Exclude Evidence You Exclude Justice’? A Critical Evaluation of Israel’s Exclusionary Rule After Issacharov

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“EXCLUDE EVIDENCE, YOU EXCLUDE JUSTICE”? A CRITICAL EVALUATION OF ISRAEL’S EXCLUSIONARY RULE AFTER ISSACHAROV

Binyamin Blum*

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1. 5 Jeremy Bentham, RATIONALE OF JUDICIAL EVIDENCE SPECIALLY APPLIED TO ENGLISH PRACTICE 34 (1827).
I. Introduction

The United States Supreme Court’s ruling in Herring v. United States,² which expanded the “good faith” exception to the exclusionary rule, has caused much concern among American legal scholars. Many fear that Herring might be “a mere harbinger of things to come.”³ They have pointed to its dangerous potential of transforming the exclusionary rule, making exclusion the exception rather than the

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² 129 S. Ct. 695 (2009).
Following Justice Ginsburg’s lead, some have expressed concern that Herring’s approach towards exclusion will increasingly leave violations of the Fourth Amendment without remedy; this, in turn, will significantly weaken rights. Herring’s transformative power of course largely depends on how broadly or narrowly it will be construed. Many of the concerns may be overstated. Still, even taking a cautious approach, Herring appears to be yet another chapter in the Supreme Court’s chipping away at the exclusionary rule.

Part of the criticism of Herring was aimed at the Court’s holding that “the benefits of deterrence must outweigh the costs. . . of letting guilty and possibly dangerous defendants go free,” and that deterrence must “pay its way.” Such language seems to imply that the exclusionary rule might increasingly take the form of a case-by-case balancing test, which will weigh the benefits of deterrence against the costs of exclusion and possible acquittal.

If critics are right, and American law is in fact headed towards adopting a more flexible exclusionary standard, it is crucial to consider the experience of other countries that have taken that approach. Flexible exclusionary standards, based on elaborate weighing tests, are quite prevalent among other legal systems. Therefore, their experience may provide useful insight, but also important warnings about the dangers of shifting towards a more flexible exclusionary standard. To shed light on that issue, this article explores recent developments in Israeli exclusionary rule jurisprudence and how they have impacted judicial practices.

In May 2006, the Israeli Supreme Court handed down its much anticipated ruling in Issacharov v. The Chief Military Prosecutor, redefining the Court’s position towards unlawfully obtained evidence. Whereas in the past Israeli courts would not exclude illegally acquired evidence, now the Court follows a more flexible approach. This shift indicates a move towards a more pragmatic and less rigid application of the exclusionary rule, which is in line with the international trend towards more flexible exclusionary standards.
evidence unless also deemed unreliable, the new doctrine empowered courts to disregard such evidence altogether, reliable as it may be. Still, exclusion would in no case be automatic, even if the most fundamental of the defendants’ rights were severely and intentionally violated. Under Issacharov, judges were to have broad discretion over exclusion. They were to rule on a case-by-case basis, taking into account the totality of the circumstances. To that end, Issacharov provided a long illustrative list of potentially relevant considerations.

According to the Supreme Court, Issacharov was not an isolated decision. The Justices explained that their ruling reflected a broader transformation in Israel’s normative landscape, which began in 1992 with the passing of Basic Law: Human Dignity and Liberty. This “Constitutional Revolution” as the Court has dubbed it, had introduced greater protection for human rights, including those of criminal defendants. Courts would now give such rights greater consideration when they collided with other rights, values, and interests such as crime control and verdict accuracy. Whereas in the past rectitude of decision reigned supreme as the primary objective of Israeli evidence law, “doing justice” would henceforth require greater attention to trial fairness and due process.

In previous work I have argued that Issacharov’s main significance was rhetorical: it was meant to proclaim the Israeli Supreme Court’s liberal values and signal its affiliation with other common law jurisdictions. I explained that from a practical perspective the decision’s significance was limited. Still, I wondered what effect Is-

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11. Courts could only diminish the evidence’s weight. *Id.* ¶ 48, at 377-79.
12. *See id.* ¶ 76, at 429.
13. *Id.* ¶ 54, at 402.
15. *Id.* ¶ 40, at 379-81. The Court emphasized that rectitude of decision would continue to be the primary goal of the criminal legal process, but due process would now play a greater role. *See id.* ¶ 47, at 390-92. The Court also emphasized that rectitude of decision was never the *sole* objective of the rules of evidence and of the criminal process. Other aims are reflected in the various privileges recognized under Israeli law and in the Meiri doctrine, that allowed courts to discount the weight given to unlawfully obtained evidence. *See id.* ¶ 44, at 379-81, 383-85. The Court also emphasized legislation that excludes evidence obtained in breach of privacy or through illegal wiretapping. *Id.* ¶ 39, at 376-79.
16. *See id.* ¶ 45, at 385-88. “A broader conception of dispensing justice is not restricted to uncovering the truth and accurately applying the law to the facts of a given case; the administration of justice is also dependant on the way in which the court reaches its decision in the circumstances of the case before it.” *Id.* ¶ 45, at 387.
sacharov’s rhetoric might have on Israeli courts’ exclusionary practices.

This article is designed to answer that question. My purpose is to examine the extent to which Israeli courts have delivered on Issacharov’s rhetorical promise to take defendants’ rights more seriously. Has Issacharov indeed been a watershed, representing a paradigm shift in the way that Israeli courts consider unlawful police behavior and the evidence it yields? Or has the stated shift been primarily rhetorical? To answer these questions, I take a close and critical look at the decisions rendered in motions to exclude unlawfully obtained evidence during the three and a half years since Issacharov. Qualitatively analyzing a dataset of 126 decisions, I examine how the judiciary—both lower courts and the Supreme Court itself—has interpreted and applied Issacharov. I examine how courts have balanced the defendants’ right to due process with other competing interests and values. In an effort to identify what judges deem determining factors when applying the exclusionary rule, I compare and contrast the cases in which courts have excluded unlawfully obtained evidence and those in which they have not.

I argue that in practice, judicial responsiveness to Issacharov has been rather limited. Regardless of the rights infringed, Israeli courts have been loath to exclude illegally obtained evidence. Proof of guilt is rarely suppressed, even in relatively minor charges. Successful motions to exclude can generally be traced to a small group of judges who have seized on Issacharov’s rhetoric to further defendants’ rights. However, the vast majority of judges in Israel avoid exclusion, drawing on the highly flexible and ambiguous doctrine provided in Issacharov to justify their rulings.

I do not, however, consider Issacharov’s flexibility and internal inconsistencies to be the cause of the exclusionary rule’s demise in Israel. Rather, I argue that Issacharov as well as subsequent cases are the effects of broader socio-legal phenomena. While other scholars have drawn attention to Issacharov’s many doctrinal shortcomings, my dataset demonstrates that in an effort to eschew the exclusionary rule and admit unlawfully obtained evidence, lower courts have gone beyond the bounds of the doctrine as laid down by the Supreme Court and have proven quite resourceful in avoiding exclusion.

Therefore I suggest a different explanation for the exclusionary rule’s failure in Israel. Drawing on Mirjan Damascha’s scholarship on

from a practical standpoint, deeming evidence “admissible, but without weight” was equivalent to adopting a flexible exclusionary rule.
comparative legal process, I argue that Issacharov and its progeny reflect a particular approach towards justice that prevails in Israeli legal culture. Notwithstanding the Supreme Court’s rhetoric, Israeli courts remain far more outcome driven, rather than process oriented. If a result is regarded by a court to be accurate it is therefore also considered just, regardless of the procedural flaws in arriving at that outcome. This result-driven approach has proved resilient even after the Constitutional Revolution, and in fact seems only to be gaining ground, in criminal procedure and beyond.

Furthermore, I argue that concepts and doctrines originating in administrative law, such as reasonableness, proportionality, presumptions of regularity, inherent powers and “relative voidness,” have all found their way into the application of the exclusionary rule. In an attempt to explain how and why these doctrines have crept into the criminal legal system, I suggest that counterterrorism might provide at least a partial explanation: efforts to try terrorists in civilian courts may have opened the gates to incorporating administrative law standards into criminal procedure. The desire to afford a fair criminal trial, coupled with the fear of setting potentially dangerous terrorists free, has deemed criminal procedure more pliable. The flexibility that such trials have introduced often goes well beyond cases of national security, influencing standard criminal proceedings as well.

The article is divided into three parts. I begin by exploring the Supreme Court’s ruling in Issacharov and the exclusionary rule it created. I then consider some of the doctrinal critiques Israeli legal scholars have raised against the decision. In the second part I turn my attention to the empirical component and examine how courts have applied Issacharov. In the final section I consider some of the underlying causes for judicial reticence to exclude unlawfully obtained evidence despite the high and promising rhetoric of Issacharov.

II. THE ISSACHAROV RULING

A. The Facts and the Holding

On May 4, 2006, the Israeli Supreme Court handed down its decision in Issacharov v. The Chief Military Prosecutor, awarding courts the discretion to exclude illegally obtained evidence. Upon admission to a military prison to serve a sentence for absence without leave,

20. Id. ¶ 76, at 429.
Rafael Issacharov, a private in the Israeli Defense Forces, was caught with cannabis on his person. The small packet of marijuana had dropped from his underwear while the defendant was being strip-searched. Issacharov responded immediately: "it's weed; I can explain." The following day, Issacharov was interrogated by the military police who informed him of his right to remain silent, but knowingly and intentionally refrained from informing him that he was under arrest or of his right to an attorney. Issacharov subsequently confessed to prior possession and use of marijuana and provided the military police with a urine sample, which corroborated his confession. Only after his initial questioning did Corporal Ophir, who questioned the accused, inform Issacharov that he was under arrest and of his right to counsel.

In an 8-1 decision, the Israeli Supreme Court acquitted Issacharov of the prior use and possession charges. He was convicted only for possession of the drugs found on him. The Court found that Issacharov's confession was "free and voluntary" in accordance with Article 12 of the Israeli Evidence Ordinance in that his personal autonomy had not been compromised. The Court nevertheless excluded the confession through a new judicially-created exclusionary rule for unlawfully obtained evidence. The Court rendered its innovative exclusionary rule part of the larger "Constitutional Revolution" that has swept Israel since the passage of Basic Law: Human Dignity and Liberty in 1992. The Basic Law, according to the Court, created a new balance between rectitude of decision and crime control on the one hand and due process on the other, leading to greater considera-

21. Id. ¶ 1, at 327.
22. Id.
23. Id. ¶ 1, at 327-28.
24. Id. ¶ 1, at 328.
25. Id.
26. Id. at 320. Justice Grunis dissented while Justice Cheshin issued a separate opinion. Id. at 435, 437. Unlike the United States Supreme Court, the Israeli Supreme Court typically decides cases in panels of three justices. The Chief Justice or the original panel of three may order a hearing before a broader panel of an odd number of judges. See Courts Law (Consolidated Version), 5744-1984 §26, 38 LSI 271 (1983-84) (Isr.). Such larger panels are reserved for questions of particular significance. See id.
28. Id. ¶¶ 36-37, at 374-75. The Court found that since the defendant had been informed of his right to remain silent, and since after consulting a defense attorney he chose to give a second statement, the MP's failure to warn him of his right to an attorney did not deem his initial statement involuntary; it did not compromise his personal autonomy or ability to choose not to give a statement. Id.
29. Id. ¶ 80, at 431-33.
30. See id. ¶ 46-47, 54, at 388-92, 402-03.
tion for defendants' procedural rights. This protection translated into the greater power and willingness of courts to exclude illegally obtained evidence, rather than merely discounting its weight as they had previously (albeit rarely) done under the old doctrine. The decision was hailed by many in the Israeli press, academia, and criminal legal practice as "a revolution in Israeli evidence law."

In crafting its decision and determining the proper scope of the exclusionary rule, the Israeli Supreme Court drew heavily on comparative law, turning to a series of common law jurisdictions including the United States, England, Canada, Australia, and South Africa for inspiration. The Court began by considering the primary objectives that exclusion serves in different legal systems. The Justices distinguished the American model, which focuses on deterrence, from the Canadian, English, and South African models, which emphasize exclusion's role in ensuring the fairness of the proceedings and maintaining judicial integrity. The Israeli Court preferred the latter approach. Closely linked was the Court's distinction between backward-looking approaches meant to "erase" or remedy the damage already caused by the illegal action, and forward-looking approaches aimed at avoiding future injustice that would result from admitting unlawfully obtained evidence against the defendant at trial. From these two distinctions flowed a third: automatic exclusion as opposed to a more flexible and discretionary rule, with the Israeli Supreme Court preferring the latter.

Drawing heavily on the Canadian Supreme Court's ruling in Collins, the Israeli Court articulated three groups of considerations that

31. Id. ¶ 54, at 402-03.
32. Id. ¶¶ 47, 54, at 390-92, 402-03. It is worth noting that in practice courts rarely discounted the weight of unlawfully obtained evidence.
33. See Blum, supra note 17, at 2131, 2135-36, n. 19.
34. CrimA 5121/98 Issacharov [2006] ¶¶ 55-66, at 403-18. As we shall see in the following section, many have criticized the Court's misunderstandings and questionable borrowing of foreign law.
35. See id.
36. Id. ¶ 56, at 405-06.
37. Id. ¶¶ 57-59, 407-10.
38. Id. ¶ 61, at 413. The Court also mentions the "Protective Principle," but it remains unclear to what extent this principle has been adopted. See Boaz Sangero, An Exclusionary Rule for Evidence Obtained Unlawfully as Established in the Issacharov Ruling - Good or Bad Tidings?, 19 ISR. DEF. FORCES L. REV. 67, 89-90 (2007). For a discussion of the Protective Principle, see Peter Mirfield, Silence, Confessions and Improperly Obtained Evidence 18-19 (1997).
40. Id. at 413-14.
may bear on a trial judge's discretion when deciding whether to exclude evidence. The first was the nature and severity of the violation committed by the authorities: whether it was marginal and technical or intrusive and in breach of a fundamental right; whether the authorities acted maliciously or in good faith; whether extenuating circumstances could justify the police's behavior (for example, whether the police acted to prevent evidence destruction); if there was a ready way to obtain the evidence legally, a factor that would weigh towards exclusion; and the evidence's "discoverability," i.e. whether the police would have obtained the evidence, even without infringing the rights of the accused. The second group of considerations addressed the

see Rinat Kitai-Sangero & Yuval Merin, Miranda, Collins and Issacharov: The Gap Between the Ideal and the Real in the Issacharov Ruling, 37 MISHPATIM 429, 461 (2007). As Don Stuart demonstrates in his article in this volume, the Collins decision has since come under considerable criticism in Canada and many of its holdings have since been revised. See generally Don Stuart, Welcome: Flexibility and Better Criteria from the Supreme Court of Canada for the Exclusion of Evidence Obtained in Violation of the Canadian Charter of Rights and Freedom, 16 SW J. INT'L L. 299, 313 (2010). The Israeli Supreme Court failed to account for many of these criticisms and shortcomings. Furthermore, even assuming that the Collins decision was sound, the Israeli Supreme Court seems to have jumbled some of its tests and considerations in a way that makes little or no sense.

42. The list was illustrative rather than exhaustive. CrimA 5121/98 Issacharov [2006] ¶ 74, at 426.

43. Id. ¶ 70, at 421-22. This group has been linked to the "dissociation rationale," i.e. the court's need to dissociate itself from the police's action lest its admission of the evidence be construed as tacit approval of the unlawful methods. See Kitai & Merin, supra note 41, at 469.

44. Id. ¶ 70, at 421. The Court notes that if the right infringed was fundamental, the fact the police acted in good faith will not necessarily save the evidence from exclusion. The definition of "good faith" remained vague, as we shall see below.

45. Discoverability is comparable to the American inevitable discovery and independent source exceptions to the exclusionary rule. See CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 46-50 (2008). The main rationale for admitting such evidence is that the defendant should not benefit from the exclusion of evidence that the police would have uncovered anyway, even without employing unlawful means. To exclude such evidence would provide a windfall to the defendant: not only would the prosecution not benefit from the police's unlawful action—a consideration that stands at the core of the exclusionary rule—but it would lose valuable evidence that would have been discovered anyway. Some believe this to be a pragmatic than principled approach. See Stuart, supra note 41, at 329. Whitebread and Slobogin convincingly argue that the deterrence rationale for exclusion does not necessarily support admitting such evidence: if such evidence is admitted, "police would have no disincentive to engage in illegality when they believe that they already have a legal source for the evidence or that one will develop shortly." WHITEBREAD & SLOBOGIN, supra, at 49. A further complication in determining discoverability is establishing with any degree of certainty whether or not the evidence would have otherwise been uncovered; this is often highly speculative and fraught with difficulties and hindsight (unlike the previous query of whether or not the police could have conducted the search or interrogation legally rather than in the fashion they actually did). The discoverability test has come under considerable criticism in Canada and it appears to have been limited under Grant. See Stuart, supra note 41, at 329. Although discoverability indirectly implicates the severity of the infringement, the
relation between the violation and the evidence obtained. Courts would examine the influence that the unlawful means may have had on the probative value of the evidence, and the evidence’s existence independently of the illegality—or what in Canada has been referred to as the conscription test.46

An important distinction under this heading—at least according to the Israeli Supreme Court—was between testimonial and real evidence.47 Finally, the third group of factors considered the social price exacted by suppressing the evidence. The more severe the crime and the more central the evidence to securing a conviction, the less likely exclusion would be.48 The Court explained that if a finding of guilt rests solely on the proof in question,

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46. Evidence is considered “conscriptive” if the accused is compelled to participate in its creation or discovery and is either (1) a statement, (2) a bodily sample, (3) its discovery involved “the use as evidence of the body” of the accused, or (4) is derivative and would not have been discovered if not for one of the three former conditions. See DAVID M. PACCO & LEE STUSSER, THE LAW OF EVIDENCE 352 (5th ed. 2008). As Don Stuart shows in his article, the conscription test has itself come under considerable criticism in Canada and appears to have been abandoned under Grant. Stuart, supra note 41 at 316-24.

47. CrimA 5121/98 Issacharov [2006] ¶ 71, 432-24. This distinction appears to be a misreading of Collins. The Israeli Supreme Court reasoned that real evidence allays concerns regarding the violation’s possible effects on the evidence’s reliability. But that is not the focus of the Canadian conscriptive test, which does not rely on the distinction between real and testimonial. Urine samples or breathalyzer tests are not testimonial although they are without a doubt conscripted. Nor is their reliability adversely affected if obtained through unlawful means.

