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Articles

The Jurisprudence of Dealing with Unsatisfactory Fundamental Law: A Comparative Glance at the Different Approaches in Medieval Criminal Law, Jewish Law and the United States Supreme Court

Aaron M. Schreiber†

I. Introduction

A perennial problem faced by nearly all systems of law is how to react when deeply embedded or fundamental laws become unworkable or produce unfortunate results. Often, undesired consequences of the law emerge as conditions in society change. It may be instructive to look at the contrasting ways in which two different societies, each with its own culture and system of law, dealt with this problem in the context of criminal law, and then to compare how the United States Supreme Court deals with it and to see which, if either, of the two precedent models it follows.

II. Medieval Criminal Law

Criminal trials in medieval continental Europe were heavily influenced by the traditions of the Christian church and ancient Roman law.[1] Until about the thirteenth century, the guilt or in-

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1. J. LANGBEIN, TORTURE AND THE LAW OF PROOF 3-8 (1977); Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978); A. ESMEIN, A HISTORY OF CONTINENTAL

nocence of a criminal defendant in continental Europe was commonly determined by ordeal, such as withstanding infection when a hot iron was applied to the hand, or the hand was plunged into boiling water, or floating when cast into the river.[2] This practice was based upon the belief in "immanent justice," which assumed continuous divine intervention in the affairs of many and, therefore, brought about certainty in criminal adjudication.[3] Thus, at the climax of the criminal trial, the court would adjourn its session, and the judges would go to church where a solemn mass would be held. Then, an ordeal of the defendant would be conducted by church officials, who, it was felt, would be the appropriate persons who could invoke divine judgment.

When the Church's Fourth Lateran Council of 1215 abolished ordeals in criminal trials, the entire extant system of proof was destroyed.[4] A new system was substituted, which provided for human, instead of divine, judgment. In order to prevent human error and to achieve certainty in adjudication, the new system was designed to keep out human discretion from the determination of guilt or innocence of a criminal defendant.[5] Instead, objective and certain proof was required by the testimony of two eyewitnesses to the crime.[6] According to the medieval viewpoint which was shaped by well-entrenched traditions rooted in Christian perspectives, Roman law, the Bible and other cultural influences, such testimony was believed to provide the requisite certainty.[7] There could be no conviction without such testimony because that would have required a subjective

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CRIMINAL PROCEDURE 10-11, 78-79, 96 (J. Simpson trans. 1913); E. PETERS, TORTURE 49, 65, 67, 69 (1985); E. PETERS, INQUISITION (1989). The work and conclusions of a number of scholars, principally Esmein, Langbein and Peters, have been relied on heavily herein, particularly for medieval sources in Latin and Italian cited hereafter.

2. LANGBEIN, TORTURE AND THE LAW OF PROOF, *supra* note 1, at 6; ESMEIN, *supra* note 1, at 7ff.

3. PETERS, TORTURE, *supra* note 1, at 43.

4. LANGBEIN, TORTURE AND THE LAW OF PROOF, *supra* note 1, at 6; P. FIORELLI, LA TORTURA GIUDIZIARIA NEL DIRITTO COMUNE 8 (1953); Van Caenegem, *The Law of Evidence in the Twelfth Century: European Perspectives and Intellectual Background*, PROC. SECOND INT'L CONGRESS MEDIEVAL CANON L. 297 (1965); Baldwin, *The Intellectual Preparation for the Canons of 1215 Against Ordeals*, 36 SPECULUM 613 (1961); ESMEIN, *supra* note 1, at 57-58.

5. LANGBEIN, TORTURE AND THE LAW OF PROOF, *supra* note 1, at 4.

6. *Id.* at 6, 7.

7. FIORELLI, *supra* note 4, at 38. Many court officials had ecclesiastical training.

decision by a judge as to whether or not the circumstantial evidence proved guilt.[8] Subjective judgment by humans was felt to be error-prone.[9]

Judicial procedure in criminal trials was henceforth to be governed by three fundamental rules.[10] First, no court could convict and condemn an accused unless there were two eyewitnesses to the gravamen of the crime.[11] Second, a court could convict on the basis of a voluntary confession.[12] Third, circumstantial evidence, no matter how compelling, was inadequate.[13] For example, a suspect seen running away from a murdered man's house, who was later found to possess the bloody dagger and stolen loot, could not be convicted on the basis of this evidence alone.[14]

It soon became apparent to medieval decision makers that the new system had set the standard of proof at too high a level. The system could be effective only for those who committed crimes in full view of eyewitnesses, or for criminals who repented and confessed their crimes. It was not suited for the cold-blooded or deliberate criminal, whom it was simply impos-

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8. LANGBEIN, TORTURE AND THE LAW OF PROOF, *supra* note 1, at 6.

9. *Id.*

10. LANGBEIN, TORTURE AND THE LAW OF PROOF, *supra* note 1, at 4. Some antecedents of the first and third rules may be traced to Jewish and Biblical Laws, while the second is contrary to Jewish Law, as indicated hereafter.

11. *See, e.g., Deuteronomy* 19:15.

12. In Jewish Law, however, all confessions were completely disregarded even if they were undeniably voluntary. For a further discussion of this point, see *infra* note 49 and accompanying text.

13. LANGBEIN, TORTURE AND THE LAW OF PROOF, *supra* note 1, at 4.

14. LANGBEIN, TORTURE AND THE LAW OF PROOF, *supra* note 1, at 4; FIORELLI, *supra* note 4, at 1, 105 Vol. 1 (1953); PETERS, TORTURE, *supra* note 1, at 47. The Talmud, which contains the Jewish Law tradition has a similar example. Rabbi Simeon ben Shetah said:

> May I never see comfort if I did not see a man pursuing his fellow into a ruin, and when I ran after him and saw him, sword in hand with blood dripping from it, and the murdered man writhing, I exclaimed to him: Wicked man, who slew this man? It is either you or I! But what can I do, since thy blood (i.e., life) does not rest in my hands, for it is written in the Torah, *by the mouth of two witnesses . . . shall he that is to die be put to death?* [Therefore, he could not be executed since there were not two eyewitnesses to the murder.] May He Who Knows One's Thoughts exact vengeance from him who slew his fellow!

SANHEDRIN, BABYLONIAN TALMUD, ch. 4, p. 376 (J. Schacter trans. 1969). In certain cases, however, circumstantial evidence and inferences could be used in Jewish Law. *See infra* note 74 and accompanying text.

sible to convict.[15] In the interests of justice and the maintenance of public order, it was felt to be crucial to convict and punish criminals. European jurists, therefore, gradually developed a strategy to overcome the difficulty of convicting under the new system of proof.

The new strategy was made feasible by a coalescence of factors. One was the spread of the inquisitorial system of trial, in lieu of the accusatorial system that had prevailed in Western Europe.[16] Under the accusatorial system, trials were initiated by accusations brought by private parties, trials were public and by peers, and the judge acted as a neutral arbiter.[17] An accused could exculpate himself by either oath or ordeal.[18] This system is in contrast to the inquisitorial system, whose "two predominant features are, the secret inquiry to discover the culprit, and the employment of torture to obtain his confession."[19] This system entailed intense and detailed investigation by a magistrate who controlled the entire trial procedure.[20] "There is the atmosphere of secrecy and consequently of suspicion, in the midst of which the trial proceeds . . . ."[21]

A change from an accusatorial to an inquisitorial system occurred in Roman law during the first century B.C.[22] Thereafter, in Europe, "the Church was the first authority which changed from the accusatory to the inquisitorial procedure."[23] Moreover, "[t]he Church was able to furnish secular courts with a lesson and a model, in the methods of its ecclesiastical tribunals. By its example, it paved the way for the substitution, consummated in the 1500s, of the inquisitorial procedure for the accusatory procedure in every country of Europe."[24]

Moreover, confession was regarded as the *regina probatorium* (the queen of proofs) and as standing at the very

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15. For an explication of how this problem was handled in Jewish Law, *see infra* notes 89-95 and accompanying text.

16. PETERS, TORTURE, *supra* note 1, at 40.

17. ESMEIM, *supra* note 1, at 7.

18. *Id.*; *see also* PETERS, TORTURE, *supra* note 1, at 42.

