Prohibition's Fourth Amendment Confessions Rule

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Brown v. Mississippi is one of the most famous cases decided by the Supreme Court, involving the most infamous police interrogation in American history.[1] Three black sharecroppers were sentenced to hang for murder based on confessions extracted by lengthy periods of whipping and hanging—treatment one of their tormenters described as "not too much for a Negro."[2] The Court held that the defendants' coerced confession was inadmissible—a decision Michael Klarman has described as the Supreme Court's efforts in early twentieth century criminal procedure to ensure that courts in the Deep South fairly evaluated a defendant's guilt, and didn't maintain one system for white defendants and a less-protective one for black defendants.[3] There is an extraordinary intuitive appeal to Professor Klarman's explanation. *Brown*, the Court's case to review an interrogation by state officials, involved three potentially innocent African American men who were condemned to die based on evidence discovered through torture—torture inflicted by duly appointed law enforcement officers who had no shame in admitting their acts in open court.

Something other than innocence and equal protection concerns, however, appear to animate *Brown v. Mississippi*. The lower court's indifference to state-sanctioned violence in *Brown* was an outlier.[4] The Mississippi Supreme Court had demonstrated considerable concern about interrogation practices used against African Americans in the first quarter of the twentieth century,[5] while tortured interrogations were neither uncommon nor limited to either the Deep South or to

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1 *See, e.g.,* J. MICHAEL MARTINEZ, THE GREATEST CRIMINAL CASES: CHANGING THE COURSE OF AMERICAN LAW 63–72 (Praeger 2014).

2 Brown v. Mississippi, 297 U.S. 278, 284 (1936).

3 Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 49, 69, 77 (2000).

4 This idea has been suggested previously. *See* OTIS H. STEPHENS, JR., THE SUPREME COURT AND CONFESSIONS OF GUILT 37–38 (U. Tenn. Press 1973) ("The highest courts in various southern states [were not] altogether unwilling to condemn the use of such police methods against the Negro community."); Wilfred J. Ritz, *State Criminal Confessions Cases: Subsequent Developments in Cases Reversed by the U.S. Supreme Court and Some Current Problems*, 19 WASH. & LEE L. REV. 202, 204 (1962) ("It is also possible the *Brown v. Mississippi* case was something of a freak, a unique case of physical violence that slipped through the judicial screen. Prior to the *Brown* decision, Mississippi had reversed convictions based on confessions obtained by physical violence. Other states were following the same rule.").

5 *See* discussion at note 129 *infra* and accompanying text.

black suspects.[6] *Brown* and the Supreme Court's interrogation cases that followed were part of a new approach to criminal procedure: discouraging unacceptable police practices by denying the prosecution the opportunity to use evidence so derived. We typically think of the Supreme Court first requiring the states to adopt the exclusionary rule in the 1961 case of *Mapp v. Ohio*.[7] But the idea that evidence must be excluded to deter misconduct gained traction in state cases involving illegal searches in the 1920s during Prohibition, and was first imposed on the states by *Brown v. Mississippi* in 1936.

In this essay, I argue that the sympathies the *Brown* decision evoked against the villains of the Old Confederacy provided the Supreme Court an ideal vehicle to reshape confessions law to mirror developments in search and seizure law. *Brown* appears to have been driven by the single-minded deterrent concern that would come to define the Fourth Amendment's exclusionary rule, even before the Court identified deterrence as a rationale for the exclusionary rule. Perhaps not coincidentally, it did so at a time when police were increasingly using "third degree" tactics against black suspects.[8] *Brown*, though, does not appear to have been driven by a concern that appellate courts, North or South, could not be trusted to fairly apply the standards relating to the admissibility of confessions. Instead, the Supreme Court appears to have found the confessions rule, as it existed in the 1930s, to be insufficient to the task of preventing widespread torture in interrogation rooms, requiring the strong deterrent approach courts had taken to prevent unlawful physical searches.

The history of the exclusionary rule—at least in federal court—is quite familiar. In *Boyd v. United States,* the Supreme Court in 1886 introduced to federal law the idea that illegally obtained evidence was inadmissible, solely because of the manner of the discovery of the evidence.[9] The significance of *Boyd* itself is justifiably questioned.[10] Versions of the exclusionary rule existed in state courts decades earlier[11] and the rationale behind *Boyd* was almost immediately repudiated by the Court. In finding that subpoenaed records were inadmissible in a forfeiture proceeding, the Court found that "the Fourth and Fifth Amendments run almost into

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[6] *See* Jeffrey S. Adler, *The Greatest Thrill I Get is When I Hear a Criminal Say, 'Yes, I Did It': Race and the Third Degree in New Orleans, 1920–1945*, 34 LAW & HIST. REV. 1, 8–12 (2016) (describing nationwide problem of tortured confessions).

[7] *See, e.g.*, 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, 1372 (1983).

[8] *See* Adler, *supra* note 6 at 4–6.

[9] Boyd v. United States, 116 U.S. 616 (1886); TRACEY MACLIN, THE SUPREME COURT AND THE FOURTH AMENDMENT'S EXCLUSIONARY RULE 3 (Oxford U. Press 2013).

[10] *See, e.g.,* Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 49 STAN. L. REV. 555, 578 (1996) (observing that the theory behind *Boyd* "probably strikes the contemporary reader as archaic, and perhaps wrong.").

[11] *See* Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 GONZ. L. REV. 1 (2009–2010).

each other," that obtaining these physical documents was unreasonable because the holder of the records would be forced to incriminate himself.[12] Within two decades, the Court had rejected the idea that turning over documents to federal investigators amounted to a Fourth Amendment violation, [13] but part of the *Boyd* opinion would be resurrected. The Fourth and Fifth Amendments would again run into each other during Prohibition. The regulation of confessions would, for the first time, be justified on the same grounds as regulating search and seizure, and that principle would be extended to the states.

Seeing extraordinary backlash against searches for alcohol during National Prohibition, state courts became comfortable with an idea that had not previously resonated with them—that unlawfully obtained physical evidence should be excluded from criminal trials to deter subsequent police misconduct. An early version of this evidentiary principle had gained traction in some state courts in the 1850s, when many state legislatures introduced short-lived prohibitory laws.[14] National Prohibition in the 1920s, however, caused much greater consternation. Unlike in the 1850s, there were large police departments in the 1920s charged with the enforcement of liquor laws.[15] Vigilante groups unknown in the 1850s—the Law and Order League and the Ku Klux Klan—were assisting in the effort.[16] Excluding reliable evidence in criminal cases seemed then, as it seems to many now, antithetical to fact-finding mission of courts, but drastic times called for drastic measures. Eighteen of the twenty-four states to adopt the exclusionary rule did so during Prohibition, with most of those states doing so during the first two years of the so-called "Noble Experiment."[17]

Deterring misconduct became an accepted basis of excluding *physical* evidence in state courts during Prohibition, as it had been in federal courts since *Boyd*, but state courts did not extend this principle to confessions. In many ways, this is shocking. State courts were willing to sacrifice reliable evidence to prevent unjustified searches for alcohol. During this period, however, state courts did not view the deterrence of torture in interrogation rooms sufficient to justify the exclusion of evidence. Surely the nature of evidence lost as a result of misconduct in an interrogation room would have been quite different than the nature of evidence lost to an unreasonable search. Alcohol was the most frequent evidentiary product

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[12] Boyd, 116 U.S. at 630.

[13] Hale v. Henkel, 201 U.S. 43 (1906); William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1052 (1995).

[14] *See* Wesley M. Oliver, *Portland, Prohibition, and Probable Cause*, 23 MAINE BAR J. 210 (2008).

[15] *See, e.g.,* MIKE WALLACE, GREATER GOTHAM: A HISTORY OF NEW YORK FROM 1898 TO 1918 (Oxford U. Press 2018); MICHAEL A. LERNER, DRY MANHATTAN: PROHIBITION IN NEW YORK CITY 61–95 (First Harvard U. Press 2007).

[16] LISA MCGIRR, THE WAR ON ALCOHOL: PROHIBITION AND THE RISE OF THE AMERICAN STATE 132–42 (W. W. Norton & Co. Inc. 2015).

[17] Elkins v. United States, 364 U.S. 206, 224–32 (1960).

of a police search; police interrogations, by contrast, were used to close more serious crimes of homicide, robbery, arson, burglary, as well as bootlegging cases.[18] But just as the societal costs of excluding evidence were higher for confessions, seemingly so would have been the benefits. Commentators writing in the 1920s and 1930s observed that third degree interrogation practices surpassed the scope and severity of any period of torture in Anglo-American history.[19]

This is not to say that state courts were unconcerned about torture. Taking their opinions at face value, Prohibition era judges were appalled at the practices that they were routinely seeing. They sometimes called for the criminal prosecution of officers conducting the examinations.[20] Early twentieth-century state judges, however, viewed reliability as the only basis for excluding confessions. Torture, and practices far short of torture, certainly led these judges to conclude that confessions lacked sufficient reliability to be considered by a jury.[21] When, however, a suspect identified physical items during the interrogation that corroborated his statements, or independently established his guilt, the physical evidence and often the statements themselves were admitted because they were reliable. A reliable tortured confession, unlike unreasonably seized reliable physical evidence, would be admitted in state courts throughout the entire Prohibition era.[22] The ends sometimes justified the means in police work—an inconsistency in jurisprudence encouraging official violence that would not survive the Prohibition era.