48. The Israeli Supreme Court noted that Canadian courts tend to attach little significance to the severity of the crime when determining exclusion. Id. ¶ 73, at 425-26. Still, the Court did not resolve what significance, if any, Israeli courts would attach to this consideration. As we shall see, this consideration has loomed quite large in Issacharov’s application to a degree that it appears to have trumped all other considerations.
fighting crime, maintaining the peace and the public’s confidence in the criminal justice system, as well as protecting potential victims, all might require admission.\textsuperscript{49} This is true even if the defendant’s fundamental rights were severely violated.\textsuperscript{50}

B. The Issacharov Revolution from A Doctrinal Perspective: Much Ado About Nothing?

Soon after the smoke from the Court’s “Constitutional Revolution” rhetoric began to settle and scholars had the opportunity to consider the doctrine’s practical ramifications more carefully, most began to question Issacharov’s innovation and true significance. After much anticipation for a strong statement of the Court’s liberal values and hopes for a robust exclusionary rule,\textsuperscript{51} some scholars went as far as labeling Issacharov a disappointment;\textsuperscript{52} others even suggested that the decision may have caused more harm than good.\textsuperscript{53} They were taken aback by the courts timidity and wondered if the Justices had delivered on their grand promise to usher in a new era for defendants’ rights.

There were several reasons for disappointment with Issacharov. First, Israel’s revolution came decades after most other democracies had developed comparable doctrines.\textsuperscript{54} Beyond its delay, the Court’s

\textsuperscript{49} Id. ¶ 72, at 424-25.
\textsuperscript{50} Id. The Court did, however, note that in Canada these considerations have received limited weight. The role these considerations would play in Israel was left open. Id. ¶ 73, at 425-26.
\textsuperscript{51} The appeal was submitted in 1998. It took the Court eight years to decide the case. Furthermore, it was rendered fourteen years after the 1992 Constitutional Revolution. See Sangero, supra note 38, at 67-68.
\textsuperscript{52} See id. at 68, 99.
\textsuperscript{53} Id. at 68-70. Part of the concern is that the first part of Issacharov eroded the definition of “free and voluntary” under Article 12 of the Evidence Ordinance in suggesting that a confession made without proper notice of the right to an attorney should still be considered “free and voluntary” thus not recognizing counsel’s importance in properly informing suspects of their possible courses of action. A further criticism stems from the Court’s holding that since Issacharov was warned of his right to remain silent, and given his later cooperation with police questioning even after being given access to a lawyer, his autonomy was not fundamentally infringed by not warning him of his right to counsel. According to Sangero, such reasoning ignores the reality that defendants cannot fully exercise their autonomy without access to an attorney. It further ignores that once the “cat is out of the bag,” suspects tend to believe that all is lost and are therefore more likely to repeat or elaborate on previous statements, even after consulting an lawyer. Id. at 79. For my own evaluation of why creating an exclusionary rule but so rarely applying it might cause more harm to judicial reputation and to public discourse than not having such a rule at all, see infra.
\textsuperscript{54} Id. at 68. Sangero argues that the United States established such a rule—or in fact a more robust one—almost a century earlier and that most European jurisdiction had adopted such a rule 20 years before Israel. Id.
Doctrine seemed weak and diluted: the presumption remained that relevant and reliable evidence, however obtained, would still be admissible. The defendant bore the burden of persuading the Court that exclusion would be appropriate rather than the prosecution having to defend the evidence’s admissibility despite the violation. This presumption, and other aspects of the ruling have been deemed signs of the Court’s continuing prosecutorial bias and reticence to genuinely embrace due process when it conflicts with crime control.

Furthermore, critics deemed the Court misguided in engaging in ex-post proportionality tests that balance admissibility versus exclusion. They argued that criminal procedure legislation already struck the necessary ex-ante balances when defining the rules of interrogation, search and seizure, taking into account special circumstances and allowing for limited exceptions. Additional balancing would only further curtail the already limited liberties of the accused. Some also criticized the Court’s false assumption that it must choose between deterrence, the protective and the judicial-integrity models as rationales for exclusion, instead of simply embracing all three.

Still others pointed out that the Court’s alleged shift from diminishing the weight of illegally obtained evidence towards a discretionary “exclusionary rule” was mostly semantic. It had little or no practical

55. Id. at 99
57. Keren Etinger-Shapira & Ron Shapira, The Israeli Disqualification Rule Following Issacharov, 3 DIN UDVARIM (HAIFA L. REV.) 427 (2007). The authors contrast this approach to the Australian one, wherein the prosecution must justify the reliance on the unlawfully obtained evidence. The presumption in Australia, by their account, is that the evidence should be excluded. I must note that in Issacharov, the Court even raises the curious question—which it leaves unanswered—who should bear the burden of proving basis under which the evidence was obtained—which should clearly be on the prosecution. See Sangero, supra note 38, at 98. A more appropriate question would have been by what standard: beyond reasonable doubt or a preponderance of the evidence. An equally curious question that was left unresolved in Issacharov was whether the prosecution could request the exclusion of illegally obtained evidence or whether this privilege was reserved for only the defendant. See CrimA 5121/98 Issacharov [2006] ¶ 77, at 429-30. This is a curious statement indeed: it would seem outrageous to exclude evidence tending to prove the defendant’s innocence just because it was obtained illegally. See Sangero, supra note 38, at 98.
59. Sangero, supra note 38, at 92-93.
60. See id. at 90. Sangero further argues that although the Court tries to clearly distinguish between the three rationales, it confounds and leaves ambiguous whether the protective rationale is to play a role. Id. All that remains clear is that deterrence should not be considered and that judicial integrity is the guiding factor. To be fair, however, the Court does state that deterrence would be a welcome side effect. CrimA 5121/98 Issacharov [2006] ¶ 61, at 412-13. Although the court seems to place its emphasis on the moral rationale, it does not reject the protective rationale outright. See id.
significance in the Israeli legal system, which does not employ juries. Arguably, the true significance of an exclusionary rule (versus a rule concerning weight of evidence) is derived from bifurcation and the law-finder’s ability to conceal the evidence’s content, or even its existence, from the fact-finder. Such bifurcation naturally exists in jury trials, but may also be achieved in bench trials by having a different judge rule on motions to exclude; but this procedure was not adopted in Israel. This seemingly cosmetic change, coupled with the doctrine’s weakness, led some to believe that the Supreme Court’s true intention was to signal its affiliation with other legal traditions, particularly the common law, rather than truly embrace the ideological underpinnings of the exclusionary rule.

The Court also came under attack for its three-prong test and the long list of factors it considered relevant to suppression. Some pointed out that by simply listing the possible considerations, the Court provided little or no guidance as to their weight in relation to one another, leaving the doctrine vague and overly flexible. Moreover, in deeming the list of considerations illustrative rather than exhaustive, Issacharov essentially left judges unfettered discretion.

Furthermore, Issacharov’s three-prong test and its list of factors raised serious questions of whether the Court may have included impertinent considerations, and perhaps even misclassified them within the three prongs. First, the Court was criticized for suggesting that the more crucial the evidence to securing a conviction, the less prone courts should be to exclude it. This test implied that the Court was willing to stand by its lofty ideals primarily when they made no difference because there was sufficient, lawfully-obtained evidence to convict. The Court wished to have its cake and eat it too: it wanted to create an exclusionary rule “on the cheap,” while avoiding suppression’s most difficult dilemma, and without genuinely sacrificing rectitude of decision or crime control.

61. Blum, supra note 17, at 2139-42; Ettinger-Shapira & Shapira, supra note 58 at 431-33, 439.
62. Blum, supra note 17, at 2160; see also Sangero, supra note 38, at 97. On the relationship between legal transplants and signaling in the Israeli legal system more broadly, see Assaf Likhovski, Argonauts of the Eastern Mediterranean: Legal Transplants and Signaling, 10 THEORETICAL INQUIRIES L. 619 (2009).
63. Kitai & Merin, supra note 41, at 429-430.
64. Sangero, supra note 38, at 93.
65. For example, it was unclear why discoverability would bear on the severity of the infringements. See supra text accompanying note 45.
66. Sangero, supra note 38, at 97.
A related critique was the Court's mention of the severity of the crime as a relevant consideration against suppression. Sangero commented sarcastically that the exclusionary rule might be reserved for parking violations.\textsuperscript{67} He reasoned that even the International Criminal Court, which tries the most atrocious crimes and criminals, is mindful of their rights as defendants and allows for the exclusion of evidence obtained contrary to internationally recognized norms.\textsuperscript{68} Specifically, article 69(7) of the Rome Statute states, "Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if . . . the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings."\textsuperscript{69} Others suggested that courts must show the greatest vigilance towards the rights of those accused of heinous crimes because the risks of false conviction are highest there.\textsuperscript{70} An approach confining the exclusionary rule only to contraventions or misdemeanors would also suggest, to both the police and the public at large, the existence of a constitution-free zone, where authorities do as they please and courts turn a blind eye. Such public cynicism would contribute little to judicial integrity and reputation.

Some criticized the Court for inserting questions of reliability into a doctrine fundamentally concerned with public policy.\textsuperscript{71} The Court's second prong, which examined the relation between the violation and

\begin{footnote}
\textsuperscript{67} Id. at 96.
\textsuperscript{68} Id.
\textsuperscript{69} Sangero, \textit{supra} note 38, at 96.
\textsuperscript{70} Etinger-Shapira \& Shapira, \textit{supra} note 57, at 440-51. The authors embark on a comparative journey, showing that in Australia—which the Court cites in connection with this factor—the severity of the crime as a consideration has come under considerable attack and has since been abandoned. I found that in their treatment of the issue, the authors tended to confound the exclusion of unreliable evidence with the exclusion of reliable, yet illegally obtained evidence. See \textit{id}. False convictions are a risk only if the evidence obtained unlawfully is also perceived as unreliable. But seeing that the exclusionary rule is primarily concerned with public policy rather than reliability, one can see why such a balance might still be influenced by the severity of the crime. The authors recognize this towards the end of their article but nevertheless think the Court did not make its opinion sufficiently clear, which may in fact be the case. See \textit{id} at 451. Be this as it may, I share the authors' concern that in severe crimes—especially where the police enjoy broad public support, either generally or against that particular criminal—the fear of police abuse is heightened. Therefore it is precisely in such instances that the judicial system must show heightened awareness towards the defendants' rights as a matter of deterrence but also as a matter of judicial integrity. I shall discuss this issue further when we come to national security investigations in Israel and the question of necessity.
\textsuperscript{71} Kitai \& Merin, \textit{supra} note 41, at 474-75. As Alex Stein has explained, the exclusionary rule, along with a number of other evidence-related rules and doctrines, is "driven by concerns altogether extraneous to fact-finding." ALEX STEIN, \textit{FOUNDATIONS OF EVIDENCE LAW} 25 (2005). As such, Stein has gone so far as stating that such rules "do not belong to the law of evidence" since their "affiliation to evidence law exhibits contingent instrumentality, rather than
the evidence, seemed to reintroduce reliability considerations, representing a throwback to the pre-Issacharov doctrine. By weighing credibility as a central factor, courts might tend to exclude illegally obtained evidence primarily or only if its credibility was also tainted, which misses the mark of the true significance of the exclusionary rule: it is precisely because the evidence is reliable that excluding it is so difficult, and speaks volumes about the legal system’s devotion to its constitutional values. If the evidence was not only unlawfully obtained but also inherently unreliable, forgoing it does not sacrifice—but rather contributes to—verdict accuracy. In such instances, due process and trial fairness are on the same side of the scales.

A related criticism touched on the Court’s undue focus in the second prong on the distinction between real and testimonial evidence, which as we shall see, looms large in the application of Issacharov by lower courts. Sangero argues that one of the exclusionary rule’s greatest potential contributions to Israeli jurisprudence would have been the license it gave to suppress physical evidence, which Article 12’s “free and voluntary” test, which applies only to confessions, does not authorize. But the Court suggested that real evidence would be less likely to be excluded due to its reliability. Rinat Kitai-Sangero and Yuval Merin suggest that the real-testimonial distinction, though perhaps pertinent to reliability, had been unduly confounded with the question of whether or not the evidence existed irrespective of the violation—a misreading by the Israeli Court of the Canadian conscription test.

immutable bond.” Id. at 27. What characterizes such rules is that their “design and operation are evidence-related, but their essence is not evidential.” Id.

72. Kitai & Merin, supra note 41, at 475; Sangero, supra note 38, at 95.

73. As noted above, this fear was further strengthened by the Court’s statement that admission would remain the rule and that it would also consider the evidence’s centrality for conviction, all of which suggested that rectitude of decision would still trump all other considerations.

74. Kitai & Merin, supra note 41, at 479.

75. As Kitai and Merin argue, to the degree that this distinction emerged in Canada under R. v. Collins [1987] 1 S.C.R. 265, ¶ 37 (Can.), it was abandoned—long before Issacharov—in the Stillman case and was replaced by the conscription test (now itself defunct after Grant) which does not draw a clear line between physical and testimonial evidence per se. See Kitai & Merin, supra note 41, at 479-80. Physical evidence may in some cases nevertheless be conscripted—as it was in the Issacharov case—where the defendant was forced to participate in its creation or discovery. The conscription test goes to the fairness of introducing such evidence, and implicates the defendant’s privilege against self-incrimination, but should not be tied too closely to the physical/testimonial divide.

76. Sangero, supra note 38, at 95.

77. See Kitai & Merin, supra note 41, at 479-83; Collins, 1 S.C.R. 265, 284-85.
This last observation is related to a broader flaw that seemed to characterize Issacharov’s use of comparative law. In their international quest for an appropriate model, the Israeli Supreme Court not only failed to account for relevant differences—both social and legal—between Israel and the countries surveyed; in some cases, the Court also seemed to misstate the foreign doctrine or neglected to account for the intellectual and practical knots that entangled these doctrines in their native lands. Arguably, one of the strengths of comparative law is precisely that it allows us to explore and learn from the experience of others, both positive and negative. But the Israeli Supreme Court appeared to do neither. For example, Kitai and Merin noted that in Canada, discoverability was correctly categorized as bearing on the relation between the evidence and the unlawful behavior, not on the egregiousness of the illegal means as it was in Israel. The Court was also charged with paying inadequate attention to public debates and to developments in case law in Canada, the United Kingdom, and in Australia on whether the severity of the crime should be considered relevant, and if so, how.  

Even if one accepted the Court’s list of considerations, Issacharov remained a narrow ruling in an easy case, providing little practical guidance for lower courts. First, the Court found that Corporal Ophir acted not only knowingly, but maliciously, when he failed to inform Issacharov of his right to an attorney. Second, as a clear and immediate result of Ophir’s omission, Issacharov confessed to possession of marijuana and provided a bodily sample pointing to prior use—both conscripted pieces of evidence (even though the urine sample was physical and hence reliable). The causal relation between the violation and the evidence was further proved in that after consulting an attorney, Issacharov declined to comment on instances of prior possession and use. Third, the defendant’s youth and inexperience with the police made it likely he was unaware of his rights. Fourth, both possession and use of marijuana are minor crimes that often go unprosecuted, making it relatively easy for the Court to acquit without the moral qualms associated with setting a dangerous criminal free.

78. Blum, supra note 17, at 2140.
79. Kitai & Merin, supra note 41, at 471.
80. Etinger-Shapira & Shapira, supra note 57, at 443-45.
81. Blum, supra note 17, at 2167.
83. Id. at ¶ 1.
84. Blum, supra note 17, at 2164, n. 144.
And marijuana found on Issacharov's person still left sufficient evidence to convict him of drug possession. *Issacharov* therefore fit neatly within the Court's list of considerations, weighing almost entirely in favor of exclusion.

But it remained unclear how lower courts should or would apply *Issacharov* in harder cases, where the Court's extensive list of factors seemed to pull in opposite directions. With a list so long, complicated, and often contradictory, the "exclusionary rule" hardly looked like a rule at all: judges wishing to admit unlawfully obtained evidence would have little difficulty distinguishing the case before them from *Issacharov*. Similarly, those wishing to exclude evidence would find ample authority within *Issacharov*'s language to justify their ruling.85 Ultimately, it appeared that *Issacharov*'s primary strength lay in its rhetoric. What remained to be determined was how far its spirit would carry lower courts and how they would apply the Court's highly flexible guidelines. Critics of the decision remained hopeful that lower courts might nevertheless seize on its rhetoric and distill *Issacharov*'s spirit from its weak flesh, delivering on the Court's yet unfulfilled promise of a Constitutional Revolution.

That is precisely what the next chapter seeks to examine: how have lower courts in Israel, and the Supreme Court itself, interpreted *Issacharov*? Has it in fact resulted in a meaningful ban on unlawfully obtained evidence or has exclusion remained an exception, rather than the rule? In what cases have courts suppressed evidence and how do they justify their decisions when they do—or perhaps more interestingly when they do not? Which considerations in *Issacharov*'s long list have taken root in Israel? It is this line of questions we turn to now.

III. The Empirical Analysis: *Issacharov* in the Courts

The previous section suggested a near-consensus among Israeli scholars that from a doctrinal standpoint, *Issacharov* suffered from considerable shortcomings. But notwithstanding its flaws and inconsistencies, *Issacharov* still had the potential to set the Israeli legal system on a different course, one that would take defendants' rights more seriously. In the following section we take a closer look at the trends that have emerged since *Issacharov*. These point to troubling

85. Had deterrence been a primary objective, arguably lack of certainty would supply enough deterrence for police to play by the rules without providing the windfall gain for guilty defendants. But given that the Court did not adopt this rationale it is not clear that sporadic and inconsistent application of the rule actually serves the Court's objectives.
A. Methodology

To examine Issacharov's interpretation and determine its true impact on Israeli criminal procedure, I have coded and analyzed a dataset of 126 cases decided between May 4, 2006 and November 1, 2009 that addressed the admissibility of unlawfully obtained evidence. These represent the entire population of opinions available online that have invoked Issacharov. To provide a comprehensive view of Issacharov's effects and look beyond high-profile cases, the dataset includes not only Supreme Court decisions but also rulings by the district and magistrates' courts in relatively minor offenses. Supreme Court decisions constitute only slightly more than a fifth of the decisions analyzed. Using the Nevo online database, I identified 54 magistrate court decisions, 44 district court decisions, and 28 Supreme Court rulings addressing the exclusion of unlawfully obtained evidence.86

Each of the 126 cases was analyzed with a view at determining how courts have interpreted the facts before them in light of Issacharov's tests. The analysis consisted of two stages: first, an examination of how courts have applied a particular test to the facts they have found; second, an evaluation of the relative weight given to that test or fact in relation to other prongs of Issacharov's multi-faceted test. Particular attention was paid to issues that scholars have flagged as problematic or questionable in Issacharov, as well as issues that the Supreme Court itself left unresolved in that decision. Still, I have also been cognizant of additional considerations, both explicit and implicit.

