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NOTE

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INTRODUCTION

In recent years, the proper role of comparative law in the jurisprudence of American courts has become a hotly debated and controversial topic. The question was brought to the forefront of the legal community's attention following a number of United States Supreme Court decisions, perhaps most notably in *Atkins v. Virginia*[1] and *Roper v. Simmons*,[2] rulings that addressed the constitutionality of administering the death penalty to mentally retarded and juvenile defendants. In both decisions, the Court was divided on whether to regard foreign laws and practices as indicative of an evolving standard of decency when determining whether a punishment should be considered "cruel and unusual" under the Eighth Amendment of the United States Constitution.

Those who oppose reference to comparative law have argued that the use of foreign opinions to interpret domestic law unduly imposes foreign "moods, fads, or fashions" upon Americans.[3] Since laws are enacted by democratically elected representatives, the experience and legislation of other jurisdictions is immaterial and should carry little, if any, authority in their interpretation.[4] Critics contend that using foreign law to determine the proper scope of American legislation may award judges a legislative or treaty-ratifying power, an authority clearly reserved by the Constitution for other branches of government.[5] Judges who have used comparative law in formulating their opinions have been accused of "cherry picking" foreign law that supports their opinions; they have been charged with "sophistry" and disguising their personal and political preferences behind a mask of international consensus.[6]

Proponents of comparative law have countered that although foreign law should not *bind* American courts, surveying international practices and exploring the approaches of other nations may lend American courts useful insight into common problems and affirm their convictions about correct

1. 536 U.S. 304 (2002).

2. 543 U.S. 551 (2005).

3. Foster v. Florida, 537 U.S. 990, 990 (2002) (Thomas, J., concurring in denial of certiorari); *see also Roper*, 543 U.S. at 622-28 (Scalia, J., dissenting); *Atkins*, 536 U.S. at 321-26 (Rehnquist, C.J., dissenting).

4. *See Roper*, 543 U.S. at 622-28 (Scalia, J., dissenting).

5. *Id.* at 622.

6. *Id.* at 627.

solutions. As Justice Kennedy has said, "The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."[7] Others have emphasized comparative law's crucial role in prompting us to challenge the necessity and wisdom of doctrines to which we have grown accustomed and that we might view as unchangeable. Foreign law reminds us that other, and perhaps better, solutions might exist elsewhere.[8] True, supporters allow, the citation of foreign law may be prone to abuse, but such risks are neither unique to nor inherent in the use of comparative law.[9]

Despite considerable attention given to the proper role of comparative law in interpreting domestic law, legal scholarship in the United States has concentrated primarily on the use of foreign law by *American* courts. But especially for those who have emphasized the relevance of foreign experience in addressing common legal dilemmas, examining the approach of *foreign* courts toward comparative law is an equally informative and relevant inquiry. The use of comparative law by courts is by no means a uniquely American practice; the United States in fact does relatively little of it in comparison to other nations. This Note, therefore, takes a different course: it focuses primarily on the role played by comparative law in the jurisprudence of a foreign jurisdiction—one that frequently relies upon comparative law—and the problems this practice has bred. That is, it offers a comparative angle to the use of comparative law.

More specifically, I offer a case study of a recent decision of the Israeli Supreme Court in *Issacharov v. Chief Military Prosecutor*,[10] which dealt with the exclusion of illegally obtained evidence. For many reasons the Israeli Supreme Court has often relied heavily on comparative law when formulating its own opinions. However, despite frequent citation of foreign authorities by Israeli courts, this practice has largely escaped controversy. Cases making key use of comparative law therefore abound, as do complications to which this practice may lead. Examining the Israeli use of comparative law also helps underscore some of the differences between the objections raised in the United States and concerns that exist in other countries, highlighting those that are uniquely American and pointing out why the United States may have less to fear from foreign law than some critics suggest.

The Note also addresses a debate closely related to the controversy surrounding the use of comparative law: the possibility and desirability of legal

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7. *Id.* at 578.

8. *See* Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1227 (1999).

9. *See* Mark Tushnet, *When Is Knowing Less Better Than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275, 1297-98 (2006).

10. CrimA 5121/98 Issacharov v. Chief Military Prosecutor [2006] (not yet published), *available at* http://elyon1.court.gov.il/files/98/210/051/n21/98051210.n21.pdf.

transplants. Opponents of legal transplanting have argued that the deep ties between legal rules and the culture and traditions in which they develop often make it difficult or unwise to transplant the legal rules of one jurisdiction into the judicial system of another. Pierre Legrand, one of the most prominent critics of legal transplants, warns that transplanted doctrines often fail to maintain their original meaning in a new environment and that therefore courts should borrow cautiously and with limited expectations.[11] He and others have criticized the work of "comparativist transplanters," who through the citation of foreign doctrines create a sense of false consensus regarding legal rules. Critics argue that such formal citation of foreign law often overlooks the unique character and operation of a doctrine in its original setting, blurring in the process the distinction between *self* and *other*. In contrast, proponents of legal transplants emphasize the important role foreign doctrines have played in legal development since time immemorial.[12] According to Alan Watson and other scholars, it would be impossible to imagine a modern legal system that did not borrow or was not influenced in significant ways by laws originating elsewhere. Legal rules are readily transplanted, they say, and the links between law and culture, history, economics, and language are easily exaggerated.

In the hunt for a test case to add substance to this debate, I offer an in-depth analysis of Israel's exclusionary rule to assess the challenges of translating and transplanting doctrines across borders and cultures. My choice to focus on evidence law stems from the particular challenges that its transplantation poses.[13] The strong ties between rules of evidence and the broader institutional context in which they are administered suggest that evidence law can provide unique insight into the dangers of legal borrowing and the use of comparative law.[14] The exclusionary rule,[15] a doctrine intimately linked to judicial structure, offers a particularly illustrative test

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11. *See* Pierre Legrand, *The Impossibility of 'Legal Transplants'*, 4 MAASTRICHT J. EUR. & COMP. L. 111 (1997).

12. *See* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 22-24 (2d ed. 1993); Alan Watson, *Legal Transplants and European Private Law*, 4.4 ELECTRONIC J. COMP. L., Dec. 2000, http://www.ejcl.org/44/art44-2.html.

13. *See* Mirjan Damaska, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 839 (1997).

14. I allude here to factors such as the identity of the fact finder, lay or professional, whether the court is unitary or bifurcated, the temporal organization of proceedings, and the allocation of procedural control between the judge and the parties. *See id.* at 840.

15. I use the term "exclusionary rule" in this Note as a shorthand for the exclusion of evidence obtained illegally (through the violation of rules governing search and seizure for example). This is only part of the greater category of exclusionary rules and more specifically, of the many *extrinsic* exclusionary rules, i.e., rules that reject probative information for the sake of values unrelated to the pursuit of truth (such as the protection of defendants' rights). Other such extrinsic exclusionary rules are those which address privileges. *Intrinsic* exclusionary rules are those designed to enhance the accuracy of fact-finding. *See* MIRJAN DAMASKA, EVIDENCE LAW ADRIFT 12-17 (1997).

case.[16] Hence, in Part I, I examine the *Issacharov* decision, in which the Israeli Supreme Court redefined the exclusionary rule in what the Court proclaimed to be a groundbreaking decision. Was the decision in fact as revolutionary as it suggests? The Court's considerable, and often questionable, reliance upon comparative law may have misled the Court to see an unremarkable case as groundbreaking.

Issacharov is only the most recent attempt by the Israeli Supreme Court to transplant foreign exclusionary rules into Israel. In Part II, I provide a historical look at four stages in the development of the exclusionary rule in Israeli evidence law to further illustrate the inherent difficulties of legal transplanting. That Part explores the Israeli Supreme Court's ongoing struggle to define and translate "admissibility," a term which developed primarily in bifurcated jury systems, into Israel's unitary judiciary. During different eras in Israeli history admissibility has connoted different aspects of the common law term, yet without capturing its full and true essence.

Part III addresses the risks of treating foreign law as *precedent* and the dangers of legal emulation. I ask why the Israeli Supreme Court has relied so heavily upon the common law in shaping Israel's evidence rules, despite the fundamental differences between Israel and other common law jurisdictions.[17]

Finally, Part IV evaluates the rhetorical role of comparative law as a tool for legitimizing judicial innovation. I discuss how comparative law can be (mis)used to create a sense of international consensus concerning an issue highly debated within a jurisdiction. I consider how comparative law can bolster the power of courts to "revolutionize" and how it served such functions in *Issacharov.*

I. EXCLUDING ILLEGALLY OBTAINED EVIDENCE IN ISRAEL: THE *ISSACHAROV* DECISION

In May 2006, the Israeli Supreme Court handed down its decision in *Issacharov*,[18] awarding Israeli courts the discretion to exclude illegally obtained evidence. The decision was hailed by many as "a revolution in Israeli evidence law."[19] Rafael Issacharov, a private in the Israel Defense Forces

16. On the links between exclusion and bifurcation and why "[t]he unitary structure of Continental courts . . . bedevils the employment of extrinsic exclusionary rules—such as . . . those rejecting improperly obtained confessions," see *id.* at 49.

17. Legal scholars often link the development of the unique Anglo-American rules of evidence to lay adjudication and the need to protect lay fact finders from potentially unreliable information. *See* MIRJAN DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 180 (1986); *see also* GEORGE FISHER, EVIDENCE 1-2 (2002).

18. CrimA 5121/98 Issacharov v. Chief Military Prosecutor [2006] (not yet published), *available at* http://elyon1.court.gov.il/files/98/210/051/n21/98051210.n21.pdf.

19. *See* Efrat Porscher, *Illegally Obtained Confessions May Be Excluded*, NRG, May 4, 2006, http://www.nrg.co.il/online/1/ART1/170/923.html; Tal Rosner, *The Supreme Court*

(IDF), had been arrested for absence without leave. Entering a military prison, he was strip-searched and marijuana was found in his underwear. Issacharov was taken for interrogation but was not warned of his right to an attorney. During this interrogation, he provided the Military Police with a urine sample that indicated previous drug use, and he admitted to prior possession and use of marijuana. On appeal, the Supreme Court ruled that Issacharov's confession and the physical evidence he provided should be excluded because the defendant was not informed of his right to an attorney. The defendant was acquitted of three counts of prior use and possession and convicted only for possession of the marijuana found on him.[20]

The opinion of the Court in *Issacharov* distinguished the new doctrine, which gave courts the discretion to *exclude* evidence, from the old doctrine established in 1978 in *Meiri v. Israel*.[21] Under *Meiri* courts were able to reduce the *weight* awarded to illegally obtained evidence—and in some cases even give such evidence no weight at all—but could not exclude it.[22] According to the *Issacharov* Court, the creation of an exclusionary rule for illegally obtained evidence should be viewed as part of the larger "Constitutional Revolution" that has swept Israel since the passage of Basic Law: Human Dignity and Liberty in 1992. The law created a new balance between crime control and due process, leading to a greater protection of the defendant's procedural rights. This protection translated into the greater power and willingness of courts to exclude illegally obtained evidence, not merely diminish its weight.[23]

Comparative law played an important role in the Supreme Court's reasoning in *Issacharov*, both as a basis for the Court's authority to create an

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Rules that Confession Without a Defense Attorney Present is Inadmissible, YNET, May 4, 2006, *available at* http://www.ynet.co.il/articles/0,7340,L-3246887,00.html; Yuval Yoaz, *The Supreme Court: Courts May Exclude Evidence Obtained Illegally*, HAARETZ, May 5, 2006, *available at* http://www.haaretz.co.il/hasite/pages/ShArtPE.jhtml?itemNo=712770. The headnotes introducing the case in the Nevo database (which is comparable to Lexis or Westlaw) characterize *Issacharov* as "a revolutionary precedent which adopts the exclusionary rule into the Israeli legal system. In this case, a confession obtained before the detainee was given the right to consult with an attorney was excluded." Nevo Database, http://www.nevo.co.il/serve/home/it/titleslawlink.asp?build=2&System=1&Exec=&cpq=&ProcNum=5121&ProcYear=98&Process=%D7%A2%D7%A4&lawlink=11 (last visited April 6, 2008).

However, there are also those who have expressed skepticism about how revolutionary *Issacharov* really is. *See* Ron Shapira, *Not Such Big News: The Decision to Exclude Illegally Obtained Evidence Promises More than It Can Deliver*, HAARETZ, May 9, 2006, *available at* http://www.haaretz.co.il/hasite/pages/ShArtPE.jhtml?itemNo=713879&contrassID=2&subContrassID=3&sbSubContrassID=0.

20. *Issacharov* [2006] § 82.

21. CrimA 559/77 Meiri v. State [1978] IsrSC 32(2) 180.

22. Although Israeli courts had the power to diminish the weight of evidence to zero under *Meiri*, this authority was rarely exercised. *See* Eliahu Harnon, *Illegally Obtained Evidence: A Comparative Survey*, *in* 2 STUDIES IN HONOR OF JUSTICE MOSHE LANDAU 983, 1021 (Aharon Barak & Elinoar Mazuz eds., 1995).

23. *Issacharov* [2006] §§ 47, 54.

exclusionary rule and in determining the scope of the new doctrine. When addressing the anticipated criticism that establishing an exclusionary rule should be left to the Israeli parliament, the Court turned to "legal systems that are similar to our own."[24] It showed that even in the absence of explicit legislative authorization, the United States, England, and Australia all developed an exclusionary rule through judicial fiat, sometimes followed later by legislative approval.[25]

The Supreme Court also relied upon comparative law in formulating the proper scope of the exclusionary rule, turning again to a series of "legal systems that are similar to our own," namely common law jurisdictions.[26] The Court first examined the primary objectives served by exclusion in different jurisdictions.[27] It distinguished between the American model, which concentrates primarily on deterring the police from obtaining evidence illegally,[28] and the Canadian and English models, which emphasize exclusion's

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24. *See Issacharov* [2006] §§ 40, 50, 55.