19. ESMEIN, *supra* note 1, at 8; PETERS, TORTURE, *supra* note 1, at 51, 69.

20. PETERS, INQUISITION, *supra* note 1, at 12.

21. ESMEIN, *supra* note 1, at 11.

22. PETERS, INQUISITION, *supra* note 1, at 2, 11.

23. ESMEIN, *supra* note 1, at 78; PETERS, TORTURE, *supra* note 1, at 51, 67.

24. ESMEIN, *supra* note 1, at 10; *see also*, PETERS, TORTURE, *supra* note 1, at 41, 67.

apex of the hierarchy of proofs required for the conviction of the criminal defendant.[25] In significant part, this was due to Church teachings.[26] Sacramental confessions were made an annual obligation by the Fourth Lateran Council of 1215.[27] "[T]he role of confession became central to many areas of twelfth-century life. It was not long before it became central in serious criminal cases as well."[28]

The thirteenth century revolution in the law of proof and the central value placed on confessions as the queen of proofs, resulted in convictions of criminal defendants becoming absolutely dependent on coerced confessions.[29] These in turn had become an integral part of the inquisitorial system of trials.[30] The strategy now employed to obtain confessions and convictions "at any cost"[31] in the interests of justice and public order was uniquely suited to the inquisitorial system.[32] It entailed torturing a criminal defendant until he confessed, albeit under certain safeguards.[33] The court would then treat the confession as though it was voluntary and, therefore, acceptable under the new system.[34] Because of the elevated status of confessions in the medieval hierarchy of proofs, the defendant could now be convicted.[35] Gradually, an intricate and detailed Law of Torture developed in continental criminal procedures.[36]

The system of judicial torture spread through Europe. It was still current everywhere in most of Europe five hundred years later, well into the eighteenth century, and in some areas,

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25. PETERS, TORTURE, *supra* note 1, at 41, 44.

26. *Id.* at 46, 49, 67, 69.

27. *Id.* at 44.

28. *Id.* at 46. Peters also states, "[i]t was impossible to use Roman-Canonical procedure without using torture with it." *Id.* at 69; *see also id.* at 51.

29. LANGBEIN, TORTURE AND THE LAW OF PROOF, *supra* note 1, at 72.

30. PETERS, TORTURE, *supra* note 1, at 51, 69.

31. ESMEIN, *supra* note 1, at 676; LANGBEIN, TORTURE AND THE LAW OF PROOF, *supra* note 1, at 3.

32. R. VAN CAENEGEM, LA PREUVE, XIX RECUSILS DE LA SOCIETE JEAN BODIN POUR L'HISTOIRE COMPARATIVE DES INSTITUTIONS 740 (1963); PETERS, TORTURE, *supra* note 1, at 51.

33. *See infra* notes 53-63 and accompanying text.

34. PETERS, TORTURE, *supra* note 1, at 41.

35. *Id.*

36. LANGBEIN, TORTURE AND THE LAW OF PROOF, *supra* note 1, at 8; PETERS, TORTURE, *supra* note 1, at 44.

into the nineteenth century.[37] Numerous legal treatises were written on the Law of Torture, and torture was routinely applied under judicial approval and supervision.[38] "Torture was part of the ordinary criminal procedure, regularly employed to investigate and prosecute routine crime for the ordinary courts."[39]

This system of judicial torture entailed the use of physical coercion by officers of the state in order to gather evidence for judicial proceedings in cases of serious crime punishable by death or severe physical maiming.[40] This system should be distinguished from torture used as a sanction or mode of punishment for those already convicted.[41]

The use of torture in judicial proceedings was not a new innovation in Medieval Europe, but was well established in the cultural traditions of Europe. In ancient Greece, torture was applied as a judicial tool, mainly against slave witnesses to have them verify under torture the testimony that they had previously given.[42] Demosthenes claimed that it had never been known to fail.[43]

Torture was also used in imperial Rome, and the Digest contains many references to the use of torture in Roman law.[44] During the first century, the Romans in Palestine used judicial torture as a standard tool in criminal law proceedings to elicit confessions from the accused, and widely applied it against Jews.[45] Judicial torture was also employed by many Germanic

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37. LANGBEIN, TORTURE AND THE LAW OF PROOF, *supra* note 1, at 3.

38. LANGBEIN, TORTURE AND THE LAW OF PROOF, *supra* note 1, at 3; Langbein, *Torture and Plea Bargaining*, *supra* note 1, at 3, 5.

39. LANGBEIN, TORTURE AND THE LAW OF PROOF, *supra* note 1, at 3; *see also* ESMEIN, *supra* note 1, at 9.

40. LANGBEIN, TORTURE AND THE LAW OF PROOF, *supra* note 1, at 4.

41. *Id.* at 3.

42. 2 R. BONNER & G. SMITH, THE ADMINISTRATION OF JUSTICE FROM HOMER TO ARISTOTLE 126-30, 223-31 (1938); *see* ARISTOTLE, RHETORIC, ch. 15. The practice of torture in criminal trials is also mentioned in ARISTOPHENES, THE FROGS 44-45 (R. Lattimore trans. 1962). *See* PETERS, TORTURE, *supra* note 1, at 14-15; *see generally* 1 R. BONNER & G. SMITH, THE ADMINISTRATION OF JUSTICE FROM HOME TO ARISTOTLE (1930); R. BONNER, EVIDENCE IN ATHENIAN COURTS (1905).

43. DEMOSTHENES 23-37 (J. H. Vince trans. 1935).

44. *See* DIG. 48.18; THEODOSIAN CODE at 9.40.1 (C. Pharr. trans. 1952); CODE J. 9.41.8, 9.47.16; LANGBEIN, TORTURE AND THE LAW OF PROOF, *supra* note 1, at 8; PETERS, TORTURE, *supra* note 1, at 18, 21, 33.

45. Lieberman, *Roman Legal Institutions in Early Rabbinics and the Acta Martyrom*, 35 JEWISH Q. REV. 1,15 (1944).

tribes.[46]

The Church, too, adopted the use of torture:

> [T]he ancient ecclesiastical Fathers who lived in the days of the Roman Empire . . . spoke of torture which they saw in practice every day in a civilized country as if it were a natural and normal thing. Johannes Teutonicus who compiled the glossary to Gratian's "Decretum" also approves of torture in his "teaching" and he adopts all the applications made of it by the Roman laws.
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> The great doctors of the 1200s including Pope Innocent IV and Durantis, entertained no doubts as to the legality of this method of examination. Certain formal texts also admitted it. In the "inquisito haereticae pravitatis" the legislation was particularly precise.[47]

After the mid-thirteenth century, torture had a secure place in ecclesiastical procedure which had a crucial influence on lay criminal procedures.[48] This is reflected in a decretal of Pope Innocent IV in 1252 which confirmed the use of torture in canon procedure.[49] Moreover, one of the rationales for the use of torture was that "God will give the innocent the strength to resist the pain"[50] and that if one were tortured three times and still did not confess, "it will be evident that God performed miracles for him."[51]

To be sure, the law purported to place limits on the use of torture, and the torture was surrounded by numerous procedural safeguards. For example, torture was only to be used if there was probable cause to believe that the defendant was, in fact, guilty.[52] This could occur, for example, if there was a "half-proof" of guilt, such as one eyewitness, or cogent circumstantial

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46. ESMEIN, *supra* note 1, at 108.

47. ESMEIN, *supra* note 1, at 91.

48. PETERS, TORTURE, *supra* note 1, at 49, 65, 67.

49. LANGBEIN, TORTURE AND THE LAW OF PROOF, *supra* note 1, at 7; *see* FIORELLI, *supra* note 4, at 131; R. VAN CAENEGEM, *La Preuve dans le Droit du Moyen Age Occidental*, in RECUEILLS DE LA SOCIETE JEAN BODIN POUR L'HISTOIRE COMPARATIVE DES INSTITUTIONS 691, 735-39 (XXXX); ESMEIN, *supra* note 1, at 79 (1913); C. LEA, THE INQUISITION OF THE MIDDLE AGES, ITS ORGANIZATION AND OPERATION 175 (1963).

50. LANGBEIN, TORTURE AND THE LAW OF PROOF, *supra* note 1, at 147 n.12; J. GILISSEN, *La Preuve en Europe du XVI au Debut du XIX Siecle*, in 17 RECUEILLS DE LA SOCIETE JEAN BODIN POUR L'HISTOIRE COMPARATIVE DES INSTITUTIONS 755, 788.