86. The decisions fall into two main categories: decisions on motions to exclude unlawfully obtained evidence and final criminal verdicts that include rulings on such motions. Due to time and access constraints, the sample does not include military and juvenile court rulings, though it would be interesting to examine whether different trends emerge from analyzing the decisions of those courts. The sample also does not include decisions on detention pending trial, which often raises questions of how to treat unlawfully obtained evidence: under Israeli law, the prosecution must present prima facie evidence of the defendant's guilt to justify such detention. See Criminal Procedure Law (Enforcement Powers—Arrests) 5756 – 1996, §21(B) (Isr.). It is questionable whether only admissible evidence should be evaluated as part of the prosecution's prima facie case in such motions. Arguably, the prosecution should be allowed some latitude, assuming that the investigation is not yet over and that they might be able to offer similar evidence from a lawful source.
that although not mentioned in Issacharov have nevertheless manifested themselves in subsequent rulings.

B. The Judges

Perhaps one of the most significant findings of this study is the strong correlation between exclusion and the identity of the judge deciding the case. Of 14 exclusions resulting in acquittals (partial or full) almost half can be traced to only two judges; Shmuel Landman and Dan Mor of the Tel Aviv Magistrate’s Court are each responsible for three decisions. Beyond their tendency to exclude evidence, both seem to apply stricter standards towards police activity in related contexts, in some cases contrary to case law. For example, both judges have ruled that absent reasonable suspicion, a defendant must provide informed consent to a search and may not be assumed to consent by acquiescence. They have ruled that absent informed consent the search will be deemed unlawful and its findings suppressed. In some such cases Landman has also excluded subsequent confessions, adopting the “fruit of the poisonous tree” doctrine, despite the Supreme Court’s explicit rejection of that doctrine in Issacharov.

Judge Mor, a former prosecutor, has gained a strong reputation as an anti-prosecutorial judge. According to some sources, his attitude towards prosecutors has led to his recent ban from ruling on criminal cases. Judge Landman seems to have been somewhat more responsive to appellate court criticism of his strict standards on search and seizure, though he seems to have devised other methods for ac-

87. This would seem, at least formally, to be the legal situation in England. See STEPHEN C. THAMAN, COMPARATIVE CRIMINAL PROCEDURE: A CASEBOOK APPROACH 54 (2d. ed. 2008).


89. See CrimA (TA) 70490/08 State of Israel v. Kasser ¶ 16.

90. In a particularly high profile case recently, Mor released a defendant who was placed under arrest pending trial because the police had conducted an improper line-up. Chief Superintendent Benny Peles, commander of the Mesubin station, reportedly reacted by saying: “It is merely the decision of a magistrate court judge.” See Avi Ashkenazi, The Judge and the Police Fight, While Tel Aviv Criminals Benefit, NRG, Feb. 5, 2010, http://www.nrg.co.il/online/1/ART2/050/807.html. For a critical analysis of this comment by Superintendent Peles, see Ze’ev Segal, Merely Judges, HAARETZ, Feb. 1, 2010, available at http://www.haaretz.com/hasite/spages/1146554.html.

91. See Amit Ben-Aroya, Lawyers Express Concern: The Prosecution is Targeting Judges, and That is Dangerous, THE MARKER, Feb. 16, 2010, available at http://www.themarker.com/tmc/article.jhtml?ElementId=skira20100216_1149993. Still, some believe that it was Mor who requested to be reassigned to civil cases only.
quitting defendants who he believes were searched unfairly. These findings suggest that Issacharov has more to do with the identity of the judge and the judge’s general outlook on proper police powers than with the actual doctrine. The exclusionary rule seems to be applied mainly by “rogue judges,” rather than by the judicial system as a whole. We shall return to these observations in the final part of the study.

C. Severity of the Crime as Trump

As discussed in the theoretical analysis, it is questionable whether the severity of the crime should factor into motions to exclude and whether it should have found its way into Issacharov. The Court seems aware of the scholarly critique and the problems inherent in that test: in Zeliger, Justice Levi in dicta expressed his doubts to that effect. Notwithstanding Levi’s reservations, the severity of the crime has largely determined the scope and reach of the exclusionary rule; it has dominated the weighing tests conducted by courts, both explicitly and implicitly.

Let us begin by noting the implicit: in the 14 cases since Issacharov in which evidence has been excluded (four of which were overturned on appeal), only one was for a crime punishable by more severe penalties.
than seven years imprisonment. Courts have been willing to disregard illegally obtained evidence primarily in minor offenses, within the jurisdiction of Israel's magistrates' courts.

The offenses in which evidence was excluded share a number of other related characteristics. Many are crimes of negligence rather than criminal intent (e.g. negligent homicide and medical malpractice); a significant subset are preparation crimes, meant to capture potential criminals before they have acted or even attempted to act (e.g. knife and break-in tool possession); additionally, they are often victimless crimes or crimes where the state is the direct victim (e.g. antiquity theft, tax and social security fraud). And a large subset of these cases, especially those affirmed on appeal, are white-collar crimes (tax fraud and business operation without a license). They are typically not violent crimes. That is perhaps why Israeli courts have been more willing to exclude the evidence and see defendants go free.

Courts have also been explicit in citing the severity of the crime at their reason for admission. In Farhi, the defendant was charged with rape and sodomy. The Tel Aviv District Court held that if it were to accept the defendant's motion to exclude the evidence, a person who "committed very severe crimes and who poses a real and concrete threat to others, especially women and in particular helpless girls, would go free and could carry on committing such crimes." The

94. These include three instances of knife possession (two of which were later overturned), one instance of break-in-tool possession (overturned), one instance of theft from an automobile and intent of auto-theft, one instance of possession of stolen goods (defendant was still convicted of dealing in antiquities without a license), one instance of drug possession for personal usage, one case of VAT fraud (overturned), one case of income tax fraud, one case of social security fraud, one instance of business operation without a license, one case of creating a life-threatening risk through negligent medical treatment, and one instance of negligent homicide.

95. The seven-year mark is significant because it determines the jurisdictional boundaries between the Israeli magistrates' and district courts: crimes punishable by fine or less than seven-years imprisonment are within the jurisdiction of the magistrates' courts and may be appealed to the district court. Other crimes are within the original jurisdiction of the district courts and may be appealed as a matter of right to the Supreme Court. See Courts Law (Consolidated Version), 5744-1984 § 51(a)(1), 38 LSI 271 (1983-84) (Isr.). An alternative classification could have been the distinction between felony and non-felony charges, with the threshold being three-years imprisonment. See Penal Law, 5737-1977 § 24, 8 LSI 136 (1977) (Isr.).

96. In some of these cases the defendants were misled to think that the evidence was collected for internal review or disciplinary purposes and would not be used against him in a criminal proceeding. See Crim (Hadera) 2037/05 State of Israel v. Uzana [2007] (unpublished); Crim (Kerayot) 433/06 State of Israel v. Atias § 12(B) [2007] (unpublished).

97. CrimC (TA) 1084/06 State of Israel v. Farhi [2007] ¶ 15, at 13 (unpublished). Although the court addressed this aspect under the defendant's claim for abusive proceedings, it nevertheless analyzed the claim comparing it to Issacharov and making reference to the fruit of the poisonous tree doctrine.
court went on to note that unlike Issacharov, this was not a man charged with possession and use of recreational drugs.98

An extreme example of this approach is the Mubarack case99 in which the defendant—a male Palestinian prostitute—was charged with the murder of a male Jewish-Israeli client.100 The Tel Aviv District Court’s opinion discloses what can be described only as an ongoing physically and mentally abusive interrogation, replete with verbal and psychological abuse,101 denial of sleep,102 food, and access to counsel. Mubarack was not informed of the precise charges against him even after these had taken form in his interrogators’ minds;103 he was subjected to threats and given false promises.104 He was also placed in painful positions105 and continually interrogated for approximately 20 hours.106 The decision to admit Mubarack’s confession turned on the argument that time had severed the relation between the abuses and the defendant’s confession.107 Nevertheless, the Tel Aviv District Court also cited the severity of the crime as a reason why the abuse should not trigger exclusion.108

98. Id. ¶ 15.
100. See id.
101. Id. at 28-29. The police called the defendant a cockroach, a terrorist who killed his client because he belongs to Hammas, a stupid Arab, who for NIS 100 lets someone “bang them from behind.” They also expressed regret that the defendant was not in Saudi Arabia, where he would not have lived to see the age of 18. The court expressed its disgust with the language used by the police, but still did not exclude the confession because the causation between the abuse and the confession was severed: many of these statements were made on May 4, whereas the defendant finally confessed on May 7.
102. Id. at 39. The district court initially held that although the defendant was initially denied sleep, he later could not sleep on his own accord, which therefore did not deem the interrogation unlawful.
104. For example, he was threatened that if he did not cooperate his father would be informed of his occupation. Id. at 40-41.
105. Id. at 35. The day before he confessed, the defendant was handcuffed while sitting on a chair for over seven hours.
106. Id. at 32. The Court nevertheless deemed this extended interrogation necessary and legal given the circumstances and the need to find the truth.
107. The court found that he was provided with food and rest during the time leading up to his confession.Id. at 39.
108. Id. at 26 (citing the Smirk case which is discussed in greater detail later in this article).

The court wrote:

On this matter there is a crucial importance to the distinction between the kinds of offenses. Thus, if we are dealing with particularly severe crimes, and of course including the murder charges against the defendant, the balancing point between the various rights and interests will vary, and the matter of exclusion will be determined accordingly.
1. What is a Severe Crime?

Courts favor admission not only when addressing truly heinous crimes such as murder or rape. What is considered too high a social cost to acquit under Issacharov has proved a malleable standard that has been construed quite broadly. Motions to exclude are rejected on these grounds in even relatively minor offenses such as social security fraud. A more prevalent example of this approach is judicial treatment of knife possession charges, which represent a significant subset of motions to suppress. In a series of rulings by both trial and appellate courts, knife possession has been portrayed as a severe crime, thereby weighing heavily in favor of admitting knives found as a result of unlawful searches. To bolster this notion, lower courts have relied on the Israeli Supreme Court’s harsh words condemning the spread of knife related violence, referring to it as a “knife subculture.” Courts have also cited legislation that has re-categorized knife possession as a felony rather than a misdemeanor, raising the maximum sentence from three to five years’ imprisonment.

109. See, e.g., Crim (Jer.) 2563/06 State of Israel v. Eli Biton [2009] ¶ 11 (unpublished). The case dealt with social security fraud, where defendant was not warned of his right to remain silent and right to an attorney. The Jerusalem Magistrate’s Court found that excluding the evidence will have “no social benefit, while the damage from excluding it will be considerable, since social security is meant to provide benefits to the needy. The investigation was meant not only to catch those committing fraud against the SSA but also to prevent potential cheaters from getting a slice of the welfare cake, which is intended for the truly needy.” Id. ¶ 11(f).

110. To an American audience this offense may seem unusual, perhaps even unconstitutional. Nevertheless, as my dataset suggests, in Israel this is not an infrequent charge—meaning that it is not only in the books, but a law that is actually enforced, and in a troubling manner. Furthermore, knife possession is a crime of simple rather than compound possession; it does not specify a minimum blade size, and is now a felony punishable by five years’ imprisonment. Furthermore, it includes an unusual burden of proof, which forces the defendant to prove by a preponderance of the evidence that he possessed the knife for a lawful purpose. For an application of this rule, see Crim (Hi) 13661-07-08 State v. Razilov [2009] at 11 (unpublished).

111. Knife possession charges represented twelve of the fifty-five cases of the exclusionary cases addressed by the magistrate courts, and twelve of nineteen cases dealing with suppression of physical evidence. In three of these cases the magistrates’ court suppressed the evidence, but two of the rulings were later overturned by the district court.

112. Crim A (TA) 7250/09 State of Israel v. Ben Haim [2009] ¶ 23 (unpublished); citing Crim A 2047/07 Hanuk v. The State of Israel [2007] (unpublished decision), which referred to the spreading “knife subculture.” We should note, however, that in Hanuk which is widely cited by lower courts as proof of the Supreme Court’s harsh rebuke of knife possession, the defendant not only carried a knife but also stabbed the victim in his stomach. Therefore, this was not an inchoate crime of preparation like knife possession.


Without underestimating the problem of knife-related violence in Israel, we must assess whether such crimes should be labeled “severe” under Issacharov. If severity of the crime should be relevant at all, such labels must apply only to the most heinous crimes, such as murder, rape, or armed robbery, or to instances in which the knife was violently used, not only carried. Otherwise, this test becomes meaningless.

A closer look at knife-possession case law discloses disturbing police practices associated with such charges: police often engage in unlawful and harassing searches of suspects who have had prior fallouts with the law. Even when such searches do not yield the evidence they expected, police sometimes still discover knives that they then report to the district attorney, who usually prosecutes them successfully. In some cases, these are small knives attached to lighters or keychains,\textsuperscript{115} or kitchen knives carried in a car,\textsuperscript{116} which hardly seem like the hazard that the legislation sought to criminalize. Courts have still convicted, despite the illegality of the searches.

It is difficult to determine whether courts genuinely consider social security fraud or knife possession to be severe crimes or are instead using these considerations simply to “check the box” on the Issacharov checklist and justify their decision to admit evidence. Either way, expanding the category of severe crime under Issacharov warrants Sangero’s fear that exclusion will be reserved only for parking violations or comparable infractions.

2. The Exception That Proves the Rule: Elzam

The only case involving a truly severe crime in which unlawfully obtained evidence was excluded was the appeal of Yoni Elzam.\textsuperscript{117} Based on his own confession, Elzam was convicted by the district court for conspiracy and premeditated murder.\textsuperscript{118} He first confessed to undercover agents who posed as fellow cellmates, later repeating


\textsuperscript{116} See Crim (Ramle) 5568/06 State of Israel v. Karimov [2008] ¶ 2 (unpublished). Compare Crim (KG) 106/06 State of Israel v. Naula [2008] (unpublished), where the court acquitted the defendant of knife possession. The court acquitted the defendant since he had just received the knife from his girlfriend as a gift. Since he did not leave the house with the knife, he lacked the requisite mens rea. Id. ¶ 29. Still, here too the court admitted the knife as evidence even though it was obtained unlawfully. The court reasoned that the search did not involve violence and was not sufficiently intrusive. Id. ¶ 25.


\textsuperscript{118} Id. ¶ 1.
his statement to uniformed investigators.\textsuperscript{119} The main question on appeal was whether Elzam’s confession should be excluded due to the undercover agents’ dubious techniques, and given the denial of Elzam’s access to counsel.\textsuperscript{120}

In excluding his confession and acquitting the defendant, Justice Hayut ruled that although the police may have acted without malice, Elzam’s fundamental right to counsel, his privilege against self-incrimination, and his right to due process had been infringed.\textsuperscript{121} Writing for a 2-1 majority, Hayut ruled that the undercover agents overstepped their authority when they “systematically acted to undermine” the defendant’s confidence in his lawyer. They aggressively persuaded Elzam to forgo his right to silence, which his attorney had advised him to invoke, and which he eventually waived.\textsuperscript{122} Allowing Elzam’s choice to confess may have stemmed from his desire to clear his conscience, Hayut doubted whether he would have done so had it not been for the police’s problematic methods.\textsuperscript{123} Denying the defendant access to counsel after he confessed to the undercover agents was also held unlawful: it did not conform with the statutory requirement for written authorization by an officer over the rank of superintendent.\textsuperscript{124} Hayut explained that delaying or denying access to counsel is already

\textsuperscript{119}. Id.

\textsuperscript{120}. Id. Elzam was denied access to his lawyer between his confession to the undercover agents and his overt interrogation. Id. \textsuperscript{120}. Id.

\textsuperscript{121}. Id. \textsuperscript{120}. Id.

\textsuperscript{122}. Id. \textsuperscript{120}. Id.

\textsuperscript{123}. See id.