25. *Id.* § 50. The Israeli Supreme Court cited *Kuruma v. The Queen*, [1955] A.C. 197 (P.C.) (E. Afr.), as establishing the rule later adopted in England in Section 78 of the Police and Criminal Evidence Act 1984, and *Bunning v. Cross*, (1978) 141 C.L.R. 54, as the antecedent of Section 138 of the Australian Uniform Evidence Act 1995. Even though the Court in *Issacharov* does not state so specifically, it appears to be relying on *dictum* from *Kuruma* in which the Lords stated that "[n]o doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused." *Kuruma*, [1955] A.C. at 204. However, the evidence in *Kuruma* was ultimately *not* excluded, with Lord Goddard stating that "[i]n their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained." *Id.* at 203.

26. *See Issacharov* [2006] § 55 (entitled "Models for the Exclusion of Illegally Obtained Evidence: A Comparative View").

27. *Id.*

28. The characterization of the American exclusionary rule as focused *solely* on deterrence is itself highly questionable; at the very least, the matter has been under debate within the U.S. Supreme Court and there is strong evidence that other factors have been considered as well. Justice Clark's majority opinion in *Mapp v. Ohio*, 367 U.S. 643 (1961), cited judicial integrity as one of the rationales behind the exclusionary rule. He quoted with agreement the dissenting opinion of Justice Brandeis in *Olmstead*, stating, "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." *Mapp*, 367 U.S. at 659 (citing Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)). A similar view was expressed by Justice Brennan in 1984:

> Because seizures are executed principally to secure evidence, and because such evidence generally has utility in our legal system only in the context of a trial supervised by a judge, it is apparent that the admission of illegally obtained evidence implicates the same constitutional concerns as the initial seizure of that evidence. Indeed, by admitting unlawfully seized evidence, *the judiciary becomes a part of what is in fact a single governmental action prohibited by the terms of the Amendment.*

United States v. Leon, 468 U.S. 897, 933 (1984) (Brennan, J., dissenting) (emphasis added). The role of deterrence in excluding evidence can be tied to a broader question of whether exclusion is a personal constitutional right of the aggrieved or an outside *safeguard* designed

role in protecting the reputation of the judicial system and the fairness of the process.[29] According to the Canadian Charter of Rights and Freedoms, evidence should be excluded if its admission would "bring the administration of justice into disrepute."[30] In England evidence can be excluded if it will have "such an adverse effect on the fairness of the proceedings that the court ought not to admit it."[31]

The Israeli Supreme Court went on to distinguish between backward-looking remedies, meant to "erase" the damage caused by the illegal action, and forward-looking remedies aimed at avoiding future injustice caused by admitting such evidence against the defendant at trial.[32] The former was attributed to the American approach and the latter to the other legal systems cited.[33] From these two distinctions flowed a third: automatic exclusion as opposed to discretionary exclusion, with the Court choosing the latter as the most appropriate model for the Israeli legal system.[34]

The Court illustrated three groups of considerations that might bear on a trial judge's decision to exercise her discretion to exclude evidence.[35] The first group dealt with the nature and severity of the illegal act itself. The trial judge could consider whether the illegal act was marginal and technical or fundamental; whether it was intentional; whether extenuating circumstances could justify the police behavior (for example, whether the police acted to prevent evidence destruction); and whether there was a ready way to obtain the evidence legally, a factor that weighs toward exclusion. Finally, the trial judge may consider whether the police would have obtained the evidence had it not been for the use of illegal means.[36]

The second group of considerations addressed credibility; the Court examined the influence that the illegal means might have had upon the reliability of the evidence obtained, distinguishing primarily between testimonial and physical evidence.[37] Finally, the third group of considerations involved the balancing that courts must conduct between the social advantages

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to deter those who might infringe it. The question remains controversial and some have argued that post-Warren Court decisions have emphasized the role of deterrence rather than other competing considerations. *See* CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: REGULATION OF POLICE INVESTIGATION 544-46 (3d ed. 2002). Nevertheless, as illustrated by Justice Brennan's opinion, some post-Warren Court rulings have underscored other policy considerations such as judicial integrity and noncomplicity in unlawful interrogation.

29. *Issacharov* [2006] §§ 57-59.

30. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 24(2) (U.K.).

31. *See* Police and Criminal Evidence Act, 1984, c. 60, § 78(1) (Eng.).

32. *Issacharov* [2006] § 55.

33. *Id.* § 56-59.

34. *Id.* § 60.

35. *Id.* §§ 69-74.

36. *Id.* § 70.

37. *Id.* § 71.

and disadvantages of excluding the evidence—the more severe the crime and the more central the evidence in securing a conviction, the less likely exclusion would be.[38]

A. Issacharov *and* Meiri*: Has Anything Really Changed?*

Issacharov was described by the Israeli Supreme Court as a significant departure from previous precedents and particularly from the doctrine established in 1978 in *Meiri v. Israel*.[39] Under *Meiri*,[40] courts could not *exclude* illegally obtained evidence, but could decide to give the evidence little or no *weight*. Like *Issacharov*, *Meiri* also addressed the infringement of the right to counsel. The police failed to summon Moshe Meiri's attorney to a photo identification. Although the court in *Meiri* deemed the witness's identification of the defendant to be completely reliable, the Supreme Court decided to give the evidence no weight whatsoever. The Court ruled that police failure to comply with the law could reduce the weight of the evidence obtained, and may even result (as it did in this instance) in awarding such evidence no weight at all, leading to the acquittal of the defendant. *Meiri* came after a series of incidents in which the police had failed to abide by legal guidelines and paid no heed to the Supreme Court's repeated warnings.[41]

Reviewing the ruling in *Meiri*, one must wonder: is *Issacharov* a significant departure, or is the difference primarily semantic? In Israel's unitary judiciary, in which judges engage in both fact-finding and legal determinations, the differences between the *Meiri* doctrine of "admissible, but without weight" and *Issacharov's* "discretionary exclusion" are all but self-evident. Let us first consider how alike the two doctrines are in practice: under both doctrines, legal determinations concerning the admissibility of evidence are made by the same person who engages in fact-finding—the judge. The judge examines the content of the contested evidence before determining its fate; under neither doctrine is exclusion automatic even if the court determines that the rights of the defendant have been infringed; that is, under both doctrines, the trial judge retains discretion over the fate of the evidence. What, then, are the differences between *excluding* evidence and giving it *no weight* in a unitary court system?[42]

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38. *Id.* § 72.

39. *Id.* §§ 39, 42-43, 54.

40. CrimA 559/77 Meiri v. Israel [1978] IsrSC 32(2) 180.

41. *See* CrimA 260/78 Suliman v. Attorney General [1979] IsrSC 33(2) 207; CrimA 559/77 Meiri v. State [1978] IsrSC 32(2) at 182; CrimA 161/77 Zuher v. State [1978] IsrSC 32(1) 327.

42. For a discussion of why the term "exclusion" is itself problematic in unitary courts, see DAMASKA, *supra* note 15, at 47-52. Damaska points out that in unitary systems the fact finder cannot entirely erase the impressions of inadmissible evidence to which he has been exposed. Therefore, exclusion in such contexts is limited; the most that can be expected is that the judge not base a written opinion upon inadmissible evidence. *Id.* Damaska's

The Supreme Court in *Issacharov* encountered some difficulty when attempting to distinguish the existing doctrine from the new one.[43] The Court gave no hint of the practical consequences of the change in doctrine. It conceded that the two doctrines would *often* lead to the same result, yet neglected to provide a single example in which the two approaches would lead to different outcomes.[44] Moreover, before *Issacharov* was decided, some legal scholars had indicated that the two doctrines were *de facto* commensurate and would produce identical results.[45] In fact, in *Issacharov* itself the two doctrines could have led to the same outcome, and Private Issacharov could have been acquitted of marijuana possession and use even under the *Meiri* doctrine: the Court could have given no weight to his confession to prior use and to the urine sample he provided, leaving the prosecution with too little evidence to prove the crimes.[46]

B. *Distinguishing Admissibility from Weight in Bifurcated and Unitary Courts*

Although the distinction between admissibility and weight had no significance in the Israeli context, it does carry great importance in bifurcated courts. In most common law systems cited by the Israeli Supreme Court in *Issacharov*, the distinction between a question of admissibility and one of weight was critical. It determined *who* decided the fate of the evidence—judge or jury. Whereas admissibility is determined by the judge, weight is the province of juries; if a judge excludes the evidence, the jury can no longer determine its weight. In motions to suppress illegally obtained evidence, the result of exclusion is that the jury never has access to the questionable evidence at all. In England and the United States, suppression motions are held, whenever possible, outside the hearing of the jury, which never even learns of the *existence* of such evidence.[47] In the United States, these hearings are often

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observations are equally applicable to bench trials in common law jurisdictions as they are in unitary civil law systems. However, the question of whether exclusion can be effectively achieved in a unitary court is beyond the scope of this Note.

43. *See Issacharov* [2006] § 74.

44. *Id.*

45. *See* Harnon, *supra* note 22, at 1021.

46. Furthermore, in at least one sense *Issacharov* is narrower than *Meiri* and is contained in the *Meiri* doctrine. *Issacharov* gives the court the possibility to admit or exclude evidence, in an all-or-nothing manner, whereas *Meiri* allowed the court a broader range of sanctions if it found that illegal means were used: it can admit the evidence but reduce its weight. *See* CrimA 559/77 Meiri v. State [1978] IsrSC 32(2) at 182. However, it appears that *Issacharov* did not reverse *Meiri*. Therefore, courts maintain their power to discount the *weight* of illegally obtained evidence; it appears that the Court *added* the possibility to "exclude."

47. *See* FED. R. EVID. 104(c) ("Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests."). Mueller and Kirkpatrick observe that "[d]efense requests to exclude confessions

conducted before a jury is even impaneled.[48] Hence, in bifurcated jury settings, the distinction between admissibility and weight is significant. In Israel, which does not employ juries, the distinction does not carry similar ramifications.

Although Israel does not employ juries, there are a number of ways in which the Israeli Supreme Court could have given substance to the new doctrine of "exclusion" as distinguished from the old doctrine of "no weight" in a unitary system. First, in an effort to maintain the fact finder's ignorance toward the excluded evidence, the Court could have ordered that a different judge rule on preliminary motions to suppress evidence on constitutional grounds.[49] Another possibility would be to limit motions to suppress to proving the circumstances surrounding the obtaining of the evidence (e.g., the behavior of the police interrogators when obtaining the confession), without examining the substance of the contested evidence. Some courts in the United States have followed such practice in bench trials when determining the voluntariness of a confession.[50] But as we have seen, the Israeli Supreme Court ruled that the decision to exclude must be based in part upon the effect of the illegal means on the content of the evidence obtained; to make such a determination, the court must be allowed to examine the content of the evidence as well and cannot satisfy itself by examining only the means through which it was obtained.

The Court also could have given substance to the distinction between exclusion and weight by ruling that certain facts, such as a failure to warn the

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as involuntary, and motions to suppress evidence on other constitutional grounds, are typically made before trial . . . and resolved before a jury is impaneled." 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 1:37 (3d ed. 2007). In England these determinations are also typically conducted in the absence of the jury. Furthermore, in England, if a judge has admitted such evidence and later realizes that it should not have admitted it, this can be sufficient grounds to dismiss the jury. *See* ARCHBOLD: CRIMINAL PLEADING, EVIDENCE AND PRACTICE 1578, 1603, 1606 (P.J. Richardson ed., 2005).

48. 1 MUELLER & KIRKPATRICK, *supra* note 47.

49. As a matter of practice, Israeli courts do so in pretrial arrests: the judge who considers the grounds for pretrial custody cannot rule on guilt, since some of the evidence to which he is exposed (e.g., hearsay, prior convictions) are inadmissible at trial. *See* HAYA SANDBERG, CRIMINAL PROCEDURE LAW 98 (1996).

50. *See* 1 MUELLER & KIRKPATRICK, *supra* note 47, at § 1:37. The authors note that "[t]here is strength in this view, since confessions can be unusually potent in persuasive force and they merit special attention." On the other hand they note that "judges inevitably hear much evidence ultimately excluded, and the presence of constitutional issues does not itself mean they cannot perform in a dual capacity, and some cases have been less concerned on this point." As I point out later, the former approach was adopted in Israel during the 1960s in the *Yassin* case. Generally, such a procedure is applied in Israel when determining whether a confession is free and voluntary: Israeli courts conduct a "trial within a trial" to determine the matter and, at least historically, were not supposed to examine the substance of the confession when ruling on its admissibility. Nevertheless, court practice has evolved over the years and courts today are more likely to examine the content of the confession during the trial within a trial when ruling on its voluntary nature, in a manner that may "poison the judges mind." *See* George C. Gebbie & Dan Bein, *'Trial Within A Trial' in Scotland and Israel*, 10 EUR. J. CRIME CRIM. L. & CRIM. JUST. 253, 264 (2002).

defendant of his rights, would result in automatic exclusion.[51] This constraint on judicial discretion would have moved the doctrine a step away from *Meiri*.[52] However, the Court in *Issacharov* preferred to retain full discretion, providing only general (and often vague and counterintuitive) guidelines as to what circumstances would lead to inadmissibility.

