-five percent.[69]

Second, let us assume that a confession makes it ten times more likely (the ratio of the feasibility of evidence) that a person is guilty. At this stage, after the law enforcement authorities have squeezed a confession out of the defendant, creating evidence *ex nihilo*, we may use Bayes' Theorem to update the odds of the defendant's guilt. However, as we illustrated above, using improper means such as torture does not increase the probability after a confession has been made, so the *a priori* odds of guilt remain as they were. Correspondingly, according to the game-theory approach we presented above, late confessions as well do not increase the

69. We are talking about a disposition for illustrative purposes, but it is not farfetched to argue that there is an evidentiary value to detainment by law enforcement agencies (not merely because law enforcement agencies decide to invest resources in detaining this specific person). Richard Posner was one of the first to consider the resources of the prosecution as having practical ramifications, in terms of everything related to laws of evidence and odds of guilt. *See* Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1505–09 (1998).

measure of probability *a priori*. Thus, we have proven that each of these confessions neither increases nor decreases the probability of guilt, and thus these confessions have no pragmatic relevancy. To put it more cautiously, we may say that at least the weight of relevancy of the confession is significantly less than the weight ascribed to them today.

The authors note, from a practical point of view, that this research recognizes the pragmatic difficulty in using Bayes' Theorem. The authors intend to use the theorem with an emphasis on the pragmatic difficulty in a judicial determination that there are no ramifications for the defendant,[70] and an emphasis on the difficulty of applying probabilistic theories in law.[71] Indeed, the probative value of any item of evidence is influenced by the whole of the body of evidence and their reciprocal relationship which cannot be expressed in probabilistic calculations. Even if it were to be expressed, such a complex mathematical equation is impractical.[72] In light of these considerations, in order to carry out a Bayesian analysis in a certain legal proceeding, it is necessary to simplify significantly the situation under discussion in such a way that has an effect upon the validity of the analysis's conclusions.[73]

In Section III.D, we will present the difficulties inherent in using evidentiary additions for the purpose of proving guilt beyond any reasonable doubt; and in Part IV, we will present a practical proposal for a solution, which will balance the desire to avoid convicting innocents and the need of the law enforcement authorities to fight crime.

D. ' *The Difficulties Inherent in Using Evidentiary Additions for the Purpose of Proving Guilt Beyond a Reasonable Doubt*

The rulings presented above, both in military and civilian court, illustrate for us the difficulty and the existing impingements on the rights of defendants. The discussion on the plane of weight, apart from the

---

70. We must note that such a determination defies the tendency of Israeli jurisprudence, which discusses the corpus of evidence on the plane of weight, not the plane of admissibility, ignoring the question of whether the model is appropriate or not.

71. We must note that this research's departure point is that there is no hidden detail in the original confession (aside from conceding one's guilt based on the information put in the defendant's mouth) and, in addition, that the second confession relies, in its entirety, on the original, essentially being a laconic repetition of the first confession. For the difficulties inherent in relying on recreations constructed based on confessions extracted via invalid means, see Retrial 3032/99, Barens v. State of Israel 56(3) PD 354, §§ 5–6 (2002) (Isr.) (Dorner, J.).

72. *See* Michael S. Pardo, *Juridical Proof, Evidence, and Pragmatic Meaning: Toward Evidentiary Holism*, 95 NW. U. L. REV. 399, 400–03 (2000).

73. *See* Menashe & Otzari, *supra* note 67, at 392–94.

difficulty of incentivization inherent in it, contains within it a leeway that is inappropriate in the criminal sphere, which is also expressed in a broad construction.[74]

According to our approach, and as we showed above, it cannot be that after proving that there is no relevance to such confessions, and as arises from the inherent difficulties in avoiding invalidating them via the case law doctrine of inadmissibility, the courts will nevertheless pass over these two insurmountable hurdles and evaluate on the plane of the weight of the evidence.

In this context, these inherent difficulties are reinforced by the tendency of law enforcement authorities to collect only incriminating evidence and to avoid exculpatory evidence.[75] Thus, the Court avoids being exposed to the general network of evidence, including facts which constitute a type of "negative supplementary evidence" (our definition). Negative supplementary evidence is any factual detail that may provide an explanation that is not consistent with the prosecution's narrative for how the event unfolded. Such a supplement is particularly likely to provide a reasonable explanation for the defendant's version. Thus, in light of the fact that it cannot help the prosecution's case, sufficient resources (or any resources at all) are not invested to investigate factual alternatives. This behavior of the prosecution, in certain circumstances, is likely to be the difference between acquittal and conviction of an innocent person.

The Authors will not delve into the depths of these matters in this constricted framework, but it is still worthwhile to note that the question

74. For the difficulty inherent in a broad construction, see Boaz Sangero, *Broad Construction in Criminal Law?! On the Supreme Court Chief Justice as a Super Legislator and Eulogizing the Strict Construction Rule*, 3 ALEI MISHPAT 165 (2003) [Hebrew]. *See also* Gabriel Hallevy, *The Legal and Constitutional Principle in Israeli Punitive Law*, 8 KIRYAT HAMISHPAT 335 (2009) [Hebrew].