51. ESMEIN, *supra* note 1, at 113 n.5 (quoting *Bourdot de Richeborg* IV, 1, p. 214).

52. LANGBEIN, TORTURE AND THE LAW OF PROOF, *supra* note 1, at 5.

evidence, for example, possession of the bloody dagger and loot, each of which was regarded as constituting one-quarter proof. The utilization of the "probable cause" doctrine, however, permitted circumvention of the prohibition against the use of circumstantial evidence.[53] According to the ingenuity of medieval jurists, if there was probable cause to believe in the suspect's guilt, circumstantial evidence could be used to produce a decision to torture the suspect, even though it could not be used to convict.[54]

Another purported safeguard was that under the inquisitorial system of trials, the investigating magistrate had the responsibility to supervise the administration of the trial, and could not delegate this function. Accordingly, the magistrate himself conducted the interrogation under torture in the presence of two or more observers, and a clerk who transcribed the proceedings in an official record.[55] Additionally, "vast legal treatises" were compiled to determine when there was sufficient probable cause to torture and to minutely regulate procedure and establish and refine principles of law.[56] The foregoing procedural protection for the criminal defendant brings to mind Grant Gilmore's quip, "[I]n Hell there will be nothing but law, and due process will be meticulously observed."[57]

As an additional safeguard, confession under torture was officially treated as involuntary and, therefore, ineffective unless it was repeated later by the defendant at a hearing. The rub, however, was that:

> [O]ften enough the accused who had confessed under torture did recant when asked to confirm his confession. But seldom to avail: the examination under torture could thereupon be repeated. An accused who confessed under torture, recanted, and then found

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53. *Id.* at 5-7.

54. *Id.* at 14; Langbein, *Torture and Plea Bargaining*, supra note 1, at 5.

55. CONSTITUTIO CRIMINALIS CAROLINA Article 46 (1532); FIORELLI, *supra* note 4, at 60-62; JOOST DAMHOUDER, PRACTIQUE JUDICIAIRE EN CAUSES CRIMINELLES (1564); LANGBEIN, TORTURE AND THE LAW OF PROOF, *supra* note 1, at 14.

56. LANGBEIN, TORTURE AND THE LAW OF PROOF, *supra* note 1, at 5; PETERS, TORTURE, *supra* note 1, at 72. As Peters put it, "[o]nly the widespread, although often indirect influence of the Romano-Canonical procedure can explain the large amount of legislation and jurisprudence devoted to the problem of torture in the sixteenth and seventeenth centuries." PETERS, TORTURE, *supra* note 1, at 70.

57. G. GILMORE, THE AGES OF AMERICAN LAW 111 (1977).

himself tortured anew, learned quickly enough that only a "voluntary" confession and the ratification hearing would save him from further agony in the torture chamber.[58]

Furthermore, in theory, torture was to be used to elicit facts which, in the words of a German statute of 1532, "no innocent person can know."[59] Torture was not to be used to elicit a confession. The facts which the tortured defendant brought forth were required to be investigated and verified.

In the real world, however, these protective procedural devices did not always work. In the words of a sixteenth century commentator, under torture, defendants might break down under "the pain and torment" and "confess things that they never did."[60] The examining magistrate might accidentally, or unknowingly, ask suggestive questions and elicit a confession rather than simply verify facts. It was also not infrequent for an innocent defendant to know something about a crime, and that fact given under torture would corroborate his commission of the crime and prove his guilt.[61] Unfortunately, too, the procedural rules were not always enforced, or were not scrupulously enforced, to require verification of confessions.[62]

Although the drawbacks and inhumanity of torture were pointed out by many during the Middle Ages, this was done only to suggest improvements in the system. Rarely, and only exceptionally, was the abolition of torture itself recommended.[63] The system of torture nevertheless survived for five hundred years, ending only a little more than two centuries ago.[64] In some parts of Europe, it continued until the nineteenth century.[65] European jurists and European society in general, evaded their own requirements of justice by subterfuge and circumvention of both the letter and spirit of the law in the interests of "justice."

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58. LANGBEIN, TORTURE AND THE LAW OF PROOF, *supra* note 1, at 15-16.

59. *Id.* at 5; *Constitutio Criminalis Carolina*, *supra* note 55, Art. 54.

60. *See* LANGBEIN, TORTURE AND THE LAW OF PROOF, *supra* note 1, at 9; DAMHOUDER, *supra* note 55, ch. 39 at 44.

61. LANGBEIN, TORTURE AND THE LAW OF PROOF, *supra* note 1, at 9.

62. LANGBEIN, TORTURE AND THE LAW OF PROOF, *supra* note 1, at 16; DAMHOUDER, *supra* note 55, ch. 35 at 8.

63. PETERS, TORTURE, *supra* note 1, at 72.

64. LANGBEIN, TORTURE AND THE LAW OF PROOF, *supra* note 1, at 18.

65. *Id.* at 3.

Through some psychological mechanism, they went further and deluded themselves into believing that they were carefully following the law, and prided themselves on their scrupulous observance of the law. One should not accuse the medieval jurists of hypocrisy. They merely utilized a mental process long before pinpointed in antiquity in the Bible.[66] The jurists simply closed their eyes to what was really happening, and made themselves oblivious to the cruelty and the base inhumanity of inflicting torture and the agony on the tormented.

An alternative explanation is the suspension of critical thinking, called by some, a "sleep of reason."[67]

> In an era when all philosophy derived from Aristotle, astronomy from Ptolemy, medicine from Hippocrates and Galen, and the law was contained in those texts of Roman wisdom preserved in Justinian's compilation, to argue against torture, which the texts sanctioned, would have meant (unheard of temerity!) to undermine the common foundations of respect, of indisputable authority, of the thing speaking for itself, self-evident, upon which regulated itself in that epoch the entire ordering, not only of the laws, nor only of human wisdom, but of an entire human social structure.[68]

While the modern mind is appalled at such practices, one should not be surprised. The attitudes and practices of judges and other law personnel regarding physical brutality reflected those of the general population. After all, the onset of the practice of routine judicial torture took place during the era of the Crusades. From 1063 on, crusaders through nearly all of Europe attacked hundreds of Jewish communities, massacred thousands of Jews and forcibly converted others.[69] At other times, entire

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66. *Isaiah* 6:10

> You hear, but refuse to understand. You see, but refuse to perceive. Therefore, stuff up the heart of the people and make its ears heavy and seal its eyes, lest it see with its eyes and hear with its ears and its heart would understand and it would repent and be healed.

67. This is the title of one of Lucientes de Goya's caprichos. He noted "when reason sleeps, it produces monsters." *See* PETERS, TORTURE, *supra* note 1, at 75-76.

68. FIORELLI, *supra* note 4, at 218; PETERS, TORTURE, *supra* note 1, at 81.

69. *See e.g.*, H. GRAETZ, HISTORY OF THE JEWS (1941); A. HABERMAN, SEFER GEZEROT ASHKENAZ VE'ZAREFAT (1946); S. RUNCIMAN, HISTORY OF THE CRUSADES (1951-55); S. SALFELD, DAS MARTYROLOGIUM DES NURENBERGER RAKHAMIN (1898). Most Jews in Europe, however, chose to be killed rather than to relinquish their faith, and often commit-

Jewish communities (and sometimes, all Jews in the entire country), were forcibly expelled from France, England, parts of Germany and Italy, and later from Portugal and Spain. Similarly, horrible massacres occurred of Christian communities that refused to follow the beliefs and practices of the Roman Catholic Church during the Albigensian Crusades.[70]

The behavior of the medieval jurists and the society which tolerated torturing criminal defendants helped to set the stage for the cruelties later practiced by the Church Inquisition in the Middle Ages in which unspeakable tortures were inflicted upon its victims by those who uttered sanctimonious pronouncements about mercy and kindness.[71]

In sum, medieval jurists resolved the problem of unsatisfactory fundamental law which prevented conviction, by purporting to observe the law carefully but, in fact, circumventing it by use of torture, while cultivating self-inflicted blindness to the realities involved and the unfairness and cruelties of the process.

III. Jewish Law

In the thirteenth century, Jewish jurists in Western Europe came face-to-face with the identical situation that induced their non-Jewish colleagues to introduce the routine practice of torture in criminal law procedure. Defendants could not be convicted if traditional Jewish law was applied. Jewish law was even more strict than Church law, and made it nearly impossible to convict criminal defendants.[72] Two eyewitnesses were required, and the use of circumstantial evidence was severely downgraded,

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ted suicide en masse, sometimes by killing each other, instead of waiting to be tortured and killed by crusading mobs.

70. RUNCIMAN, *supra* note 69, at 25.

71. C. LEA, *supra* note 49; C. VON BAR, A HISTORY OF CONTINENTAL CRIMINAL LAW 180 (1916). For an exploration of the stark contrasts that sometimes exist between how the law actually operates in practice, as distinct from mythical claims of how it purports to operate, *see* Reisman, *Myths Systems and Operational Codes in* FOLDED LIES 1 (1979).

There may be relevant in this context the notion of legal fictions, law statements whose patent falseness (called by some "white lies" or "swindling") is never exposed because of generally accepted convention. *See* FULLER, LEGAL FICTION ix, 5 (1967); MAINE, ANCIENT LAW 25 (1963); POUND, INTERPRETATIONS OF LEGAL HISTORY 4 (1923).