In the early years of Prohibition, however, the United States Supreme Court came to view unlawfully obtained physical evidence and confessions in the same manner. In the all but forgotten opinion of *Ziang Sung Wan v. United States*, the Court cited Fourth Amendment precedents alone to exclude a statement obtained from a very ill man after a week of seemingly endless interrogation.[23] State courts had been willing to adopt the *Boyd* and *Weeks* precedents for unlawfully obtained physical evidence, but only after the start of National Prohibition.[24] Despite concerns about police torture in interrogation rooms that long pre-dated Prohibition, *Ziang Sung Wan* did not gain acceptance in state courts.

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[18] *Cf.* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 204–5 (2011).

[19] Charles T. McCormick, *The Scope of Privileges in the Law of Evidence*, 16 TEX. L. REV. 447, 453–55 (1938).

[20] Baughman v. Commonwealth, 267 S.W. 231 (Ky. 1924). The United States Supreme Court would similarly call for the prosecution of officers who engaged in a blatant pattern of illegal entries in the 1950s prior to *Mapp v. Ohio*. *See, e.g.,* Irvine v. California, 347 U.S. 128, 137–38 (1954).

[21] George E. Dix, *Promises, Confessions, and Wayne LaFave's Bright Line Rule Analysis*, 1993 U. ILL. L. REV. 207, 212–15.

[22] *See* McCormick, *supra* note 19 at 453–55.

[23] Ziang Sung Wan, 226 U.S. at 17, n.6.

[24] SARAH E. SEO, POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM 121 (2019).

A long series of decisions, beginning with the landmark case of *Brown v. Mississippi*, would ultimately require the exclusion of coerced confessions regardless of their reliability. In contrast to *Ziang Sung Wan*, the Supreme Court's decision in *Brown v. Mississippi* is perhaps the second most readily identified confession case from the high tribunal. *Brown* contained gruesome facts and a racial dimension that brought the case national attention, even prior to the Supreme Court agreeing to hear the case. Its facts left a memorable historical marker in this first federal case to apply constitutional standards to a state confession. Interestingly, the Fourth Amendment style of regulating state confessions foreshadowed in *Brown* pre-dated, by about thirty years, *Mapp v. Ohio*'s requirement that states exclude physical evidence obtained contrary to the Fourth Amendment.

While *Ziang Sung Wan* and *Brown* are rightly seen as progressive, civil libertarian decisions addressing very serious police conduct, these decisions had seemingly unintended consequences. The Fourth Amendment approach to confessions represented not just a different theoretical underpinning for federal oversight, this deterrence-focused scheme left to evidentiary codes any concern about false confessions. Exclusion that was focused on concerns other than reliability allowed the *Miranda* warning-and-waiver scheme to dominate the assessment of a confession's admissibility.[25] The 1986 decision of *Colorado v. Connelly* then, with extraordinary clarity, demonstrated that constitutional standards would not prevent the admission even of a statement that utterly lacked reliability.[26] DNA exonerations have revealed that false confessions do occur, even in the absence of torture, and legal standards that fail to recognize this reality risk wrongful convictions.[27] State and federal evidence codes that do consider the accuracy of confessions are quite liberal in allowing the admission of evidence that may bear on the guilt of the defendant, excluding it only when its probative value is "substantially outweighed" by reliability concerns.[28]

Prohibition rightly brought courts' attention to issues of police misconduct. Unfortunately, however, it fixated legal standards on misconduct. Part One of this essay looks at how Prohibition, first in the 1850s, then in the 1920s, introduced deterring illegal searches as a goal of state criminal procedure. Part Two then looks at how the United States Supreme Court required states, under the Due Process Clause, to apply this Fourth Amendment remedy in criminal cases to deter coerced confessions. Finally, Part Three looks at how this shift from reliability to deterrence abandoned too much. In its single-minded effort to deter torture and excessive

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[25] Richard A. Leo, Miranda*'s Irrelevance: Questioning the Relevance in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1027 (2000–01).

[26] 479 U.S. 157.

[27] Steven Drizin & Richard A. Leo, *The Problem of False Confessions in a Post-DNA World*, 82 N.C. L. REV. 891 (2004).

[28] *See* Fed. R. Evid. 403. *But cf.* Richard A. Leo, et al., *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMP. L. REV. 759, 792–99 (2013) (arguing for a more searching analysis of reliability concerns under Rule 403).

coercion, the Court's decisions would ultimately leave the issue of false confessions to rules of evidence that liberally favor admissibility.

I. PROHIBITION'S DETERRENT MODEL FOR SEARCH AND SEIZURE

While there were early fragments of the exclusionary rule before Prohibition, there can be no serious doubt that the rule survived and flourished because of Prohibition. It was not until Prohibition that the rule was justified as a deterrent to police misconduct.[29] During the 1920s, the rule then gained sufficient support among the states during Prohibition to lead the Court to conclude that it should be imposed on all the states in *Mapp v. Ohio*. Use of evidentiary rules to control police investigatory tactics, first seen in Prohibition era Fourth Amendment cases, would come to define the constitutional regulation of interrogation in state and federal cases even before *Mapp* required all states to embrace it in search and seizure cases.

In the Framing Era, there were occasional but rare examples of courts preventing cases from going forward because necessary evidence had been seized in an unreasonable manner. During America's first effort at Prohibition in the nineteenth century, this basis for thwarting a case became quite common. In 1886 and 1914, the United States Supreme Court held that the Fourth Amendment prevented unlawfully obtained evidence from being admitted in federal courts.[30] These decisions gave the exclusionary rule the form we recognize today, but these decisions alone would have been insufficient to transform the rules of evidence into our primary method of police oversight. Given the influence the Supreme Court has over present-day state courts, it is somewhat remarkable to say that these decisions received almost no traction in the states. It was only during America's better-known effort at prohibition during the Jazz Age that state courts began to embrace the rule, leading the Supreme Court to ultimately require it in state court.[31] Though courts did not always expressly state that the goal of excluding reliable evidence was deterring misconduct, commentators came to describe the new procedure in these terms.

Some form of the exclusionary rule is as old as the country. Framing era cases invoking a version of the exclusionary rule are quite uncommon, but far from non-existent, as critics of the exclusionary rule often claim.[32] Roger Roots has demonstrated that there were decisions in the late eighteenth century in which courts effectively took into account the manner in which evidence was obtained to conclude

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[29] *See* Thomas E. Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 COLUM. L. REV. 11 (1925); McCormick, *supra* note 19 at 455 (recognizing Atkinson's article to be one of the first recognitions of a deterrent basis for the exclusionary rule). *See also* Gore v. State, 218 P. 545 (Okla. Crim. App. 1923); State v. Johnson, 226 P. 245, 250 (Kan. 1924) (Harvey, J., dissenting).

[30] Boyd v. United States, 116 U.S. 616 (1886); Weeks v. United States, 232 U.S. 383 (1914).

[31] *See* SEO, *supra* note 24 at 121.

[32] *See* Roots, *supra* note 11 at 3.

that a case could not go forward.[33] As Roots recognizes, the nature of judicial reporting, the rare use of physical evidence in criminal trials, and the lack of appellate rights for criminal defendants in the Framing Era necessarily means that there will be few surviving cases that relate to the modern exclusionary rule. Nevertheless, he observes that there are cases during this period dismissing proceedings against debtors and criminal defendants when the warrants summoning them to court are inadequate.[34] A faulty arrest warrant would not conclude a criminal proceeding under modern law, but the fact that it did in the Framing Era is evidence that the principles underlying the modern exclusionary rule were in the mind of Framing Era lawyers.

With the emergence of vice crimes, however, the exclusionary rule would emerge from the shadows. It is not terribly well-known that there were two periods of Prohibition in American history. The first was a product of state laws in the 1850s and, in most states, it lasted only a handful of years.[35] The second period of Prohibition is much more familiar to us. This version was a product of federal and state legislation, spanning from 1920 to 1933.[36] The culture of enforcement was very different for each period for reasons largely relating to the rise of modern cities and police departments. During the 1850s, in the absence of full-time police departments, private organizations were almost exclusively responsible for ferreting out illegal alcohol.[37] By the 1920s, there was a fairly well-developed network of federal and state law enforcement officials, as well as societies claiming to preserve morals, that would be a part of the effort, with varying degrees of willingness.[38] Each period, however, saw courts exclude unlawfully seized alcohol as they witnessed societal backlash to the enforcement of Prohibition—and came to distrust the enforcers of Prohibition.

In the 1850s, all of the states in the Midwest and Northeast, except Pennsylvania, enacted laws preventing the sale, transportation, and manufacture of alcohol for sale or transport.[39] Though southern states were in the vanguard of the twentieth-century temperance movement, a link between the Prohibition and Abolition movements of the mid-nineteenth century squelched the anti-liquor

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[33] *Id*. at 1–66.

[34] *Id*. at 22–26.

[35] *See* MICHAEL F. HOLT, THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR 898 (Oxford U. Press 1999) (describing the Maine Law); FRANCES L. BYRNE, PROPHET OF PROHIBITION: NEAL DOW AND HIS CRUSADE (1961); JOHN A. KROUT, THE ORIGINS OF PROHIBITION 266 (1925).

[36] *See generally* DANIEL OKRENT, LAST CALL: THE RISE AND FALL OF PROHIBITION (Scribner 2011).

[37] ROBERT L. HEMPEL, TEMPERANCE AND PROHIBITION IN MASSACHUSETTS, 1813–1852 (1982); BYRNE, *supra* note 35 at 39.

[38] McGirr, *supra* note 16.

[39] RONALD F. FORMISANO, FOR THE PEOPLE: AMERICAN POPULIST MOVEMENTS FROM THE REVOLUTION TO THE 1850S, 290 n.18 (Univ. N.C. Press 2008).

movement in the antebellum south.[40] Enforcement of these largely short-lived laws depended on private actors, primarily Temperance Watchmen, who led the charge to get state legislators to enact laws that permitted ordinary citizens to obtain warrants to search for illegal alcohol possession. The Watchmen were, with justification, viewed as zealots who might be over-eager to inspect the premises of their neighbors.[41] The law that authorized them to search therefore required a statement of reasons supporting a belief that alcohol would be discovered.