75. This inclination, whether intentional or not, is without a doubt a situation of perversion of justice on the part of the prosecution. Broad construction of this statement allows us to say that this is akin to falsification of evidence on the part of the prosecution, which is likely to lead to false convictions, while case law and rulings have not addressed this problem at all. For an exception to this tendency, see CrimC 44591-11-10 Department for Internal Investigations v. Alchades (Apr. 12, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.). Although in this case as well, the court ultimately vindicated the defendant. *Id.*

of supplementary evidence to the defendant's confession must be dealt with more extensively.[76]

IV. PROPOSAL FOR A COMPROMISED SOLUTION: APPLYING THE BLUE PENCIL DOCTRINE $

What arises from everything we have said is that there is a compelling need to alter the approach of the law to confessions made under circumstances similar to those of the *Duma* case. Beyond this, as long as we focus on the requirement of relevancy, the law requires us in any case to ignore a confession which has no probative value. At the same time, our research recognizes the fact that such disqualification and inadmissibility is impractical and may easily be misused by defendants and their counsel. Therefore, there is a need to balance the essential requirements of the laws of evidence and law enforcement's need to fight crime.

In order to strike a balance between these two aims, this Article proposes to try, as much as possible, to isolate the element of the reliability of the confession by using the blue pencil doctrine,[77] and to relate to it as *independent* relevant evidence. Thus, for example, if the confession includes hidden details from the scene, instead of disqualifying every jot and tittle of the confession (which would lead to the release of guilty parties and would harm the court's attempt to uncover the truth),[78] we should disqualify it while leaving admissible the indicators of reliability *as independent circumstantial evidence*.

---

76. We must note that Israeli databases do not show any example of a confession disqualified due to a lack of something else. In light of the law of large numbers, assuming (optimistically) that about 0.1% of convictions are false, then at least one out of 1,000 false confessions ought to be disqualified. This statement, on its own terms, raises many questions about the aim of supplementary evidence and its proper status in these circumstances.

77. This means a relative disqualification of the confession, striking a balance between admitting the confession (as in the *Duma* case) and totally disqualifying it as inadmissible, as arises from the Bayesian analysis. *See supra* Section III.A. *See also* Guy Seidman & Hillel Sommer, *The Israeli Supreme Court and the Disengagement Plan: In the Aftermath of the H.C.J. Decision in the Regional Council of Gaza Beach v. the Israeli Knesset*, 9 MISHPAT UMIMSHAL 579, 603 (2006) [Hebrew] (discussing the blue pencil doctrine and its legal ramifications, with an emphasis on using it in cases where it is difficult or close to impossible to reach an unambiguous decision.

78. Concerning the dilemma between the ideal of exposing the truth and preventing the conviction of innocents, see Doron Menashe, *The Ideal of Finding Truth and the Principle of Minimizing False Convictions: An Analysis of Complex Relations*, 1 KIRYAT MISHPAT 307–34 (2001) [Hebrew].

The claim of this research is that the special legal protection of Section 12 does not extend beyond statements that are not an integral part of the confession and which can rise to the surface even without it. In other words, the absence of this issue is not a lacuna, but rather a negative arrangement, as even the *Yissacharov* case does not mandate the disqualification of the derivative evidence.[79]

Indeed, it is correct that unlawful means motivated the suspect to expose these details, but as long as these details are reliable, they should not be automatically disqualified; rather, we must examine if it is possible to invalidate them according to a weaker general doctrine, which protects the suspect less, and rightfully so—in accordance with the ruling in the *Yissacharov* case.[80]

CONCLUSION

We have seen from a logical epistemic point of view that the law as it stands, under the aegis of the Court, creates a situation in which there is a substantive incentive to give a false confession. It would not be farfetched to claim that the law enforcement authorities—the recurring players in criminal proceedings—calculate their steps accordingly and consciously (at least potentially, if not practically), conforming to the incentives which exist to produce a false confession.

This situation brings us to the two conclusions we discussed above. First, the confession of a defendant has no relevancy for the question of his or her guilt, and this is based on the two-world model that originates in Bayes' Theorem. Therefore, we may disqualify the evidence based on Section 1 of the Israeli Evidence Law, which requires relevancy of the evidence in order to present it.[81]

Secondly, it is appropriate to establish a relative rule related to the admissibility of evidence regarding confession, in light of the difficulties inherent in the current situation. This is based on the understanding that it is not possible to disqualify evidence in a sweeping manner in light of the existing difficulties that law enforcement authorities have in fighting crime, as well as the understanding that we cannot impinge in an essential

79. *See* CrimA *5121/98* Yissacharov v. Chief Military Prosecutor (May 4, 2006), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

80. Thus, there will be an important discussion regarding the tests set there, in terms of the ease of acquiring evidence by lawful means—the alternative which the authorities had—and all of the tests as required in the *Yissacharov* case.

81. *See* EVIDENCE ORDINANCE [NEW VERSION] ch. A, art. A, § 1 (1971) (Isr.).

manner, as described, on the rights of the defendant. The blue pencil doctrine would help us attempt to find a balance, in a measured way, between these two important principles. It also would provide the court with another tool to examine the issue, one that is not harsh and sweeping like absolute disqualification. Adopting these principles, as presented above, would allow more just and accurate verdicts, whether from the viewpoint of criminal procedural law and the appearance of justice, or from the viewpoint of the essential law, as such false confessions are likely to bring about false convictions.