72. As indicated above, Jewish and Biblical Law were among the sources for the similar Medieval Law doctrine. *See supra* note 7 and accompanying text.

if not made useless.[73] In addition, Jewish law went much further in casting a protective net around criminal defendants. Unlike the Roman and Canon law traditions, confessions were absolutely disregarded, even where there was no question that they were voluntary.[74] Moreover, a defendant could not be convicted unless immediately before the commission of the crime, he was warned in the presence of two persons that if he committed the crime he would be punished.[75] Additionally, the precise penalty had to be stated to him.[76] Still more, the defendant had to acknowledge the forewarning by stating, "I know the crime and the penalty, but I will do it nevertheless."[77] It was not sufficient for him to merely nod his head or even to say, "I know it."[78] These and other technical rules made it nearly impossible to convict a cold-blooded or deliberate clandestine murderer, thief, or assaulter. If he were forewarned, and was thus alerted to the presence of witnesses, he could simply wait and commit the crime at a time or place when there were no witnesses. These requirements were such that convictions were generally possible only for those who committed crimes of passion or for revenge and did not care that they might be observed and executed.[79]

During the existence of the Jewish Commonwealth (until approximately the year seventy) there apparently existed a dual authority system, with two parallel, but distinct, juridical organizations that dealt with those accused of crimes. These bodies were the religious courts and secular royal officials. Where a Jewish court, which applied traditional Jewish law, could not or would not convict a criminal defendant, the king or other secular authorities could execute or inflict severe physical sanctions without recourse to traditional Jewish law.[80] Where the secular

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73. *See Deuteronomy* 19:15; TALMUD, B. Sanhedrin 37b; A. SCHREIBER, JEWISH LAW AND DECISION-MAKING 277, 394 (1979). For a detailed discussion, see E. HENKIN, *Pirushei Ivra* 17, 20, *reprinted in* E. HENKIN, *Kitvei Hagria* (1981).

74. TALMUD, B. Sanhedrin 9b; RAMBAM, YAD HA'KHAZAKA, Laws of the Sanhedrin, 18:6.

75. B. TALMUD, Makkot, 6b, Sanhedrin 8b, 40b, 41a, 80b.

76. RAMBAM, YAD HA'KHAZAKA, Laws of the Sanhedrin, chap. 12:2.

77. SCHREIBER, *supra* note 73, at 269.

78. *Id.*

79. *See generally id.* at 277-78.

80. *See* RAMBAM, YAD HA'KHAZAKA, Laws concerning a Murderer and the Preservation of Life 2:4; N. Gerundi, *Derashot Ha'Ran*, Discourse No. 11; Y. Abarbanel, Com-

officials did not act, even the Jewish religious courts were empowered to execute or sanction one who was obviously a criminal, although the application of traditional Jewish law would have prevented conviction.[81]

With the destruction of the Jewish Commonwealth by the Romans and the dispersion of Jews from Israel throughout the world, Jews lost the power to inflict execution or serious physical sanctions even where they were permitted to govern themselves for other limited purposes, such as taxation.[82]

In the thirteenth century, however, there were occasions, particularly in Spain, where the king gave Jewish communities the power to pass a sentence of execution upon a criminal.[83] The execution would generally be carried out by royal officials.[84] It was at this point that Jewish law jurists came up against the problem of how to maintain public order when Jewish law made it nearly impossible to convict.

The focus of the Jewish public order problem concerned informers.[85] They would report the alleged violations of laws by Jews to local non-Jewish authorities. Their reports were often avidly listened to by the various local rulers of petty principalities, as is true of informers in police states in the contemporary world today. Those who were reported might be imprisoned, tortured or made to suffer otherwise.[86] The activities of the informers caused havoc in Jewish communities which were often subjected en masse to onerous penalties, including enormous fines, and even expulsion. As described by a historian regarding the Jewish community in medieval Spain:

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mentary to Deuteronomy 17:18, and to Judges 17, and 18:7; I. Horowitz, *Shnei Luhot Ha'Brit*, reprinted Jerusalem, 1972, vol. 3 at 186-87; Y. Loewe, *B'er Ha'Gola*, ch. 2; Y. Gershuni, *Kol Tzofayikh*, at 92 (1980) and his *Khok U'Mishpat*, at 9-15 (1988). For additional discussion and citations, *see* SCHREIBER, *supra* note 73, at 245-49, 258.

81. RAMBAM, *supra* note 80, at 2:4. Trials before the court using traditional religious law appear to have had as a main purpose, the expiation or atonement of the criminal and the community for the offenses of the defendant, rather than the maintenance of public order and safety. *See* SCHREIBER, *supra* note 73, at 276-78.

82. *See* SCHREIBER, *supra* note 73, at 292, 312.

83. *Id.* at 402, 405.

84. *Id.* at 405.

85. *Id.* at 383.

86. A. NEUMAN, THE JEWS IN SPAIN (1948); Kaufman, *The Jewish Informers in the Middle Ages*, 8 JEWISH Q. REV. 221 (1895).

> [t]he most dangerous criminal in the Spanish *Juderia* was the informer, or *Malasin*. He was despised as a traitor and dreaded as an enemy of society. The hatred which he inspired can be explained only by the panicky state of mind of a community which lived in constant dread of lurking danger . . . no one was too highly placed to be beyond his poisoned fangs. Men of leading importance in their communities — Jewish bailiffs, court physicians, diplomats and ministers of finance; distinguished rabbis who are universally beloved and revered, like Alfasi, Nissim Gerundi, Barfat, and Hasdai Crescas — were the targets of venomous denunciations. They were thrown into prison, their lives were in grave danger and, with their fate, the existence of their communities was at stake . . . .[87]

Murderers, thieves, and other offenders were also, although to a lesser extent, a public order concern of Jewish communities.[88]

But, how could public order be maintained in view of the doctrines of Jewish law which made it nearly impossible to convict deliberate and clandestine offenders? The issue was squarely faced and resolved by the Jewish jurists. Rabbi Shlomo ben Aderet (known by the acronym *Rashba*, 1235-1310) one of the outstanding Jewish jurists and religious leaders of that time, stated the matter quite candidly. "If . . . you establish everything in accordance with the laws of the Torah [traditional Jewish law], according to the laws of the Sanhedrin [the chief Jewish court], the world would be desolate, because murderers and their associates would multiply . . .",[89] or, as he recorded in another responsum, "for should you establish everything according to the laws of the Torah, and act only in accordance with how the Torah punished, . . . the result would be that world society would perish, for we would need witnesses and forewarning. . . . The result would be that the world would be desolate . . . ."[90] He accordingly ruled that many of the traditional requirements of Jewish law need not be applied. The decision and Rabbi Shlomo's approach were assented to by Rabbi Baruch ben Meir

87. NEUMAN, *supra* note 86, at 130, 132.

88. *See, e.g.* Yehudah ben Asher, Responsa, *Zikhron Yehuda*, No. 58; Yitzchok ben Sheshet, Responsa, *Rivaṣh*, No. 234-6.

89. SCHREIBER, *supra* note 73, at 380-83 (Trans. of a Responsum of Rabbi Shlomo ben Aderet, published by Kaufman in 8 JEWISH Q. REV. 228 (1895)).

90. Responsa *Rashba* vol. III, No. 393; *see also* vol. IV, No. 311.

of Rothenberg, an older contemporary of Rabbi Shlomo, an influential Jewish law scholar and, perhaps, the most renowned religious leader in Germany and France.[91] This decision was cited with approval by the authoritative codifier of the Jewish Code of laws, Rabbi Yosef Karo, and was widely accepted as binding in Jewish law.[92]

In sum, medieval Jewish law decision makers squarely faced the problem of a traditional fundamental law that was unsatisfactory in that it would not bring about desired results under the changed circumstances in which they found themselves. They thereupon candidly and openly decided to suspend application of traditional Jewish law doctrines. In fact, they turned traditional law on its head and abolished fundamental principles which required two eyewitnesses, forewarning, and numerous other provisions of law.[93] They found ample precedent and legal doctrine in Jewish law for this radical step.[94] These precedents and doctrines made Jewish law flexible enough to be applied under the changed circumstances in which they found themselves, and, also to be able to achieve the desired ends.[95] Unlike their contemporary non-Jewish jurists, medieval Jewish jurists resisted the temptation to resort to torture in order to convict criminal defendants. Torture would have violated basic dogmas and traditions in Biblical and Jewish law. These had constantly called for the reduction of corporal punishment and sufferings

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91. SCHREIBER, *supra* note 73, at 383.