II. LOST IN TRANSLATION: ADMISSIBILITY IN ISRAELI COURTS THROUGHOUT THE DECADES

From a practical standpoint, the *Issacharov* decision introduced little innovation into the Israeli legal system. Why, then, was the Supreme Court so convinced it was spearheading a revolution? As we shall see in this Part, *Issacharov* was the result of an ongoing attempt within the Israeli judiciary to translate the legal terms *admissibility* and *weight* from common law jurisdictions into Israeli law. The Court proceeded on the assumption that these terms could convey the same meaning in Israel that they held in the many common law jurisdictions that were cited in *Issacharov*. In law much like in literature, however, literal translations do not always capture the essence of the original; concepts and doctrines are often lost in translation. As Pierre Legrand has warned, "legal transplants" often emphasize the bare propositional statement borrowed from another jurisdiction, while overlooking the true and deeper *meaning* of the adopted rule.[53] Mirjan Damaska and others have pointed out the particular perils of legal transplants in the field of evidence.[54] The history leading up to *Issacharov* illustrates these dangers and the fraught task of translating evidentiary rules and terminology from one legal system into another.

Therefore, this Part is dedicated to analyzing Israel's attempts throughout the decades to translate evidentiary rules from other legal systems. It surveys four stages of development in the meaning of admissibility in relation to the exclusionary rule: the British Mandate era, when admissibility and weight connoted the distinction between law and fact respectively; the 1960s, when admissibility was regarded as a separate procedural stage in the examination of evidence; the 1970s, when admissibility came to connote rigid rules as opposed to the more discretionary weight standards; and finally, admissibility as a more

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51. This is the case in Germany. For example, evidence obtained through brutality or deceit must be excluded, whereas other violations leave the courts with discretion whether to exclude the evidence or not. *See* Craig M. Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032, 1034 (1983); Harnon, *supra* note 22, at 1007.

52. My purpose is not to advocate such an automatic exclusionary rule; rather, this possibility is presented to demonstrate how in the Israeli institutional context the term "exclusion" could have been distinguished from the *Meiri* "no weight" doctrine.

53. *See* Legrand, *supra* note 11, at 114-15.

54. *See* Damaska, *supra* note 13. For a discussion of the difficulties of comparative procedure, see John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 551-54 (1995).

severe sanction (when compared to weight) for dealing with police misconduct and abuse.[55] After analyzing the complex meaning of admissibility in Israeli law, I will discuss how these shifting meanings, coupled with developments abroad, helped shape the *Issacharov* decision and how they led the Court to conclude that it was revolutionizing Israeli evidence law.

A. *The British Mandate over Palestine: Admissibility as a Legal Standard*

The leading precedent concerning exclusion of illegally obtained evidence during the British Mandate over Palestine was the 1942 *Berkovitz* case, in which the Court excluded the confessions of four defendants because the police had not properly warned them of their right to remain silent.[56] The four defendants, all constables, were charged with theft of tin from the Royal Engineers' Store Base Depot. After hearing the initial account of the first defendant, the police interrogator informed him that it would be "better for him to tell the truth,"[57] while informing all four defendants that they "are entitled to give evidence before [him] or in Court."[58] In the Supreme Court's opinion, both actions infringed the defendants' right to silence.[59] The Court held that although the confessions seemed reliable, "[t]he question as to whether or not a confession is *true* is utterly immaterial when considering its admissibility"[60] and excluded them.

One of the Supreme Court's main dilemmas in *Berkovitz* was how to apply jury-based rules of admissibility in a judicial system that did not employ juries. The Court explained that in England, when deciding the admissibility of a confession alleged to have been obtained illegally, the judge engaged in the finding of both fact and law; he determined the circumstances under which the confession was obtained (fact) and whether it should still be regarded as "*free and voluntary*" (law). If the evidence was admitted, the jury then decided what weight to attach to it, depending on whether the jury found the evidence reliable.[61]

However, in Palestine, where there were no juries, the judge would rule on all matters, including the weight of the confession. Therefore, different

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55. Anglo-American law includes many of these distinctions between admissibility and weight: the distinction between law and fact, the separate procedural and sequential determination of the two, and the maintaining of the fact finder's ignorance of the content of evidence deemed inadmissible. However, the Israeli definition of admissibility has placed emphasis on particular distinctions at different periods, thus leading to inconsistencies.

56. CrimA 155/42 Berkovitz v. Attorney General [1942] 9 Palestine L. Reps. 654.

57. *Id.* at 659.

58. *Id.* at 661.

59. Interestingly, the Court excluded the evidence even though the defendants were constables, who presumably would have been aware of their right to remain silent.

60. CrimA 155/42 Berkovitz v. Attorney General [1942] 9 Palestine L. Reps. at 661 (emphasis added).

61. *Id.* at 657-58.

distinctions between admissibility and weight had to be drawn. The Court ruled that "admissibility" must no longer include the factual inquiry into the circumstances of the interrogation (as it would in England), but should be strictly a question of the legal standard applied.[62] For example, if it had been established that the defendant was not warned of his right to remain silent (a factual determination), the *admissibility* question would be whether from a legal standpoint such failure to warn should trigger exclusion of the evidence.

As a consequence, whereas an appellate court would be unlikely to determine the weight of a confession or the factual circumstances surrounding the interrogation, "admissibility is eminently a matter with which a Court of Appeal not only may, but should interfere if, in their opinion, the wrong tests have been applied."[63] As we can see, the term admissibility was defined by the Court narrowly, as the legal standard applied to exclusion of evidence, while all factual determinations, both those pertaining to the circumstances of the interrogation and those concerning the reliability of the evidence, were beyond the scope of admissibility. During this period, admissibility in Palestine was only part of the admissibility test applied in England.

B. *The 1960s: Admissibility as a Separate Procedural Step*

In many regards, the first years of Israeli statehood signify an effort to break away from the past, to reevaluate the laws implemented by the British, and to reexamine their applicability and desirability in the newly established state. The treatment of the exclusionary rule by Israeli courts during these years fits this broader trend: courts viewed the British rules as too rigid, leading to exclusion of perfectly reliable evidence due to "mere technicalities" such as a failure to warn the defendant of his right to silence.[64] During these early years of statehood, therefore, the courts raised the bar for exclusion and ruled that evidence would be excluded only if there were doubts concerning its reliability—an assessment that turned primarily upon a factual determination that the illegal means used to obtain the confession may have prompted an innocent defendant to confess. It grew unclear what role legal determinations would have in admissibility rulings, as reliability became the only relevant factor. Appellate courts now had little role in second-guessing the treatment of illegally obtained evidence by lower courts, since the determination was

62. *Id*. at 655, 657-58.

63. *Id*. at 658.

64. *See, e.g.*, CrimA 20/49 Hadi v. Attorney General [1949] IsrSC 3(1) 13. The Court discusses at great length the fact that the Supreme Court of Palestine was even stricter than English courts were at the time in sanctioning failures to secure the rights of defendants. According to the Israeli Supreme Court in *Hadi*, in England there was an ongoing debate about the exclusion of such evidence and in many cases illegally obtained evidence was nevertheless admitted, whereas British judges in Palestine excluded evidence far more readily.

primarily one of fact and not law.

In an attempt to reintroduce a clear *legal* criterion for determining admissibility, in 1963 the Supreme Court redefined the boundaries between admissibility and weight. In *Yassin v. Attorney General* the Court created a two-prong, two-step test for illegally obtained evidence.[65] First, admissibility and weight were crafted to correspond with objective and subjective categories respectively: to determine admissibility, a court asked whether the means used to obtain the evidence could in theory lead an innocent person to confess to a crime he did not commit. This question turned on both factual findings (what means were used by the police in that case) and a legal determination (would such means lead a "reasonable" defendant to confess to a crime he did not commit). The second stage of the test, which determined the weight of the evidence, was subjective: did the illegal means lead the specific defendant to confess?[66] Answering this question depended primarily on factual findings and the court's impression of the particular defendant.[67] It was this subjective component of the test that went to the credibility of the evidence and would therefore affect its weight.[68]

Under *Yassin* admissibility and weight were determined sequentially and based on different data: the court would have to determine the admissibility of evidence without looking at its content. Only after determining that the evidence was admissible could the court look at the evidence itself and determine what weight should be attached to it.[69] In creating this two-step process, the Supreme Court appeared to be trying to approximate the judge-jury distinction, by "bifurcating" the *judge* (or more precisely, the judicial process), in an attempt to leave the judge ignorant of the content of the evidence unless he found it to be admissible.[70]

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65. *See* CrimA 307/60 Yassin v. Attorney General [1963] IsrSC 17(3) 1541, 1555-56.

66. *Id.* at 1555-56.

67. *See, e.g.*, CrimA 115/82 Muadi v. Israel [1984] IsrSC 38(1) 197. For a discussion of how the particular characteristics of the accused may affect the voluntariness of a confession, see MCCORMICK ON EVIDENCE 608-09 (Kenneth S. Broun ed., 6th ed. 2006).

68. It is notable that this test is applied primarily, if not exclusively, to testimonial evidence, as opposed to real, or physical evidence.

69. CrimA 307/60 Yassin v. Attorney General [1963] IsrSC 17(3) 1541, 1556.

70. Such bifurcation is suggested by some evidence scholars in the United States, and some courts have tried to maintain this separation in bench trials. *See* 1 MUELLER & KIRKPATRICK, *supra* note 47, at § 1:37 ("In bench-tried criminal cases, the separate and reliable finding required by *Jackson* means that the court should determine voluntariness before taking evidence on the merits."). But while some courts have followed this practice, others do not make such a distinction. *Id.* § 1:37 nn.15-16. Interestingly, this bifurcation of the proceedings was created by Justice Simon Agranat, a graduate of the University of Chicago, who immigrated to Israel in 1930. Agranat's bifurcation mechanism solved one problem (to some degree), but it created another: Although the judge would not be unfairly biased by the content of the confession, she would also be denied the possibility of considering the substance of the evidence when ruling on its exclusion, which would be available to her English or American counterpart. The judge was to impose upon herself technical restrictions that were largely absent in bench trials in "classic" common law

Under the *Yassin* test, admissibility and weight no longer corresponded neatly to the law/fact division established during the Mandate period. Instead admissibility became entangled in fact-finding about the means by which the evidence was obtained, as was true in jury trials. *Yassin* therefore represented a new attempt to translate the doctrine of admissibility into Israel's unitary courts.

C. Meiri*: Admissibility as Rigidity*

The years after *Yassin* coincided with a broader trend in Israeli evidence law that extended beyond illegally obtained evidence: a move away from strict rules of *admissibility* towards more flexible standards concerning the *weight* of evidence.[71] Israeli judges and legal scholars argued that rules of admissibility were conceptually alien to the Israeli legal system: they were devised primarily for juries, to shelter lay fact finders from exposure to unreliable evidence and data that would unfairly bias their decision.[72] Israeli judges voiced frustration with inherited British law, marked by rigid admissibility rules that often forced judges to disregard reliable and relevant evidence.[73]

Since professional judges thought themselves less susceptible to the perils of over-weighing questionable evidence, many believed that in Israel rules of admissibility should give way to greater judicial discretion concerning the weight of problematic evidence.[74] More flexible standards of weight would enable judges to rule on a case-by-case basis, allowing the court to admit evidence that possessed probative value, even if it did not strictly comply with the common law rules of admissibility. Whereas admissibility was a binary "all-or-nothing" system, weight gave courts greater flexibility in dealing with

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jurisdictions. Furthermore, Agranat's bifurcation was not complete: even if the judge would not be aware of the content, she would still be aware that the defendant had confessed, for example.

71. *See, e.g.*, Eliahu Harnon, *Criminal Procedure and Evidence*, 24 ISR. L. REV. 592, 612-13 (1990). For a discussion of a similar move away from rules of admissibility toward "free proof" in other Anglo-American jurisdictions, see ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 108-09 (2005).

72. For an illustration of such concerns in the United States, see, for example, FED. R. EVID. 403.

73. *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." 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.* at 178. Struzman makes a series of recommendations for reform concerning, for example, out-of-court statements and the admissibility of accomplice testimony.

74. *See* Emanuel Gross, *Should Israel Adopt a Constitutional Exclusionary Rule?*, 30 MISHPATIM 145, 149 (1998).

contested evidence. Admissibility came to connote rigidity and technicality, as opposed to the more discretionary nature of weight.

The process of shifting away from rules of admissibility towards standards of weight affected the examination of illegally obtained evidence as well, and appears to have led the Court in *Meiri* away from viewing its treatment of the evidence (by giving it no weight) as "exclusion."[75] Rather, the Court regarded *Meiri* to be a question of weight, bringing the exclusionary rule into line with the broader shift in Israel away from admissibility rules.[76]

But the formulation of *Meiri* as pertaining to weight rather than admissibility presented many complications that would play out in the years leading up to *Issacharov*. First, *Meiri* eroded the distinction between *unreliable* and *illegally obtained* evidence. It discounted both categories of evidence in a similar fashion, even though the policies underlying their treatment were quite different. Whereas unreliable evidence is deemed inadmissible because it undermines the accuracy of (jury) decisions, illegally obtained evidence, which is often highly reliable, is excluded to vindicate defendants' rights. Therefore, despite Israel's employment of professional fact finders (judges rather than juries), in the debate over the exclusion of illegally obtained evidence Israel was no different than any jury system. The general aversion in Israel towards rigid admissibility rules, which often deemed reliable evidence inadmissible, was irrelevant to the debate concerning the exclusion of illegally obtained

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75. 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 such exclusion is motivated by social goals that are not aimed solely toward fact-finding. *See* STEIN, *supra* note 71, at 25-26. Therefore, 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. In any event, this improper analogy led to the formulation of *Meiri* as a rule of weight, not admissibility, thus emphasizing the courts' discretion on the matter.