Judges began to view their role as guardians against illegal liquor searches. Magistrates on a number of occasions granted search warrants on the basis of complaints lacking a statement of support.[42] Courts, much as they had in the handful of cases Roger Roots identified during the Framing Era,[43] concluded that such proceeding began on an illegitimate basis and could not proceed. Unlike in the Framing Era, however, state appellate courts existed in the 1850s.[44] Published opinions therefore had occasion to "arrest the judgment of conviction" when trial courts had allowed convictions on the basis of evidence seized as a result of a complaint lacking the specificity required for liquor warrants.[45] This version of the rule did not contain all of the provisions that we are familiar with today. Courts would clarify that this remedy applied only to defects in the complaint, the equivalent of a modern-day affidavit in support of a search warrant, not to searches done without a warrant or illegally executed warrants. State-level prohibition enforcement, however, transformed an infrequently recognized early version of the exclusionary rule into a fairly commonly-invoked limitation on prosecutions for improperly issued search warrants.

Between the first and second period of Prohibition, the United States Supreme Court decided two cases that are alternatively, and falsely, cited as the first to hold that unlawfully obtained evidence is inadmissible in a criminal trial. In *Boyd v. United States*, a forfeiture case, the Court concluded that the Fourth Amendment prevented the government from issuing a subpoena to require a company to turn over its records. *Boyd* reasoned that the right to be free from unreasonable searches and seizures was informed by the right to be free from compelled self-incrimination. This ruling would have effectively prevented government entities from investigating potential criminal activity in businesses, absolutely thwarting the regulatory state—

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[40] Thomas H. Appleton, Jr., *"Moral Suasion Has Its Day:" From Temperance to Prohibition in Antebellum Kentucky, in* A MYTHIC LAND APART: REASSESSING SOUTHERNERS AND THEIR HISTORY 19–42 (John David Smith & Thomas H. Appleton, Jr. eds., 1997).

[41] HEMPEL, *supra* note 37; BYRNE, *supra* note 35 at 39.

[42] State v. Staples, 37 Me. 228–29 (1854); State v. Spirituous Liquors, 39 Me. 262–63 (1855).

[43] Roots, *supra* note 11 at 22–26.

[44] *See id*. at 15.

[45] State v. Staples, 37 Me. 228 (1854); State v. Spirituous Liquors, 39 Me. 262 (1855); State v. Twenty-Five Packages of Liquor, 38 Vt. 387 (1866) (recognizing that forfeiture action could be quashed for failure to have a sufficiently particular search warrant); Fisher v. McGirr, 1 Gray 1 (Mass. 1854) (action for value of seized liquor permitted on the basis of an insufficient search warrant); People v. Toynbee, 11 How. Pr. 289 (N.Y. Sup. Ct. 1855).

and, as a result, would not remain good law.[46] The 1906 decision in *Hale v. Henkle*, holding that a custodian of records may be required to surrender documents in his possession when ordered to do so by subpoena, effectively reversed *Boyd*'s conclusion that the Fourth Amendment protected a defendant's interest against self-incrimination.[47] Even though *Hale* later concluded that *Boyd*'s theory for the exclusion was invalid, *Boyd* is still regarded as the case that introduced the exclusionary rule to American law.[48]

At the federal level, however, the rule would be resurrected prior to Prohibition. In 1914, the Court decided *Weeks v. United States*. In *Weeks*, officers physically entered the defendant's home, while in *Boyd* the government required documents to be turned over, arguably making *Weeks* the better case to be identified as establishing the federal exclusionary rule. Government agents, suspecting that the defendant was transporting illegal lottery tickets, entered Weeks' home without a warrant using a key they discovered he kept hidden outside the home. Once inside, they discovered records they wished to use in the prosecution. The modern method of preventing the use of this evidence in a criminal trial is obviously a suppression motion, something unknown to the law at the time of Weeks' trial. Instead, he filed a motion to return property which, if granted, would have put him in possession of the papers the government sought to use. The Supreme Court found that the trial court had improperly denied his motion and reversed his conviction.[49]

The Court's rationale in *Weeks* would also appear unfamiliar to most present-day lawyers. We are accustomed to thinking of the exclusion of illegally obtained evidence being justified as a deterrent measure.[50] If police know they will lose the fruits of their unlawful searches, they will not engage in them, the argument goes. The *Weeks* opinion spent a lot of time describing the rationale for protecting the freedom from unreasonable searches but offered essentially only one sentence in support of the remedy: "To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."[51] The motion to suppress and the deterrent rationale would not appear until National Prohibition as state courts quickly came to embrace the exclusionary rule.

As bizarre as it may seem to twenty-first century lawyers, *Boyd* and *Weeks* held almost no persuasive sway over state courts. In 1903, the Iowa Supreme Court

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[46] Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 956–57 (2010).

[47] Stuntz, *supra* note 13 at 1052–54.

[48] *See* Stewart, *supra* note 7.

[49] Weeks v. United States, 235 U.S. 697 (1914).

[50] *See, e.g.,* Davis v. United States, 564 U.S. 229, 237 (2011) ("Real deterrent value is a condition 'necessary for exclusion' but not a 'sufficient' one.").

[51] Weeks, 232 U.S. at 394, 398–99.

adopted the *Boyd* decision, but reversed itself in 1924.[52] No other state court or legislature would accept the exclusionary rule before National Prohibition. The excesses of lawless enforcement, likely combined with resistance to even lawful enforcement, led state courts to embrace the rule, rather than the persuasive authority of *Boyd* and *Weeks*.

The timing of state courts is very telling. South Carolina was the first to flirt with the exclusionary rule after the *Weeks* decision, but did not cite the federal precedent when it did so. While the federal version of Prohibition went into effect January 17, 1920, several states enacted their own versions that went into effect years earlier.[53] South Carolina went dry in 1907.[54] In 1916, the South Carolina Supreme Court in *Town of Blacksburg v. Beam* reversed the conviction of "a young, white farmer" who was subjected to an unlawful search on a train that revealed illegal alcohol.[55] One year later, a defendant who claimed that he was the victim of an illegal search that revealed illegal lottery tickets argued that his conviction could not stand under either the South Carolina *Beam* precedent or the federal *Weeks* precedent. The court found that "protection against officers not acting under claim of federal authority is not afforded by the guaranty of immunity from unreasonable searches and seizures under the Fourth Amendment of the federal Constitution."[56] The Court further reasoned that *Beam* should be understood not as a mechanism to protect citizens from illegal searches and seizures but as a case recognizing the right to possess alcohol for personal consumption.[57] The unique circumstances of liquor prohibition and enforcement, not a generic concern about privacy or autonomy—and certainly not deference to federal courts—animated a narrowly cabined version of the rule in South Carolina.

Most other state courts, to adopt the exclusionary rule, cited to the United States Supreme Court's opinions in *Boyd* and *Weeks* as persuasive authority.[58] Other than Iowa, however, none did so before a second round of Prohibition began. Of the eighteen states to adopt the rule during this period, many were the states most heavily impacted by enforcement efforts—states with histories of brewing and distilling

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[52] State v. Sheridan, 96 N.W. 730, 731 (Iowa 1903); State v. Rowley, 195 N.W. 881, 881 (Iowa 1924).

[53] OKRENT, *supra* note 36 at 1, 66.

[54] JOHN EVANS EUBANKS, BEN TILLMAN'S BABY: THE DISPENSARY SYSTEM OF SOUTH CAROLINA 1892–1915 172 (U. Mich. 1950).

[55] Town of Blacksburg v. Beam, 104 S.C. 146, 88 S.E. 441 (1916).

[56] State v. Harley, 92 S.E. 1034, 1035 (S.C. 1916).

[57] *Id*.

[58] *See, e.g.*, SEO, *supra* note 24, at 121.

such as Kentucky, Missouri, and Tennessee;[59] and states likely to be entry points for smuggled alcohol such as Michigan, Texas, and Washington.[60]

These decisions were addressing concerns at the forefront of the nation's public conversation. The Wickersham Commission would observe in 1931 that "encouragement of bad methods of investigation and seizures on the part of badly chosen agents started a current of adverse opinion in many parts of the land."[61] Front-page articles in newspapers read like mini-treatises on the Fourth Amendment while America's first actual treatise on search and seizure law—a 925 page scholarly compilation that would rival any later entry into the field—was published in 1926 by attorney Asher Cornelius in Detroit, ground-zero for Prohibition enforcement.[62]

During Prohibition, courts for the first time began to expressly recognize that deterring illegal seizures was a goal of excluding unlawfully obtained evidence. It is perhaps worth noting that this recognition came from state appellate courts rather than the United States Supreme Court, where scholars most often look to track the development of search and seizure doctrines. A couple of examples, laden with rhetorical flourish, illustrate the point. The Oklahoma Supreme Court in 1923 concluded that:

> If . . . government agencies . . . are encouraged and condoned by the courts in their invasion of the privacy of homes, offices and places of business, forcibly and without invitation, for the purpose of procuring evidence to convict one of a misdemeanor, the practice followed to its logical conclusion will make our vaunted freedom a mere pretense, valueless, and without substance. Whenever the court actively encourages officers to procure evidence by force, the officers soon become dictatorial, arrogant, and even brutal—a natural consequence of the courts' approval of obtaining evidence illegally by force.[63]

Kansas Supreme Court Justice Harvey, dissenting in a case affirmed a conviction in a liquor prosecution in his court, took aim at early twentieth-century originalism in his call for a rule to deter illegal seizures:

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[59] Youman v. Commonwealth, 224 S.W 860 (Ky. 1920); State v. Owens, 259 S.W. 100 (Mo. 1924); Hughes v. States, 238 S.W. 588 (Tenn. 1922).