92. Yosef Karo, Commentary *Beth Yosef* to Jacob ben Asher's *Tur*, *Hoshen Mishpat*, Laws Concerning Judges, Section 2. Karo also cites him in Section 388:8. For similar holdings see also Responsa Rabbi Moshe ben Nachman (known as *Ramban*, 1194-1270), No. 240, and 279; and Responsa *Rashba*, 1:612, 3:109; Y. Anatoli, *Malemed Ha'Talmidim*, pp. 71-72, Berlin, 1866; Y. M. Ginsberg, *Mishpatim Le'Yisrael*; p. 55 (1956); Mann, "*Skirah Historit al Dine Nefashot Bazman Hazeh*", *Hatzofeh le'Hakhmat Yisrael* 10:200, and in *Jewish Quarterly Review*, N. S. 10:120-130, 1920.

93. *See supra* notes 75-76 and Responsa of Rabbi Yehudah Ben Asher in *Zikhron Yehudah*, No. 58 (1946, 1968; Shlomo Luria, *Yam Shel Shlomo*, B.K; 8:6; Yitzkhok Ben Sheshet, Responsa *Rivash*, Sec. 251; Meir of Lublin, Responsa *Maharam Lublin*, Sec. 138; (author unknown), *Kalbo*, Sec. 116; R. Yerukham, *Mesharim*, Sec. 2, No. 51; Y. Ginzberg, *Mishpatim Le'Yisrael*, 55 ff. (1956).

94. SCHREIBER, *supra* note 73, at 234-35, 397-405.

95. These precedential doctrines included the authority to temporarily suspend laws in an emergency, and to view public order laws of non-Jewish states as binding upon Jews. Thus, these doctrines overrode otherwise applicable Biblical Law in addition to other principles which Jewish jurists were able to utilize to deal with the new circumstances in which they found themselves. *See* SCHREIBER, *supra* note 73, at 234-35.

and created a remarkable protective net around criminal defendants.[96]

Moreover, unlike the medieval and Canon law tradition where confession was the "queen of proofs," the use of confessions at trials in Jewish law was absolutely barred, whether or not voluntary.[97] Additionally, while confession of sins by man to his Maker is mandated as a penance in the Jewish religious tradition, confession to another person, or even confession in a loud voice so that another can hear, is prohibited to avoid embarrassment to the confessor or invasion of his privacy.[98] Also, Jews had long suffered horribly from the judicial tortures inflicted on them by the Roman judges in Palestine, and recoiled from its use.[99]

In sum, Jewish law decision makers and religious authorities in medieval Western Europe adopted an opposite tack from that adopted by the jurists who followed the Roman or Canon law traditions. Instead of purporting to retain traditional, but unsatisfactory fundamental laws while circumventing them in practice, Jewish law jurists took a very different path. They openly suspended the application of traditional Jewish law in order to be able to convict criminals and maintain public order but re-

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96. *Id.* at 399.

97. TALMUD, B. SANHEDRIN 9b; RAMBAM, LAWS OF THE SANHEDRIN 18:6; A. KIRSCHENBAUM, SELF-INCRIMINATION IN JEWISH LAW (1970).

98. TALMUD, Yoma, 21; Rashi ad Loc; Sotah 32b; Yoma 86b; Shulkhan Arukh, O.H. § 607(2).

99. Coercing confessions by whipping is mentioned in the Talmud (Baba Batra, 167a, Baba Meziah 24a, *Moed Katan* 16a), and in a few medieval Jewish Law decisions, (see e.g., Shimon Ben Tzemakh Duran, *Responsa Tashbatz*, Sec. 2, No. 224, and Sec. 3, No. 168; responsum of Asher Ben Yekhiel included in Yehudah Ben Asher's *Zikhron Yehudah* at p. 53; *Responsa Rosh*, Sec. 68:21; Shlomo Ben Aderet, *Responsa Rashba*, Sec. 1, No. 1210; Yitzkhak Ben Sheshet, *Responsa Rivash*, No. 484; Shmuel D. Medine, *Responsa Mahrashdam H.M.* No. 360; Avraham Halevl, *Responsa Ginat Veradim*, Sec. 3:9; Yaakov Ben Asher, *Tur H.M.* Sec. 42. A computerized search of more than 50,000 Jewish Law responsa, however, covering the last millennium has uncovered only the aforementioned handful of decisions which mention this practice. Because of the paucity of adequate information, one can only guess as to whether such whipping was practiced only sporadically or frequently, under what circumstances, where, and when. It seems clear, however, that Jewish judges and decision makers did not apply the gruesome tortures which were routinely inflicted by their non-Jewish counterparts.

For the legal validity of coerced acts (other than confessions) in areas such as commerce, marriage, divorce or in sacerdotal matters, *see* B. TALMUD, Baba Kama 62a, Baba Batra 48b, Rosh Ha'shana 6a, 28a, Yebamot 106a, Kiddushin 50a, Erukhin 21a.

sisted the temptation to introduce torture.

IV. The Exclusionary Rule in the United States

The exclusionary rule, which bars the use at trial of illegally obtained evidence or confessions, originated more than one hundred years ago. In *Boyd v. United States*,[100] the United States Supreme Court concluded that admitting into evidence papers that had been acquired through an illegal search and seizure constituted a violation of the fifth amendment of the United States Constitution, which guarantees against compulsory self-incrimination.[101] Nearly thirty years later, in *Weeks v. United States*,[102] the Court unanimously reversed the conviction of a gambler because papers, which had been illegally seized in violation of the fourth amendment, had been admitted into evidence.[103] Again, only a few years later, in *Silverthorne Lumber Co. v. United States*,[104] the Supreme Court, in an opinion written by Justice Holmes, held that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way" is that "not merely evidence so acquired shall not be used before the Court but that it shall not be used at all" and that this rule is "*constitutionally required.*"[105] Just one year later, in *Gouled v. United States*,[106] the Supreme Court once more reiterated its view and effectively overruled an earlier case, *Adams v. New York*.[107] Subsequently, it extended the exclusionary rule to apply not only to the illegal seizure of private papers, but also to contraband illegally seized from a defendant's home.[108] Thus, the rules set forth in *Boyd* and *Weeks* became an established principle requiring the exclusion of illegally obtained evidence at federal trials.

Most criminal trials, however, took place in state courts,

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100. 116 U.S. 616 (1886).
101. *Id.* at 638.
102. 232 U.S. 383 (1914).
103. *Id.* at 398.
104. 251 U.S. 385 (1920).
105. *Id.* at 392 (emphasis added).
106. 255 U.S. 298 (1921).
107. 192 U.S. 585 (1904).
108. *See* Agnello v. United States, 269 U.S. 20 (1925) (where a can of cocaine was illegally seized).

while the foregoing cases dealt only with the use of evidence in federal court. In *Wolf v. Colorado*,[109] however, the Supreme Court held that the exclusionary rule also applied to the states through the due process clause of the fourteenth amendment.[110] In *Mapp v. Ohio*,[111] the Court went further and ruled that the exclusion of illegally seized evidence is *constitutionally* required in state and federal courts.[112] Even though other steps were taken to punish offending police officers and to deter illegal seizure, these courts could not admit the tainted evidence. Justice Clark stated explicitly that "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments."[113] In a concurring opinion, Justice Black asserted that "when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually *requires* the exclusionary rule."[114] Thus, the limitations on state actions imposed by the fourteenth amendment were held to be coextensive with the limitations placed on the federal government by the fourth amendment.[115]

Both prior to and following *Mapp*, the exclusionary rule has been widely applied in a host of decisions by the United States

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109. 338 U.S. 25 (1949). The Court ruled that the security of a person's privacy against unlawful intrusion by the police is "implicit in the concept of ordered liberty." *Id.* at 27 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). Nevertheless, the Court did not at that time mandate that states were always required to exclude evidence seized unlawfully. They could, instead, use other equally effective remedies to deter illegal seizures. *Id.* at 31. Subsequently, however, the Court ruled that evidence illegally obtained by state officials could not be used in federal courts, thus overruling the so called "silver platter" doctrine. *See* Elkins v. United States, 364 U.S. 206 (1960); *see also* Byars v. United States, 273 U.S. 28 (1926).

110. *Wolf*, 338 U.S. at 33.

111. 367 U.S. 643 (1961).

112. *Id.* at 660.

113. *Id.* at 657. *See also* Kamisar, *Does (Did) (Should) The Exclusionary Rule Rest On A "Principled Basis" Rather Than An "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983).

114. *Mapp*, 367 U.S. at 662 (emphasis added). Earlier United States Supreme Court decisions had already asserted that the exclusionary rule is constitutionally mandated. *See supra* notes 100-08 and accompanying text.