76. Furthermore, in formulating *Meiri* and subsequent decisions, the Israeli Supreme Court wished to set itself apart from courts in the United States in the post-*Miranda* era. From an Israeli perspective, American courts seemed to reach unjust results under *Miranda* by excluding crucial evidence due to the slightest police misconduct. Yet at the same time, the American strict exclusion of evidence appeared to be ineffective in deterring the police from acting abusively. See, for example, CrimA 369/78 Abu Medijam v. State [1979] IsrSC 33(3) 383, in which H. Cohn's Supreme Court decision cited and discussed Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970), to question the effectiveness of the exclusionary rule in deterring the police. Categorizing *Meiri* as a question of weight emphasized two aspects of the Court's flexible and discretionary position when treating illegally obtained evidence. First, the court's discretion in determining what kinds of illegality would affect weight. Second, framing *Meiri* as a question of weight provided Israeli courts with a broad range of sanctions, beyond the binary options of admitting or excluding evidence; they could admit the evidence and give it little weight or no weight at all.

evidence.[77]

Second, weight was now determined not only by fact (i.e., the reliability of the evidence), but also by law: the evidence in *Meiri* had no weight as a matter of *law*, as a way of protecting the defendant's rights, not due to doubts concerning the evidence's reliability.[78] Defining weight as a question of law stood in sharp contrast to the Court's previous approach: under the 1942 *Berkovitz* distinction between admissibility and weight, legal considerations were at the heart of the admissibility test, while the weight test was solely factual.[79]

Third, when stating that illegal means could "only" affect the weight of the evidence but not lead to its exclusion, the Court created the impression that there was a concrete difference between the two even in a unitary system and that exclusion was a more severe sanction.

D. *Developments Abroad: The 1980s and 1990s*

To understand what occurred between *Meiri* and *Issacharov*, our analysis must leave Israel and examine developments in Canada, South Africa, and most importantly England. In 1984 England enacted the Police and Criminal Evidence Act (PACE). Section 78 of PACE established a statutory discretionary exclusionary rule, providing that a court "may refuse to allow evidence . . . if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of proceedings that the court ought not to admit it."[80] One might notice the law's emphasis on the court's power to deem the evidence *inadmissible*. After *Meiri*, looking at the English doctrine from an Israeli vantage point made the two doctrines seem fundamentally dissimilar: whereas in England such evidence could be *excluded*, in Israel, under *Meiri*, it could "only" be given no weight. [81]

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77. As discussed above, the analogy between the two kinds of inadmissibility might stem from Israeli perceptions of the American legal system, which appeared to exclude evidence due to the slightest infringement of the defendant's rights. *See supra* note 76.

78. As discussed earlier, admissibility was understood to be both a factual and legal determination by the judge in a jury trial, but weight was viewed as exclusively factual.

79. CrimA 155/42 Berkovitz v. Attorney General [1942] 9 Palestine L. Reps. 654, 657-658.

80. Police and Criminal Evidence Act, 1984, c. 60, § 78(1) (Eng.). Since this Note is not concerned with the reform introduced by Section 78(1) but rather with how it was perceived in Israel, I do not address this matter further. The formulation of Section 78 and its intended effects are discussed in DAVID WOLCHOVER, THE EXCLUSION OF IMPROPERLY OBTAINED EVIDENCE 207-14 (1986). After its enactment it was debated to what degree Section 78(1) had in fact modified the common law on this issue. *See* C.J.W. Allen, *Discretion and Security: Excluding Evidence Under Section 78(1) of the Police and Criminal Evidence Act 1984*, 49 CAMBRIDGE L.J. 80 (1990).

81. A separate yet highly relevant query is how English courts have construed Section

Like the PACE in England, the Canadian Charter of Rights and Freedoms of 1982 established that "where . . . a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."[82] Lastly, in 1996 South Africa adopted its constitution, in which it determined that "[e]vidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."[83] All three provisions speak of the *exclusion* of evidence. Furthermore, in both Canada and South Africa the provision was a constitutional one, as it had been construed to be in the United States.

Israeli courts and scholars looking at developments abroad got the unwarranted impression that Israel was falling behind other enlightened democracies: whereas foreign courts were allowed to *exclude* illegally obtained evidence, Israeli courts under the *Meiri* doctrine could "only" diminish its *weight*, which seemed a less extreme sanction and less protective of defendants' rights, even though the Israeli Supreme Court had clearly demonstrated in *Meiri* that it could give such evidence no weight at all. Furthermore, in the United States,[84] Canada, South Africa, and even England[85] the exclusionary rule had become a constitutional issue, whereas in Israel it had been viewed as merely a procedural matter, not associated with a supreme law. When in 1992, Basic Law: Human Dignity and Liberty was passed, leading Chief Justice Barak to proclaim the beginning of a "Constitutional

78(1) and under what circumstances they have in fact excluded evidence. Scholars have recently argued that in England the section has been narrowly applied, especially concerning physical evidence, due to a restrictive interpretation of the term "fair trial." *See* Choo & Nash, *supra* note 75, at 78-79. This should have perhaps interested the Israeli Supreme Court when citing foreign authority on the matter.

82. *See* Part I of the Constitution Act 1982, being Schedule B to the Canada Act 1982, ch. 11, § 24(2) (U.K.).

83. S. AFR. CONST. 1996, ch. II (Bill of Rights), § 35(5). South Africa was the only nonjury jurisdiction mentioned in *Issacharov*. Perhaps focusing more closely on the South African model would have indicated to the Israeli Supreme Court that there was little practical difference between the *Meiri* doctrine and the South African approach.

84. *See* Mapp v. Ohio, 367 U.S. 643, 649 (1961) ("There are in these cases of this Court some passing references to the *Weeks* rule as being one of evidence. But the plain and unequivocal language of *Weeks*—and its later paraphrase in *Wolf*—to the effect that the *Weeks* rule is of constitutional origin, remains clearly undisturbed.").

85. *See* A and Others v. Secretary of State for the Home Department, [2005] UKHL 71 (U.K.), § 51 ("It trivialises the issue before the House to treat it as an argument about the law of evidence. The issue is one of constitutional principle, whether evidence obtained by torturing another human being may lawfully be admitted against a party to proceedings in a British court, irrespective of where, or by whom, or on whose authority the torture was inflicted.").

Revolution,"[86] the time seemed ripe to align Israeli law with that of other common law jurisdictions by giving courts the power to exclude illegally obtained evidence based on a quasi-constitutional provision.

And indeed a number of law journal articles from the mid 1990s onward advocated the recognition of a constitutional exclusionary rule in Israel, citing both the Constitutional Revolution and the new developments abroad as reasons for change.[87] Chief Justice Barak himself referred in a 1996 article to the influence of the Constitutional Revolution on criminal procedure, indicating that one of the possible effects could be the authority of courts to exclude illegally obtained evidence.[88] Shortly thereafter, the Supreme Court indicated its eagerness for reform in its written opinions. In a series of decisions from 1996 onward, the Court hinted strongly that it was prepared to recognize such a constitutional exclusionary rule, but was awaiting an appropriate case.[89] *Issacharov*, a seemingly routine matter submitted for review in 1998, provided exactly such an opportunity to complete the Revolution. But little attention was given to how a new exclusionary rule would differ in practice from the *Meiri* doctrine. Only one scholar noted the *de facto* resemblance in the operation of the two rules. The differences were mostly declarative and symbolic.[90]

E. *The Exclusionary Rule and Rejection of Legal Transplants*

Israel's difficulty in satisfactorily translating the common law's admissibility and weight distinction and the Supreme Court's interpretation of developments abroad illustrate some of the inherent challenges which have led Pierre Legrand to conclude that legal transplants are "impossible." Legrand has emphasized that legal rules are more than mere propositional statements and go beyond the words that constitute them. They consist of the meaning given to them and by their operation in practice, which in turn are products of history, culture, language, politics, sociology, anthropology and economics. To import a single line of text without its broader context, he says, is both superficial and

86. *See* Aharon Barak, *The Constitutional Revolution: Protected Human Rights*, 1 MISHPAT UMIMSHAL 9 (1992); *see also* CA 6821/93 United Mizrahi Bank v. Migdal Cooperative Village [1995] IsrSC 49(4) 221, 342, 447.

87. *See* Gross, *supra* note 74; Harnon, *supra* note 22.

88. *See* Aharon Barak, *The Constitutionalization of Israeli Law: The Basic Laws on Human Rights and Criminal Law*, 13 BAR-ILAN L. STUD. 5, 24 (1996). Barak also discussed the possible effects of the Constitutional Revolution on the presumption of innocence and the right to silence. He further elaborated on these ideas in an English-language article written in 1997. *See* Aharon Barak, *The Constitutionalization of the Israeli Legal System as a Result of the Basic Laws and Its Effects on Procedural and Substantive Criminal Law*, 31 ISR. L. REV. 3, 19 (1997).

89. *See, e.g.*, CrimA 2180/02 Kassem v. State [2002] IsrSC 57(1) 642, 654; CrimA 5203/98 Hasson v. Israel, [2002] IsrSC 56(3) 274, 283, § 7.

90. *See* Harnon, *supra* note 22, at 1021.

misleading.[91]

Transplanting the exclusionary rule to Israel largely illustrates Legrand's theory. The *Issacharov* Court sought to import the English rule, but focused too narrowly on the linguistic aspects of the term "admissibility," rather than what it *meant*. Although Israeli law, and the law of Palestine before it, had incorporated the terminology of admissibility and weight into Israeli evidence law, these terms and the distinction between them had developed a distinctly Israeli character, which diverged from their meaning in English, Canadian, or American law. These terms could not be identical because of the structural differences discussed in this Note (the relation between admissibility and bifurcation), but also because of broader cultural and historical factors that have affected application of the exclusionary rule and the goals it seeks to achieve.[92]

The distinctly Israeli flavor of the terms admissibility and weight had colored the Israeli perception of developments abroad. Rather than examining the significance of PACE from an *English* perspective, Israeli jurists focused on what changes Section 78 of PACE would have introduced had it been passed in Israel. They concentrated on what were regarded to be unifying characteristics, assuming that admissibility connoted the same thing in both countries. However, obliterating the requisite distance between *self* and *other* led to a questionable understanding of what "exclusion" would change in the *Israeli* legal system and ultimately to the *Issacharov* ruling. The reason for this strong focus on developments abroad while largely overlooking the implications upon the local legal system will be addressed in the following Part.

III. THE ANGLICIZATION OF ISRAELI EVIDENCE LAW

Comparative law played a crucial role in the formulation of *Issacharov*.

91. Legrand, *supra* note 11, at 119.

92. For example, when determining the proper objectives of the exclusionary rule in Israel, it is insufficient to note that American courts have focused on police deterrence whereas other countries have considered the fairness of trial and the potential disrepute to the judiciary to be relevant factors. In evaluating these competing objectives one must determine, for example, whether the crime rate in Israel is comparable to that of the United States. One must further determine whether excluding evidence can in fact deter *Israeli* police from abusive conduct, without relying solely on empirical data from the United States that supports or questions the efficacy of such measures. Similarly, evaluating the disrepute caused to the judiciary by admitting such evidence depends on existing perceptions of the judicial system as well as concepts of what constitutes a fair trial. These determinations may be affected by history, religion, and culture, and they may even differ between populations within a single jurisdiction. The perception of the judiciary in post-Apartheid South Africa, for example, may be quite different than in Canada. Within South Africa, the white population may perceive the judiciary differently than the black population. Similarly, courts in England might exclude evidence of terrorist activity in a criminal trial since it was obtained through torture, because its *admission* may cause disrepute or affect the fairness of trial, whereas Israeli courts may conclude that *excluding* such evidence and acquitting a self-proclaimed terrorist might result in disrepute within Israeli society. As we can see, transplanting legal formulae tells us little about their proper application.

Developments abroad seem to have sparked the ruling; the sense that Israel was falling out of line with a group of nations with which it identified from a legal standpoint meant that action had to be taken. The *Issacharov* Court drew on constitutions, legislation, and precedents from what it repeatedly referred to as "legal systems similar to our own"—namely those of England, the United States, Canada, South Africa, and Australia—to explain why reform was crucial and why *courts* had both the authority and responsibility to initiate it.[93]

One of the striking features of the Supreme Court's comparative analysis in *Issacharov* is its reliance solely upon common law jurisdictions.[94] The Court completely overlooked the experience of Continental European courts, though many civil law jurisdictions had recently adopted versions of the exclusionary rule.[95] Pointing out that even civil law countries, which do not typically bar evidence, had devised an exclusionary rule for illegally obtained evidence would have strengthened the Israeli Supreme Court's claim of an international consensus. Yet the Court ignored this trend.

The experience of Continental European jurisdictions might have been more pertinent to Israel than that of common law countries. After all, Israel's unitary trial courts had struggled to translate and incorporate common law admissibility rules, which assume bifurcation. Continental systems, typically unitary, have generally recognized their inability to regulate the exposure of fact finders to questionable evidence.[96] They therefore have not focused on "admissibility" in the sense of regulating input of contested information. Rather they have concentrated on regulating their *output* and ensuring that written

93. *See* CrimA 5121/98 Issacharov v. Chief Military Prosecutor [2006] (not yet published), §§ 40, 50, 55, *available at* http://elyon1.court.gov.il/files/98/210/051/n21/98051210.n21.pdf.