[60] People v. Marxhausen, 171 N.W. 557 (Mich. 1919); State v. Laundy, 204 P. 958 (Ore. 1922); State v. Gibbons, 203 P. 390 (Wash. 1922).

[61] NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE U.S., at 82 (Jan. 7, 1931).

[62] ASHER L. CORNELIUS, THE LAW OF SEARCH AND SEIZURE: BEING A PRESENTATION IN THE FORM OF BRIEFS WHICH COVER ALL OF THE VARIOUS PHASES OF THE SUBJECT, TOGETHER WITH PERTINENT FORMS (Bobbs-Merrill 1930).

[63] Gore v. State, 218 P. 545, 550 (Okla. Crim. App. 1923).

> The early authorities in this country without much discussion of the matter, and some later state decisions, hold that the rule of evidence should be followed, and that one who was deprived of his constitutional rights must seek redress by an action against the officer for damages. It is now generally recognized that the only effective way of securing the constitutional rights of the party in such a case is to prohibit the use of such evidence by prosecuting officers.[64]

Law review articles during Prohibition also began to describe the utilitarian basis for the rule for the first time. In 1923, a comment in the *Yale Law Journal* observed that "[m]any difficult problems have arisen in connection with the Eighteenth Amendment . . . not the least of these is that of enforcing it in a constitutional manner." At this point, the term "exclusionary rule" had not become the accepted nomenclature, so the article observed that federal courts "return[] upon demand property illegally obtained." The comment observed that in the absence of this remedy, civil actions against officers for trespass prevented the illegal search but that there was a "well known inadequacy" of tort law to prevent illegal searches.[65]

The Supreme Court would not expressly describe the exclusionary rule as a deterrent until *Wolf v. Colorado*, sixteen years after Prohibition.[66] Certainly the Supreme Court read a deterrent goal back into its earliest exclusionary rule decisions, but deterrence as a justification appears to have been first offered in state decisions adopting the federal exclusionary rule during Prohibition. This Prohibition Era deterrent justification for the exclusionary rule would come to define the law of confessions.

II. ADAPTING THE DETERRENT MODEL FOR INTERROGATIONS

In the early days of Prohibition, while the debate was raging about whether the criminal justice system ought to sacrifice reliable-but-unlawfully-obtained physical evidence to deter subsequent violations, routine use of torture in interrogation rooms was increasingly becoming a public concern. The confessions rule, later known as the "voluntariness test" under the Due Process Clause of the Fifth Amendment, had since the birth of the American Republic excluded statements that were the product of "the threat of fear or flattery of hope."[67] The rule was based on fears that a coerced confession would be unreliable. Fears of tortured interrogations were not at the

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[64] State v. Johnson, 226 P. 245, 250 (Kan. 1924) (Harvey, J., dissenting).

[65] Comment, *Legal Search and Arrest Under the Eighteenth Amendment*, 32 YALE L. J. 490, 490–91 (1923).

[66] 338 U.S. 25, 31 (1949); Robert M. Bloom & David H. Fertin, *"A More Majestic Conception": The Importance of Judicial Integrity in Preserving the Exclusionary Rule,* 13 U. PA. J. CONST. L. 47, 53 (2010)

[67] The King v. Warickshall (1783) 168 Eng. Rep. 234, 235.

forefront in the minds of eighteenth-century judges. Police officers, to the extent they existed in the eighteenth century, generally did not question suspects at all.[68] They only began to routinely do so in the second half of the nineteenth century.[69] A rule designed to prevent the admissibility of untrustworthy statements therefore adequately served the interest of a society prior to the creation of modern police forces. With the rise of routine interrogations, however, this legal standard was inadequate to prevent torture from becoming routine in interrogation rooms.[70] A new version of the confessions rule, based on the Fourth Amendment's deterrent model, gained acceptance over the Prohibition era.

Practically speaking, whether reliability or deterrence provides the theoretical underpinning for a confessions rule matters only for a particular type of evidentiary concern. If false confessions alone are the law's concern, then physical evidence discovered as a result of an improper interrogation should be admissible, perhaps even the confession itself if corroborated by reliable evidence. If deterrence of inappropriate interrogation techniques is the law's concern, then admitting the physical fruits of a coerced, or even tortured confession creates an incentive to obtain an accurate confession by any means necessary. The choice between a deterrent and reliability basis for the confessions rule is, of course, a separate issue from how much judges will tolerate coercive interrogation tactics. In fact, historically the same courts willing to admit corroborated tortured confessions would quite readily exclude uncorroborated ones on the basis of scant inducements.[71] The rarity of police interrogations meant that law enforcement lost few confessions from rules quick to find that an interrogator's tactic risked a false statement. By the same token, deterring even torture in non-judicial interrogations was not a pressing concern in a world in which interrogations outside the judicial process were themselves extremely rare.

The earliest judicial opinion on the admissibility of confessions to be cited by American courts was *The King v. Warickshall*, decided by the King's Bench in 1783. We learn in the opinion that Jane Warickshall confessed to a theft, but we know nothing of the details about what was said to or done to her during the process of the interrogation. The court nevertheless concluded that because she had been given "promises of favor" her confession came "in so questionable a shape when it [was] to be considered as evidence of guilt, that no credit ought to be given to it . . . ."[72] It was the risk of false confession, not the need to send a message to future

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[68] *See* Crawford v. Washington, 541 U.S. 36, 53 (2004) (recognizing that magistrates rather than police officers conducted interrogations of suspects at common law).

[69] *See* Bruce P. Smith, Miranda's Paradoxical Prehistory 13 (2005) (unpublished manuscript) (on file with author) (observing how little is known about origins of police interrogation).

[70] Richard A. Leo, *The Third Degree and the Origins of Psychological Police Interrogation in the United States, in* 20 PERSPECTIVES IN LAW AND PSYCHOLOGY: INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 37 (G. Daniel Lassiter ed., 2004).

[71] *See* Jackson v. Commonwealth, 81 S.E. 192 (Va. 1914).

[72] *Warickshall*, 168 Eng. Rep. at 235.

interrogators, the court instructed, that required her statement to be disregarded. Ms. Warickshall had, however, told her interrogators that the stolen item could be found in her bed, where they did, in fact, find it.[73] As the reliability of the discovered item—and its evidentiary value—were not in dispute, the fears of falsehood in the confession created by whatever promise was extended to her did not apply to physical evidence revealed by her statement.

Subsequent decisions from the United States Supreme Court accepted *Warickshall*'s reliability rationale for the regulation of interrogation practices until the turn of the twentieth century. *Hopt v. Utah* reasoned in 1884 that

> voluntary confession of guilt is among the most effectual proofs in the law . . . . But the presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature . . . or because of a threat or promise . . . depriv[ing] him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law.[74]

State courts throughout the nineteenth and early twentieth centuries would similarly regard reliability to underpin the regulation of confessions. With two rare exceptions—the only two discovered after extensive searching of confessions cases of the period—state courts did not find deterrence of coercion or even torture to be a basis for rejecting a confession, so long as its reliability could be demonstrated. Much as in *Warickshall*, nineteenth-century courts held that physical evidence discovered as a result of a confession was admissible because its reliability was beyond dispute, and noted that the coerced confession would often also be admitted if its reliability was corroborated by the discovery.

There were, however, two exceptional cases in this period that invoked deterrence, rather than just reliability, as a basis for excluding confessions. The first, *Jordan v. State*, involved a runaway slave in Mississippi who was accused of killing another slave who attempted to thwart his flight to freedom. Interrogators struck the defendant in the face with a stick while another threatened him with a pistol cocked at his face. The Mississippi Supreme Court concluded in 1856 that the "rule which protects [a suspect] against a full confession of guilt, if it appeared that the confession had been extorted by violence, also protects him against testimony which could only be discovered, or made available through the instrumentality of such confession . . . ."[75] Corroborating physical evidence was therefore inadmissible in this outlier case, despite its reliability, because of the violent means used to obtain it.

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[73] *Id*.

[74] Hopt v. Utah, 110 U.S. 574, 585–86 (1884).

[75] Jordan v. State, 32 Miss. 382, 386 (1856).

In the second case, *Rusher v. State*, the Supreme Court of Georgia in 1894 made what appears to be the earliest, and clearest, expression of a rule of evidence designed to deter misconduct in the investigation of crime, but it created a rule that deterred a very narrow category of misconduct. Private citizens had seized a suspect and asked him to identify the location of stolen money. At trial, a lawyer said to one of the interrogators during the trial, "You gentlemen had used some coercion on him, hadn't you?" to which the witness responded, "I suppose you might call it that."[76] As in *Warickshall*, the Georgia court concluded that physical evidence was regarded as admissible, and going further, so too were "acts and declarations of the accused . . . in so far as they explain are necessary to account for it."[77] Reliability had its limits, however. Far ahead of its time, the court reasoned that the "law ought to hold out no encouragement to violent and lawless men to commit crime for the sake of detecting a previous crime and bringing the offender to punishment."[78] Almost poetically, the court offered, "[t]he law should never suffer itself to become an enemy or antagonist to its own reign."[79] This seemingly universal maxim, for the late nineteenth-century Georgia court, had substantial limits. "Fruits of physical torture," such as whipping would be excluded, but not reliable pieces of evidence discovered from interrogations that caused only "mere fear."[80] The defendant in *Rusher* did not, however, benefit from the rule in the case as the factual record made it unclear whether physical abuse occurred and the court said it would always presume no violence absent it being clearly established in the transcript. The rule of law announced in this case was essentially dicta that would not be embraced by courts until *Brown v. Mississippi.*

While physical force did not itself render a statement inadmissible, accuracy concerns—prompted by improper actions far short of physical force—were taken very seriously in state courts in the late nineteenth and early twentieth century. As the Georgia Supreme Court stated, "coercion, however mild" was sufficient to cast doubt on a statement's accuracy. From a twenty-first century lens, these courts were far more willing to exclude statements infected by concerns of falsehood than we might expect. A Virginia court in 1914, for instance, excluded a vague confession because a private citizen, who befriended a murder suspect, conversed with him over the course of few days, provided him food and tobacco, and confirmed the suspect's belief that a suspect in a different case was spared the electric chair after he pled guilty.[81] Countless cases were reversed because an interrogator merely said that it would be "better" for the suspect to confess.[82]

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[76] Rusher v. State, 21 S.E. 593, 594 (Ga. 1894).