\textsuperscript{124}. See id.
an exceptional measure; doing so without proper authorization consti-
tuted a substantive breach of Elzam’s rights.\footnote{125}{Id. ¶ 11. The police’s stated rationale for postponing the meeting—that the investigation had reached a critical phase, so allowing the defendant access to counsel would have set back the momentum—was also rejected by the Court. Hayut further noted that there were absolutely no grounds for postponing the meeting until after the reenactment, which took place the following day. The trial court’s reference to the confession reliability as grounds for its admissibility was deemed insufficient under Issacharov. \textit{Id.} We must note that the lower court decision was rendered six months before \textit{Issacharov}. \textit{See} CrimC (TA) 1023/04 State of Israel v. Elzam [2005] (unpublished decision). But the decision was still subject to \textit{Issacharov}’s tests and standards. As we shall see below, there has been some doubt in the courts about \textit{Issacharov}’s retroactive application. }

While \textit{Elzam} provides important guidelines regarding the lawful use of undercover informants, we must note the decision’s particulari-
ties. These raise some doubts concerning \textit{Elzam}’s true significance as an application of the exclusionary rule. Perhaps most noteworthy is a fact barely mentioned in the ruling, but that provides indispensable context for this uncharacteristically successful motion to exclude: the appeal was submitted in 2006 by the defendant’s \textit{estate}. Elzam died of cyanide poisoning in prison on December 12, 2005, a month after his conviction, and the day before he was scheduled to testify against his coconspirator.\footnote{126}{Proceedings against criminal defendants are typically abated post-mortem. Criminal Procedure Law (Consolidated Version) § 236 (1982) (Isr.), states “Should a defendant die, all criminal proceedings against him shall be abated.” Still, Rule 36 of the Rules of Criminal Proce-
dure seems to allow courts to \textit{continue} deliberating on a pending appeal (though it does not \textit{mandate} the court to rule). But it is doubtful whether an appeal may \textit{commence} after the defendant’s death, as it did in \textit{Elzam}. The language of the Rule does not seem to support such a position. Rules of Criminal Procedure, 5734-1974 (Isr.), R. 36 states that “Should an appeal be \textit{pending at the time of the defendant’s death}, the court \textit{may} allow the hearing to continue and determine that the defendant’s family member, heir, executor of his will or administrator of his estate will continue the appeal in the defendant’s stead” (emphasis added). Case law has also not established such a right, especially if the defendant has only been sentenced to serve in prison. Where the sentence includes a fine, there are perhaps good reasons to allow an appeal to go forward even after the defendant’s death: a fine directly affects the estate of the defendant and his heirs. \textit{See} e.g. CrimA 1619/00 Alruzi v. State of Israel [2000] (unpublished). In that case the defendant had been fined the sum of NIS 1,500 and his appeal before the Supreme Court was pending when he died. Following the Rules of Criminal Procedure, the Court elected to rule, waived the fine and went on to annul the proceeding under §236 of the Criminal Procedure Code. Criminal Procedure Law (Consolidated Version), § 236 (1982) (Isr.). In \textit{Elzam}, however, the Court simply dismissed this entire issue by noting that the parties had not raised it. CrimA 1301/06 Estate of Elzam v. State of Israel [2009] (unpublished) ¶1. A post-mortem acquittal based on the exclusion of an illegally obtained confession, like that of \textit{Elzam}, to some degree also negates the potential significance a posthumous acquittal might still have: unlike an acquit-
tal based on a lack of reliable evidence or a positive finding of innocence, such an acquittal does little to clear the defendant’s reputation. According to Elzam’s father, that was precisely his}
Regardless of the philosophical merits of allowing posthumous appeals, the decision attests to a more profound point: the Supreme Court is willing to exclude evidence and acquit defendants mainly when the practical ramifications of such decisions are limited. Like Private Issacharov, whose probation had expired by the time the Supreme Court had acquitted him,\(^{128}\) Elzam gained nothing from the exclusion of his confession. Nor did society pay a price by setting a criminal free. Such exclusions allow the Court to display high rhetoric, while exacting a low or non-existent cost: they do not call on the Court to truly reconcile crime control and due process. They instead enable the Supreme Court to avoid the head-on confrontation between the two. The Court can display lofty ideals of procedural justice without appearing soft on crime.

Given the publicity that Elzam received due to the defendant's mysterious death, the Court's procedural justice was further amplified, albeit in a misleading fashion. In Lawrence Friedman's words, acquitting a man post-mortem has great "propaganda value," providing at least the appearance of "meticulous justice."\(^{129}\) To the average newspaper reader, the system might appear "obsessed with the rights of defendants,"\(^{130}\) insisting on delivering due process even beyond the grave. I doubt, however, that the Court would have reached the same result had the defendant still been alive. The data suggests otherwise.

Yet the State Attorney's Office was still concerned about Elzam's force as a binding interpretation of Issacharov. It petitioned to have the case reconsidered by a broader panel of the Supreme Court based on the ruling's precedential importance and innovation.\(^{131}\) In his petition, the State Attorney argued that Elzam shifted the balance established under Issacharov when giving insufficient, or no consideration to the social costs of excluding the evidence. Factors such as retribution, the severity of the crime, the need to uncover the truth and to purpose in appealing his son's conviction—clearing his son's name. See Tomer Zarhin, *In A Rare Move A Father Appealed His Deceased Son’s Conviction for Murder*, HAARETZ, May 20, 2008, available at http://www.haaretz.co.il/hasite/spages/985245.html

\(^{128}\) CrimA 5121/98 Issacharov v. Chief Military Prosecutor [2006] ¶ 5, reprinted in 2006(1) Isr. L. Rep. 320, 333. Issacharov was sentenced to two months probation for a year and a half; but his appeal took six years, by which point his probation had expired. *Id.* Arguably, acquitting him in such a high profile decision did more to harm his reputation than leaving the conviction for possession and use of marijuana in place. We might also recall that he was still convicted of possession, which meant that he would continue to suffer from the ramifications of having a criminal conviction.

\(^{130}\) *Id.* at 258.  
maintain the public's faith in the criminal legal system allegedly got short shrift.\textsuperscript{132} In dismissing the State's petition, Chief Justice Beinisch held that Issacharov had provided only general guidelines while leaving the actual application to broad judicial discretion on a case-by-case basis, considering the totality of the circumstances.\textsuperscript{133} The "special circumstances" of the case\textsuperscript{134} persuaded the majority that the evidence should be excluded and the defendant acquitted. But this particular application of Issacharov's guidelines to the concrete facts of the individual case, Beinisch wrote, did not fundamentally alter or restate the considerations relevant to exclusion or the proper balance between them; it therefore did not justify rehearing.\textsuperscript{135}

Nevertheless, cynics might argue that the "circumstances" that rendered exclusion and the acquittal sound, and were alluded to so frequently but never specifically in the Chief Justice's ruling, were the defendant's death. In dismissing the State's petition, the Chief Justice seemed to reassure the State Attorney that Elzam was a truly unusual case. It seems likely that Elzam's passing emboldened the Court to be so uncharacteristically nonchalant about acquitting a murder suspect in a case involving prominent organized crime figures.

D. The Relation Between the Violation and the Evidence

We now come to the interpretation of Issacharov's second prong: the relation between the violation and the evidence. A central factor under this heading is the "independence" of the evidence, including what Kitai and Merin have considered a misreading of the Canadian conscription test and the distinction between real and testimonial evidence. The confusion in the Supreme Court's reasoning is reflected—and has been amplified—in the lower courts.

1. Fruit of the Poisonous Tree or the Forbidden Fruit Itself?

Since Issacharov, lower courts have seized on Issacharov's distinction between real and testimonial evidence—and the reliability test

\textsuperscript{132} Id. ¶ 4. In addition, the State Attorney argued that the decision in Elzam unjustifiably curtailed the use of active undercover agents: it limited their ability to encourage a suspect to forgo his right to silence and confess. See id. ¶ 5.

\textsuperscript{133} Id. ¶ 6.

\textsuperscript{134} Justice Beinisch mentioned the term "circumstances," in varying combinations ("circumstance based discretion"; "the special and particular circumstances of the case"; "the totality of the circumstances," etc.), eight times in only two paragraphs. See id. ¶¶ 6-7.

\textsuperscript{135} Id. ¶ 7.
therein—to dismiss motions to suppress real evidence. Some judges have gone as far as fundamentally misstating Issacharov’s holding, asserting that physical evidence should never be excluded. To support this proposition, judges have cited the Supreme Court’s rejection of the American “remedial approach” and of the “fruit of the poisonous tree” doctrine. But when doing so, lower courts often misstate the “fruit of the poisonous tree” doctrine, its rationale, and its application: citing the Supreme Court’s rejection of the American doctrine, lower courts have admitted not only the fruit of the poisonous tree, but the forbidden fruit itself, those objects found in the course of the unlawful search. Real evidence in almost all cases has been admitted, and in the few cases where it was excluded at the trial court level, the decision was often reversed on appeal. These readings further distort Issacharov’s already debatable holding, which deemed real evidence more likely to be admitted due to its inherent reliability.

Despite scholarly critique and the evident confusion among lower-court judges, the Supreme Court has done little to clarify or correct the real/testimonial distinction or to elucidate the other independence tests: of the 28 rulings in which the Supreme Court revisited

136. Crim App (TA) 7250/09 State of Israel v. Ben Haim [2009] ¶ 21 (unpublished). The district court explained that reliability is the primary concern under this prong. “The nature of the evidence obtained bears on this consideration [the influence of the violation on the evidence obtained] and we should distinguish between an incriminatory statement by a suspect following an illegal investigation—due to the fear that improper means might influence the credibility and veracity of the statement—and physical evidence, that stands independently, as an objective piece of evidence.” (Then citing the relevant part of Issacharov). See also CrimA (TA) State of Israel v. Kasser (unpublished), separate opinion by Judge Kara. For similar approaches in the magistrates’ courts see Crim (TA) 2745/08 State of Israel v. Hilwani [2000] ¶ 2 (unpublished); Crim (Ramle) 5568/06 State of Israel v. Karimov [2008] ¶ 10(g) (unpublished).

137. See Crim (TA) 1086/08 State of Israel v. Salah [2008] ¶ 20 (unpublished). In the decision, Judge Naor concluded “I need not answer this question [of whether consent may have deemed the search legal] given the Supreme Court’s explicit ruling in Issacharov concerning the admissibility of physical evidence found during the course of an illegal search.” Id. For a similar misstatement of Issacharov and the Fruit of the Poisonous Tree doctrine, see Crim (BS) 1519/06 State of Israel v. Sabag [2008] ¶ C (unpublished); Crim (Ramle) 5568/06 State of Israel v. Karimov [2008] ¶ 10(G) (unpublished).

138. Id. For a discussion and explanation of the “Fruit of the Poisonous Tree” doctrine and its rationale see WHITEBREAD & SLOBOGIN, supra note 45, at 39. As the authors explain, typical situations for applying the doctrine are when the police have conducted a search or detained the suspect without probable cause in violation of the Fourth Amendment. The question is whether a subsequent confession, given after proper Miranda warnings, should nevertheless be excluded. Id. at 39-41. This is not at all the case which Israeli courts were facing when addressing the physical findings of an indisputably illegal search.

Issacharov, only one—the Almagor ruling\(^{140}\)—provided any kind of in-depth analysis of how to address real evidence.\(^{141}\) In that case, it was exclusively the evidence’s independence and physicality that carried the decision not to suppress. In Almagor, the defendant was charged with arson, murder, and attempted murder.\(^{142}\) The prosecution’s case relied heavily on burns found on the defendant’s body and a burnt shirt discovered in his apartment. Expert testimony established that the shirt was exposed to extremely high temperatures for a short period of time,\(^{143}\) which ruled out the defendant’s claim that the fibers had been scorched during ironing.\(^{144}\) More importantly, the scorched shirt further undermined the defendant’s claim that burns on his body were the result of extended exposure to the sun, since the shirt’s scorching coincided with the location of his skin burns.\(^{145}\) Although the evidence was mostly circumstantial, joined with the defendant’s lies and his motive they were found sufficient to prove his guilt beyond a reasonable doubt.\(^{146}\)

Still, the search that uncovered the burnt shirt was deemed unlawful: despite his request, the defendant’s attorney was not informed, violating the defendant’s right to the assistance of counsel.\(^{147}\) The Supreme Court nevertheless affirmed that the shirt was rightly admitted by the trial court.\(^{148}\) Although Justice Naor found that the police could offer no convincing reason for not alerting the defendant’s lawyer, and were evasive when asked about the matter, she still deemed the evidence admissible.\(^{149}\) Wrapping three rationales into one, hanging primarily on the physicality and reliability of the proof, Naor based her decision exclusively on the second prong of Issacharov—the relation between the illegality and the evidence: the evidence would have been discovered even had the defense attorney been informed;

\(^{141}\) Requests for certiorari, mainly in knife-possession cases, have typically been dismissed. See, e.g., A.Cr.A. 8831/09 Kasser v. State of Israel [2009] (unpublished). But Ben Haim is scheduled for hearing.
\(^{143}\) Id. ¶ 4.
\(^{144}\) Id. ¶ 11.
\(^{145}\) Id. ¶ 4. The defendant’s explanation that his burns were caused by extended exposure to the sun seem to have already been discredited even without the shirt in evidence: the defendant displayed burns on the soles of his feet, which the experts opined—and the district court agreed—was an unusual place for a sun burn. The prosecution’s experts testified that the defendant’s claim that the burns were aggravated by rubbing alcohol, were unlikely. See id. ¶ 3.
\(^{146}\) Id. ¶ 7.
\(^{147}\) Id. ¶ 11.
\(^{148}\) Id.
\(^{149}\) Id.
rejecting the defendant's claim that the shirt was planted by the police, the Court ruled that the shirt existed independently of the police's violation of the defendant's rights; and as real evidence, the shirt was particularly reliable.\textsuperscript{150} The Court ended its analysis there, without considering how the other prongs of Issacharov might affect the equation. Still one can glean from the decision that the police acted in bad faith, that the violation could have been easily avoided, and the violation was considered serious. As we can see in this ruling too, the second prong of Issacharov seems to control in cases where real evidence is obtained.

2. Testimonial Evidence: Causation and the Burden of Proving It

One of the questions that Issacharov left unresolved was the causal link required to trigger exclusion.\textsuperscript{151} The dataset indicates that even when the police's failure to comply with the law has been firmly proved, courts tend to insist on a clear and unambiguous causal relation between the violation and the evidence obtained.\textsuperscript{152} Defendants seeking exclusion of their statements are essentially required to prove a negative counterfactual: not only must it be shown that the defendant was not properly warned, but also that he was unaware of his rights and that had he been properly informed he would have behaved substantially different.\textsuperscript{153} We should note that the Israeli approach stands in sharp contrast to the United States Supreme Court's holding in Miranda.\textsuperscript{154}
The strict approach that Israeli courts have applied towards causation draws attention away from the police’s failure to abide by the law. Instead, it focuses on the defendant’s failure to exercise his rights even though he was aware of them. The defendant’s presumed awareness of his rights has typically been sufficient reason to deny motions to exclude; failure to assert rights one was aware of is not attributed to the police’s omissions and therefore need not result in suppression of evidence.

Sound as this line of reasoning may be, courts have gone on to rely on debatable presumptions to prove defendants’ awareness of their rights. Discoverability has been stretched to its outer limits. The Israeli Supreme Court has affirmed that prior contact with authorities may establish the defendant’s knowledge. Courts have shown little interest in the nature of the previous encounter and whether it gave the defendant a chance to inform himself. Serving as an expert witness in a civil proceeding has been considered ample opportunity to learn one’s rights as a criminal defendant. The assumption that the recidivist-defendant as a “repeat player” knows the law stands in sharp contrast to the courts’ expectations from the police, as we shall soon see.

Even defendants with no prior experience with the police have been assumed to know their rights as suspects. Issacharov’s facts have proven usefully distinguishable when formulating such presumptions: in contrasting the case before him from Issacharov, one judge noted that unlike Private Issacharov, the defendant was not an inexperi-


We must also remember that the defendant has had ample experience in the criminal field, the police world, and the ways of prosecution and defense and is therefore unlike a person who encounters criminal proceedings and arrest for the first time and is therefore ‘shell shocked’ and we must take this as well into account.


156. See Crim (HI) 219/03 State of Israel v. Ta’anach [2006] ¶ 74, at 67 (unpublished). The defendants were real estate appraisers. From the decision it does not appear that they had any prior experience with the criminal legal system. Nevertheless, the court found that based on their profession, they must have been aware of their rights as criminal defendants. The court wrote:

Defendants 1, 3 and 4 claim that they were not informed of their right to an attorney... We are dealing with defendants for whom courts are not foreign. They all submitted appraisals over the years that were subject to court review and it may be assumed that they were also examined in court. Helef and Shachar [two of the defendants] even conducted proceedings against the commission. It seems reasonable to me that they were aware of their right to an attorney. In any event, it has not been proved that this was not the case.

(emphasis added). As we can see, the burden in such cases is placed on the defendant to prove he was unaware of his rights, rather than settling for proof that he was not informed of his rights.
enced youth but an adult woman who knew—or perhaps should have known—her rights. 157

Even when the defendant’s counterfactual claims seem plausible, courts still tend to sever the causal links between the violation and the testimonial evidence obtained. Early breaches in the investigation can be cured through later compliance with protocol. 158 As we have seen in Mubarack, although the defendant was severely and systematically abused at the beginning of his interrogation, the causal relations between the violations and his statement were disjoined by later providing him with adequate conditions. 159 The district court gave little consideration to the cumulative effects that several days of harsh interrogation and abuse might have. And even if later compliance is believed to have severed all causal links, in cases of such brutal abuse judicial integrity is still implicated when courts do not dissociate themselves from such brutal police behavior. 160

Another way that courts have avoided exclusion has been by finding that the defendant would not have remained silent or consulted an attorney even had he been properly warned. This counterfactual may be sufficiently proved by showing that the defen-

157. Crim (Hadera) 1127/07 State of Israel v. Moskovitzi [2007] ¶ 16 (unpublished). The fact that the defendant did not take the stand was held against her, since it did not allow the court to establish whether or not she would have behaved differently had she been warned. This means that if a defendant would like to challenge the authority’s failure to inform her and show that she in fact did not know her rights, she must waive the right not to testify. This seems like a questionable outcome. See also CrimC (BS) 992/02 State of Israel v. Juabra [2007] ¶ 6 (unpublished). For a similar approach, which places the burden on the defendant to prove that he would have behaved differently had he been informed of his rights see Crim (Jer) 2065/06 State of Israel v. Wallace [2008].

158. See, e.g., Crim (TA) 40033/07 State of Israel v. Abu Assa [2008] ¶ 14, at 27-28 (unpublished). The court admitted the defendant’s statements even though some of them were obtained without proper warning of his right to silence, to an attorney, or in some cases both. Furthermore, it appeared that defendant’s counsel was denied access to his client without proper authorization or documentation. Id. at 27. Until the fourth statement there was no documentation that the defendant was informed of his right to an attorney at all. Id. at 14. The court nevertheless ruled that the statements should be admitted since the defendant’s fundamental rights were honored, “albeit not fully.” The court also noted that Issacharov dealt with an easy case, and although this was not deemed a “hard” case, it nevertheless did not justify exclusion. Id. at 28.

159. CrimC (TA) 1060/07 State of Israel v. Mubarack [2008] ¶ H, at 31, 40 (unpublished). The district court also made much of the fact that the defendant said, immediately after the confession, that he confessed to clear his conscience, meaning that it was not the abuse that caused him to confess. Id. at 44-45.

160. Courts have also held that the exclusionary rule should apply only to confessions obtained in violation of the defendant’s rights. Statements denying involvement, though used by the prosecution to impeach, have been deemed admissible and unaffected by the exclusionary rule. See CrimA 1250/07 Abu Sulab v. State of Israel [2007] ¶ 7.
dant did not exercise his rights even after being informed of them.\textsuperscript{161} In \textit{Wallace} the court took this logic a step further, reasoning by analogy: since the defendant did not choose to remain silent although warned of that right, he probably would not have consulted an attorney even if told of the possibility.\textsuperscript{162} His statement was therefore deemed admissible.