94. The one exception is the brief mention of the European Convention of Human Rights and the European Court of Human Rights in *Issacharov*. *Id.* § 58. However, the Court only noted that the European Court of Human Rights has not mandated exclusion and has approved of England's discretional exclusion when admission would adversely affect the fairness of the trial.

95. Courts in Germany, Italy, and France have all adopted some version of the exclusionary rule. *See* Craig M. Bradley, *The Emerging International Consensus as to Criminal Procedure Rules*, 14 MICH. J. INT'L L. 171 (1993); Walter Pakter, *Exclusionary Rules in France, Germany and Italy*, 9 HASTINGS INT'L & COMP. L. REV. 1 (1985). However, in the absence of juries these countries do not make the distinction between *admissibility* and *weight*. In France for example, the result of a decision to exclude is that the evidence is removed from the dossier and may not be referred to by the parties or by the judge in his decision. *See* Richard Vogler, *Criminal Procedure in France*, *in* COMPARATIVE CRIMINAL PROCEDURE, 14, 48-49 (John Hatchard et al. eds., 1996). Similarly, in Germany the fact finder is exposed to the contested evidence but asked not to rely upon it in his written decision. See Christian Fahl, *The Guarantee of Defense Counsel and the Exclusionary Rules on Evidence in Criminal Proceedings in Germany*, 8 GER. L.J., Nov. 1, 2007, http://www.germanlawjournal.com/pdf/Vol08No11/PDF_Vol_08_No_11_1053-1067_Articles_Fahl.pdf.

96. *See* Fahl, *supra* note 95.

decisions do not rely on excluded evidence.[97] Had Israel followed such a model more closely and understood that speaking of "admissibility" in the strict common law sense is largely meaningless in a unitary system, it could have avoided some of the confusion between admissibility and weight. It would have realized that the *Meiri* doctrine of giving illegally obtained evidence no weight was commensurate to the model of many Continental systems which prohibit reliance upon such evidence in a written decision even if it is "admitted."

In this Part I shall examine why the Israeli Supreme Court relies so heavily upon the common law despite the incompatibility between the systems. I explore some of the historical, linguistic, and cultural factors that have shaped Israel's strong relationship with the common law. I then try to place these factors within the broader context of why codes and legal doctrines travel and what choices of comparative law can teach us about the self-perception and identity of a legal system. Finally, I consider the perils of self-definition through comparative law and of uncritical emulation of foreign legal systems.

A. *The Empirical Basis*

One of the striking attributes of the Israeli Supreme Court's jurisprudence is the Court's heavy reliance upon comparative law in its rulings.[98] However, while the Court often cites decisions from common law jurisdictions, it rarely cites Continental European decisions, constitutions, or laws. An empirical study

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97. Whereas "common law systems seek to regulate the presentation of evidence to the decision maker, continental systems put emphasis on the regulation of the decision itself and eventually on the motivation in the (written) decision." Johanes F. Nijboer, *Methods of Investigation and Exclusion of Evidence: A Comparative and Interdisciplinary Perspective*, *in* BEWEISVERBOTE IN LÄNDERN DER EU UND VERGLECHBAREN RECHTSORDNUNGEN [EXCLUSION OF EVIDENCE WITHIN THE EU AND BEYOND] 39, 40 (1997). In contrast to Continental systems that are unable to regulate the flow of information to the fact finder due to lack of bifurcation, common law systems often suffer from an inability to monitor the motivations of lay fact finders. *See* DAMASKA, *supra* note 15, at 48-49. This is because juries do not produce reasoned decisions. Furthermore, the common law's reluctance to scrutinize jury deliberations even in cases of clear jury misconduct, further complicates the task of ensuring the fairness of the decision. *See, e.g.*, Tanner v. United States, 483 U.S. 107 (1987). Scholars view these factors as reasons for the common law's strong emphasis upon regulating the information to which lay fact finders are exposed. *See* DAMASKA, *supra* note 15, at 41, 44; FISHER, *supra* note 17, at 15-16. Damaska explains that since juries do not give reasons for their decisions, they suffer from a "legitimacy deficit," which can only be mitigated by regulating the *database* to which they are exposed. DAMASKA, *supra* note 15, at 41, 44.

98. *See* HCJ 7081/93 Botzer v. Local Council of Macabim-Reut [1996] IsrSC 50(1) 19 (citing Canadian and Australian law in interpreting the right to equality and defining discrimination); HCJ 73/53 "Kol Ha'am" Co. Ltd. v. Minister of the Interior [1953] IsrSC 7(2) 871 (citing American and English authorities in determining the scope of the freedom of speech); *see also* HCJ 316/03 Bakri v. Censorship Council [2003] IsrSC 58(1) 249 (citing American and Australian case law in determining the proper scope of the freedom of speech); HCJ 4112/99 Adalah v. Municipality of Tel Aviv-Jaffa [2002] 56(5) 393 (citing Canadian law in defining lingual equality).

conducted in Israel in 1994 that sought to outline the citation patterns of the Israeli Supreme Court over forty-six years of statehood confirmed a significant decline in citations of Continental legal systems. By 1994 the Supreme Court did not cite even a single Continental legal source.[99] However, perhaps surprisingly, the research also showed that even during the first decades of statehood, when many of Israel's leading jurists were immigrants who had been educated in Continental Europe (primarily Germany), the Supreme Court never relied heavily on Continental sources.[100] Only 0.5% of citations have been to Continental sources, and in no year have they exceeded 2%.[101]

In contrast, reliance on the common law, primarily English and American sources, has been far greater. On average, 20.9% of the Israeli Supreme Court's citations have been to common law jurisdictions.[102] Reliance upon the common law peaked in 1952, when as many as 38.1% of citations in published opinions named common law sources. Of the various common law sources, American precedents and scholarly work have grown more prominent, claiming no citations at all in 1948 and 5.1% in 1994. English sources have steadily declined, falling from 24.4% to only 2.3%.[103] The greater influence of

99. *See* Yoram Shachar et al., *Citation Practices of the Supreme Court: Quantitative Analyses*, 27 MISHPATIM 119, 152 (1996). The decline in the influence of the civil law is not unique to Israel and has been observed as a general phenomenon extending to other countries as well. *See* Ugo Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 AM. J. COMP. L. 195, 200 (1994) (book review).

100. The study does not necessarily lead to the conclusion that Israeli judges were not influenced by European jurisprudence, but it does indicate the formal sources that the judges regarded as authoritative and what they consciously chose to cite. In an article discussing the German influences on the Israeli Supreme Court, Salzberger and Oz-Salzberger argue that although the Court rarely cites German sources, the influence of German thought and jurisprudence on the early decisions of the Court was profound. They explain that the Justices may have been reluctant to cite German sources in the years following the Holocaust. They further note that even in the 1990s, when the new Israeli Criminal Code was presented to the *Knesset*, no formal mention was made in the proposal to German law despite the clear reliance upon the German Code in the formulation of the Israeli law. This demonstrates, in their opinion, how the German tradition in Israel is very much alive, but hidden. Eli Salzberger & Fania Oz-Salzberger, *The German Heritage of the Israeli Supreme Court*, 21 TEL AVIV U. L. REV. 259 (1998). Another possibility is that the typically shorter opinions of European Courts provide less material from which to quote or cite, making Anglo-American courts a more attractive source.

101. This peak was reached in 1954. Other years of relative peaks were 1948, 1955, and 1975, during which the court cited Continental law in only 1.3% of cases. Shachar et al., *supra* note 99.

102. This does not include decisions from the Mandate period, which the authors characterized as *Israeli* precedents, even though many of the decisions were rendered by British colonial judges. *See* Shachar et al., *supra* note 99.

103. The fact that a decision has been *cited* does not mean that it was *followed.* For example, in *Issacharov* the Supreme Court cited American precedents and scholarship, yet went on to explain why the American model has gone too far in excluding evidence that should be admitted. *See* CrimA 5121/98 Issacharov v. Chief Military Prosecutor [2006] (not yet published), §§ 60-61, *available at* http://elyon1.court.gov.il/files/98/210/051/n21/98051210.n21.pdf. Nevertheless, even though the United States model had been rejected in

American law in the post-World War II era has been observed outside Israel as well.[104] This empirical project ended in 1994, only shortly after the 1992 Constitutional Revolution. Though lacking updated data, we may suspect that since 1994 there has been a growing reliance on Canadian, Australian, and South African law, especially as some formulations in Israel's Basic Laws were founded upon provisions from the Canadian Charter.[105]

B. *The British Mandate and Its Legacy*

One of the most convincing explanations for Israel's strong reliance upon common law sources, especially English precedents and scholarship, is the historical tie between Israel and England, which began during the British Mandate over Palestine. In 1922, in the aftermath of World War I, the British were given a mandate by the League of Nations to prepare Palestine for self-governance.[106] As part of the preparation for self-rule, the British performed considerable legal reform in Palestine, enacting new laws and ordinances, restructuring the Ottoman legal system (which was based primarily on Muslim and French laws), and introducing into Mandate Palestine many institutions of the English common law. Many of the laws enacted in Palestine were based on English and colonial legislation and used similar formulations.[107] The laws of Palestine were also often interpreted by British colonial judges who drew on English precedents in determining their scope and meaning. The 1922 Palestine Order in Council, the "constitution" of the Palestine Mandate, provided that in cases of lacunae, the Palestine courts were authorized to rely upon the common law and doctrines of equity.[108] Furthermore, decisions of the Supreme Court of Palestine could be appealed to the Privy Council.[109]

Israel's ties to English law outlived the Palestine Mandate and were

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Israel, it has still served as a point of reference that informed the Court when formulating the Israeli approach. This cannot be said for the German, Italian, or French approaches, which were not even considered.

104. *See* Mattei, *supra* note 99, at 207.

105. *See* Emanuel Gross, *The Procedural Rights of Suspects and Defendants*, 15 BAR-ILAN L. STUD. 155, 156 (1996). For example, Section 1 of the Canadian Charter "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Part I of the Constitution Act 1982, being Schedule B to the Canada Act 1982, ch. 11, § 1 (U.K.). Similarly, Article 8 of Basic Law: Human Dignity and Liberty has a similar provision that reads: "There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose and to an extent no greater than is required." Basic Law: Human Dignity and Liberty, 1992, S.H. 1391.

106. *See* The Palestine Mandate, art. 2, July 24, 1922.

107. *See* Daniel Friedmann, *Infusion of the Common Law into the Legal System of Israel*, 10 ISR. L. REV. 324, 326 (1975).

108. *See* Palestine Order in Council 1922, art. 46; *see also* Friedmann, *supra* note 107, at 359.

109. Palestine Order in Council 1922, art. 44.

officially severed only in 1980.[110] The reasons for the ongoing reliance upon English law were many. First, during the early years of statehood, Israeli courts had only a limited body of local precedent from which to draw. Therefore, when new questions arose, courts continued to rely upon English precedents and continued to consult English authorities, much as they did during the Mandate period. Second, until 1972, some laws that remained in force from the Mandate period *required* Israeli courts to follow English interpretations and precedents.[111] Third, even in cases in which the law made no such formal requirement, since many statutory provisions were based upon the laws of England (and were often even worded in the same manner), English precedent remained highly useful and relevant in addressing problems of interpretation. For example, the Israeli Evidence Ordinance continues to require that confessions be "*free and voluntary*," a wording that has remained unaltered since its enactment under the British Mandate in 1924.[112] Even after Israel severed all formal ties to English law in 1980, courts have continued to draw upon English legislation and precedent.

C. *Legal Education*

A related factor that has contributed to Israel's strong reliance upon the common law is the legal education of Israeli judges and scholars over the years. Beginning in the Mandate period, many of Palestine's leading judges and scholars traveled to England to pursue a higher legal education. Lawyers who were trained locally did so in the "Law Classes," a legal training program established by the British in Palestine in 1920.[113] The tradition of legal scholars seeking higher education in England continued after the establishment of the state: well into the 1960s many of Israel's leading jurists pursued their

110. See Foundations of Law Act, 5740-1980, 34 LSI 181 (1979-80) (Isr.), which in Section 2 formally abolished Article 46 of the Palestine Order in Council. The law determined that in cases in which analogy, statute or case law provide no clear rule of decision, the courts shall decide "in light of the principles of freedom, justice, equity and peace of Israel's heritage" rather than based upon the "the substance of the common law, and the doctrines of equity in force in England" mentioned in Article 46.

111. *See* Shachar et al., *supra* note 99, at 158. However, in 1957 the Israeli Supreme Court ruled that it no longer considered itself obligated to rely upon English precedent even when required so by law. *Id.*

112. *Compare* Evidence Ordinance § 9, 1 Laws of Palestine 670 (1924) (Isr.), *with* Evidence Ordinance [New Version], 5731-1971 § 12, 2 LSI 198 (1968-72) (Isr.).

113. *See* ASSAF LIKHOVSKI, LAW AND IDENTITY IN MANDATE PALESTINE 110 (2006); Friedmann, *supra*, note 107, at 326. Before the arrival of the British, the legal profession in Palestine was extremely underdeveloped, with only approximately sixty practicing lawyers. In 1930, the Bar had a membership of approximately 260 and by the end of the Mandate in 1948, this number had jumped to one thousand. *See* Nathan Brun, Early Foundations of the Israeli Judicial System: Judges and Lawyers in Eretz-Israel 1908-1930, 84-85, 321-322 (Oct. 2003) (unpublished Doctor of Law dissertation) (on file with the author).

studies for higher degrees in Oxford, Cambridge, and London.[114] As such Israel can be viewed as part of a broader phenomenon whereby jurists in former British colonies continued to seek their higher legal education in England's leading colleges rather than at local universities.