115. Justice Potter Stewart, *The Road to Mapp v. Ohio and Beyond: the Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1379, (1983).

Supreme Court, and, of course, by federal district and appellate courts. For example, the exclusionary rule has been applied to violations of the fifth amendment,[116] sixth amendment,[117] to behavior that shook the conscience,[118] to confessions,[119] and statutory provisions.[120] The exclusionary rule covers not only the direct products of illegal government conduct, but also applies to evidence ultimately derived from illegal conduct, often referred to as the "fruit of the poisonous tree."[121] The Supreme Court later reiterated in *Mapp* that the rule was a constitutional one and held that "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments."[122] Thus, in the many years since the birth of the exclusionary rule, it became indisputable that "the exclusionary rule is now part of our legal culture,"[123] and a fundamental part, at that.

V. The Retreat from the Exclusionary Rule

The exclusionary rule faced mounting criticism, particularly in the years following the Court's decision in *Mapp v. Ohio*.[124] It

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116. *See, e.g.*, Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); Malloy v. Hogan, 378 U.S. 1 (1964).

117. *See, e.g.*, Nix v. Williams, 467 U.S. 431, 442 (1984); United States v. Wade, 388 U.S. 218, 237-38 (1967); United States v. Brown, 699 F.2d 585, 588-93 (2d Cir. 1983).

118. *See, e.g.*, Rochin v. California, 342 U.S. 165 (1952).

119. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Massiah v. United States, 377 U.S. 201 (1964).

120. *See, e.g.*, Nardone v. United States, 308 U.S. 338, 339-40 (1939).

121. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471, 487-88 (1963); Nardone v. United States, 308 U.S. 338, 341 (1939); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). The term "fruit of the poisonous tree" is derived from Justice Frankfurter's opinion in *Nardone*, 308 U.S. at 341.

122. Mapp v. Ohio, 367 U.S. 643, 657 (1961).

123. *See* Stewart, *supra* note 115, at 1386.

124. *See e.g.*, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting); COMPTROLLER GENERAL, UNITED STATES GENERAL ACCOUNTING OFFICE, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS, Rep. No. GGD-79-45 (April 19, 1979); National Institute of Justice, United States Department of Justice, *The Effects of the Exclusionary Rule: A Study in California* (1982); GRISWOLD, SEARCH AND SEIZURE A DILEMMA OF THE SUPREME COURT, (1975); POLICE POWER AND INDIVIDUAL FREEDOM: THE QUEST FOR BALANCE, 75-222 (C. Sowle ed. 1962); SCHLESINGER, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE (1977); Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1 (1964); Canon, *Is The Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681 (1973-74); Inbow, *Restrictions in the Law of Interrogation and Confessions*, 52 NW. U.L. REV. 77 (1957); Oaks, *Studying the*

has been argued that "a decision to exclude probative evidence with the result that a criminal goes free to prey upon the public should shock the judicial conscience even more than admitting the evidence,"[125] and that "the conscience of the Court ought to be at least equally shaken by the idea of turning a criminal loose on society."[126]

Professor Dallin N. Oaks, for example, examined twelve days of proceedings of the courts.[127] He found that motions to suppress evidence were filed in thirty-four percent of the narcotics prosecutions and in thirty-six percent of concealed weapons prosecutions. Ninety-seven percent of the narcotics motions and two-thirds of the concealed weapons motions were granted. In every instance in which the motion was successful, the case was subsequently dismissed because prosecution was not possible where the illegal object could not have been introduced into evidence. The result of the exclusionary rule was that one-third of the narcotics cases and one-fourth of the weapons cases were never tried.[128]

The study by the National Institute of Justice[129] disclosed that numerous cases involving illegal searches were excluded from prosecution even *before* they reached the stage of a suppression hearing. In California, between 1976 and 1979, nearly three thousand felony drug cases were not prosecuted because of the exclusionary rule.[130] Nearly half of defendants in those cases who were not prosecuted in 1976 and 1977 because of the exclusionary rule problems were arrested again within two years on

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Exclusionary Rule in Search and Seizure, 37 U. CHI. L. REV. 665 (1970); Spiotto, *The Search and Seizure Problem — Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule*, J. POLICE SCI. & AD 36 (1973); Wingo, *Growing Disillusionment With The Exclusionary Rule*, 25 SW. L.J. 573 (1971); Wright, *Must The Criminal Go Free If The Constable Blunders?*, 50 TEX. L. REV. 736 (1972); Law Reform Commission of Canada, *Report on Evidence* 15-45 (1975); Rosenblatt, *A Legal House of Cards*, HARPER'S, July, 1977 at 18; WALL ST. J., April 3, 1991 at A21, col.3, March 28, 1991 at A14, col. 1, July 12, 1971 at 8, col. 1.

125. United States v. Mount, 757 F.2d 1315, 1323 (D.C. Cir. 1985) (Bork, J., concurring).

126. McGuigan, *An Interview With Judge Robert H. Bork*, JUD. NOTICE 1, 1-6 (June 1, 1986).

127. *See* Oaks, *supra* note 124, at 665.

128. *Id.*

129. *See* National Institute of Justice, *supra* note 124.

130. *Id.* at 1, 2, 12, 13, 18.

new charges.[131] Moreover, it has been suggested that prosecutors often entered into lenient plea bargains rather than run the risk that key evidence would be suppressed.[132]

Additionally, as Chief Justice Burger pointed out, "[t]his evidentiary rule is unique to American jurisprudence. Although the English and Canadian legal systems are highly regarded, neither has adopted our rule."[133] As Justice Frankfurter had pointed out, "[o]f 10 jurisdictions within the United Kingdom and the British Commonwealth of Nations which have passed on the question, none has held evidence obtained by illegal search and seizure inadmissible."[134] The argument that the United States is alone among all the other countries of the civilized world in applying an exclusionary rule was bolstered by the fact that the rule was not employed by United States courts until approximately one hundred years after the adoption of the fourth amendment.

Moreover, it was argued that the rule has not, in fact, deterred illegal conduct.[135] Oaks, in his study, concluded that "[a]s a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure. . . . The harshest criticism of the rule is that it is ineffective."[136] Spiotto, who made a comparative study of the exclusionary rule with an alternative rule existing in Canada, concluded that:

> [e]mpirical study (of narcotics and weapons cases) indicates that, over a 20-year period in Chicago, the proportion of cases in which there were motions to suppress evidence allegedly obtained illegally increased significantly. This is the opposite result of what would be expected if the rule had been efficacious in deterring police misconduct.[137]

The rule has also been criticized as hampering gun control

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131. *Id.* at 2, 10, 14-18.

132. *Id.* at 1-2.

133. Bivens v. Six Unknown Named Agents of The Federal Bureau of Narcotics, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting); *see also* Mitchell, *The Supreme Court of Canada on the Exclusion of Evidence in Criminal Cases under Section 24 of the Charter*, 30 CRIM. L.Q. 165 (1987).

134. Wolf v. Colorado, 338 U.S. 25, 30 (1949).

135. *See* Oaks, *supra* note 124, at 755.

136. *Id.* at 755.

137. *See* Spiotto, *supra* note 124, at 36-37.

by permitting criminals to carry guns free of the fear of being stopped on the street unless they do something drastically suspicious.[138]

Another drawback of the rule is that it does not discriminate between the degree of culpability of the police officer and the degree of harm to the victim of the illegal search. Similarly, it does not make adequate distinction between minor offenses and more serious crimes.[139] Moreover, it allegedly encourages policemen to perjure themselves regarding a search in order to prevent the evidence from being barred.[140] It is even claimed that it encourages corrupt policemen to stage phony raids on criminal establishments in deliberate violation of the fourth amendment and other constitutional provisions. This would be done in order to immunize the persons and premises raided, while giving the officers the appearance of being actively engaged in a crusade against crime.[141]

These criticisms began to be reflected in court opinions. "The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice."[142] The rule may "generat[e] disrespect for the law and [the] administration of justice."[143] It is a "drastic and socially costly course."[144] As Justice Cardozo noted, "the criminal is to go free because the constable has blundered."[145] Justice Cardozo further stated that, "[a] room is searched against the law, and the body of a murdered man is found. . . . The privacy of the home has been infringed, and the murderer goes free."[146] Justice Powell expounded:

> [t]he costs of applying the exclusionary rule even at trial and on

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138. Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214, 224 (1978).

139. *Id.* at 226.

140. *Id.*

141. *See supra* note 138.