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Jackson v. Commonwealth*, 81 S.E. at 193–94.

[82] *See* People v. Heide, 135 N.E. 77, 79 (Ill. 1922) (observing numerous states have recognized that telling a suspect that it would be better for him to confess renders a confession involuntary); *see*

This focus on accuracy, however, not only made the torture exceptions to *Warickshall*'s admissibility of physical fruits of a confession quite rare, it also ensured that the exceptions would not survive. No state other than Mississippi or Georgia appears to have even considered such an exception. This is not to say necessarily that state courts were unconcerned about the horrific acts that were occurring in the secret chambers of police stations in the late nineteenth and early twentieth century. Taking these judges at their word, they appear to have been quite disturbed by interrogation practices that were emerging. The exclusion of reliable evidence to address this concern was, however, quite a novel concept that state judges did not latch onto, even after they came to embrace this mechanism to curb illegal searches for liquor.

Some cases involving multiple defendants vividly revealed that the same improper interrogation technique—used against multiple suspects—could yield very different results depending on whether the improperly obtained confession was corroborated. In one such case, the Tennessee Supreme Court, appointed by the military governor in 1865,[83] had great sympathy for "free men of color" who were questioned by a posse of white citizens about a theft.[84] One of the members of the posse told the freedmen that he would bail out anyone who identified the location of missing money, threatening that if there was no confession, all of the suspects would "go to the penitentiary, and probably be hung."[85] These men, the court described, "amidst the convulsive throes of one of the most terrible civil wars which the world has ever witnessed, had but recently been released from the yoke of bondage."[86] The court's analysis of the legal concerns about the confessions, however, were stated in

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also, People v. Phillips, 42 N.Y. 200 (1870); Flagg v. People, 40 Mich. 706 (1879); Earp v. State, 55 Ga. 136 (1875); Couley v. State, 12 Mo. 462 (1849); Biscoe v. State, 8 A. 571 (Md. 1887). The Illinois Supreme Court reversed its conclusion in *Heide* one year later, citing cases holding that a statement that it would be "better" to tell the truth is insufficient, by itself, to render a confession involuntary. People v. Klyczek, 138 N.E. 275 (Ill. 1923). *See also* Huffman v. State, 30 So. 394 (Ala. 1901); Hardy v. State, 3 App. D.C. 35 (1893); State v. Kornstett, 61 P. 805 (Kan. 1900); State v. Stanley, 14 Minn. 105 (1869); Hintz v. State, 104 N.W. 110 (Wis. 1888); Commonwealth v. Hudson, 70 N.E. 436 (Mass. 1904). One month before the Illinois Supreme Court reversed itself on this issue, the Seventh Circuit had found that a statement that it would be "better" for the defendant to confess would not alone "disqualify the confession made pursuant thereto." Murphy v. United States, 285 F. 801 (7th Cir. 1923). *See also* discussion at n.92 & 112, *infra.* As *Klyczek* recognized, a line of English decisions had recognized that an officer's statement that it would be better for him to confess would be an improper inducement, rendering the subsequent confession inadmissible. *Klyczek*, 138 N.E. at 154 (citing *Regina v. Laugher* (1846), 2 Car. & K. 225; *Regina v. Hatts* (1883), 49 L.T. (N.S.) 780; Regina v. Griffin (1809), Russ. & R.C.C. 151; Regina v. Cheverton (1862), 2 Fost. & F. 833). *Klyczek* also observed that a Canadian case had recognized that the phrase, "you had better" had taken on a technical meaning in the eyes of courts and had been absolutely prohibited as part of the interrogation. *Klyczek*, 138 N.E. at 154 (*citing* Regina v. Jarvis (1867), L.R. 1 C.C.R. 96. *See also infra* note 92.

[83] *See, e.g.,* R. Ben Brown, *The Tennessee Supreme Court During Reconstruction and Redemption*, in A HISTORY OF THE TENNESSEE SUPREME COURT 100 (James W. Ely, Jr. ed., 2002).

[84] McGlothin v. State, 42 Tenn. 223, 224 (1865).

[85] *Id.* at 226.

[86] *Id*. at 229.

a way that was not unique to the plight of these new citizens toward whom it clearly had particular sympathy.

> Evidence of confessions is liable to thousand abuses. They are generally made by persons under arrest, in great agitation and distress, when every ray of hope is eagerly caught at, and frequently under the delusion, though not expressed, that the merits of a disclosure will be productive of personal safety—in want of advisers, deserted by the world, in chains and degradation, their spirits sunk, fear predominant, hope fluttering around, purposes and views momentarily changing, a thousand plans alternating, a soul tortured with anguish, and difficulties gathering into a multitude. How uncertain must be the things which are uttered in such a storm of passion.[87]

While the Tennessee court refused to allow the uncorroborated confessions of the defendants in this case to be admitted, the suspect who identified the location of stolen coins did not fare so well. The accuracy of his statement no longer in doubt, the coins were admissible even though they were found as a result of his confession. This decision was from a court that has been described by even a modern-day historian as a "radical court protecting Unionists and freedmen from Conservative Rebel sympathizers" to the point that precedent was often completely ignored.[88] The willingness of the Tennessee Supreme Court to admit the reliable physical evidence extracted by fear by a posse reveals how strongly nineteenth-century courts viewed their role to be ensuring accurate confessions, not deterring future misconduct. The risks of coerced interrogations the newly freed person faced surely would have seemed very plausible to this court in particular. The Ku Klux Klan was founded in Pulaski, Tennessee, three weeks after the decision.[89] If any court had an incentive to modify the confessions rule so that it would be a deterrent to abuses it feared, it would have been the federally appointed Reconstruction Era Supreme Court of Tennessee.

The tension between judicial concern about torture and the inability of the confessions rule to address this concern continued into the twentieth century. A 1924 decision from the Kentucky Supreme Court reveals both contempt for the third degree and an implicit encouragement for interrogators to continue their brutality. Officers were interrogating "a colored boy between 16 and 17 years of age," who was "shown not to possess the strongest intellect for one of his age" for a homicide. One of the officers conducting the investigation subjected the suspect to "very brutal treatment," which the court never specifically described, but lead the court to conclude that "the maximum punishment applicable to that conduct should be meted

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[87] *Id*.

[88] Brown, *supra* note 83, at 101–02.

[89] ELAINE FRANZ PARSONS, KU-KLUX: THE BIRTH OF THE KLAN DURING RECONSTRUCTION (U. N.C. Press 2015).

out to that officer." The young defendant, however, not only confessed to the crime but lead the officers to the murder weapon. This reliable evidence supported the conviction. In order to reverse this conviction, the court observed that it would have to reverse the longstanding *Warickshall* rule that allowed the physical fruits of any confession to be admitted.

It would be easy enough to conclude that any particular court was merely paying lip service to its concerns about tortured interrogations, but they were certainly excluding confessions when corroborating evidence did not appear. The Oklahoma Supreme Court for instance excluded a confession in 1928 where officers threatened to have "two young boys" killed if they did not confess to having stolen a car. The Court offered this stinging rebuke of techniques with which it had come to be all too familiar:

> We take this occasion to condemn such practices in unmeasured terms. We are not living in the dark ages in a time when the defendant had no rights which anybody was bound to respect, but we are living in an enlightened and modern age where the defendant is presumed to be innocent until he is proven guilty beyond a reasonable doubt and where he is entitled to be confronted by his accusers and to meet a charge in writing duly verified and to give bail and to be represented by counsel. All of these constitutional rights were denied the defendants in the car at bar and by means of threats and intimidation the purported confessions were obtained from these young boys. The state of Oklahoma does not sanction such methods of obtaining evidence. County attorneys should refuse to prosecute cases where the evidence was obtained in such a manner.[90]

The United States Supreme Court, by contrast, was beginning to shape a confession doctrine that detached questions of admissibility from reliability. The Court in 1897 reversed the conviction of a suspect whose interrogator told him that if he committed the crime with another, he should admit it and "not have the blame of this horrible crime on [his] shoulders."[91] While finding even the most minor

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[90] Ross v. State, 289 P. 358, 359 (Okla. Crim. App. 1930).