In legal education as in citation practices, the United States replaced England in its status as a metropole of legal influence upon the Israeli "periphery"; with time, the United States became the primary destination for doctoral studies in law.[115] Furthermore, some of Israel's leading jurists over the years have been immigrants from the United States,[116] perhaps most notably Chief Justice Simon Agranat (who delivered the opinion of the Court in *Yassin*), who was a graduate of the University of Chicago. In recent years the Israeli Supreme Court has routinely employed American law clerks to assist in comparative research, thus furthering the influence of American law and the law of other English-speaking countries upon the Court's decisions.

However, legal education cannot entirely account for the dominance of the common law's influences upon Israel, at least not during the early years of Israeli statehood. Although many of Israel's leading jurists during the first years of statehood were trained in Germany and other civil law countries, their heritage had little influence upon the Israeli judiciary, at least as measured by the Supreme Court's citation practices.[117] Some argue that World War II led German-trained jurists *not* to rely upon German law, especially in questions of procedure.[118] After witnessing the atrocities of Nazi Germany, German

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114. A partial list of Israeli jurists who sought their higher legal education in England includes: Chief Justice Itzhak Olshan, Chief Justice Moshe Landau, Chief Justice Yoel Sussman, Justice David Goitein, Justice Zvi Berenson, Justice Itzhak Zamir, Professor and former Minister of Justice Amnon Rubinstein, Professor and former Israeli Ambassador to the United Nations Yehuda Blum, Professor Ruth Gavison, Professor Hanina Ben Menachem. The younger generation who studied in England in the 1980s includes Professors Alon Harel and Alex Stein.

115. *See* A.M. Apelbom, *Common Law A L'Americaine*, 1 ISR. L. REV. 562, 578 (1996); Stephen Goldstein, *Israel*, *in* MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY 453 (Vernon Valentine Palmer ed. 2001). The list is long but a few examples will be mentioned: Justice Shneor Zalman Cheshin who served on the first Supreme Court was a graduate of N.Y.U. Law School; Professor and Minister of Justice Daniel Friedmann; Justices Ayala Procaccia and Asher Grunis; Professors Eyal Benvenisti, Celia Fassberg, Zohar Goshen, Alexander Kedar, Assaf Likhovski, Ron Harris, Lucian Arye Babchuk, Leora Bilski, Michael Birnhack, Yishai Blank, Aeyal Gross, Ehud Guttel, Menachem Mautner, and Yoram Margaliot.

116. Dean Stephen Goldstein of the Hebrew University and Dean Arnold Enker of Bar-Ilan University are examples.

117. A few such examples of Continentally trained jurists are Moshe Smoira, Israel's first chief justice, who studied law in Heidelberg; Justice Menachem Dunkelblum (Vienna); Justice Haim Cohn (Frankfurt and Hamburg); Justice Alfred Witkon (Freiburg); Felix Rosenbluth, Israel's first Minister of Justice (Freiburg and Berlin); Uri Yadin, who served as the head of the Legislative Division within the Ministry of Justice (Berlin). *See* Salzberger & Oz-Salzberger, *supra* note 100.

118. *See* Stephen Goldstein, *The Odd Couple: Common Law Procedure and Civilian Substantive Law*, 78 TUL. L. REV. 291, 293-94 (2003).

immigrants and Holocaust survivors perhaps preferred the safeguards of Anglo-American civil liberties and criminal procedural rights to the inquisitorial systems in which they had been trained.[119]

One must not underestimate the intensity of anti-German sentiment during Israel's early years. Israel did not establish diplomatic relations with Germany until 1965; Israel's willingness to accept reparations from Germany was highly controversial during the 1950s and many Israelis have boycotted German goods. As for legal influences, when the 1992 Penal Code was presented to the Israeli Parliament, its German origins and influences were deliberately downplayed to avoid possible opposition on that ground.[120] And by the time Israel had become more willing to accept German law as a source of legal inspiration, the number of those able to draw meaningfully on German sources had shriveled.

D. *Language and Availability of Sources*

Language has also played an increasingly important role in promoting the influence of Anglo-American law upon Israel. English is taught at Israeli primary schools from an early age and is the only compulsory foreign language in the Israeli matriculation exam. Even scholars who speak or understand other foreign languages often do not have the requisite command to conduct comparative legal research and rely only upon translated secondary sources and materials. In this respect, the situation in Israel today stands in sharp contrast to earlier years, when many jurists were immigrants who spoke multiple European languages such as German, French, and Italian.[121]

A closely related factor is the availability of sources. Due to a growing language barrier and the general inability of Israelis to draw on non-English sources, universities and libraries have cut back on their investment in books in other languages. Furthermore, databases such as LexisNexis and Westlaw, which are often consulted by the courts when conducting comparative research, have allowed far greater accessibility and ease of reference to sources from English-speaking common law countries, while providing only limited access to Continental European opinions.

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119. *Id.* at 294; John H. Langbein, *The Influence of the German Emigrés on American Law: The Curious Case of Civil and Criminal Procedure*, *in* DER EINFLUß DEUTSCHER EMIGRANTEN AUF DIE RECHTSENTWICKLUNG IN DEN USA UND IN DEUTSCHLAND 321, 330 (Marcus Lutter et al. eds., 1993); Mattei, *supra* note 99, at 209.

120. Salzberger & Oz-Salzberger, *supra* note 100, at 278. The bill emphasized the reliance upon other European jurisdictions such as Belgium, France, Switzerland, and Iceland.

121. See *supra* note 117. Some additional examples are Professors Guido Tedeschi, Gualtiero Procaccia, and Alfredo Rabello, who immigrated from Italy; Professor Claude Klein, who immigrated from France; Professor and Justice Izhak Englard, who immigrated from Switzerland.

E. *Israeli Procedure and the Common Law*

Scholars have noted that the influence of the common law in Israel can be sensed most profoundly in procedural fields. Stephen Goldstein observes a similar phenomenon in other "mixed jurisdictions" such as South Africa, Louisiana, Quebec, Puerto Rico, and the Philippines: although these jurisdictions often apply substantive law founded upon Continental models, they do so through common law procedure.[122] When trying to explain this trend, Goldstein points to the "missionary zeal" with which England and the United States implemented their procedural system abroad and the mysterious "emotional attachment" that they created among colonized nations.[123] This emotional attachment can be linked to what John Langbein has referred to as the "Cult of the Common Law"—the protective aura that common law procedures and institutions enjoy within Anglo-American jurisdictions due to common law's historic accomplishments in securing civil liberties such as habeas corpus and trial by jury.[124]

Goldstein also points out the "built-in lobby of the legal profession" for retaining common law procedure.[125] Legal practitioners enjoy the greater prestige that the common law affords them: lawyers enjoy "their heroic gladiatorial role," and judges enjoy the glory that comes with individually written opinions (especially as compared to the seemingly bureaucratic role that judges play in many Continental systems).[126] As noted above, Goldstein views the experience of World War II as an additional factor that has caused Israel to prefer common law procedure and has distanced it from inquisitorial models.[127]

F. *Why Legal Doctrines Travel: Problem Solving, External Imposition and Emulation*

After examining the particular causes for Israel's close relationship with the common law, let us now turn to a slightly different line of inquiry: what authority does comparative law command in Israeli courts, what purpose does it serve, and what role did it play in the *Issacharov* opinion? As discussed earlier, during certain periods in Israeli history, English law had an authority of binding

122. *See* Goldstein, *supra* note 118, at 292.

123. *Id.* at 294.

124. *See* Langbein, *supra* note 54, at 554.

125. Goldstein, *supra* note 118, at 295.

126. *See id.*

127. *See id.* at 294. For a discussion of this phenomenon within American legal scholarship as well, see Langbein, *supra* note 119, at 330, and Langbein, *supra* note 54, at 554. Langbein notes a typical dismissal of comparative Continental procedure by American scholars: "Before you go on telling me any more about the virtues of German civil procedure, please explain why they had Hitler and we did not." Langbein, *supra* note 54, at 554.

precedent. Although English law no longer possesses this formal power, decisions like *Issacharov* demonstrate that the common law still holds sway beyond merely infusing foreign insight into a common legal problem. The Supreme Court's reliance upon the common law in *Issacharov* is closely linked to the broader inquiry of how and why codes and legal doctrines travel, a question that has sparked interest in recent years. Not only in Israel, but in South America too, recent reforms of criminal procedure and rules of evidence have revived the transplantation debate by grafting common law characteristics onto historically inquisitorial procedure.

When trying to account for the legal reform in South America, scholars have pointed to three groups of factors: problem solving, external imposition, and emulation.[128] The problem-solving theory emphasizes the role of comparative experience in supplying data and policy options for confronting common problems, primarily judicial inefficiency and corruption in the South American example. The external imposition theory emphasizes the role of foreign countries (primarily the United States in the South American case) in promoting change through economic and political incentives and threat of sanctions.

Emulation theories suggest that countries often mimic practices of nations they admire or with whom they wish to identify. According to this account, legal borrowing often stems from a sense of identity and from the self-perception of the adopting country rather than solely from the wisdom of a legal rule or its intrinsic value. Emulation theories bear a close relationship to postcolonialism: many former colonies continue to emulate the law of the metropole, though they are not formally obligated to do so, to express their sense of identity.[129] Cultural scholars have noted such mimicry of nonlegal trappings of the metropole in former colonies, which are sometimes exalted and preserved with greater fervor than in Europe.[130] English practices, adopted by colonial elites, have come to symbolize status. This theory of emulation fits well within the broader framework discussed above concerning the legacy of the British Mandate and the importance that obtaining a higher legal education in a common law country has gained in legal academia and within the judiciary

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128. *See* Máximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 AM. J. COMP. L. 617, 621-22, 666-69 (2007).

129. *Id.* at 622.

130. *See, e.g.*, HOMI K. BHABHA, THE LOCATION OF CULTURE 85-92 (1994) (exploring the concept of "mimicry"); Terence Ranger, *The Invention of Tradition in Colonial Africa*, *in* INVENTION OF TRADITION 211, 261 (Eric Hobsbawm & Terence Ranger eds., 1993). Ranger points out that Europeans are perceived as the "alpha and omega of gentlemanly refinement and lady-like elegance" and that "the body of invented traditions imported from Europe . . . in some parts of Africa still exercises an influence on ruling class culture which it has largely lost in Europe itself." However, Ranger also observes that European neotraditional symbolism was not always adopted as a form of "aping" but by "an impressive display of [Africans'] ability to keep up to date, to discern the realities of colonial power and to comment shrewdly upon them." *Id.* at 237.

in Israel.

G. *The Dangers of Treating Foreign Law as Precedent*

Although Israeli courts are no longer bound by English precedent and never were bound by other common law jurisdictions, *Issacharov* and decisions like it hint strongly that comparative common law is not cited merely because it "contains an insight that bears on the case at hand."[131] Comparative law is cited as *authority* on how the law should work and "has weight irrespective of the cogency of its reasoning";[132] it holds a power like that of precedent. Other common law nations are viewed not as equals but with an aura of superiority. To borrow a commonly used colonial metaphor, Israel looks to England and other nations for parental approval of its jurisprudence. In this regard Israel can be viewed as experiencing a broader postcolonial syndrome, residual of the Mandate era. It clung to British traditions and heritage, with the common law and developments in other former colonies and dominions serving as proxies of English law.[133] Although Israelis do not tend to view Israel within a colonial framework, it shares some of the emulation patterns that scholars have observed in other British colonies in Asia and Africa. This sense of admiration toward the English metropole can also been seen in the literary work of Israeli authors such as Amos Oz.[134]

However, emulating the laws of other common law nations and treating them as binding precedent carry great risks, as *Issacharov* shows. Even comparative law partisans in the United States such as Cass Sunstein, Eric Posner, and Mark Tushnet caution against regarding foreign law as "precedent." Tushnet defines precedent as "a decision that carries normative weight because of the authority of the court that issues it and not because of the reasons that support it."[135] A precedent leads courts to "accede to the authority of the issuing court" even if they disagree with its reasoning.[136] *Issacharov*

131. Richard A. Posner, *Enlightened Despot*, THE NEW REPUBLIC, Apr. 23, 2007, at 53, 54 (reviewing AHARON BARAK, THE JUDGE IN A DEMOCRACY (2006)).

132. *Id.* at 54-55.

133. Friedmann regarded the influence of American law as an alternative to English law during the early years of statehood when English precedent still had binding force in Israel. American law was cited as authority when the Supreme Court found English law unsatisfactory or undesirable for Israeli society. *See* Daniel Friedmann, *Independent Development of Israeli Law*, 10 ISR. L. REV. 515, 522 (1975).

134. *See* AMOS OZ, A TALE OF LOVE AND DARKNESS 2 (Nicholas de Lange trans., 2004) (2003) ("On my parents' scale of values, the more western something was the more cultured it was considered. For all that Tolstoy and Dostoevski were dear to their Russian souls, I suspect that Germany—despite Hitler—seemed to them more cultured than Russia or Poland, and France more so than Germany. England stood even higher on their scale than France. As for America, there they were not so sure: after all, it was a country where people shot at Indians, held up mail trains, chased gold and hunted girls.").

135. *See* Mark Tushnet, *supra* note 9, at 1284.

136. *Id.*

suggests we broaden this definition of precedent to apply where the citing court fails to critically examine the reasoning of the cited opinion or the premises on which it stands—in this case the bifurcation of the judicial process—but still accedes to its authority.