Perhaps the high water mark of the courts’ approach towards causation was the \textit{Belfer} decision, which held that consulting an attorney would not have changed Belfer’s defense. That police actively misled the defendant and told her that she may not meet with her attorney prior to questioning therefore did not warrant exclusion of her statement.\textsuperscript{163} Although \textit{Belfer} seemed to meet even the most stringent causal requirements between the police’s violation and the defendant’s course of action, the target continued to move, requiring yet another layer of causality: a link between the police’s violation and the defendant’s defense at trial. Belfer’s failed motion to exclude brings into focus a broader phenomenon: rather than considering the right to counsel to be a fundamental entitlement of the accused—with a corresponding obligation by the authorities to properly inform Belfer of this right—the court deemed her right relative. Since the court knew Belfer to be guilty, as proved by the fact that she could not have raised another defense, that she was actively misled no longer mat-

\textsuperscript{161} See Crim (TA) 40033/07 State of Israel v. Abu Assa [2008] ¶ 14, at 27-28 (unpublished). See also Crim (Naz.) 4813/05 State of Israel v. Dekel Concrete Ltd. [2009] ¶ 32 (unpublished), where the court held that although the defendant was not warned of his rights, this did not affect the credibility of his statement, as proved by his repetition and elaboration upon his initial statement after consulting his lawyer.

\textsuperscript{162} Crim (Jer) 2065/06 State of Israel v. Wallace [2008] ¶ 29, at 53-54 (unpublished): “In addition, it is unclear that had the defendant been informed of his right to an attorney he would have stopped the investigation for this purpose, just as he did not make use of his right to remain silent which according to him could have helped him avoid any incriminatory or other statements.” Id. at ¶ 29.

\textsuperscript{163} See Crim (TA) 40123/06 State of Israel v. Belfer [2007], at 14-15 (unpublished). Police informed the defendant of her right to inform her attorney and meet with him, but when the defendant asked to speak to her attorney after hearing the warning she was told she could not and that she would be questioned without her lawyer present. Id. at 14. She inquired: “An interrogation without an attorney?” to which the interrogator responded: “That is how it works.” Id. Nevertheless, the court held that the evidence should not be excluded because it did not constitute a “substantial violation of the defendant’s right to a fair trial.” To prove such a violation, the defendant would have to show that had she consulted an attorney she would have emphasized different facts or aspects during her questioning. The court concluded that the mistake probably stemmed from the interrogator’s lack of experience rather than from malice, an issue I address in detail in the following section. In a similar ruling, the Tel Aviv district court held that although the police unlawfully denied the defendant access to counsel, his statement should not be excluded because his attorney would have advised him to claim self-defense, as he in fact did. See Crim (TA) 40342/05 State of Israel v. Shulman [2008] ¶ 45 (unpublished).
tered. This approach that subordinates procedural rights to accurate outcomes rather than considering procedural justice an independent end will be further analyzed below.

E. Severity of the Violation

We come now to the question of the severity of the violation. Among other factors, courts are asked to consider the significance of the rights violated, the police’s state of mind in acting or omitting, and the presence of extenuating circumstances. As we shall see, each of these considerations has bred problematic applications.

1. Ignorantia Legis Neminem Excusat? On Good Faith and Bad Cops

Recall Issacharov’s distinction between intentionally and knowingly violating the law on the one hand, and doing so in good faith on the other. But between these two extremes lie a range of behaviors that were not specifically addressed in the ruling. Most notably the entire category of negligence was not specifically discussed. Therefore, how negligence factors into motions to exclude is particularly telling; it offers insight into how courts perceive state powers, the authorities’ obligations towards suspects and the judges’ confidence in the police force.

The Court in Issacharov did not spell out how it might consider the police’s claim that they were unaware of the relevant law and their violation of it. Especially given judicial rulings that repeat offenders are presumed to know their rights as suspects, one would assume that repeat law enforcers would be held to similar, if not higher standards. But since Issacharov, a number of courts have held that police’s ignorance or misunderstanding of the law might weigh against exclusion, because they lack actual malice or bad faith. For example, in more than one instance police’s unawareness that they may not rely

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165. CrimA 5121/98 Issacharov v. Chief Military Prosecutor [2006] ¶ 70. The Court held, however, that the fact that the authorities acted in good faith will not necessarily mean that the evidence should not be excluded: if the violation was severe, i.e. of a fundamental right, good faith will not suffice. Id. at ¶ 70.

166. See Crim (Safed) 1596/06 State of Israel v. Karako [2006] ¶¶ 24-25 (unpublished), where the police failed to inform the defendant of his right to an attorney. In response to questioning during trial, the officer replied that she was “not instructed to act in accordance with the case law.” The court found that this ignorance—or lack of guidance by superiors—established the officer’s lack of malice, thus favoring admission.
on an individual's status as a known habitual criminal to conduct a search was held insufficiently malicious to justify exclusion.\textsuperscript{167} Physically forcing a defendant to spit out a bag of marijuana has also been excused on similar grounds.\textsuperscript{168} While deeming the search illegal and scathingly rebuking the police's behavior,\textsuperscript{169} the court still admitted the evidence.\textsuperscript{170} Judge Tsur found that the police did not \textit{know} that they acted against the law and had acted in a similar fashion in the past.\textsuperscript{171} Hence, that police acted out of habit—albeit an illegal one—weighed towards admission.\textsuperscript{172}

A particularly striking rulings under this heading is \textit{Metodi}, in which a French national was charged with extortion and money laundering.\textsuperscript{173} When the defendant asked why counsel was not present at his questioning, he was informed that he could not see his lawyer until after his preliminary interrogation.\textsuperscript{174} He was \textit{not}, however, told that he may remain silent until then.\textsuperscript{175} When asked by the court why he misled the defendant, the interrogator responded that he understood the law to be so.\textsuperscript{176} Although the court found that had Metodi been properly warned he most likely would not have spoken at that point, thereby meeting even the stringent causal link requirement, it held that the police's absence of malice, combined with the credibility of

\textsuperscript{167} Crim (TA) 8713/07 State v. Zarka [2008] at 4 (refer to “conclusion”) (unpublished). \textit{See also} Crim (BS) 1519/06 State of Israel v. Sabag \S A (unpublished). “In this case I am under the impression that the breach was not intentional, as it appears from the policeman's testimony that he believed that the search was legal, especially since the defendant agreed to it.” \textit{Id.}

\textsuperscript{168} Crim (Jer.) 4992/05 State of Israel v. Buaziz [2007] \S 12 (unpublished). The defendant claimed that the policemen choked him to force the drugs out of his mouth. Police denied the allegation, claiming that they did no more than apply mild pressure to his cheeks. The court believed the police, but still deemed this an illegal search and ordered that a copy of the decision be passed to prison authorities. The circumstances of this search seem quite similar to the facts \textit{Collins} case, which discussed the legality of the “throat hold.” \textit{See} R. v. Collins [1987] 1 S.C.R. 265, \S\S 1-2 (Can.).

\textsuperscript{169} \textit{Id.} \S 14. Judge Tzur classified this search an “external search” in the defendant's body, comparable to collecting a saliva sample. Such a search requires the defendant's consent or a police officer's written authorization after the suspect is afforded a hearing. Such authorization allows the police to use reasonable force to conduct the search. \textit{See} Criminal Procedure Law (Enforcement Powers - Body Search of Suspect) \S 3(C)-(D) (Isr.).

\textsuperscript{170} \textit{Id.} \S 18.

\textsuperscript{171} In fact, the policemen testified that this was standard practice. \textit{Id.} \S 14.

\textsuperscript{172} Crim (Jer) 4992/05 State of Israel v. Buaziz [2007] \S 16 (unpublished). Perhaps surprisingly, the court did not lean on the fact that the evidence was physical when deciding to admit it. \textit{See} \textit{id.}

\textsuperscript{173} Crim 40186/07 State of Israel v. Metodi (January 19, 2007 ruling on motion to exclude statements) (unpublished) [2007].

\textsuperscript{174} \textit{Id} \S 42.

\textsuperscript{175} \textit{Id.} \S 43.

\textsuperscript{176} \textit{Id.} \S 42.
the defendant’s statements and the severity of the crime deemed his confession admissible.177

This questionable approach might be the result of the Supreme Court’s adamant insistence that exclusion not rest on a desire to deter or educate the police.178 Still, in admitting such evidence, courts have not only failed to deter but have created an incentive for police to not educate themselves, because doing so might deny them a valuable defense of ignorance or negligence. And just as ignorance of the law is not a defense in criminal law—and has not served defendants who have claimed ignorance of their rights as suspects—it should not serve the state as an argument against exclusion. To hold otherwise is to further compromise judicial integrity. Even assuming that the police are genuinely unaware, a judicial approach that favors admission in such cases legitimizes police’s ignorance and makes courts complicit in the authorities’ disregard for the law.

Implicit in the asymmetry between suspects’ and police’s obligations to know the law is a high measure of judicial deference towards the police. Judges operate under a strong presumption that the police act in conformity with the law, a questionable premise given the data. And even when a violation has been firmly proved, judges seem only too ready to accept that it was unintentional, and therefore should not trigger exclusion. Courts appear overly credulous of police’s claims of ignorance. Rather than treating police’s claims with suspicion and presuming malice when a defendant’s rights are violated, courts apply something akin to a presumption of regularity, a doctrine of administrative law that becomes particularly problematic when applied to the criminal context.179

177. Id. ¶ 47 (a)-(c).


179. Under the presumption of regularity the government is presumed to be acting lawfully absent evidence to the contrary. For a discussion of this presumption and the obstacles it poses to those who wish to challenge administrative actions see Itzhak Zamir, Evidence in the Administrative Courts, I LAW AND GOVERNMENT 297-302 (1993). The application of such a presumption in criminal cases is particularly problematic. It seems inconsistent with the Supreme Court's holding concerning the burden of proving that a confession was “free and voluntary.” The Court has held that the defendant need only claim that a confession was coerced to force the prosecution to prove the contrary beyond a reasonable doubt. See DN 3081/91 Kozli v. State of Israel [1991], IsrSC 45(4) 441, at 446. In so holding the Supreme Court seems to presume irregularity, which must be convincingly contradicted.
2. Applying Issacharov Retroactively

A related matter is the exclusion of evidence collected unlawfully before Issacharov. The Court in Issacharov specifically held that the new doctrine would apply immediately, even to pending proceedings. Yet some courts—including the Supreme Court—have still deliberated over whether the parties could invoke Issacharov in cases investigated before the Supreme Court created the new exclusionary rule. One court has in fact dismissed a motion to exclude on those grounds. But non-retroactive application of the exclusionary rule could be justified only if the Supreme Court accepted deterrence as the sole purpose of exclusion, in which case the police may be entitled to a warning regarding the new sanction. The Court however rejected deterrence as a rationale in Issacharov. Moreover, rejecting motions to suppress as retroactive applications of Issacharov is internally inconsistent: if Issacharov does not apply to cases investigated before it was decided, the Supreme Court could not have excluded the evidence in Issacharov itself.

This line of reasoning is also contrary to another method that some courts have employed to eschew the exclusionary rule: some appellate courts have reasoned that the parties—although they complained during trial and appeal of illegal and abusive practices by the police—had not specifically raised an Issacharov (or Issachaorv-style) objection, or had not laid down the requisite factual basis. In one such case, the appeal to the Supreme Court was submitted and oral arguments were heard before Issacharov was decided. Yet rather than


181. See, e.g., CrimA 70062/08 (TA) Sabko v. State of Israel [2009] ¶¶ 32-33(A) [2009] (unpublished). The district court avoided the Issacharov question by pointing out that the investigation had taken place before the ruling. Since in allowing exclusion Issacharov had created new law and not merely interpreted existing statute, it could not apply retroactively to investigations that had already taken place. This even though the duty to inform the defendant of his rights existed beforehand. The Supreme Court has been somewhat more cautious and ambiguous on this question, though the Justices have done little to disabuse lower courts of the notion that Issacharov does not apply to investigations conducted before it was handed down. For example, Justice Naor assumed—though only arguendo—that the defendant could have raised an objection to an illegal search conducted before Issacharov, thus suggesting that it was not clear that the doctrine even applies. See CrimA 9897/05 Almagor v. State of Israel [2006] ¶ 11 (unpublished). Similarly, Justice Levi raised the question of whether or not the doctrine applies, and also assumed only arguendo that it did. See CrimA 8332/05 Isaacov v. State of Israel [2007] ¶ 23 (unpublished). The evidence was admitted in both cases. But see Justice Hayut in CrimA 1301/06 Elzam v. Israel [2009] ¶ 3 (unpublished), with Crim (Jer.) 2647/06 State of Israel v. Badaria ¶ 17(c) (unpublished), which was investigated and decided by the District Court before Issacharov.

remanding, or requesting written pleadings on the applicability of Issacharov, the Supreme Court dismissed the issue because the parties had not raised it. But before Issacharov, trial judges likely would have dismissed this entire line of argument and inquiry as immaterial, unless the police’s behavior bore on the reliability of a confession or deemed it not to be “free and voluntary.” And if the evidence was physical, there was nothing in existing Israeli statute or case law that would have supported a motion to suppress.

The alert reader will also note that the latter line of reasoning contradicts the former dismissal on grounds of retroactivity. We just saw that appellate courts asked lawyers to anticipate and raise the Issacharov objection and present evidence of unlawful behavior before the doctrine was created. But if the doctrine does not apply retroactively defense counsel still could not have raised it.

Although Issacharov’s retroactive application is only a transitional question, that will inevitably disappear over time, it is symptomatic of a broader phenomenon: it illustrates the judicial resourcefulness in avoiding the exclusionary rule.

183. See CrimA 3097/04 Suissa v. State of Israel [2006] ¶ 30 (unpublished decision). The defendants were convicted of conspiracy, armed robbery, and murder. Id. at ¶ 1. The appeal was submitted in 2004. Oral arguments before the Supreme Court were heard on January 30, 2006, three months before Issacharov was handed down. The case was decided on October 25, 2006. It had been convincingly proved that the defendant’s lawyer was not allowed access to his client for ten days, from his hearing on January 1, 2002 until his next hearing on January 10, 2002. The Court found that there was no justification for denying the defendant access to counsel during that time. The defendant confessed on January 8, 2002. See id. ¶ 27. The Court nevertheless analyzed the case only under Article 12 of the Evidence Ordinance, under the rubric of whether the confession could be considered “free and voluntary.” Justice Jubran ruled that he would not analyze the case under the new exclusionary rule since the parties did not raise such an objection and did not provide the necessary factual basis. Id. ¶ 30. Setting aside for a moment whether the Court was correct in ruling that a defendant denied access to their attorney for ten days should be deemed to have “freely and voluntarily” confessed, one wonders why Justice Jubran decided to avoid the Issacharov question simply because the parties had not raised this not-yet-created doctrine. One might also wonder what additional facts are needed to trigger the exclusionary rule, given that it had been proved that the defendant was denied access to counsel for an extended period of time without proper justification. Justice Jubran employed similar reasoning in CrimA 7033/04 Yair v. The State of Israel [2006] ¶ 12 (unpublished), though there he ruled that even had the confessions been excluded under Issacharov, there still would have been sufficient evidence to convict the defendant based on circumstantial evidence and his later statements. The decision does not specify when oral arguments were heard, but Justice Jubran mentions that the case was pleaded a few days before Issacharov. Id. ¶ 11.

See also CrimA 3796/04 Tukalia v. The State of Israel [2007] ¶ 5 (unpublished decision). On appeal the defendant raised a claim that he was not warned of his rights. In dicta, the Supreme Court rejected this claim since it was only raised on appeal and no factual basis had been established before the lower court.

184. Sangero, supra note 38, at 95.

In the three-and-a-half years since Issacharov, Israeli courts have continued to display relatively high tolerance for police breaches of the law. When analyzing unlawful searches and seizures, courts have set a high bar in defining what constitutes a breach severe enough to warrant exclusion. Frisks or searches conducted without reasonable suspicion (let alone probable cause) have typically not been deemed sufficiently intrusive to justify suppression. In Ben Haim, the defendant was stopped at 8:15 a.m. while walking on a main street in Tel Aviv and asked to present his national identification card. A search in the system indicated that Ben Haim was not wanted by authorities but he did have prior convictions (the nature of which the police tactfully did not disclose to the court due to rules controlling character evidence). The police could not point to any particularized reason for suspecting the defendant but nevertheless ordered him to empty his pockets, where the police officers discovered a knife.

On appeal, the Tel Aviv District Court reversed Judge Mor’s decision to suppress the knife. The district court raised doubts whether the armed policemen’s “request” that the defendant empty his pock-
ets even amounted to a "search" since the officers did not actually touch the defendant. Although police testified that had the defendant refused they would have taken him to the police station for a search, the district court still pondered whether the search might be deemed consensual, and therefore legal. But assuming arguendo that this was in fact a search—and an illegal one at that—the court held that it was insufficiently intrusive to warrant exclusion. Citing its decision in Kasser, a post-Issacharov case dealing with similar circumstances, the district court contrasted such searches with more intrusive searches, such as strip-searching or taking bodily samples. In comparison, the pocket search was deemed a minor infraction not warranting suppression. This line of reasoning has been adopted in other cases as well.

Although strip and bodily searches are surely more intrusive than a search of someone's pockets, one wonders whether exclusion should be reserved for instances where the police engage in such extreme violations of the law and of the right to privacy. To insist on such a narrow reading of the exclusionary rule seems to allow police great latitude in harassing citizens in public spaces without proper grounds. There is evidence beyond my sample that suggests the police are do-

191. CrimA (TA) 7250/09 State of Israel v. Ben Haim [2009] ¶ 12 (unpublished). Since the defendant opted not to testify, the district court rejected the lower court's presumption that Ben Haim did not know his rights and that had he been informed of them he would have refused the search. The district court held that "the court cannot make factual presumptions in favor of the defendant." Id. ¶ 12. One wonders why such presumptions can be made in favor of the police but not of the defendant. Furthermore, the court suggested that the defendant may be presumed to know the law. Id. This stands in sharp contrast to the district court's holding—in that same decision—that the police did not intentionally break the law, which weighed in favor of admitting the evidence. See id. ¶ 20.
192. In CrimA (TA) 7250/09 State of Israel v. Ben Haim [2009] (unpublished), the Tel Aviv District Court on appeal held that evidence obtained in an illegal search (assuming that the search was in fact illegal) should not be excluded because the defendant was not subject to the searches enumerated in the Criminal Procedure Law (Enforcement Authorities - Suspect Body Search). Id. ¶ 20. That law, in § 1, distinguishes external and internal bodily searches. The former include visual examination of a suspect's naked body; prints of any part of defendant's body; fingernails; samples of suspect's nostrils, hair, urine, saliva, skin, breath, or cheek cells. "Internal searches" include blood, x-ray, and gynecological exams. A similar approach was expressed in CrimA 70490/08 State of Israel v. Kasser [2009] ¶ 22 (unpublished).
194. See Crim (Kiryat Gat) 106/06 State of Israel v. Naula [2008] ¶ 25, where the court ruled that although illegal, the search was nevertheless not accompanied by violence or indignity therefore rendering the knife found admissible; see also Crim (TA) 1086/08 State of Israel v. Salah [2008] ¶ 26 (unpublished).
ing precisely that: one of Israel's leading newspapers, Haaretz, recently ran a series of articles about unlawful searches that are routinely conducted by Jerusalem Police.\textsuperscript{195} The police also habitually misinform individuals of their right to refuse such searches, threatening that declining to voluntarily submit may provide grounds for arrest and search against the individual's will.\textsuperscript{196} The individual faces a lose-lose situation, seriously straining the police's claim of consent.