[91] The Supreme Court found this confession inadmissible because the interrogator told the suspect it would be better for him to confess, a very common basis for finding a confession involuntary in the nineteenth century. A Canadian court had observed that language that it "would be better" in an interrogation had a technical meaning that would render a confession inadmissible. Regina v. Jarvis (1867), L.R. 1 C.C.R. 96. A Canadian decision with this degree of clarity may have been particularly significant since the interrogation at issue in *Bram* occurred in Halifax, Nova Scotia. A very interesting fact in this case is that the suspect was being stripped as the interrogator told him it would be better to confess. This is often overlooked because the court does not address this fact in its legal analysis. The United States Court of Appeals for the Seventh Circuit in 1923 rejected the long-held view that a statement that it would be "better" for the defendant to confess would, regardless of any other circumstances, render the subsequent confession inadmissible. The Seventh Circuit quite wisely observed that Bram faced a very real threat as his interrogators began to disrobe him—he would have

inducements, or suggestions of leniency, to render a confession inadmissible was not terribly unusual in the late nineteenth or early twentieth century,[92] the basis for doing so in *Bram v. United States* was new. While the Court's previous decisions had emphasized that the admissibility of a confession turned on its trustworthiness, accuracy was not even offered as a factor to be considered in *Bram*. The admissibility of a confession, the Court ruled, was "controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"[93] Interestingly, a decade earlier the Court had used the self-incrimination clause to justify the exclusion of reliable evidence in *Boyd v. United States.* In *Bram*, the Court extended the reach of the self-incrimination doctrine to extra-judicial confessions just as *Boyd* had allowed it to expand search and seizure principles.

Using the self-incrimination clause to inform the admissibility of statements outside the judicial process was inconsistent with the history of this principle, but one can imagine the Court finding a connection between these ideas.[94] The privilege against self-incrimination, however, historically dealt only with statements made in court under oath.[95] Courts have occasions to consider two types of statements from criminal defendants—those made in judicial proceedings and those given out of court, such as in an interrogation. As statements given in an official proceeding required an oath, a doctrine emerged preventing a defendant from having to make the painful choice between incriminating himself and facing, for almost every crime before the nineteenth century, the death penalty; or falsely exculpating himself under oath, saving his earthly body but damning his immortal soul.[96] If the defendant simply refused to answer a question that would require him to incriminate himself, he could be held in contempt of court, which could lead to earthly torture.[97] Arthur

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reasonably believed he was about to be flogged—and this was the appropriate basis for finding his confession involuntary. Murphy v. United States, 285 F. 801, 812–13 (7th Cir. 1923).

[92] *See, e.g.,* People v. Foster, 179 N.W. 295 (1920); Casenote, *Evidence-Confessions-Admissibility When Elicited by Advice to Tell the Truth,* 30 YALE L. J. 418. In 1922, Zechariah Chafee called for courts to more frequently exclude interrogations when police engage in coercive conduct, but also exhorted courts to less frequently find that confessions *absent* coercion were inadmissible because officers muttered a taboo thought. Zechariah Chafee, *The Progress of the Law, 1919–1920, Evidence II*, 35 HARV. L. REV. 428, 435 (1922) ("Although greater severity toward this practice is needed, signs of fewer technical exclusions of confessions are also welcome, e.g., the admission of a confession elicited by advice to tell the truth."). *See also* citations in note 82, *supra.*

[93] *Bram v. United States*, 168 U.S. 532, 542 (1897).

[94] As Charles McCormick would observe of the *Bram* case in 1938, conflating the confessions rule and the self-incrimination doctrine "is an historical blunder," but as McCormick further noted, "the kinship of the two rules is too apparent for denial. McCormick, *supra* note 19, at 453. In fact, the Supreme Court would consider the privilege against self-incrimination as contributing to its decision in *Miranda v. Arizona.*

[95] Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625 (1995).

[96] *Id*. at 2638.

[97] *Id*.

Miller's play, *The Crucible*, depicting the Salem witch trials famously described stones being placed on Giles Corey to break his silence until he was ultimately pressed to death. The cruel trilemma of perjury, self-incrimination, or contempt had not been extended to statements taken outside the judicial process because they were not under oath. Historical protections against self-incrimination ensured that a defendant could not be required to testify in judicial proceedings. In *Bram*, decided a decade after the Court in *Boyd* concluded that the Fourth Amendment should be regarded as protecting an interest analogous to the Fifth Amendment's self-incrimination clause, the Court concluded that that a defendant enjoyed the privilege against self-incrimination in an interrogation room.

What was meant by *Bram* was not entirely clear. Neither the voluntariness standard from the Supreme Court's earlier decisions, nor the development of the doctrine in the states provided a basis for predicting *when* a confession was admissible,[98] but prior to *Bram* it was clear *why* a confession was admissible. If a court concluded there were reasons to suspect the confession was false, it would be excluded. It was not clear how *Bram* would change that if the Court would subsequently exclude statements of unquestionable accuracy when the facts suggested that the suspect would not have confessed absent coercive pressure. The facts of the *Bram* case did not require the Supreme Court to opine on this question. Understandably, the Supreme Court may have wanted to wade into such a radically different way of approaching confessions in a subtle way and *Bram* may have been a first step toward an approach that did not allow corroboration to rescue a coerced or tortured confession. But of course this type of subtlety, if that is indeed what it was, lacked clarity and left lower courts to believe that reliability remained the basis for evaluating a confession.

Decades later, in the early years of Prohibition, a decision from the District of Columbia Court of Appeals provided the Court an opportunity to craft a confessions rule to more clearly deter third degree practices. Following the murder of three diplomats staying at the Chinese Educational Mission in Washington, a man who had recently stayed at the mission but returned to his New York apartment was escorted back to D.C. for what would be a week-long interrogation. The suspect, Ziang Sung Wan, was then suffering from a very painful bout of colitis and, despite his suffering, was interrogated for hours on end, with the interrogation sometimes going well into the night, including visits to the crime scene. His ordeal ended when he told his interrogators that he had killed one of the victims, but not the other two. After he had a chance to rest in a jail cell following the confession, he was asked to provide a written statement, but for the first time he was instructed that it was his right not provide it. The defendant agreed and a stenographer was summoned to

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[98] *See* Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 112 (1998) (observing that voluntariness test that preceded *Miranda* lacked clarity).

record questions detectives posed to him and his answers, leading to a twenty-four-page document that he signed.[99]

The D.C. Court of Appeals' decision affirming Wan's conviction was a statement of the strongest possible version of *Warickshall*. Most courts admitted no more evidence of an involuntary confession than the King's Bench had done in 1783, namely only the reliable evidence discovered as a result of the confession.[100] Some courts, however, admitted the corroborated portions of the confession as well as the evidence resulting from the coerced statement.[101] In *Ziang Sung Wan*, the Court of Appeals held that the suspect's signed statement was not a confession at all, but "a mere fact or piece of competent evidence, upon which there was a conflict in the testimony, and which was properly submitted to the jury for its consideration."[102] The allegedly coerced statement, reduced to writing and signed by the defendant, was for the D.C. Court of Appeals, analogous to a unique, missing spoon investigators found in Jane Warickshall's bed following her interrogation.

As for the spoken confession itself, the appellate court recognized that such statements had to be "free and voluntary; that is, must not be extracted by any sort of threats of violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."[103] The court took the approach that state courts were then taking, and that the Supreme Court had taken prior to *Bram*, holding that "the crucial test to be applied is determining whether or not a confession is voluntarily or involuntarily made depends upon its truth or falsity." Quoting a Pennsylvania case from 1792 for a proposition conspicuously absent from the *Bram* opinion, the court observed that the "true point for consideration … is whether the prisoner has falsely declared himself guilty of a capital offence?"[104] Remarkably, the Court therefore found the confession was voluntary because it was corroborated, not because the method of interrogation was within acceptable bounds. As "[a]ll the circumstances in the case corroborate[d]" the confession, "its admissibility, as competent evidence for the consideration of the jury, is supported by every principle of law."[105]

As state courts had begun to expressly acknowledge in search and seizure cases, allowing illegally obtained evidence to be admitted provided an incentive for these tactics to continue. Abuses in interrogation rooms began to captivate the nation's attention around the turn of the century, contemporaneous with the *Bram* decision, perhaps explaining the Supreme Court's experimentation with a new regulatory

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[99] SCOTT D. SELIGMAN, THE THIRD DEGREE: THE TRIPLE MURDER THAT SHOOK WASHINGTON AND CHANGED AMERICAN CRIMINAL JUSTICE 32–48 (2018).

[100] *See, e.g.,* State v. Height, 91 N.W. 935, 935 (Iowa 1902).

[101] *See, e.g.,* Baughman v. Commonwealth, 267 S.W. 231, 235 (Ky. 1924); State v. Vaigneur, 5 Rich. 391, 403 (S.C. 1852).

[102] *Ziang Sun Wan*, 289 F.908, 913 (D.C. Cir. 1923).

[103] *Id.* at 913 (citing Bram v. United States, 168 U.S. 532, 542 (1897)).

[104] *Id*. at 914 (quoting Commonwealth v. Dillon, 1 L.Ed 765 (Pa. 1792)).

[105] *Id*.

scheme that did not depend on reliability. If the Supreme Court was hoping lower courts would take steps to deter coerced confessions, the D.C. Court of Appeals did not get the message.

There was certainly pressure for the Supreme Court to weigh in on this issue. By the turn of the century, newspapers had begun to report stories of physical torture in interrogation rooms and call for an end to the police tortures frequently called the "third degree."[106] State courts, despite their willingness to admit the corroborated fruits of torture, were frequently describing the horrors of the third degree. Legislatures passed laws that prohibited mistreatment in interrogation rooms, frequently called "anti-sweating statutes," derived from a practice of leaving a suspect in an unbearably hot room.[107] The United States Senate in 1911 conducted an investigation into the practice and the mistreatment became featured in popular culture. A Broadway play entitled *The Third Degree* premiered in 1909, and was twice made into a movie in 1919 and 1926 depicting officers wringing a confession from an innocent man during a seven-hour ordeal.[108]

The Supreme Court granted certiorari in *Ziang Sung Wan* and reversed. When the case is considered in histories of criminal procedure, and it rarely is, it is offered for the proposition that "the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or threat."[109] The Supreme Court did find that the lower court had not properly understood the voluntariness standard. Citing *Bram*, the Court held that "a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether it was applied in a judicial proceeding or otherwise."[110] Trial courts no longer had to fit coercive tactics into the model of a threat or promise as the Court had done in *Bram*.[111] Whatever coercion meant, it was broader than a threat or promise, providing a vehicle for courts to evaluate the conduct of interrogations.