142. Stone v. Powell, 428 U.S. 465, 490 (1976).

143. United States v. Leon, 468 U.S. 897, 908 (1984).

144. Nix v. Williams, 467 U.S. 431, 442 (1984).

145. People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

146. *Id.* at 23-24, 150 N.E. at 588.

> direct review are well known: . . . the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant . . . . Application of the rule thus deflects the truthfinding process and often frees the guilty.[147]

It was also felt that the rule resulted in justice being applied in an uneven manner. The Court barred illegally seized evidence, while permitting trial of defendants who had been illegally kidnapped and brought to trial.[148]

The Supreme Court began a withdrawal.[149] Already in 1920, the Court had held that illegally discovered evidence could be admitted if it was also discovered from an independent legal source,[150] or the connection between the illegal conduct and the challenged evidence was "so attenuated as to dissipate the taint."[151]

The retreat from the exclusionary rule was plainly stated in the words of Justice Harlan:

> From the several opinions that have been filed in this case it is apparent that the law of search and seizure is due for an overhauling. . . . I would begin this process of re-evaluation by overruling *Mapp v. Ohio* and *Ker v. California* . . . . In combination *Mapp* and *Ker* have been primarily responsible for bringing about serious distortions and incongruities in this field of constitutional law.[152]

The withdrawal from the exclusionary rule as first enunciated has been long and almost steady. In 1965, the Supreme Court, weighing the social costs of applying the rule against its social benefits, held that the exclusionary rule would not be applied retrospectively in cases finally decided before *Mapp*.[153]

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147. *Stone*, 428 U.S. at 489-90.

148. Frisbie v. Collins, 342 U.S. 519 (1952); Mahon v. Justice, 127 U.S. 700 (1888); Ker v. Illinois, 119 U.S. 436 (1886). The proposed Federal Criminal Code backed by the Bush Administration would also restrict application of the exclusionary rule.

149. *See* JONES, THE LAW OF CRIMINAL PROCEDURE 251 (1981); Nelson, *The Paradox of the Exclusionary Rule*, 96 THE PUB. INTEREST 117 (Summer 1989).

150. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

151. Nardone v. United States, 308 U.S. 338, 341 (1939); *see also* Wong Sun v. United States, 371 U.S. 471, 488 (1963).

152. Coolidge v. New Hampshire, 403 U.S. 443, 490 (1971) (citations omitted).

153. Linkletter v. Walker, 381 U.S. 618, 639 (1965).

In *Cady v. Dombrowski*,[154] the Court refused to allow the exclusionary rule to exclude evidence, such as blood stained articles in the trunk of a car, which had been used to convict Dombrowski of first degree murder.[155] This holding seemed to directly contradict the Court's prior holding in *Preston v. United States*.[156] The Court's decision seemed to be motivated by its preference to have a brutal murderer imprisoned, rather than to reprimand the police for searching the car in which the evidence was found.

In 1974, the Supreme Court began to erode the constitutional basis for the exclusionary rule by holding, "[i]n sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[157] If judges, not the Constitution, had created the rule, then judges could change it. The Court, accordingly, held that the use of illegally seized evidence constituted "no new Fourth Amendment wrong"[158] and that the rule should be "restricted to those areas where its remedial objectives are thought most efficaciously served."[159]

In 1984, the Court again struck at the claimed constitutional basis of the rule and held that the rule is "a judicially created remedy . . . rather than a personal constitutional right of the party aggrieved."[160] Similarly, the Supreme Court held that the rule did not apply to grand jury proceedings.[161]

Subsequently, the Court held that the rule could not be

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154. 413 U.S. 433 (1973).

155. *Id.* at 437-38.

156. 376 U.S. 364 (1964) (holding a warrantless seach of an automobile to be unconstitutional and that items seized therein were inadmissible evidence).

157. United States v. Calandra, 414 U.S. 338, 348 (1974).

158. *Id.* at 354.

159. *Id.* at 348.

160. United States v. Leon, 468 U.S. 897, 906 (1984) (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)). Justice Brennan, dissenting, argued that the exclusionary rule is constitutionally required. Otherwise, it could not be imposed upon the states via the fourteenth amendment. *Id.* at 940. Some hold that while it is not a constitutional right, it is a constitutional remedy and that the constitution requires application of the exclusionary rule, particularly, if there are no other adequate means to ensure that the fourth amendment is obeyed. *See* Stewart, *supra* note 115, at 1384; Kamisar, *supra* note 113.

161. *Calandra*, 414 U.S. at 351-52.

used to challenge a state conviction where the state provided an opportunity for full and fair litigation of a fourth amendment claim.[162] The Court eventually held that the rule did not apply to civil proceedings[163] and the Court even began applying additional restrictions on the rule to criminal trials.[164] In 1980, for example, it held that the rule would not apply for the purpose of impeachment in a criminal trial.[165] The Supreme Court even permitted the testimony of a witness whose identity was discovered in an unconstitutional search.[166]

The Court went still further. In *United States v. Payner*,[167] it applied a broad "no standing" rule to deny application of the exclusionary rule.[168] Accordingly, the evidence in *Payner*, although illegally gathered, could be used to convict.[169] Although the Court had previously applied a "no standing" rule to limit application of the exclusionary rule,[170] it had granted standing very liberally.[171] Now, the defendants had to prove both a possessory interest in the evidence seized and a legitimate expectation of privacy in order to have standing. The Court reached this

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162. Stone v. Powell, 428 U.S. 465, 494-95 (1976). Some have viewed this decision as an important portent of the Supreme Court's gradual abandonment of the exclusionary rule. "The course of the future was unveiled in *Powell*. The Supreme Court plans to abandon the contents of the exclusionary rule, *seriatum*, [one by one] . . . ." D. JONES, THE LAW OF CRIMINAL PROCEDURE, 233, 260 (1981).

163. INS v. Lopez-Mendoza, 468 U.S. 1032, 1051 (1984); *see also* United States v. Janis, 428 U.S. 433, 460 (1976); JONES, supra note 162, at 260 ("Revealed one more link in its apparent plan to abandon the exclusionary rule: in upholding a seizure of evidence pursuant to a defective warrant").

164. *See* United States v. Havens, 446 U.S. 620, 627-28 (1980).

165. *Id.*

166. United States v. Ceccolini, 435 U.S. 268 (1978). A police officer had entered a florist shop to chat with the salesclerk. Upon noticing an envelope on the cash register with some money protruding, he opened the envelope and observed that it contained betting slips as well. The policeman notified federal gambling authorities. Eventually the owner of the store, Mr. Ceccolini, was convicted. The Supreme Court ruled that the testimony of the salesclerk should not be suppressed since this, "could not have the slightest deterrent effect" on other policemen. *Id.* at 280.

167. 447 U.S. 727 (1980).

168. In *Payner*, the Internal Revenue Service caused a bank officer to be lured into an apartment where his briefcase was rifled, and the contents later used to convict a depositor of falsifying his tax return. *Id.* at 730. The Court held that since the bank officer had committed no crime, application of the exclusionary rule would not benefit him. *Id.* at 735.

169. *Id.* at 735.

170. *See* Alderman v. United States, 394 U.S. 165 (1969).

171. Nelson, *supra* note 149, at 125.

conclusion even though the lower court had found that "the Government affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties . . . ."[172]

Another important step in the retreat was the Supreme Court's decision in *Nix v. Williams*,[173] which established a new exception to the exclusionary rule. "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rational has so little basis that the evidence should be received."[174] This meant that once a lawful search was started with a high probability of success, the Court would excuse violation of constitutional requirements. Here, too, the Court appeared to be motivated by its desire to admit the challenged evidence — the corpse of a ten-year old girl murdered by the defendant. Justice Stevens stated in his concurring opinion, "there can be no denying that the character of the crime may have an impact on the decisional process."[175]

At the same time, the Court took another step backwards and fashioned a "good faith" exception to the exclusionary rule. After listing the various ways in which the exclusionary rule frustrates justice, particularly because of the criminals freed by the rule, the Court commented that "the small percentages with which they deal mask a large absolute number of felons who are released because the cases against them were based in part on illegal searches or seizures."[176] The Court, accordingly, permitted the use of illegally seized evidence, although based upon an invalid search warrant where the police were objectively reasonable in relying on the validity of the warrant.