Nevertheless, rather than regarding the Israeli example as proof of why comparative law should not be referenced by American courts and citing *Issacharov* as a case in point, one might instead focus on the *differences* between Israel and the United States. Distinguishing between the two countries may highlight the reasons why Americans have less reason to fear the citation of foreign judgments than do other nations, including Israel. As Tushnet noted, American judges are unlikely to view a foreign authority as *binding* in any sense. Even American judges who refer to comparative law do so rarely and only to ensure that a judgment arrived at *independently* is not "wildly inconsistent with judgments elsewhere."[137] The decision process in *Issacharov* was quite the opposite: the decision was the product of an imagined disjuncture between group norms. The Court looked at foreign practices and found Israeli jurisprudence inconsistent with that of other countries, and *therefore* changed Israeli law. To borrow a metaphor used by Canadian Justice Gerard La Forest, in *Issacharov* comparative law became the master rather than the tool.[138]

Israel's position in the world may help explain the profound influence of comparative law upon its judges: Israel is a young[139] and small country with a fairly recent colonial past. Its limited experience and its desire to belong to a broader community of nations with whom it most identifies may have moved it to emulate other legal systems even when the analogies drawn have been questionable and problematic. Foreign decisions may have been cited not solely because of the quality of their reasoning or applicability to Israel, but primarily because the courts that rendered them commanded authority and respect and Israeli courts believed that they could not fall out of line with their rulings.

In contrast, the United States stands at the opposite end of the spectrum: its post-World War II emergence as world leader in legal influence has endowed its judges with the confidence not to conform to foreign practices. Its record for initiating legal revolutions that later spread abroad may embolden its judges to stand proudly even when standing alone. These factors, along with sentiments of American Exceptionalism, which some scholars perceive to be at the core of rejecting foreign law as a source of inspiration,[140] guarantee an effective safeguard that the law of other nations will not be treated as binding precedent.

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137. *Id*. at 1285.

138. R. v. Rahey, [1987] 1 S.C.R. 588, 639 (Can.).

139. For a discussion of how and why the age of a country may affect reliance on foreign law, see Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006). The authors argue that young states are more likely to rely on foreign law because they "have more to learn, and old states have more entrenched practices that are harder to change." *Id.* at 173.

140. *Id.* at 139; Tushnet, *supra* note 9, at 1289-91.

American judges citing foreign law already bear a considerable burden to prove why the United States, as world leader, should care or follow what others say or do. That they should treat other's law as binding precedent seems unlikely. In these circumstances, it may be useful (and humbling) to pause and wonder why the United States should be different and whether, when standing alone on a legal issue, it is on the proper side of the debate.

IV. TALKING ABOUT A CONSTITUTIONAL REVOLUTION

The previous Parts examined why the Israeli Supreme Court turned exclusively to the common law in shaping the exclusionary rule and how its reliance upon the common law may have led the Court astray in *Issacharov*. But why did the Court frame *Issacharov* as a revolutionary ruling? Even if other common law jurisdictions misled it, why did the Court not rely more heavily upon *Meiri* to make the "creation" of the exclusionary rule seem less like the result of judicial activism and more an extension of existing doctrine? The rhetorical role of *Issacharov*, cast as a groundbreaking decision, and comparative law's role in legitimizing it are the focus of our attention now.

A. Issacharov *and* Miranda*: Revolution or Evolution?*

Although one of the key characteristics of the common law is the power of judges to create and develop law, courts are generally reluctant to frame their decisions as revolutionary, and judges usually try to avoid head-on confrontations with other branches of government. Rather, courts typically claim that their decisions flow from existing precedent or long-established principles, even when they introduce significant legal innovations. The United States Supreme Court's opinion in *Miranda v. Arizona* is a case in point. Justice Warren, writing for the Court, began his opinion by stating: "We start here, as we did in *Escobedo*, with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings."[141]

In crafting a highly controversial precedent the Warren Court saw great importance in emphasizing its reliance on long-recognized principles. *Issacharov* took the opposite course: the Court spurned the precedent *Meiri* offered and proclaimed *Issacharov* as a revolutionary departure.[142] The Court's

141. 384 U.S. 436, 442 (1965).

142. The one exception to this observation is Section 49 of the *Issacharov* decision, in which the Court notes that *Issacharov* should not be regarded as an "unexpected revolution" in evidence law but rather "an additional step in a gradual process." However, this section seems at odds with the decision's general focus on the Constitutional Revolution, its effect on evidence law, and the new balance created between crime control and due process. Section 49 may be viewed as an attempt to tone down the revolutionary rhetoric of the rest of the decision in an effort to avoid criticism. It is noteworthy that within that same section

choice to formulate *Issacharov* as groundbreaking should come as an even greater surprise considering that since 1999, six proposals to recognize a statutory exclusionary rule have failed to win the *Knesset's* approval.[143] The heavy criticism of the Israeli Supreme Court for its judicial activism would seem to present sufficient motivation to frame *Issacharov* as a direct derivative of *Meiri* and within the boundaries of existing doctrine, rather than presenting it as a creation of the Barak Court.

A number of attributes of *Issacharov* hint at why the Supreme Court framed its opinion so boldly. *Issacharov* supplied a much-awaited opportunity for the Barak Court to establish its legacy and write another chapter of the Constitutional Revolution as applied to the procedural rights of criminal defendants.

B. *How Easy Cases Can Make Bad Law*

As discussed in Part I, *Issacharov* dealt with illegal possession and use of marijuana by an IDF soldier. Although criminal offenses tend to be treated more severely when committed during an individual's military service, Israeli law (and society) does not regard marijuana use or possession as grave crimes. First offenses frequently go unpunished and are often not even prosecuted for lack of public interest.[144] The maximum sentence for drug use in Israel is three years' imprisonment,[145] a penalty that is usually reserved for possession or use of more potent drugs. In *Issacharov*, the defendant was sentenced by the trial court to two months' probation that would be deemed violated only if he committed an additional offense under the Drug Ordinance during the course of the next eighteen months.[146]

And according to the Supreme Court's own account, by the time the Court rendered its decision on Issacharov's appeal, the case had become moot. The

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the Court goes on to explain that although the Court had recognized its power to exclude evidence before *Issacharov*, it refrained from doing so until the Basic Laws were passed, once again emphasizing the innovation of the decision and the Constitutional Revolution's effect on this issue. According to the Court, it was the passage of the Basic Laws which provided the "impetus for reexamining the question." *See* CrimA 5121/98 Issacharov v. Chief Military Prosecutor [2006] (not yet published), § 49, *available at* http://elyon1.court.gov.il/files/98/210/051/n21/98051210.n21.pdf.

143. *Issacharov* [2006] § 13 (citing the legislative proposals debated in the *Knesset* thus far).

144. *See* Attorney General Guideline No. 4.1105 of Dec. 1, 1985 (updated Sept. 14, 2003), § 7 (entitled "Prosecution Policy—Drugs: Possession and Personal Use"). The prosecutor in Israel holds the discretion not to prosecute offenses due to insufficient evidence or lack of public interest. *See* Criminal Procedure Law (Consolidated Version), 5742-1982 § 62, 36 LSI 35, 49 (1982) (Isr.); *see also* RUTH GAVISON, DISCRETION IN LAW ENFORCEMENT: THE POWER OF THE ATTORNEY GENERAL TO STAY CRIMINAL PROCEEDINGS 145 (1991).

145. Drug Ordinance, 5733-1973, 23 LSI 526 (1973) (Isr.), art. 7(c).

146. *Issacharov* [2006] § 5.

Court began its opinion in *Issacharov* with an apologia about why the eight-year time lag between the submission of the appeal and the decision did not harm the defendant: since Private Issacharov received only probation, and since he had not committed any similar crimes during his probation period, the ruling had no effect on his sentence.[147] However, this justification cuts both ways in a manner which the Court neglected to address: the fact that the defendant committed no offense during this period made his conviction for drug use and therefore the admissibility of his confession moot.[148] In the past the Israeli Supreme Court has dismissed cases for being "hypothetical" and therefore unworthy of the Court's consideration and resources.[149] Given the length and comprehensiveness of the *Issacharov* decision, the waste of judicial resources on a hypothetical case is stunning. So was there more at stake in *Issacharov* than a conviction for marijuana use?

The Court's boldness in *Issacharov* contrasts strikingly with its reticence in another case in which police conduct came to the attention of the Court in a motion to suppress evidence. In 2002, while *Issacharov* was pending, the Court faced a far more controversial and consequential matter: the Court delivered a ruling admitting the confession of Steven Smirk, charged with membership in a terrorist organization and conspiracy to provide information to an enemy.[150] Smirk was a German citizen who converted to Islam, joined Hezbollah, and underwent extensive military training in Lebanon. He assisted Hezbollah in collecting information and planning a suicide bombing in Israel. During a reconnaissance trip to Israel, Smirk was caught and held in preventive arrest,

147. *See id.* § 13.

148. The decision affected only the number of prior convictions for drug use and possession in Issacharov's criminal record.

149. *See* HCJ 4827/05 Adam, Teva V'Din v. Minister of the Interior [2005] (unpublished). For a discussion of the circumstances under which the Court will nevertheless discuss a moot or hypothetical question, see HCJ 6055/95 Tzemach v. Minister of Defense [1999] IsrSC 53(5) 241. The Court explained that it would discuss such a case if it raised important questions when there is "no practical way for the court to rule on it unless it was presented as a general question, unconnected to any particular case." *Id.* § 3. In *Tzemach* the Court addressed the validity of a law that allowed a military adjudication officer to order the arrest of a lower-ranking soldier who was suspected of committing a crime for a period of up to seven days. The Court explained that this question would always become theoretical by the time it reached the Court because of the short period of the arrest and the time needed to petition the Court and schedule a hearing. The Court explained that the question is "short-lived . . . it is concrete for just a few days until the soldier is released or brought before a military tribunal to extend his arrest . . . . If the Court did not agree to consider the constitutionality of the detention, merely because the soldier has been released and the petition has become moot, it would never be able to consider the question. The end result would be to render the decision to detain soldiers immune from judicial review." *Id.* However, the admissibility of illegally obtained evidence does not generally raise a similar concern of becoming moot by the time it is brought before a court.

150. CrimA 6613/99 Smirk v. Israel [2002] (unpublished). Justice Beinisch, who wrote the *Issacharov* decision, delivered the opinion of the Court in *Smirk* as well, making the inconsistencies between the two ever more striking.

and later stood criminal trial. He was never told of his right to silence. That he was denied access to counsel during two weeks of sleep deprivation and continuous harsh interrogation was not contested. The police did not merely fail to inform Smirk of his right to counsel, but denied him counsel in the face of repeated demands.

The Court nonetheless adopted the government's position that the defendant was a "ticking bomb" and therefore the ongoing interrogation, the methods of questioning employed, and denial of counsel were necessary and legal in barring completion of terrorist activity. Since the actions of the Shin Bet, Israel's Secret Service, were justified on preventive grounds, the Court dismissed the defense's claim that the evidence should be excluded at Smirk's criminal trial—a determination that is all but trivial. In an English case raising similar concerns, Lord Nicholls explained why evidence must be excluded in a criminal trial even if the acts of the executive are justified:

> 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 for 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. In the latter case repugnance to torture demands that proof of facts should be found in more acceptable sources than information extracted by torture.[151]

Nevertheless, the ruling in *Smirk* was highly formalistic, accepting the lower court findings that sleep deprivation and failure to warn the defendant of his rights did not cause the defendant to confess. The case was reduced to a factual finding of a causal relation between the infringement of rights and the defendant's confession, with no discussion of the underlying normative issues that took center stage in *Issacharov*.

Still, the *Smirk* Court did indicate that in appropriate cases denial of rights could lead to exclusion of evidence, setting the stage for the *Issacharov* decision. According to the Court, however, *Smirk* was not the right case for such a ruling.[152] After all, a principled stance against illegally obtained evidence in *Smirk* would have triggered the acquittal of a self-proclaimed terrorist. Israeli public opinion would likely have condemned this result, especially if the Court presented its exclusionary doctrine as "revolutionary." Acquitting a marijuana smoker was perhaps more palatable.

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151. *See* A v. Secretary of State for the Home Department, [2005] UKHL 71 (H.L.) (Eng.), § 70. The House of Lords excluded the evidence in that case even though it was obtained by officials of a foreign state, and even though the Secretary of State did not seek its admission in a *criminal* trial: the question was the admissibility of such evidence before the Special Immigration Appeals Commission (SIAC).

152. *See Smirk* [2002] § 14. The Court explained that the denial of counsel was legal and therefore the core of Smirk's right to an attorney was not infringed, perhaps only his right to appeal this denial.

The Court may have reached the correct result in *Smirk*. Still, there is no denying that *Smirk* presented a far more nuanced dilemma that could have truly tested the Supreme Court's protection of defendants' rights. A genuinely new approach to the exclusionary rule would have led to a drastically different opinion, even had the outcome remained the same. In *Issacharov* the Court held that deterring wrongful police conduct is not the sole consideration when deciding whether to exclude evidence; courts must consider whether admitting the evidence will undermine trial fairness or cause disrepute to the judiciary. *Smirk* would have been a classic case for defining the precise boundaries of such a doctrine and balancing between these competing public-policy considerations: the severity of Smirk's crime and the centrality of his confession would have weighed in favor of admitting the evidence. On the other hand, admitting a confession obtained by questionable interrogation methods would certainly call into question the fairness of the trial and bring disrepute on the judiciary. Police deterrence was not at issue, since the Court ruled that the means used were appropriate, necessary, and legal to prevent terrorist activity.