4. The Cleansing Power of Necessity and Proportionality: Transforming Unlawful into Lawful

\textit{Issacharov} held that certain "extenuating circumstances" might mitigate a violation of the defendant's rights. That the police acted unlawfully to prevent the destruction of crucial evidence or to protect the public's safety and security might weigh in favor of admission.\textsuperscript{197} According to \textit{Issacharov}, although such acts remain unlawful, we might consider the police's violations less reprehensible given the necessity they present.\textsuperscript{198}

In crafting this mitigating factor, Justice Beinisch drew on her 2002 ruling in \textit{Smirk}, but slightly restated her holding in that decl-
In Smirk, Beinisch admitted the confession of a defendant who was not warned of his right to silence or to an attorney. Smirk was a German national who converted to Islam, joined Hezbollah and underwent military training in Lebanon. He came to Israel on a reconnaissance mission to seek out potential locations for a suicide attack. Upon arrival at Ben Gurion International Airport Smirk was detained and interrogated for 17 hours by the General Security Service (GSS). He was then handed over to the police for further questioning. Smirk later stood criminal trial for charges of membership in a terror organization, conspiracy to aid an enemy at war with Israel and conspiracy to communicate information with the intent of compromising national security.

At Smirk’s criminal trial one of the main questions was whether his initial confession to the GSS, which was obtained without warning him of his rights, should be admissible. In deciding to admit the confession, the Court found that the GSS acted in a preventative rather than investigative capacity; as a result, the GSS’s cognizant refraining from warning the defendant was held consistent with GSS protocol, necessary and legal. Because the GSS’s actions were justified on preventive grounds, the Court dismissed the defendant’s claim that his confession should be excluded at his criminal trial—a determination that is all but trivial. From the fact that the GSS agents in their counterterrorism role acted out of necessity, and therefore should not be punished, it does not inevitably follow that Smirk’s right to due

200. Id. at 546.
201. Id. at 534-35.
202. Id. at 535.
203. Id. at 550.
204. Id. at 534.
205. Id. ¶ 8, at 544-46. Another question was whether the defendant’s confession, which was given after seventeen hours of ongoing interrogation, should be deemed admissible. The Court answered in the affirmative, holding that “the defendant’s exhaustion and being subject to ongoing interrogation are often inevitable results or side effects of an investigation.” Id. ¶ 11, at 551. The Court also found that Smirk’s exhaustion did not break his free will, as proved by the fact that he refused to give his interrogators the names of his contacts in Israel. Id. In any event, the defendant affirmed his confession the following day, after he was given ample time to rest. Id. ¶ 11, at 552. Smirk’s denial of access to counsel for 17 days raised no question of legality since it was approved by the district court as required by law. Id. ¶ 15, at 553-54. Still, the defendant’s attorney argued that his client was not informed of his right to appeal the decision, nor was the German Consulate informed of his arrest. The Supreme Court held that these omissions did not affect the core of Smirk’s right to counsel. His denial of access was reviewed by the district court and was therefore lawful. Id. at 555.
206. Id. at 545-46.
process as a criminal suspect was not infringed.\textsuperscript{207} In related contexts, both the Israeli Supreme Court and the House of Lords have drawn such distinctions, distinguishing between executive and judicial roles.\textsuperscript{208} Nevertheless, in \textit{Smirk} the Court linked the two, subordinating the defendant's rights as a criminal defendant to a determination of necessity.\textsuperscript{209}

A related observation is brought to light by comparing \textit{Smirk} with Beinisch's later interpretation of its holding in \textit{Issacharov}: there is an important difference between necessity reflecting on the authority's state of mind, which still flags the act as unlawful, and ruling that necessity deems the act \textit{legal}. If necessity deems the authority's act legal, as the Court held in \textit{Smirk}, that would render the \textit{Issacharov} tests superfluous. Yet Beinisch included \textit{Smirk} as one of \textit{Issacharov}'s subtests, not as a preliminary question concerning legality. Conflating these issues tends to blur the lines between legal and illegal, subjecting violations of defendants' rights to case-by-case proportionality and necessity tests. As a result, the provisions of the criminal procedure code might generally appear more pliable. And in fact there seems to be good reason for such concerns.

Let us begin by considering interrogation techniques that are not specifically outlawed by statute, yet appear to be on the fringe of what the Supreme Court is willing to deem fair and legal. In \textit{Pilza}, the defendant was charged with robbery.\textsuperscript{210} The police actively misled the


\textsuperscript{208} See \textit{id.} See also A v. Secretary of State for the Home Department, [2005] UKHL 71 (H.L.) (Eng.), § 70. "The executive and the judiciary have different functions and different responsibilities. It is one thing for tainted information to be used by the executive when making operational decisions or by the police when exercising their investigatory powers, including powers of arrest. . . It is an altogether different matter of the judicial arm of the state to admit such information as evidence when adjudicating definitively upon the guilt or innocence of a person charged with a criminal offence."

\textsuperscript{209} CrimA 6613/99 Smirk v. State of Israel [2002] IsrSC 56(3) 529, ¶ 8, at 546: Characterizing the cases in which the absence of a warning should result in exclusion requires a more comprehensive discussion and must be left for days to come. As stated, in the appellant's case I am convinced that not warning him at the airport and on his way to the GSS facility stemmed from the imminent danger posed by him upon his arrival to Israel and the nature of the investigation, in which there was an urgent need to receive information from him. Furthermore, I believe that the absence of a warning did not affect his free will. . . Under these circumstances I do not consider the absence of a warning to be a disproportionate infringement of the right to remain silent, that requires exclusion.

defendant to believe that the victim had identified him in a photo lineup, which led him to confess. Justice Miriam Naor expressed her discomfort with the police's behavior. She wrote that although pre-Issacharov jurisprudence distinguished between fabricating real or written evidence and verbally misleading the accused, deeming only the former illegal, this distinction may no longer hold after Issacharov.

Naor still considered the police's behavior lawful in this instance and admitted the confession. What animated her decision was the fact that the police had already employed a number of more honest investigation techniques that did not yield the desired evidence (including interrogation of both defendants, questioning of eye-witnesses and a photo lineup). Only then did they actively mislead the accused. According to Justice Naor, the need to obtain incriminating evidence coupled with previous failed attempts to do so not only rendered the police's acts less reprehensible, but transformed them from unfair—and therefore unlawful—into lawful.

While Pilza operated in the realm of the vague and yet undefined standards of investigation fairness, other decisions have whitewashed acts that were clearly contrary to statute. In Halil, a murder suspect was denied access to counsel for a total of 16 days without district court approval, despite statutory requirements. Citing Smirk, the district court held that the evidence should not be excluded: balancing the defendant's rights on the one hand and investigation needs and the discovery of the truth on the other, the court deemed the police and GSS's otherwise unlawful denial of counsel reasonable. The court overrode the relevant statute, while declining to subject the violation to strict scrutiny.

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211. In fact, he had identified a different individual. Id.
212. Id. ¶ 14.
213. Id. ¶¶ 23-24. Justice Levi, concurring in the result, stated that he found the technique entirely legal. Id. (Levi J., concurring).
214. Id. ¶ 24.
215. Id.
217. Criminal Procedure Law (Enforcement Powers—Arrests) 1996, § 35(10) requires district court approval for denial of counsel lasting longer than 10 days, even in security investigations. The law also requires that the arrest be brought to the attention of a person who the suspect requests. Nevertheless, in this case the denial of counsel lasted for 16 days, and approved only within the police and GSS with no judicial review of the decision. In its decision, the district court did not explicitly mention the legal requirement. See id. ¶ 87.
Halil’s reasoning has not been reserved for severe crimes or threats to national security. In Salah, the police stopped the defendant’s vehicle without reasonable suspicion other than Salah being “known to them from their work.” During their search they discovered a knife in Salah’s pocket. Ruling that the defendant was searched unlawfully, Judge Hadassah Naor nevertheless admitted the evidence reasoning:

I wonder how the police may address and prevent crimes... if physical evidence such as drugs, knives, weapons or stolen property are suppressed merely because they were found during the course of a routine check or search of recidivists or suspects familiar to the police from their war against street crime. Under what circumstances may a policeman, who happens upon such suspects during the course of his work, search them or their possessions, when the conditions of Article 25 of the [Criminal Procedure] Code are not met, he has no warrant, and has no possibility within the time constraints and given the urgency of the [search] to petition the court for a judicial warrant?

I believe that the answer to this was given in Issacharov, where the Court adopted a relative doctrine that allows the court discretion in excluding evidence obtained unlawfully, taking into consideration the particular circumstances of each case, while balancing between competing interests, with the court ultimately determining whether in the particular case, given the circumstances under which the exhibit was obtained, admitting it at trial would substantially compromise the defendant’s right to due process.

Distorting Issacharov’s holding, Judge Naor treads dangerously close to authorizing the police to do what they deem necessary to fight crime, even in violation of the law. Seemingly invoking a rationale akin to the Fourth Amendment exigency doctrine, Naor goes a few steps further in generally permitting the warrantless search of recidivists. To some extent, Naor’s rationale resembles administrative law’s

220. Id. ¶ 6.
221. Id. ¶¶ 6, 13.
222. Id. ¶ 19. She left open the question of whether the search might be considered consensual, since in her opinion the evidence was admissible anyway. That was because the evidence obtained was real, and according to her understanding of Issacharov this in itself deemed it admissible. Id. ¶ 20.
223. Id. ¶ 23.
inherent powers doctrine:225 since the police are charged with maintaining the peace, and considering that the authorities granted to them by law seem insufficient to carry out their duty, they must be given greater powers and latitude. That the police’s authorities to approach and search an individual are regulated by statute, and that the law’s requirements were not met were deemed all but irrelevant. Naor construed Issacharov as a way for courts to sanction the police’s disregard for statutory restrictions when judges deem it expedient to have done so. Such reasoning essentially reduces criminal procedure to a test of reasonableness, with judges deciding subjectively on a case-by-case basis.

F. The Trees and the Forest: General Trends in the Application of Issacahrov

The focus of this Article has thus far been descriptive, concentrating primarily on the application of the exclusionary doctrine. I have paid extensive attention to analyzing the rule’s application out of the conviction that firm data is an indispensible foundation for theoretical and normative claims about what the law is and why it is so. We must look not only at what courts say but primarily at what they do, and evaluate the differences between the two. To that end, this section focused on particular interpretations of sub-categories within the Issacharov tests. I have pointed to aspects in Issacharov’s application that seem particularly problematic. In order to truly appreciate the application of the exclusionary rule, however, I propose that we step back from the individual points and look at the picture that emerges in its entirety. Although judges pay lip-service when discussing the exclusionary rule in virtually every case, courts seem to hold onto any possible test in Issacharov to justify admission regardless of how evidence is obtained. Throughout the study we have encountered extreme judicial reticence to exclude unlawfully obtained evidence, even in instances of severe and inexcusable police violations of the law.

The exclusionary doctrine’s application has been decidedly anti-exclusionary in a number of ways. First, in applying the rule, courts attribute a prominent role to some of Issacharov’s heavily criticized tests, like the physicality of the evidence. Second, even tests whose

225. See ITZHAK ZAMIR, 1 THE ADMINISTRATIVE AUTHORITY, 53 (1996). Zamir criticizes the inherent powers doctrine and points to its inconsistency with the principle of administrative legality. *Id.* The tension between inherent powers and administrative legality becomes even more pronounced in the police’s exercise of search, interrogation and detention powers, which infringe upon basic rights. Therefore, introducing such reasoning into criminal procedure is particularly troubling.
fate Issacharov left inconclusive—such as the severity of the crime—have been embraced with only few qualms in later decisions. The definition of what constitutes a severe crime has itself proved flexible and over-inclusive. Third, tests that were left vague and ambiguous, such as police’s requisite state of mind or the necessary causal link between the violation and the evidence obtained, have been interpreted almost invariably in a manner that favors admission. Judges have insisted on the strictest of causal relations, employing questionable counterfactual analysis and dubious presumptions about what the defendant knew or should have known. Conversely, anything less than malice on the police’s part has been treated as a consideration that supports admission. Finally, issues that seemed settled by law or were clearly laid down in Issacharov have been rehashed and revised: doubts have been cast as to the doctrine’s applicability to pending proceedings and the police’s claimed ignorance of the law has weighed against exclusion more frequently than not.

IV. The Faces of Justice and the Israeli Exclusionary Rule

This final section aims at situating the exclusionary rule within its broader social, political and judicial context. Though a comprehensive analysis of the causes for the exclusionary rule’s weak application will require separate treatment, I would like to briefly address some of the issues that bear on the rule’s interpretation. I believe that placing the exclusionary doctrine within this broader context will provide a more satisfying understanding of its limited application.

At different points throughout my analysis I have alluded to the security agenda’s possible influence on the exclusionary doctrine’s framing and implementation. I shall address this topic in greater detail in this section. In previous work I have also argued that Issacharov is best understood against the background of Israel’s dismissal of admissibility rules as overly rigid and formalistic. In this section I will relate the erosion of admissibility rules, and the pursuant shift towards more flexible standards, to more general approaches towards procedural justice that bear on the exclusionary debate. Evaluating the broader Israeli discourse concerning procedural justice will also highlight potential differences between Israel and the United States, and how these may have affected the form that the exclusionary rule has taken, and might take in the future, in both countries. I will also try to reconcile what appears as judicial disregard for procedure and deference towards the government with the Israeli Supreme
Court’s image as activist. Finally, I will assess some of the costs and benefits of Israel’s flexible exclusionary rule.

A. The Limits of Doctrine as an Explanatory Factor

The first section of this article reviewed the literature concerning Issacharov’s doctrinal and structural shortcomings.\(^{226}\) Looking at those critiques from a broader theoretical perspective, they can be characterized as mostly internal to the exclusionary rule. They seem to suggest that if only the Israeli Supreme Court had applied more rigorous logic, or learned properly from other countries, it could have “gotten it right,” thus providing Israel with a better exclusionary rule. Such an approach suggests that the reason for the rule’s problematic outcomes is incorrect or incoherent doctrine, which bred feeble application.

Although Issacharov’s internal and doctrinal flaws may account for some of the problems in the rule’s application, such explanations are not entirely satisfactory; nor are accounts that tie the rule’s weak application to its underlying rationale, which emphasized judicial integrity rather than deterrence.\(^{227}\) Though doctrinal flaws may provide

\(^{226}\) For example, the Supreme Court did not prioritize between the various prongs of its multi-faceted test—thus creating a vague standard rather than a bright-line rule; it erroneously categorized or misinterpreted tests borrowed from foreign jurisdictions, such as discoverability and conscription; and it included factors that should have been rendered irrelevant to the exclusionary rule, such as the reliability of the evidence and the severity of the crime.

\(^{227}\) I refer here to an ongoing discussion throughout the October 2009 symposium entitled “The Future of the Exclusionary Rule” at Southwestern Law School in Los Angeles, California. Considerable attention was given to the exclusionary doctrine’s goals and rationales, and their possible effects on the rule’s application. Some participants expressed skepticism about the “majestic idea” expressed by Justice Holmes in *Olmstead*, by Justice Brennan’s in *Leon*, and finally by Justice Ginsburg in *Herring*, that exclusion should aim at least in part at preserving the integrity of the legal process. It was suggested that such lofty ideals may reflect glorious principles, but that these might prove insufficiently pragmatic because they provide little guidance to lower courts trying to decide how to rule in a particular case. It was also suggested that deterrence could more readily and effectively be broken down into actionable items. See Professor David A. Sklansky, Symposium, *The Future of the Exclusionary Rule: American and International Perspectives* (Oct. 9, 2009), at 54-56 (unpublished transcript on file with SW. J. INT’L L.). Compare Professor Andrew E. Taslitz, *id.* at 141-42. Professor Skalnsky’s observations seems to be supported by the fact that foreign courts that have focused on exclusion as a matter of procedural rights, rather than treating it as a windfall to defendants from judicial attempts at deterrence, ironically tend to less readily exclude evidence. Perhaps surprisingly, it is the United States that has become increasingly focused on deterrence—a more utilitarian than deontological consideration—that nevertheless excludes more readily than any other country. Still, some at the Symposium also expressed skepticism about the actual effect of deterrence as a rationale for exclusion. Professor Ellen Podgor stated that she sees deterrence “as just a façade” and that “if deterrence really matters, it’s going to have to get to that point where we are back to a state of *Mapp.*” *Id.* at 54.
a partial explanation, they leave some phenomena entirely unaccounted for. In particular, they fail to explain the stretching of Issacharov's tests beyond their foreseeable limits and judicial revision of well-established legal doctrines.228 Issacharov's elastic boundaries may have made it easier for courts to bypass the exclusionary rule, but are not themselves the reasons for circumvention.

To explain these phenomena I believe we must look outside Issacharov and beyond the exclusionary rule itself, treating decisions like Issacharov not as causes but as effects, as dependent rather than independent variables. To focus criticism on Issacharov's tests is to address the symptoms rather than the root-causes of judicial anti-exclusionary policy. Understanding Issacharov and its progeny requires placing them within their broader social and political context, as well as within Israeli legal culture.