The good faith exception even permitted the use of illegally secured evidence where the warrant did not apply to the article seized and neither the judge nor the policemen had actually read the warrant.[177] The Court nevertheless held that police reliance

172. *Payner*, 447 U.S. at 730.
173. 467 U.S. 431 (1984).
174. *Id.* at 444.
175. *Id.* at 451.
176. United States v. Leon, 468 U.S. 897, 907 n.6 (1984).
177. *Id.* at 907 n.6.

on the warrant was "objectively reasonable."[178] The "good faith" doctrine was later applied to permit use of illegally seized evidence which had been obtained in reliance upon a statute which authorized warrantless searches, even though the statute was later found to be unconstitutional.[179]

Only last year, in *New York v. Harris*,[180] the Court held that the exclusionary rule would not apply to evidence obtained by policemen who unlawfully entered a defendant's home without a warrant in violation of *Payton v. New York*.[181] The Court further held, based on the rationale of *Ceccolini*, "we have declined to adopt a '*per se* or "but for" rule' that would make inadmissible any evidence, whether tangible or live-witness testimony, which somehow came to light through a chain of causation that began with an illegal arrest."[182]

The Court has also recently retreated from the long-held view that admission of a coerced confession into evidence violated due process requiring automatic reversal of conviction.[183] The Court held use of the coerced confession at trial could be regarded as harmless error.[184] Moreover, the Supreme Court recently overturned two prior decisions and narrowed the exclusionary rule further, holding that the rule did not exclude evi-

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178. *See* Massachusetts v. Sheppard, 468 U.S. 981, 988 (1984).

179. *See* Illinois v. Krull, 480 U.S. 34, 349-55 (1987).

180. 110 S. Ct. 1640 (1990).

181. 445 U.S. 573 (1980). In *Harris*, the policeman arrested the defendant illegally, and took him to the police station where he admitted that he had killed someone. The Court held that his station house admission was admissible on the ground that the statement, while the product of an arrest and custody which was illegal, "was not the fruit of the fact that the arrest was made in the house rather than some place else." *Harris*, 110 S. Ct. at 1644. The Court emphasized that "the penalties visited upon the government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve." *Id.* at 1642-43 (quoting United States. v. Ceccolini, 435 U.S. 268, 279 (1978)).

182. *Harris*, 110 S. Ct. at 1642 (quoting United States. v. Ceccolini, 435 U.S. 268, 276 (1978)). For a detailed examination of "exceptions" to the exclusionary rule allowed by the Supreme Court, *see* Note, *The Inevitable Discovery Exception, Primary Evidence, And The Emasculation Of The Fourth Amendment*, 55 FORDHAM L. REV. 1221 (1987).

183. Arizona v. Fulminante, 111 S. Ct. 1246 (1991). As indicated in the dissenting opinion, it had generally been assumed as axiomatic that use of a coerced confession in a criminal trial was ground for automatic reversal of conviction based upon decisions like *Chapman v. California*, 386 U.S. 18 (1967). *Fulminante*, 111 S. Ct. at 1258.

184. *Fulminante*, 111 S. Ct. at 1256.

dence seized in warrantless searches of automobiles and containers in such automobiles. The evidence could be admitted where there was probable cause to believe that the containers in the automobile held contraband or evidence.[185]

In sum, the United States Supreme Court has, without admitting it, functionally narrowed and severely modified the exclusionary rule.[186] It has done this even though the doctrine had become an integral and fundamental part of United States constitutional law.

Which, if either, paradigm has the Supreme Court followed: Jewish law, the approach of the medieval non-Jewish jurists, or neither? On the one hand, the Supreme Court has not admitted that it was backtracking and functionally changing the law. Like the medieval jurists, who purported to continue to apply established doctrine and refused to change the law, the Supreme Court adheres outwardly to the pose that it, too, continues to apply the same exclusionary rule. It merely defines and adds details to the scope of the rule. In fact, however, as detailed above, it is obvious that a very substantial backtracking has occurred.

Unlike the medieval Jewish jurists, the Court masks its retreat from the exclusionary rule and refuses to admit that it is gradually abandoning the rule — at least to a significant extent. Here, too, this masking by the Court of its actions follows a well-established practice in American law.[187]

On the other hand, it must be recognized that the Supreme Court, unlike its medieval counterparts, refuses to continue to blindly apply a rule which it feels to be unjust and contrary to the interests of society. Instead, in what seems to be somewhat of a middle ground between the two models of medieval non-

185. California v. Aceveto, 111 S. Ct. 1982 (1991).

186. This is not to say that the retreat has proceeded in a straight line. There have been numerous zigs and zags. *See, e.g.*, the recent decision in Minnick v. Mississippi, 111 S. Ct. 486 (1990) (excluding a confession made after a prisoner's lawyer had departed).

187. *See* M. REISMAN & A. SCHREIBER, JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW, 189 (1988). The Supreme Court's decision in Roe v. Wade, 410 U.S. 113 (1973), may be a good example. The Court purported to base its decision, striking down state anti-abortion statutes, on the right to privacy. In fact, based upon the Court's statements in the decision, and from the logical flaws in the decision, it is arguable, that the Court was motivated by entirely different factors, and desired, essentially, to mediate between conflicting claims of various groups in the United States. *See* REISMAN & SCHREIBER, *supra*, at 196.

Jewish and Jewish jurists, the Court purports to adhere to the exclusionary rule, while, in practice, it modifies it.[188] The Court is extremely sensitive to the need for protection from the dangers of overreaching by government officials. Accordingly, it seeks to shape the law to meet the changing needs of society by sheltering it from criminals, while limiting governmental intrusions.

In sum, the Supreme Court appears to follow neither of the medieval paradigms dealing with an unsatisfactory fundamental law, but strikes out in a direction of its own. Its approach, however, seems closer to that of the medieval non-Jewish jurists who also circumvented the law in practice for what they believed to be in the better interests of society, but refused to admit it.

VI. Afterword

This article has focused on torture and coerced confessions in the Middle Ages, and on the exclusionary rule, but not torture, in the United States today. It is not meant to imply, however, that forms of torture and coerced confessions are not a contemporary phenomenon as well, and that these were confined to the medieval and ancient world. On the contrary, apart from the brutal tortures that are practiced in most countries of the world today, where dictators or oligarchies rule, there are disturbing echoes of the medieval practices in civilized western countries and even in the United States.[189]

In many states in Western Europe that use the inquisitorial system, persons may still be arrested and incarcerated for long periods of time for interrogation. Extended confinement, often under conditions of privation, can shatter resolve and induce confessions, sometimes under the hope of better treatment or of being dealt with leniently.

In the United States, too, as has been persuasively ar-

188. For the long legal tradition that the law should be made to appear stable and unchanging, *see* J. FRANK, LAW AND THE MODERN MIND, 48 (1936). It is motivated by many factors, including the desire to promote the illusion that the law is stable in order to avoid upsetting the public and making it apprehensive, thus inhibiting commerce because of fears of constantly shifting rules.

189. For discussion of the practice of torture today and historical contexts, *see* THE DEATH PENALTY AND TORTURE (F. Bockle and J. Pohol ed. 1979).

gued,[190] plea bargaining may compel even an innocent defendant to confess to a lesser crime in order to avoid the possibility of conviction of a much more serious crime which would result in long imprisonment and stigmatization.[191] So too, the practice of granting immunity or promising a lenient sentence to a defendant in order to induce him to implicate bigger fish may coerce the defendant to confess falsely and incriminate others, in order to escape more severe sanctions. More recently, RICO prosecutions, with their threat of draconian measures before trial (such as seizure of assets of financial institutions, which would compel them to cease operations and face complete financial destruction), may have compelled confessions by those who would otherwise contest the criminality of their acts.[192] Moreover, the use of coerced confessions at trial may now be regarded as harmless error and no longer requires automatic reversal of conviction.[193]

Thus, confessions are still being coerced today, even though eyewitness testimony is no longer required, circumstantial evidence may be used, and we do not have an inquisitorial system of trials. The motive is the very same one that contributed to torture in the Middle Ages — the fear that trial without the forced confession would not result in a conviction. Since we are civilized, however, our methods have improved. They are more genteel and sophisticated than those of our medieval forebears. But do they differ in moral quality?

We continue to carry baggage from our past which merits close examination and introspection.

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190. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); Langbein, *Torture and Plea Bargaining*, *supra* note 1.

191. Alschuler, *supra* note 190. Alschuler reports the striking example of a defendant charged with kidnapping and forcible rape. His attorney was convinced that he was innocent and would be acquitted at trial. The defendant, nevertheless agreed to a guilty plea of simple battery, stating "I can't take the chance with a trial." *Id.* at 61.

192. *See, e.g.*, Crovitz, *Prosecutors Must Beware 'Cooperation' as Perjury*, WALL ST. J., Mar. 27, 1991, at A15, col. 3 (regarding problems with, and unreliability of, RICO - induced testimony in such well known prosecutions as the Wedtech, Michael Milken, Princeton/Newport, and other similar cases).

193. Arizona v. Fulminante, 111 S. Ct. 1246 (1991).