More importantly, however, the Court in *Ziang Sung Wan* rejected accuracy as a basis for admitting a coerced confession. Corroborating evidence was not a consideration in the Court's analysis, nor did the Court even acknowledge the lower court's position—that the written confession was an admissible fruit of the interrogation, much like the stolen item discovered as a result of Ms. Warickshall's confession.

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[106] SELIGMAN, *supra* note 99, at 82–85.

[107] Charles T. McCormick, *Some Problems and Developments in the Admission of Confessions*, 25 TEX. L. REV. 239, 254 (1946).

[108] SELIGMAN, *supra* note 99, at 85–87.

[109] Ziang Sung Wan, 266 U.S. 1, 3 (1924).

[110] *Id*. at 3.

[111] The Seventh Circuit concluded, one year before *Bram*, that it was not an implied threat of leniency that called Bram's confession into question but the removal of his clothing, something seamen of the time would understand to be a prelude to a flogging. Murphy v. United States, 285 F. 801, 803 (7th Cir. 1923).

Perhaps most interestingly, *Ziang Sung Wan* was an unusual case because of the authority it cited. Fourth Amendment exclusionary rule cases were offered for the proposition that this involuntary statement must be excluded. The Court offered a string citation to every confessions case it had ever decided, offered to support the conclusion that the statement was involuntary, but the holding of the Court was that the "alleged oral statements and the written confession should have been excluded."[112] For this, the Court offered a string citation to every case it had ever decided on what we now know as the exclusionary rule.[113]

Ziang Sung Wan was a terse, unemotional Brandeis decision, words that do not often appear in the same sentence.[114] It was also a unanimous opinion that fundamentally restated the constitutional basis for excluding a confession with citations buried in a footnote. In 1924, the Court had a body of law excluding the fruits of police misconduct that was unavailable when it decided *Bram* in 1897. *Bram* had, though, referenced the one exclusionary rule case in existence at that time (*Boyd*) in offering its description of the privilege against self-incrimination. Understandably, the Court would not have thought of the exclusion of illegally obtained evidence as a principle of law of general applicability in 1897. By 1924, the principle that unlawfully obtained evidence was inadmissible in a criminal trial had quite a pedigree in federal and state courts. Though, not surprisingly, only the federal decisions were included in this very brief opinion governed by federal law.

It may seem surprising that the Court did take up the issue of coerced or tortured confessions earlier. Despite frequent concerns being raised about third degree tactics, the Supreme Court would not have had many occasions to weigh in on the issue. Almost without exception, if a prosecutor was attempting to introduce a confession in a criminal case, it was in a state prosecution. Federal constitutional protections of criminal suspects were not, at this point, regarded to extend to the states.[115] The few interrogation cases the Court had heard in the nineteenth century came from rare circumstances where federal courts had jurisdiction over criminal matters—in territorial Utah, in Indian country, and on the high seas.[116] The criminal

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[112] *Ziang Sung Wan*, 266 U.S. at 17.

[113] *Id*. at 17 n.6.; Boyd v. United States, 116 U.S. 616, 631 (1886); Weeks v. United States, 232 U.S. 383, 398, (1914); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1919); Gouled v. United States, 255 U.S. 298 (1921); Amos v. United States, 255 U.S. 313, 316 (1921); Bilokumsky v. Tod, 263 U.S. 149, 155 (1923).

[114] Justice Holmes, who once noted that he often thought a little more than he said in a judicial opinion, read a draft of the *Ziang Sung Wan* opinion and praised it saying, "I suppose you are right not to show disgust or wrath—I don't know whether I could have held [it] in." SELIGMAN, *supra* note 99, at 99–100 (2018). The opinion very much had the feel of a Holmes opinion in its lack of elaboration of either facts or law.

[115] *See* Kenneth Katkin, *"Incorporation" of the Criminal Procedure Amendments: A View from the States*, 84 NEB. L. REV. 397 (2005) (observing that the process of incorporating criminal procedure provisions began in 1932).

[116] *See* Hopt v. Utah, 110 U.S. 574, 584 (1884) (from Utah territory); Sparf and Hansen v. United States, 156 U.S. 51, 55 (1895) (murder on the high seas); Pierce v. United States, 160 U.S. 355, 357 (1896) (in Cherokee Nation); Wilson v. United States, 162 U.S. 613, 623 (1896) (in Indian territory);

courts of the District of Columbia were however, federal courts, and therefore subject to the oversight of the United States Supreme Court. With national criticism of the third degree, it may be surprising that the Court did not identify a case suitable for calling out abusive interrogation practices from D.C. prior to *Wan*. It must be remembered however, that this was a relatively small city in 1920, and before the recognition of a constitutional right to an attorney few potential legal issues were preserved in criminal trials or taken up on appeal.

The nation's concern about the third degree certainly did not end with the *Wan* decision. Five years after the *Wan* decision, a presidential commission was appointed to consider why the administration of justice had fallen into disrepute. Though the commission had not been limited in its scope, there was a sense that this was a body primarily established to examine the enforcement of the hated liquor laws. Instead, the Wickersham Commission expanded its work to consider almost every aspect of the criminal justice system with its most sensational work relating to the third degree. Cataloging in one place abuses that were already known to courts, legislatures, and newspaper reporters brought national attention to the issue under the imprimatur of a presidential reform commission.[117]

Against this backdrop, the Supreme Court took up the case of *Brown v. Mississippi.* It is hard to imagine a worse image of the American criminal justice system on display, but the glimpse the case provides of Mississippi justice in the 1930s is, in some ways, far from entirely accurate. After suspicion for a farmer's murder fell on three African American men, officers and private citizens took one of the suspects to a private location where they slowly suspended him in the air using a noose, lowering him to ask if he was willing to confess. When he still refused, the poor man was again hoisted in the air by his neck and when he still refused to give his tormentor what they wanted, they whipped him until the party grew tired of the endeavor and released him. Two days later, the same deputy again arrested the suspect, drove him to a remote location in neighboring Alabama and began to whip him, telling him that the whipping would continue until he confessed, which he ultimately did. Meanwhile, the two other suspects were whipped in a similar manner in the county jail until they confessed. Perhaps the most disturbing of all, when the case went to trial a week after the murder, one of the three defendants tried unsuccessfully to enter a guilty plea, being less afraid of a judicially authorized execution than further tortures. The deputy sheriff who participated in the hanging and whipping made no effort to deny the abuse of the suspects and when asked at

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Bram v. United States, 168 U.S. 532, 558 (1896) (murder on the high seas); Hardy v. United States, 186 U.S. 224, 229 (1902) (Alaska territory) ; Powers v. United States, 223 U.S. 303, 314 (1912) (federal liquor tax case).

[117] John D. Calder, *Between Brain and State: Herbert C. Hoover, George C. Wickersham, and the Commission that Grounded Social Scientific Investigations of American Crime and Justice, 1929–1931 and Beyond*, 96 MARQ. L. REV. 1035, 1062 (2013).

trial if he thought the techniques used were excessive, he responded, "not too much for a Negro."[118]

Remarkably, the Mississippi Supreme Court affirmed the conviction and death sentences in *Brown* on a procedural technicality.[119] The defense lawyers in many ways performed masterfully, convincing the defendants—at least one of whom preferred a quick death to the risks associated with a trial—that if they described the tortures inflicted upon them the law would protect them Mississippi law required the defendant to move to exclude a confession in the trial court after evidence had been introduced to support a claim that interrogators had used coercion. The lawyers in Brown had made a motion to exclude the confessions but had done so before Deputy Dial's testimony and they did not renew the objection after his testimony.

The tortures involved in *Brown* became something of a national human rights case. Not only had the issue of the third degree generally come to the public's attention through the Wickersham Commission and reporting on the Commission's findings, but the *Brown* case itself became nationally known. The case was covered by *Time* magazine and the *New York Times*.[120] The case raised the possibility of the execution of innocent men who had been tortured into confessing in a state correctly perceived to have one of the worst civil rights records in the former Confederacy. In fact, Kemper County, Mississippi, where the defendants were tried, had seen more lynching than all but two counties in Mississippi.[121] Understandably, scholars have concluded that *Brown* was a type of equal protection case—that federal courts used the case to establish a certain minimum threshold of fairness so that black citizens, particularly in the Old South, would not be subjected to a very different method of proof than white citizens.[122]

It is undeniable that the facts of *Brown* are horrific, but sadly not as isolated as one would hope. The Wickersham Commission revealed similar tortures throughout the country, perpetrated against suspects of all races. In a Wisconsin case in 1922, for instance, the state's high court reversed a conviction based on a confession by a white suspect that had been extracted by tortures leaving marks from which the defendant "must have suffered greatly," according to a doctor who testified. One of the officers participating in the interrogation was asked at trial if he had beaten the

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[118] *Brown,* 297 U.S. at 281–82.

[119] State v. Brown, 161 So. 465, 466–67 (Miss. 1935).