My proposed approach towards the exclusionary rule, and towards legal doctrine more generally, questions the possibility of transplanting the Canadian formula for exclusion and expecting it to yield similar results in Israel.229 Although at inception Issacharov may have displayed strong resemblances to the Canadian Supreme Court decision in Collins, under the Israeli legal climate it seems to have lost most of its affinity to its Canadian ancestor. I believe that these differences do not stem solely from doctrinal flaws. Issacharov could not have matured in isolation of its broader social and legal environment. It appears that legal transplants rarely truly can.

B. The Exclusionary Rule and the Security Agenda

In Section II we discussed the cleansing effect that necessity sometimes bestows upon unlawfully obtained evidence. It is perhaps not surprising that this approach developed in national security cases where civilian courts were asked to consider evidence obtained for preventative purposes. Such cases reflect a fundamental dilemma facing the Israeli legal system and touch on a broader debate, in Israel and elsewhere: how must democratic societies address terrorism. One aspect of this debate is the controversy over the proper venue for trying terror suspects.

228. See supra note 226-28 and accompanying text.
229. As Don Stuart illustrates in his article, Canadian courts appear to be shifting towards a model that emphasizes the seriousness of the violation over all other considerations, thus expressing an approach focused more closely on procedural justice. See Stuart, supra note 41. In contrast, Israeli courts using mostly the same list of considerations have taken an entirely different tack.
The debate over the proper venue for prosecuting terrorists is often framed as one between civil liberties advocates, who believe that alleged terrorists must be granted the same procedural rights as criminal defendants, and those who believe that a different set of norms and institutions should govern such cases. The latter often claim that civilian courts are ill-equipped to address the complex challenges of terrorism, often citing overly restrictive and unsuitable rules of evidence and criminal procedure. Supporters of trials in civilian courts frequently retort by demonstrating how existing criminal procedure doctrines can and have been used effectively to address terrorism while ensuring fair trials.

Taken together, Smirk and Salah highlight a slightly different dimension of this issue. Smirk begs the question whether procedural safeguards will remain fixed and endure or whether standards might instead be bent or redefined to secure the conviction of alleged terrorists. Civilian courts may very well afford stronger procedural safeguards than do other fora. Still, Smirk points to potential unintended consequences of trying terrorists in civilian courts. Anti-exclusionary tendencies, which highlight the risk of guilty and potentially dangerous criminals going free, become further pronounced and more compelling in the prosecution of terrorists. Courts may be under considerable pressure and temptation to convict terror suspects, determining the lawfulness of investigation methods based on the centrality of the tainted evidence. Even well-intentioned judges might fear that their exclusion of crucial evidence will weigh towards holding terror-

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232. See Richard B. Zabel & James J. Benjamin, Jr., In Pursuit of Justice: Prosecuting Terrorism in the Federal Courts 107 (2008); Richard B. Zabel & James J. Benjamin, Jr. In Pursuit of Justice: Prosecuting Terrorism in the Federal Courts 49 (2009 Update and Recent Developments): "in the past year, while new systems have failed and new "fixes" have been floated, the criminal justice system has continued to build on its long record of being an effective and fair tool for incapacitating terrorists. The evidence collected in this 2009 Report confirms what was demonstrated in In Pursuit of Justice; that is, that the justice system, while not perfect, continues to adapt to handle all manner of terrorism prosecutions without sacrificing our national security interests or our commitment to fairness and due process for all." Id.
ism trials at other venues, which provide weaker procedural safeguards. To demonstrate their aptitude for addressing terrorism, such judges might render existing procedures more pliable. Exigency, for example, might be taken a step further.

Salah suggests yet another possible danger: doctrines developed and applied in cases like Smirk, which might appear sound in the counterterrorism context, do not necessarily remain confined within that sphere. Evidence from Israel, as well as from the United Kingdom and the United States, suggests that once extraordinary counterterrorism measures are implemented, introducing them into the ordinary criminal context becomes more acceptable, creating a spiral effect. As particularly hard cases, terrorism trials perhaps possess a unique potential of generating bad law.

To address both this spiral effect and the obstacles that regular criminal procedure poses, some in Israel have supported the adoption of a separate code the would apply in national security cases brought before civilian courts. Such a "Terror Law" would, for example, relax existing restrictions on the admissibility of hearsay evidence and allow less rigorous and frequent judicial oversight of terrorists' detention. Containing such provisions within a separate code rather than intertwining them in ordinary legislation, so the argument goes, would limit their corrupting potential. Setting aside the moral and constitutional concerns that such provisions still pose, it is doubtful whether such a separate code would successfully contain their negative impact.

233. The Israel Democracy Institute, The Battle of the 21st Century: Democracy Fighting Terror Discussion Forum 103, 433 (2006), available at http://www idi.org.il/PublicationsCatalog/Pages/BOOK_7056/Publications_Catalog_7056.aspx. For example, then Israeli Minister of Internal Security suggested that prominent figures in Israeli organized crime be subject to administrative arrests. Id. at 103. Similarly, then Deputy State Attorney Nava Ben-Or stated that the Attorney General's Office opposed recognition of a defendant's right to have an attorney present at his interrogation for fear that similar privileges might be afforded to terror suspects. Id. at 80. This suggests that the Israeli Attorney General's office is well aware of the mutual effects between the two kinds of trials, and appears to frame its policies accordingly. The result is troublesome: the denial of rights to which criminal defendants would otherwise be entitled. Ben-Or seemed genuinely unsettled by this state of affairs, and the fact that ordinary criminals are forced to bear the brunt of an Attorney General operating under a terrorism paradigm. Id. at 433.


235. Id. at 15. The process also seems to work in the reverse: a legal system might refrain from granting certain procedural safeguards to criminal defendants for fear that these might pose obstacles when investigating terror. This has been the case in Israel. See id.

236. Donohue, supra note 234, at 15-16.

237. Id. at 101, 113.
As Laura Donohue has convincingly demonstrated, there is ample evidence to suggest the contrary.\footnote{Donohue, supra note 234, at 15-16. Donohue outlines two ways in which counterterrorism measures creep into the non-terror context: in the first scenario, legislators are diligent in limiting the powers to counterterrorism, "but once such measures are implemented, the idea of using them is not longer extraordinary. . . . Subsequent laws may thus explicitly transfer counterterrorist authorities to ordinary criminal law." Id. at 15. The second mechanism stems from lack of specificity in legislation granting the counterterrorism powers. Id. at 16. It seems that the former scenario best addresses the danger of the proposed "Terror Law."}

Fully engaging this complicated and nuanced issue would go beyond the scope of this article. Still, cases like Smirk and Salah should at least give pause to consider the possible costs that trying terrorists in regular criminal courts might exact on the civil liberties of criminal defendants. Pointing out such costs is not meant to imply that terror suspects should not be tried in civilian courts. Rather, drawing awareness to the potential risks emphasizes the vigilance terrorism cases require, lest procedures be tailored to secure certain outcomes and cause undesirable side effects.

The security agenda might inform social realities, legal frameworks and judicial perceptions in additional ways. National security threats often provide the impetus for bestowing preventative powers upon the police; they may also inform judicial interpretations of those powers. This might explain the doubts that Israeli judges have expressed as to whether asking an individual to empty his pockets constitutes a "search." In a country where individuals routinely surrender their person and belongings to searches when entering malls, supermarkets and cafes, a policeman's request to empty one's pockets seems like an intrusion hardly worth fussing about. Security threats may also provide context for the criminalization of certain behaviors that would otherwise be considered "mere preparation," in particular the creation, enforcement and severe punishment of simple possession crimes.\footnote{I refer here in particular to knife possession, which has figured prominently in motions to suppress. True, scholars have shown that the increase in possession crimes at least in the United States predates 9/11, and is independent of the security agenda. See generally, Markus Dirk Dubber, Policing Possession: The War on Crime and the End of Criminal Law, 91 J. CRIM. L. & CRIMINOLOGY 829 (2001); Markus Dirk Dubber, The War on Terror and U.S. Criminal Law (University of Toronto Working Paper Series, Dec. 9, 2009), available at http://ssrn.com/abstract=1521252. Still, the fight against terror no doubt offers additional compelling justifications for adding and vigorously enforcing such crimes. Though terror may not be the sine qua non for the increased criminalization of such possession crimes, it may still have provided the impetus the and the cloak for their expansion. They may also explain judicial displays of trust towards law enforcement agents even when the police violate the law: throughout the study we have seen judges portray the police's claimed}
ignorance of the law and unlawful search of recidivists as acts conducted in good faith.

The foregoing observations suggest that in the fight against terror Israeli courts may have grown accustomed to an increasingly preventative model. That, in turn, may have affected the manner in which judges perceive police powers more broadly. It is against this background that we must assess the seeming deference that courts display when applying—or more precisely, when not applying—the exclusionary rule.

C. Procedural Justice in the Israeli Legal System

1. From Rigid Formalism to Substantive Justice: The Shift from Admissibility to Weight

To more fully appreciate judicial attitudes towards the exclusionary doctrine we must consider the broader discourse in Israel surrounding evidentiary rules. Since the 1980s Israeli courts have consciously and deliberately moved away from rules of admissibility towards more flexible standards of weight.240 Rules of admissibility have been repeatedly portrayed as conceptually alien to the Israeli legal system and culture: a colonial legacy,241 they were devised primarily for juries, to shelter lay fact-finders from unreliable informa-


242. The rules’ British colonial origin may go some way in explaining the legal system’s ambivalence towards them, which may suggest a post-colonial element to this issue. Perhaps ironically, Israel’s colonial British past may have made it more difficult to fully embrace the exclusionary rule. Whereas one would assume that Israel’s common law legacy would make it easier to introduce an exclusionary rule, experience suggests the contrary. Israel complexes with rules of admissibility do not seem to manifest themselves in quite the same fashion in civil law jurisdictions. As Stefano Maffei’s paper suggests, it would appear that the European Court of Human Rights might even be on a path towards adopting the American Fruit of the Poisonous Tree doctrine, which Israeli courts have so adamantly rejected. Stefano Maffei, The Cloak of the Law: Fruit Falling from the Poisonous Tree, Gafgen v. Germany: a European Perspective on the Exclusionary Rule, Working Paper (Sw J. Int’l L. 2009 Symposium, unpublished transcript on file). This might be because European nations do not share Israel’s past with the common law and its complex struggle with rules of admissibility throughout the decades. Like a rebellious teenager, Israel’s jurisprudence has oscillated between a sense of pride and admiration towards its common law ancestor and a sense of belonging to that imagined community of nations, and an attempt to assert its own identity and pave its own way. See also Likhovski, supra note 62.
tion that would unfairly bias their decisions. In Israel's juryless system these rigid rules have been blamed for forcing professional judges to disregard relevant and reliable evidence and ignore what they know to be the truth. Some have suggested that the adversarial model more generally, which frames the criminal trial as a contest or struggle, is ill-suited for uncovering the truth, and thus prevents judges from doing justice. Israel's conscious move from admissibility rules towards more flexible standards of evidentiary weight has been tied to a broader shift from legal formalism towards discretion that expresses substantive justice. Expressing a variant on Jeremy Bentham's maxim, in Israel the exclusion of evidence has been equated with exclusion of justice.

The casualties of the shift from admissibility to weight have not only been reliability-based evidentiary rules. Public-policy based doctrines, such as the exclusionary rule, have also fallen victim to this attitude. Though concerned primarily with defendant's rights and procedural fairness, not reliability, the exclusionary rule has been stig-


244. See, e.g., Uri Struzman, The Naked King or the Dominance of Juries in Israeli Courts, 13 Tel Aviv U. L. Rev. 175 (1988). Struzman, a judge at the Tel Aviv District Court, describes how admissibility rules often lead to the acquittal of defendants known to be guilty. He writes how “once again the rules of evidence have defeated the pursuit of justice.” Id. at 178. Struzman then wonders why “there is still a sacredness about laws imported from a foreign land” and asks why “the dust is not removed from these principles... to determine whether their [foundations] are solid or whether they have grown unstable when moved from their native England [to Israel].” Id. Struzman makes a series of recommendations for reform concerning, for example, out-of-court statements and the admissibility of accomplice testimony.

245. See Mordechai Kremnitzer, Rethinking Criminal Process, 17 Mishpatim, 475, 477 (1987). The literal translation of the Hebrew title of the article is far more suggestive: “Making Criminal Process Conform to the Goal of Uncovering the Truth, Or Is It Not Yet Time to End the Game Season?”

246. See CrimA 5614/92 State of Israel v. Messika [1995] IsrSC 49(2), 669, 680-81. This approach is also evident in Justice Cheshin’s separate opinion in Issacharov, that commends Justice Beinisch for looking beyond the rigid rules of evidence that formed during the course of history to make the judge’s craft more manageable; she instead focused on the purpose of these rules and the “spirit of the times.” See Issacharov ¶ 6 (Cheshin, J., concurring).

247. This discourse infiltrated the exclusionary rule debate despite the important differences between the two kinds of admissibility: exclusion of illegally obtained evidence, as a legal question, is independent of the reliability of the evidence; it had to do with the rights of the defendant. See Andrew Choo & Susan Nash, Improperly Obtained Evidence in the Commonwealth: Lessons for England and Wales, 11 Int’l J. of Evidence & Proof 77 (2007). In fact, some scholars have argued that the exclusionary rule has been improperly categorized as a rule of evidence, even though its “design and operation are evidence-related,” since exclusion is motivated by social goals that are not aimed solely at fact-finding. See Stein, supra note 71, at 27. Therefore, despite the absence of juries, the decision of an Israeli judge to exclude illegally obtained evidence would be no different from that of a judge in any other common law jurisdiction.
matized by exclusion’s image as inappropriately rigid legal formalism.\(^{248}\)

Even when introducing the exclusionary rule, the Israeli Supreme Court associated the idea of exclusion with the old formalism and rigidity—and ultimately with injustice. Justice Beinisch went to great lengths to explain why *Issacharov*, which at first glance seems inconsistent with the Court’s erosion of admissibility rules, was not a return to the rigid approach of yesteryears.\(^{249}\) The Court did not resolve the seeming contradiction by contrasting public-policy and reliability-based rules. Rather, the Court explained that despite its appearance, the exclusionary rule was still sufficiently flexible. Verdict accuracy would continue to reign supreme, even in the application of this safeguard of procedural justice.\(^{250}\) At the end of *Issacharov*, Beinisch reiterated the presumption that relevant evidence is to remain admissible.\(^{251}\) Therefore, it is no coincidence that reliability became a dominant ingredient in *Issacharov*; this was not the result of the Court misspeaking, or a misreading Canadian doctrine.\(^{252}\) Nor is it surprising that reliability and the severity of the offense continue to play prominent roles in the decisions of Israeli courts, loath to exclude relevant and reliable evidence regardless of how it was obtained.

2. Relative Voidness and the Erosion of Procedural Justice in Administrative Law

Portraying process as *means* rather than an independent end has not been confined to evidentiary rules of admissibility or to criminal

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\(^{248}\) For a more comprehensive analysis of this trend see Blum, *supra* note 17, at 2147. For example, the relatively developed exclusionary rule for confessions under the British Mandate in Palestine, which looked not only at the evidence’s reliability but also at police’s compliance with the Judges’ Rules, was abandoned as being excessively technical. See CrimA 20/49 Hadi v. Att’y Gen. [1949] IsrSC 3(1) 13. The question of whether a confession should be deemed “free and voluntary” under Article 12 of the Evidence Ordinance increasingly became a factual, rather than normative one, concerned mainly with the statement’s credibility. Rather than focusing on the authorities’ impropriety, the standard became whether the defendant’s free will had been broken and whether under such circumstances an innocent person may have confessed to a crime they did not commit. See CrimA 115/82 Muadi v. State of Israel [1984] IsrSC 38(1) 197.


\(^{250}\) *Id.* The Court emphasized its continued commitment to “uncovering the truth” as paramount. Hence, Justice Beinisch rejected the “rigid” American model in favor of more flexible models found in other common law jurisdictions. *Id.*

\(^{251}\) *Id.* at §§ 63, 76, at 414-15, 429.

\(^{252}\) And, therefore, no coincidence that the distinction between physical and testimonial evidence is part of this prong.
This approach is also evident in Israeli administrative law, where since the early 1980s the "relative voidness" doctrine has been steadily gaining ground, parallel to the erosion of admissibility rules. Relative voidness has enabled the Court to validate acts and decisions reached in violation of administrative law, which under the traditional approach would have been deemed null and void.

From a narrow doctrine applied sparingly to give legal effect to marginal breaches or to voidable acts of governmental agencies, the Supreme Court has increasingly used relative voidness to resuscitate void acts. The Court has done so even when administrative decisions were reached ultra vires or in violation of fundamental principles of natural justice, such as the right to a hearing. At first the Court took this ends-oriented approach when validating an otherwise void act was crucial to protect individuals who acted in good faith or in reliance upon it. But the doctrine soon expanded; it was increasingly used to give general effect to decisions reached in violation of administrative law. More importantly for our purposes, the doctrine has often been invoked against individuals and in favor of the government, rather than the other way around.

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253. See Daphne Barak-Erez, Relative Voidness in Administrative Law: On the Price of Rights, in ITZHAK ZAMIR BOOK: ON LAW, GOVERNMENT AND SOCIETY 284-85, n.6 (Ariel Bendor & Yoav Dotan eds., 2005). Barak-Erez shows how the doctrine idea of relative voidness is applied to legal fields from contracts to labor law, but though primarily in the sphere public law.

254. Id. at 294.

255. Traditional Israeli administrative law (following the English lead) distinguished between void and voidable acts. Id. at 287.

256. Id. at 304.

257. Id. at 312. Relative voidness can be understood as an attempt by the Supreme Court to separate "conduct" rules from "decision" rules. For a discussion of the distinction between the two see generally, Meir Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 HARV. L. REV. 625 (1984).


259. Initially the act was validated for a particular proceeding or towards a particular party, against whom it would be unfair to deem it void. Id. at 297.