Nevertheless, the Court declined the opportunity to engage in a controversial debate concerning the scope of the exclusionary rule. The revolution was reserved for *Issacharov*, a low-stakes case, far less controversial or complicated than *Smirk*, in which the same result could have been reached under the existing *Meiri* doctrine. Easy cases make bad precedents for precisely that reason: they avoid the true controversy surrounding the exclusionary rule. Such cases give little guidance to lower courts on how to address the hard cases in which courts are asked to exclude key evidence of a severe offense and to acquit a dangerous enemy of society.

Apart from *Smirk*, in the eight years between the *Issacharov* hearing and decision, the Court faced many other cases in which defense attorneys requested the exclusion of evidence due to police misconduct. The Court dismissed them all, but emphasized that it would consider excluding such evidence in appropriate cases that might present themselves in the future,[153] perhaps referring to *Issacharov*, which was pending at the time. Why the Court delayed decision for so long remains unclear.[154] We can only speculate about

153. *See, e.g.*, CrimA 2180/02 Kassem v. State [2002] IsrSC 57(1) 642, 654; CrimA 5203/98 Hasson v. Israel [2002] IsrSC 56(3) 274, 283.

154. The Court attributed the delay to two factors: first, the long period needed to study the different facets of the exclusionary rule, its proper scope, and possible foreign models; second, the desire to allow the Israeli parliament to consider pending legislative proposals on this issue. *See* CrimA 5121/98 Issacharov v. Chief Military Prosecutor [2006] (not yet published), § 13, *available at* http://elyon1.court.gov.il/files/98/210/051/n21/98051210.n21.pdf. However, as discussed above, the Court could have applied the *Meiri* doctrine to decide this case, reaching the same outcome but avoiding the lengthy study which made the case moot. More importantly, relying on *Meiri* would have allowed the *Knesset* to define the rule as it saw fit. This only strengthens the impression that the Court was eager to establish precedent and not defer to the legislature's judgment.

possible causes. Perhaps the Court was waiting for a better "test case" on which to establish the new doctrine. Maybe the Court was waiting until it sensed that public opinion would support such a move, and through the opinions leading up to *Issacharov* the Court prepared the public for the coming change.[155] Perhaps the Justices who supported exclusion in *Issacharov* faced opposition within the Court and were awaiting the retirement of opposing judges; by the time *Issacharov* was decided, six of the nine Justices on the original panel had retired.

C. *Unfinished Business:* Issacharov *and the Constitutional Revolution*

The timing of *Issacharov* suggests that yet another factor may have played a role in its selection and formulation as groundbreaking. The decision came down almost eight years after the appeal was submitted[156] but more significantly, only four months before the retirement of Chief Justice Aharon Barak, who coined the term "Constitutional Revolution"[157] and who dedicated much of his career as Chief Justice to expounding the Basic Laws. The timing suggests that the Court was eager to render such a precedent, an Israeli *Miranda*, before Barak's retirement. Issuing the decision during Barak's tenure (albeit at the eleventh hour) helped cement the Barak Court's status as the Israeli Warren Court. Recognizing an exclusionary rule was an important component of Barak's vision of the Constitutional Revolution and its effect on criminal law and procedure; he articulated this idea in a 1996 article.[158] Other legal scholars supported Barak's vision.[159] Some went so far as to hint that *Issacharov*, pending before the Supreme Court at the time, might provide a proper opportunity for developing such a doctrine.[160]

Framing *Issacharov* as a quasi-constitutional doctrine flowing directly from the Basic Laws bore symbolic significance: it underscored the importance of the exclusionary rule and its status within the Israeli legal system. Exclusion

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155. Posner, *supra* note 131, at 53 ("[Barak] borrowed from Marshall the trick of first announcing a novel rule in a case in which he concludes that the rule does not apply, so that people get accustomed to the rule before it begins to bite them.").

156. The decision gives us no indication of the precise date in 1998 that the appeal was submitted. However, we know from the decision that the Attorney General joined as a respondent on September 9, 1998, which means that the appeal was submitted before that date. A hearing was held on June 13, 1999, and the Court ruled that the case should be decided by a broader panel of nine Justices. (In Israel, most cases are decided by a panel of three Justices). Only three of the Justices on the original 1999 panel still served on the Court when the decision was rendered in 2006 (Barak, Cheshin, and Beinisch). The remaining six Justices were appointed to the Supreme Court after 1999.

157. *See* Barak, *supra* note 86.

158. *See* Aharon Barak, *The Constitutionalization of Israeli Law: The Basic Laws on Human Rights and Criminal Law*, 13 BAR-ILAN L. STUD. 5, 24 (1996).

159. *See* Gross, *supra* note 74; Harnon, *supra* note 22.

160. Gross, *supra* note 74, at 150 n.21.

of illegally obtained evidence would no longer be merely a procedural matter but rather a constitutional doctrine. In some respects this elevation placed the rule beyond the Knesset's reach, thus preempting and limiting subsequent legislation on the matter. Although this move was not necessary to arrive at the result in *Issacharov*, it did change the status of the exclusionary rule within Israel's pyramid of norms. The Court stripped away much of the legislature's ability to define the boundaries of the statutory exclusionary rule which the Knesset had been considering. In this regard, *Issacharov* was indeed revolutionary.

Conversely, placing the exclusionary rule within the purview of Basic Law: Human Dignity and Liberty also bolstered the status of the Basic Law itself. *Issacharov* extended the reach of the Basic Law into a new realm, emphasizing the Law's constantly growing scope and its status as a cornerstone of Israeli jurisprudence. Such reinforcement of the Basic Law brought it one step closer towards becoming Israel's Constitution or Bill of Rights rather than a weaker quasi-constitutional provision.[161]

D. *Comparative Law and Legitimacy*

We have seen why the Court sought out a case like *Issacharov* to proclaim its new doctrine and why it was important to frame the decision as part of the Constitutional Revolution. But by framing the decision as revolutionary, the Court faced an acute problem of legitimacy and undermined its authority to innovate. Creating new doctrines without legislative authorization and in seeming defiance of legislative intent is no light matter, especially for a court already under attack for its activism. Comparative law addressed this legitimacy concern in *Issacharov* in two ways. First, it showed that courts in other common law countries adopted a constitutional exclusionary rule absent explicit legislative authorization. It thus demonstrated the law-creating power of common law judges in this field and suggested that Israeli judges hold inherent authority to do the same.[162]

Furthermore, by relying upon the content of the exclusionary rule in other common law jurisdictions, the Court justified its new creation as a necessary result of international consensus. The Court relied on the reputation of the foreign courts cited to make the "old rule" seem outdated, proving that reform

161. *See* CrimA 5121/98 Issacharov v. Chief Military Prosecutor [2006] (not yet published), § 54, *available at* http://elyon1.court.gov.il/files/98/210/051/n21/98051210.n21.pdf ("The spirit and principles of the Basic Laws project in varying levels of intensity upon all branches of the law and influence basic terms and perceptions therein.").

162. For a criticism of Barak's general approach toward the power of judges to make law and its reliance upon the common law, see Posner, *supra* note 131, at 53-54. This also might provide some further explanation of why the Court did not refer to civil law jurisdictions, even if the Court was in fact aware that they too had adopted an exclusionary rule.

was essential. A judicially spearheaded revolution promised to bring Israel in line with similar legal systems. The Supreme Court depicted itself as the enlightened branch in contrast to the less progressive legislature. Hence, comparative law served largely as a rhetorical tool that made the reform of Israeli law appear inevitable. Casting the decision in this manner enabled the Court to present the decision as an Israeli judicial revolution while drawing legitimacy from abroad.

Comparative law in *Issacharov* served in an interesting double capacity. First, it led the Court to the impression that reform was necessary to align Israeli law with that of other common law countries (as discussed in Part II). Then, in legitimizing the decision, comparative law *justified* such a revolution. These two objectives may seem to conflict: according to the first, comparative law is the culprit for potentially misleading judges and causing them to draw misguided analogies, whereas under the second, there is nothing inherently problematic with comparative law—only its rhetorical use by judges. However, these two understandings need not be at odds with each other. Each comes into play at a different point within the decision-making process. Nevertheless, the role of comparative law in *Issacharov* highlights two of the dangers inherent in its use: It may prompt one country's misguided emulation of another. And it may further serve to justify reform internally in the absence of legislative authorization or in defiance thereof.

The Israeli Supreme Court's use of comparative law to justify *Issacharov* may seem to illustrate one of the primary dangers against which Scalia, Richard Posner, and others who oppose the use of foreign law in the United States have cautioned: that comparative law can be used as a rhetorical tool to mask personal or political preferences.[163] Courts might justify controversial decisions through reference to international consensus, making them seem more objective and less as a result of their own political or moral convictions. As Scalia stated in *Roper*, what truly drove the Court to deem the execution of juveniles unconstitutional was "the court's 'own judgment' that murderers younger than 18 can never be as morally culpable as older counterparts."[164]

163. *See* Atkins v. Virginia, 536 U.S. 304, 347-48 (2002) (Scalia, J., dissenting) ("Beyond the empty talk of a 'national consensus,' the Court gives us a brief glimpse of what really underlies today's decision: pretension to a power confined *neither* by the moral sentiments originally enshrined in the Eighth Amendment (its original meaning) *nor even* by the current moral sentiments of the American people . . . . The arrogance of this assumption of power takes one's breath away."). Scalia goes on to talk of the "contrived consensus" which the Court has found. *Id.*; *see also* Richard Posner, *The Supreme Court 2004 Term: Forward: A Political Court*, 119 HARV. L. REV. 32, 85, 88 (2005) ("The search for such a consensus is an effort to ground controversial Supreme Court judgments in something more objective than the Justices' political preferences and thus to make the Court's political decisions seem less political . . . it is a 'rhetorical' move in the pejorative sense of the word.").

164. Roper v. Simmons, 543 U.S. 551, 615 (2005) (Scalia, J., dissenting).

Scalia dismissed the Court's comparative rhetoric as "sophistry."[165]

But such fears of misuse need not lead to a generally dismissive approach towards using comparative law in judicial decision making. As Tushnet has pointed out correctly, Posner and Scalia's criticism on this count confounds (perhaps justified) criticism of the *ends* to which comparative law is employed with (unwarranted) criticism of the *means*. If Scalia and Posner are correct that their counterparts wear comparative law as a façade, it is not comparative law that should be blamed, but the end to which it is put by judges—to mask their personal or political preferences. This criticism of comparative law feeds on other critiques of judicial decision making and although typical of comparative law, is neither unique not inherent in its use.[166]

One need not dismiss all use of comparative law just because it bears the potential of misuse. Even those who support the use of comparative law have proceeded on the assumption that it is not being used rhetorically.[167] Obviously, determining when it is being used rhetorically is itself controversial and may be influenced by one's opinion of the outcome reached by the court. But the potential for judicial misuse cannot justify abandonment of an interpretive tool without requiring abandonment of all rules of construction. Instead we should be wary of the typical misuses to which comparative law is prone and the unique dangers it carries, some of which I have addressed here. With due warning, courts should value comparative law as a source of foreign wisdom and experience.

CONCLUSION

The Israeli Supreme Court's revolutionary rhetoric will most likely mark *Issacharov* as one of the groundbreaking decisions of the Barak Court era. Due to its branding as innovative, *Issacharov* will be remembered by future generations as Israel's *Miranda* while the *Meiri* decision, which reached an essentially identical outcome, will soon be forgotten. Within Israel, *Issacharov* is an important omen of what is to come after the retirement of Chief Justice Barak: *Issacharov* has reaffirmed the Beinisch Court's commitment to the Constitutional Revolution of the Barak era. It remains to be seen what shape this Revolution will take under Beinisch's leadership and what reactions it might provoke from other branches of government. Also uncertain is *Issacharov*'s impact on lower-court rulings in Israel and on the Supreme Court's own application of the exclusionary rule. Will *Issacharov* in fact result in the exclusion of more evidence than *Meiri*? Will the Court be able in the future to distinguish the *Issacharov* doctrine from *Meiri* despite their identical

165. *Id.* at 627 ("To invoke alien law when it agrees with one's own thinking and ignore it otherwise, is not reasoned decisionmaking but sophistry.").

166. *See* Tushnet, *supra* note 9, at 1280-81.

167. *See* Posner & Sunstein, *supra* note 139, at 137.

operation in a unitary judiciary?

Issacharov also bears broader implications which are relevant beyond the borders of Israel. The decision demonstrates some of the risks of using comparative law and of transplanting foreign doctrines: the futility of precisely replicating doctrines across borders and the dangers of false analogies when attempting to do so. *Issacharov* also underscores the risks of emulation, of regarding comparative law as binding precedent, and of courts using comparative law as a rhetorical tool for legitimizing controversial decisions.

Nevertheless, the questionable fashion in which comparative law was employed in *Issacharov* should not deter us from examining the experience of other nations and learning from them whenever possible. Comparative law has an important role to play in formulating new rules and doctrines and in interpreting old ones, in Israel and elsewhere. Comparative law, like history, can save us from repeating the mistakes of others. We may all benefit from both the positive and negative experiences of other jurisdictions. However, when doing so we must maintain the proper distance between *self* and *other*: we must remember the differences between ourselves and the source from which we borrow, and account for factors that might stretch or snap the analogies drawn.

Although *Issacharov* demonstrates why one cannot expect to replicate legal doctrines precisely or "transplant" them, engagement with foreign texts and ideas can still enrich and inform our ideas for approaching and solving common problems. But rather than seeing foreign law as a model to mimic we must use it to start a conversation between equals. Adopted doctrines must be adapted to suit local conditions, while accounting for factors that might influence their operation. And even if we choose not to adopt the laws of others, simply examining them may lead to a better understanding of ourselves. By looking in the comparative mirror we are forced to see who we are and determine what values we hold dear, why we are different and why, in some cases, we ought to remain so.