260. See id. at 308-09. A case in point, which is particularly relevant to our discussion of procedural justice, was HCJ 118/80 Greenstein v. Chief Military Prosecutor [1980] IsrSC 35(1) 239. The petitioner, an IDF soldier, was not given proper access to the Military Police file that his commander had consulted before disciplinary proceedings were brought against him. Id. The Supreme Court denied the soldier's petition to pronounce the proceedings null and void. Id. at 247. The Court reasoned that nondisclosure of the file did not compromise the soldier's defense or "lead to a miscarriage of justice." Id. Bakke expounded upon this approach. See Barak-Erez, supra note 253, at 300. There Justice Zamir addressed the ramifications of the authority's failure to conduct a hearing although obligated by law to do so:

A decision reached in the absence of a hearing may remain valid if after the fact it becomes evident that there would have been no use in the hearing, meaning that there were no valid arguments to be made. . . We must distinguish well between the rule that
The relative voidness doctrine can be directly linked to the exclusionary rule. Both are outcome driven. Focusing on the merits, both ask whether the result may or should have been different, which trumps most procedural flaws. In Issacharov Justice Beinisch, and to a greater extent Justice Cheshin, drew an explicit analogy between the two doctrines. But in doing so, they imported an already controversial doctrine of administrative law into the criminal context, where it becomes only more problematic. If the relative voidness approach is to prevail in the application and understanding of Issacharov, little will be left of the exclusionary rule. After all, the evidence excluded is typically reliable; ergo, the accurate and therefore just result is typically conviction.

The Israeli approach towards procedure, as manifested in both the relative voidness doctrine and the exclusionary rule, reflects a certain understanding of what lends legitimacy to the state’s exercise of authority. This approach corresponds quite neatly with Mirjan Damas\'ka’s characterization of procedure in the "activist state." He binds the administrative authority, and the remedy prescribed by courts for breach of that rule. The rule operates in one dimension, whereas the remedy acts in another. The court may consider, after the fact, factors that differ from those that bound the authority ex-ante.

Both Greenstein and Bakke emphasize that the crux of an injustice is the outcome it produces. Again, we see that procedural justice—and the rights it entails—are subordinated to the accuracy of the result.

261. Id. at 297-98, citing in particular HCJ 598/77 Deri v. Parole Commission [1978] IsrSC 32(3) 161, which formed the foundation for this approach: Justice Kahan in his separate opinion noted that although the parolee’s right to a hearing had been breached, in reality he had no good claim to make. Therefore, the voidness of the decision was relative. This reasoning is strikingly similar to that applied in Belfer, discussed on page 134. There too, the violation of the defendant’s right to an attorney was not considered sufficient to justify exclusion of her statement because it did not affect her defense.


263. Damas\'ka distinguishes between two state models—activist and reactive—and the justice systems they adopt. Reactive states are “limited to providing a supporting framework” to their citizens. Id. at 73. The state refuses to embrace an independent theory of what is good for society and displays no inherent interests or problems separate from those of society. Such a state’s legal system is geared primarily towards dispute resolution in cases where citizens choose to engage the system. Its procedural rules are crafted to maintain the fairness of the contest, upon which the legitimacy of the outcome—and the legal system more broadly—ultimately rest. In contrast, the activist state “strives towards a comprehensive theory of the good life and tries to use it as a basis for a conceptually all-encompassing program of material and moral betterment of its citizens.” Id. at 80. Such states typically treat civil society with suspicion; “society is defective and in need of improvement.” Perhaps more importantly for the case of Israel, such states place “a strong emphasis on a shared sense of citizenship” and “the government regards itself not as a neutral conflict resolver but rather as a manager of joint pursuit.” Id. at 81.
explains that whereas reactive states, such as the United States, justify judicial decisions:

more in terms of fairness of procedures employed than the accuracy of results obtained... procedural rules in the activist state occupy a much less important and independent position: procedure is basically a handmaiden of substantive law... decisions are legitimated primarily in terms of the correct outcomes they embody. A proper procedure is one that increases the probability—or maximizes the likelihood—of achieving a substantively accurate result rather than one that successfully effects notions of fairness or protects some collateral substantive value... procedural law is doubly derivative: like art in Plotinus' vision, it can be likened to a shadow of a shadow.264

In such a state, "sacrifice of substantive accuracy for the sake of procedural regularity remains a somewhat embarrassing anomaly; it smacks of the 'formalism' so alien to the ideology of the activist state, and so, in most instances, procedural regulation remains pliable."265 It is precisely this procedural pliability and aversion to formalism that we encounter in Israel's relative voidness doctrine and in the erosion of admissibility rules. This approach also helps contextualize the Israeli application of the exclusionary rule, which seems to only interfere with accurate outcomes.

Israel's outcome-driven approach towards process appears in sharp contrast to the image of procedural justice in the United States. For that reason, predictions that the American exclusionary rule will remain "significantly stronger than its overseas analog[s]" seem accurate.266 Still, we must not overstate the differences in the exclusionary rule's application in both countries. As Carol Steiker has demonstrated in her analysis of criminal procedure developments since the Warren Court, the United States Supreme Court has increasingly be-

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264. Damaska, supra note 18, at 148.
265. Id. at 152.
come "less sympathetic to claims of individual rights and more accommodating to assertions of the need for public order." While the norms governing police activity have remained relatively unchanged, the development and expansion of "inclusionary rules" has fundamentally altered the consequences of violating those norms. In this respect, both the United States and Israel reflect a similar approach that separates violations from their consequences.

3. Activist States and Activist Courts

The foregoing analysis of procedural justice in Israel begs the question why the Israeli Supreme Court would create an exclusionary rule in the first place. Furthermore, the Israeli exclusionary rule and the relative voidness doctrine both seem highly deferential towards the executive, which appears inconsistent with the Israeli Supreme Court's frequent portrayal as highly activist. Though seemingly unrelated, both point to the same answer: what at first blush appears as deference to government and state authority becomes slightly more complicated upon closer examination. Though less overt than striking down laws, creating an exclusionary rule but rarely applying it perhaps embodies a more subtle form of judicial activism. As Barak-Erez points out, relative voidness is perhaps the essence of judicial activism albeit in a sheep's skin. Focus on the outcome and its desirability, rather than on the legitimacy of the process, enhances judicial discretion and activism even though it may ultimately result in fewer instances of judicial intervention. But the insistence on procedural niceties becomes the preference of the individual judge, based on her subjective view of the optimal result. Judges can be stricter on procedure if they disapprove of the outcome, but otherwise declare the result only relatively void. In principle, adopting an exclusionary rule would seem like a reversal of this trend, imposing some restrictions on outcome-based evaluations. In practice, however, we have seen that the doctrine's flexibility has only provided an additional tool for re-

268. Id. at 2504. Drawing on the work of Dan-Cohen, Steiker distinguishes between changes in the Court's conduct rules and its decision rules. She notes that the main innovations introduced by the Burger and Rehnquist Courts were in the consequences of Fourth, Fifth and Sixth Amendment violations. The two main manifestations are the application of the exclusionary rule and appellate review of decisions in which unconstitutionally obtained evidence was admitted. Id. 2504-05. In the application of the exclusionary rule, Steiker points out changes in the doctrines of standing, good faith, fruits or the poisonous tree and impeachment. Id. at 2521, 2523.
versing results that judges find substantively objectionable, or for making a rhetorical point where the costs of exclusion are low.

4. The Power to Exclude and Judicial Oversight

The form that the exclusionary rule has taken also embodies a particular approach towards judicial oversight, one that keeps the executive in check while allowing it the flexibility to be effective. By creating a highly elastic exclusionary doctrine, Israeli courts have refused to communicate clear \textit{ex-ante} guidelines regarding when and how the police might be able to break the law and still get away with it. The police are to operate under the looming threat that what they do might be deemed unlawful, the evidence they acquire excluded, and in extreme cases, their violations prosecuted. Such an approach might aim at ensuring that the police do not \textit{rely} on the fact that the court will admit the evidence and overlook their transgressions. As a result, the police are perhaps less likely to violate the law unless doing so is truly necessary. And although the Court asserted that deterrence was not its primary aim, such an unpredictable model may in

\footnote{270. The Supreme Court has employed a similar approach towards checking executive power while still allowing authorities enough flexibility to be effective. See for example HCJ 5100/94 Public Committee Against Torture in Israel IsrSC 53(4), 817, [1999], in particular ¶¶ 36, 38-39, \textit{available at} http://elyon1.court.gov.il/verdictssearch/englishverdictssearch.aspx. Such a model may be particularly attractive for addressing issues of national security, as demonstrated by a recent decision: in February 2010, the Israeli Supreme Court struck down a law that allowed \textit{in absentia} detention hearings for those suspected of security offenses. See CHR 8823/07 Anonymous v. State of Israel [2010] ¶ 34-35 (unpublished). The Court struck down the law as unconstitutional at a time when the Court’s authority to do so was already under considerable attack, with the \textit{Knesset} considering a number of proposals that would limit that power. Striking down the law only added fuel to an already high flame, making the Court seem overly activist. Though undoubtedly a bold move on the Court’s part, Chief Justice Beinisch sowed the seeds of the Court’s power to declare exceptions within the decision to strike down the law. In her concurring judgment, Beinisch wrote that the Court might still allow \textit{in absentia} hearings in cases of the proverbial “ticking bomb.” \textit{Id.} (Beinisch, C.J., concurring). In so ruling, the Court expressed its distaste for overly broad legislation that provides the executive a wide \textit{ex-ante} safety net to rely on when curtailing the fundamental rights of security-offense suspects. At the same time the Chief Justice maintained the Court’s ability \textit{ex-post} to declare the exception. It is perhaps the combination of striking down a law, while maintaining the power to declare the exceptions, which only further contributes to the Court’s image as activist.}

\footnote{271. For a similar argument concerning the defense of necessity in criminal law see Dan-Cohen, \textit{supra} note 257 at 637-38 (1984). “[T]he prospect of punishment (undiminished by the availability of the defense [of necessity]) can be seen here to place an objectively determined price tag on the option of violating the law. The willingness of the individual to pay the price of his transgression lends credence to the claim of necessity by helping to assure the judge that the evil averted by the transgression was compelling.” \textit{Id.}}
fact prove quite effective, while not entirely sacrificing crime control, national security or accuracy of verdicts.272

However, to maintain the effectiveness of such checks, courts must enforce the norms they proclaim at least occasionally, lest their threats appear empty. Yet one inference we may draw from this research is that Israeli courts are highly unlikely to release even a common criminal merely because the police or GSS blundered. Although the decision will ultimately rest with the judiciary, courts are more likely than not to defer to law enforcers’ judgment. Had the police been aware of Issacharov but ignorant of its weak application, the exclusionary rule could have perhaps still served as an effective check against police abuses. But the police will likely realize (if they have not already) that the exclusionary rule is no more than a paper tiger. Although after Issacharov the police appeared to be making a conscious effort to improve their compliance with the law,273 it is doubtful whether such attempts will endure.

5. The Costs of a Flexible Exclusionary Standard

The foregoing analysis throws into sharp relief some of the costs to judicial reputation and integrity that are, perhaps ironically, inherent in creating a discretionary exclusionary rule. With the power to exclude comes a responsibility to do so in certain cases. But by not enforcing a power they now clearly possess, Israeli courts appear complicit in police abuses in a way they previously were not. When they admit evidence despite its unlawfulness, judges now seem to provide their tacit approval to executive violations. Whereas in the past judges could reprimanded the police and still admit the evidence, citing their lack of authority to exclude, they must now address the mer-

272. As David A. Sklansky explained, courts tend to prefer an ambiguous exclusionary rule that will allow them on the one hand to deter and maintain judicial integrity, while allowing them to admit evidence that will lead to the conviction of the guilty. Professor Sklansky aptly compared this judicial tendency to that of a parent who wishes to teach their child not to rely on the parent’s willingness to bring the child’s homework to school when they forget it, but still wants the child to succeed and therefore delivers the homework anyway. Sklansky, supra note 227, at 178-79. While this metaphor seems to aptly capture many instances in which the court disapproves of the police’s behavior, it leaves out an important subset. As we have seen in the case of terror investigations, authorities can sometimes point to a necessity that required them to ignore the law, which further compounds a court’s choice of what to do with the evidence. See id.

273. See Crim (Jer.) 2647/06 State of Israel v. Badaria [2008] ¶ 17 (unpublished). See also CrimA 9956/05 Shai v. State of Israel [2009], Berliner J. dissenting, ¶ 6 (unpublished). Judge Berliner opined that the police’s regard for the right to counsel increased considerably following Issacharov. Id.
its of each violation. When balancing costs and benefits, judges must explain in every instance why, though obtained unlawfully, the police’s behavior does not require exclusion.

As we have seen throughout this research, whether courts like it or not, every decision to admit unlawfully obtained evidence reads like an apologia for the police’s violation: good faith, necessity, proportionality, crime control, national security. The intellectual sophistication of relative voidness and the attempt to separate conduct rules from decision rules thus turns out to be a double-edged sword. Though the exclusionary doctrine may have seemed like a good way for courts to scold authorities while approving the outcomes of their actions, the judiciary’s intended double message does not come through. The most visible and lasting feature of dismissing motions to exclude is not their rebuke of the police, that by now rings hollow, but judges’ justifications for the police’s acts. The attempt to separate violation from outcome thus brings the judiciary into the arena every time they opt to admit, denying it the luxury of being a spectator and claiming that it is merely applying the law.

Yet another undesirable consequence of an unexercised exclusionary power is its potentially lulling effect on Israeli civil society. As long as no exclusionary rule existed in Israel, academics, defendants’ rights activists and NGOs had a clear target at which they could aim: creating such a doctrine. But once the Supreme Court recognized such a doctrine in principle in Issacharov, it provided a false hope that from now on police abuses would bear consequences. In the process, a unifying cause for activism was diffused. At least until the judiciary’s reticence to exclude unlawfully obtained evidence is widely studied and understood by the Bar and the public, demands for exclusion will be in the hands of defense lawyers pleading for their individual clients. I hope this study will draw attention to the de facto absence of an exclusionary rule and will help re-galvanize defendants rights’ advocates once again.

274. A similar argument has been voiced concerning the Supreme Court’s generally increased intervention in government decisions: when the Court chooses not to act it appears to be approving of the executive’s actions. See David Kretzmer, Forty Years of Public Law, 24 Isr. L. Rev. 355. See also: Ruth Gavison, Mordechai Kremnitzer & Yoav Dotan, Judicial Activism: For and Against, The Role of the High Court of Justice in Israeli Society 115-17 (2000).
V. Conclusion

Despite growing international consensus that criminal defendants must be awarded due process, the precise definition and content of this concept remains highly elusive and differs drastically from one legal system to another. Systems also differ in the consequences they attach to the state’s failure to comply with the requirements of due process laid down in its constitution, legislation, or judicial decisions. That has been our focus in this article. In taking a stance on this issue, legal systems fall somewhere along a broad spectrum as to what they consider to be the primary aims of the exclusionary rule: deterrence, the “protective principle,” judicial integrity or judicial reputation. When they recognize more than one goal, systems differ in how they prioritize between the objectives, especially when the goals lead to different outcomes. Legal systems also diverge on what they regard to be relevant considerations in deciding whether to exclude and how they weigh those factors against one another when they conflict.

I have argued that the exclusionary rule ultimately implicates a deeper and more fundamental dilemma: under what circumstances, if any, might a legal system deem it necessary in the interest of justice to elevate due process (however defined) over accurate outcomes. This dilemma reflects a legal system’s approach towards procedural safeguards: are these merely the “handmaiden of substantive law”\textsuperscript{275} that ensure accurate results and may therefore be overridden when they interfere with that end? Or do procedural safeguards represent ends in themselves that provide the foundation upon which judicial legitimacy ultimately rests? Obviously, these seemingly contrasting approaches are to some extent Weberian ideal types. Most legal systems are hybrids. Still, these characterizations provide a useful prism for analyzing the exclusionary rule and evaluating judicial approaches towards justice more generally.

Legal systems do not address dilemmas on the proper scope of due process or its balancing against other values and interests in the abstract: they often shape their approaches incrementally in response to concrete challenges. Nor do their positions on these questions remain static. Some have likened them to a pendulum or a spiral,\textsuperscript{276} with

\begin{itemize}
  \item \textsuperscript{275} Damaska, supra note 18, at 148.
  \item \textsuperscript{276} For the pendulum analogy see M. Groenhuijsen, Illegally Obtained Evidence: An Analysis of New Trends in the Criminal Justice System of the Netherlands, in The XIIth World Congress on Procedural Law: The Belgian and Dutch Report 112-13 (A.W. Jongbloed ed., 2008). Laura Donohue has preferred to describe the effects of counterterrorism as a spiral rather than a pendulum. The pattern she recognizes is that extraordinary powers awarded temporarily have the tendency to become permanent. Donohue, supra note 234, at 15.
\end{itemize}
particularly dramatic events—either domestic or international—possessing the power of significantly altering the center of gravity. Balances are highly contextual and embedded in experience, both historical and present, rather than based on logic or first principles. Furthermore, balances are not defined solely by the judiciary, but also by its relations to other branches of government and towards society more broadly. Such relations are themselves dynamic and may be heavily swayed by events.

Judicial systems are often divided within themselves over the proper balance between these competing ideals. Few judges wholeheartedly embrace the frequent outcome of the exclusionary rule, the release of a person who is held to be guilty and possibly dangerous. Still fewer embrace such a result when the defendant is charged with terrorist acts or other severe crimes. There is a natural discomfort in acquitting a defendant just because "the constable had blundered." But there is also uneasiness with a conviction founded on the state's breach of the law, which implicates the integrity and moral standing of the criminal legal system. That is precisely why even a century after Weeks, and though many democracies have since adopted an exclusionary rule of some scope, the doctrine remains so controversial. That is also why it will likely be debated for many years to come.

Despite spiral effects and swings of the pendulum and notwithstanding internal divisions, judicial systems can still be characterized by where their center of gravity rests. In the case of Israel, we have seen that Issacharov represented a conscious effort by the Supreme Court—at least rhetorically—to shift the paradigm, taking procedural rights more seriously. But in practice such a shift has not occurred, at least not yet. This may have been evident in the Issacharov ruling itself. But the absence of a paradigm shift has become further apparent in the decisions that followed Issacharov, which remain highly focused on rectitude of decision regardless of the rights violated, especially in the context of severe crimes and acts of terrorism.

Although the choice of outcomes over process is linked to broader social and political realities, I do not suggest that the Israeli legal system—or any legal system for that matter—must remain trapped within its existing paradigm until a dramatic external change of circumstances. Although dramatic events often sound the alarm and present the strongest impetus to reconsider received wisdom, change can be generated from within, as the Israeli Supreme Court

has proved time and again. Judges can resolve to take procedural safeguards more seriously *despite* the reality in which they operate, if they genuinely believe that judicial integrity is compromised in their admission of unlawfully obtained evidence. But to truly effect such profound change, judges must be resolute and brave, and bold decisions must be made. Alas, *Issacharov* and its progeny reflect no such resolve.