[120] RICHARD C. CORTNER, A SCOTTSBORO CASE IN MISSISSIPPI: THE SUPREME COURT AND BROWN V. MISSISSIPPI ch. 7 (U. Press of Miss. 2005).

[121] HEWITT CLARKE, BLOODY KEMPER: A TRUE STORY IN MISSISSIPPI (2nd ed. 1998); JULIUS E. THOMPSON, LYNCHINGS IN MISSISSIPPI: A HISTORY, 1865–1965 (reprt. ed. 2011).

[122] Klarman, *supra* note 3, at 48; Scott W. Howe, *The Troubling Influence of Equality in Constitutional Criminal Procedure: From Brown to Miranda, Furman and Beyond*, 54 VAND. L. REV. 359, 377 (2001) (contending that *Brown* "responded in part to the perception of discrimination against poor and African American defendants."); Francis A. Allen, *Griffin v. Illinois: Antecedents and Aftermath*, 25 U. CHI. L. REV. 151, 153–54 (1957) (observing that the Supreme Court's early criminal procedure decision were aimed at achieving equal racial treatment).

suspect. With language particularly mirroring Deputy Dial's in the *Brown* case, he responded, ". . . what we ought to have done would be to kill him."[123]

Suspects of every race and region were at risk. *Brown v. Mississippi*, citing the revelations in the Wickersham Commission, forbade state courts from admitting tortured confessions. The scathing opinion did not expressly state the Court's concerns were unrelated to the reliability of the statement obtained. The Supreme Court's omissions in the *Brown* opinion may have been as important as its express statements. Anyone reading the record of the torture the suspects in *Brown* endured would naturally imagine that they would say anything necessary to end the ordeal. Reliability was the strongest argument against the admission of these confessions, yet reliability was not addressed in the first opinion of the Supreme Court overruling a state supreme court interrogation opinion. As state confessions law was based on reliability concerns, however, these courts would leave untouched even tortured confessions when corroborated by reliable physical evidence. *Brown* started the Supreme Court down a path toward ultimately requiring states to ignore reliability in deciding whether police conduct in the interrogation room prevented the admission of the subsequent confession.

The surprisingly civil libertarian history of the Mississippi Supreme Court further reveals that *Brown* was a vehicle for creating a new type of confessions rule. The Supreme Court in 1936 had the ability to do only two things about interrogations: it could require states to use a different legal standard, and it could supervise the application of whatever legal standard due process required. Certainly, the *Brown* decision did the latter and the facts of *Brown* would suggest that this was appropriate as state appellate courts could not be trusted. The racial overtones of this case in one of the poorest counties in Mississippi, a county that had the dubious distinction of having seen more lynchings than any other county in America, would understandably seem to suggest that courts, especially in the Deep South, were turning a blind eye to the plight of African American men in the criminal justice system.[124]

Appellate courts however, even in the Deep South, did not follow such easy stereotypes. This is not to suggest that these courts were colorblind, in fact quite far from it. The race of the defendant was apparent in their descriptions. Prior to the Civil War, the title of the case indicated when the party was "a slave."[125] Well into the twentieth century, these courts would identify the defendant's race in the facts, often sympathetically noting in interrogation cases that the suspect's social status

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[123] Lang v. State, 189 N.W. 558, 560 (Wis. 1922).

[124] Kemper County, Mississippi, had one of the most notorious records in America for racially-motivated violence from Reconstruction into the twentieth century. In 1875, a Republican sheriff and his family, as well as a large number of African Americans were indiscriminately killed by those who objected to the sheriff's protection of black citizens. JAMES M. WELLS, THE CHISHOLM MASSACRE: A PICTURE OF "HOME RULE" IN MISSISSIPPI (1877). Race riots in 1906 followed a physical encounter between two black men and a conductor that left sixteen black men dead. HEWITT CLARKE, BLOODY KEMPER: A TRUE STORY IN MIS'SIPPI (2nd ed. 1998).

[125] *See, e.g.*, Jordan v. State, 32 Miss. 386 (1856).

made him particularly vulnerable, but as often simply observing that the defendant or a witness was a "negro."[126]

The Mississippi Supreme Court appears to have been uniquely vigilant in policing the interrogations of black suspects in interrogation rooms. That court reversed over half of the confessions involving black defendants from the turn of the twentieth century, until the United States Supreme Court's decision in *Brown.*[127] No other appellate court in the Deep South appears to have had a reversal rate in confessions cases approaching this somewhat remarkable record, but this does not mean that they were abdicating the duty. As Otis Stephens observed, appellate courts throughout the south were certainly reversing convictions involving African American defendants.[128] In a particular telling Alabama Supreme Court case, even though the court did not reverse, it showed particular concern about the facts of a case it heard. In 1909, in *Kelly v. State*, the court held that the jury was justified in convicting the suspect and identified no problem with the method of interrogation that led to the defendant's confession. Even though the defendant, a black man who had been gambling on the night in question, was convicted of shooting someone the court identified as a very popular police officer in Talladega County. While the court affirmed the conviction and the death sentence, the court also concluded that there were serious questions about the reliability of the confession and recommended that the governor consider the case for executive clemency.[129] It is hard to argue that the United States Supreme Court felt it needed to gain supervision

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[126] *See, e.g.*, State v. Bernard, 106 So. 656 (La. 1925) (finding confession involuntary in case where defendant was described as an "ignorant country negro"); Hawkins v. State, 64 S.E. 289 (Ga. App. 1909) (statement extracted from thirteen-year-old African American held not admissible because it was "virtually extorted from a young and weak-minded boy under a well-founded apprehension of punishment."); White v. State, 91 So. 903 (Miss. 1922) (finding waterboarding an "ignorant negro boy" to produce an inadmissible confession); Matthew v. State, 59 So. 842 (Miss. 1912) (finding confession of "fourteen-year-old negro boy" inadmissible); Durham v. State, 47 So. 545 (Miss. 1900) (finding confession of a "dull negro boy" inadmissible); Lord v. State, 21 So. 524 (Miss. 1897) (excluding confession of "a 13-year-old negro boy, not bright").

[127] *See* Hamilton v. State, 27 So. 606 (Miss. 1900) (reversed); Durham v. State, 47 So. 545 (Miss. 1908) (reversed); Jenkins v. State, 54 So. 158 (Miss. 1911) (reversed); Matthews v. State, 59 So. 842 (Miss. 1912) (reversed); Ward v. State, 91 So. 903 (Miss. 1922) (reversed); Whip v. State, 109 So. 697 (Miss. 1926) (reversed); Fisher v. State, 110 So. 361 (Miss. 1926) (reversed); Loftin v. State, 116 So. 435 (Miss. 1928) (affirmed); Fisher v. State, 116 So. 746 (Miss. 1928) (affirmed); Roe v. State, 131 So. 114 (Miss. 1930) (affirmed); Tyler v. State, 131 So. 417 (Miss. 1930) (affirmed); Perkins v. State, 135 So. 357 (Miss. 1931) (affirmed); Winchester v. State, 142 So. 454 (Miss. 1932) (reversed); Hoye v. State, 157 So. 367 (Miss. 1934) (affirmed).

[128] *See* Wilfred J. Ritz, *State Confession Cases: Subsequent Developments in Cases Reversed by U.S. Supreme Court and Some Current Problems*, 19 WASH. & LEE L. REV. 202, 204 (1962) (". . . it is also possible that *Brown v. Mississippi* was something of a freak, a unique case of physical violence that slipped through the state judicial screen. Prior to the *Brown* decision, Mississippi had reversed convictions based on confessions obtained by physical violence. Other states were following the same rule.").

[129] Kelly v. State, 49 So. 535 (Ala. 1909). I have not been able to discover what happened to Kelly, except that he was not executed by the state of Alabama.

over state appellate courts' application of the existing legal doctrines. *Brown* was an outrageous decision by a state appellate court, but very much an outlier, especially in Mississippi.

The Supreme Court would, however, have had an interest in changing the doctrines these courts were applying. A rule that did not admit a reliable but tortured confession would eliminate incentives to torture that were present in confessions rules used in state courts prior to *Brown*. The Wickersham Commission brought police torture in interrogation rooms out of the shadows, and collected in one very public place the examples that had been previously discussed in state court opinions and newspaper reporting. *Brown* cited Wickersham, therefore the court was intensely aware that police officers were willing to resort to torture. A confessions rule premised on reliability gave interrogators an incentive to continue the regular use of abusive practices. When the D.C. Court of Appeals in *Ziang Sung Wan* affirmed the admission of a corroborated coerced confession, the Supreme Court unanimously reversed, tersely but clearly stating that principles from the Fourth Amendment's exclusionary rule animated the federal confessions rule.[130]

Brown, though, had not expressly stated that coerced but corroborated confessions—or the physical evidence from coerced confessions—would not be admissible. A decades-long debate about whether the Constitution was meant to ensure a confession's reliability or deter improperly coercive interrogation tactics would therefore follow. Two famous evidence scholars of the early twentieth century clearly staked out each perspective. John Henry Wigmore, author of the first definitive evidence treatise and Northwestern Law School Dean, was no fan of keeping evidence from juries to give officers an incentive to obey the legal limits on investigations. As Roger Roots has described, Wigmore "invested decades of effort into a personal war against the exclusionary rule," going to the point of "misstat[ing], deliberately it would seem, the holding of some of the cases he cited" to support his claim that there was substantial judicial opposition to the rule.[131] With Prohibition, judicial support for the rule increased substantially and immediately, something Wigmore described as "misplaced sentimentality" and the "heretical influence" of *Boyd* and *Weeks*.[132]

Wigmore's perspective on physical evidence mirrored his view on confessions, believing that reliability alone should govern the admissibility of evidence against a criminal defendant. He even rejected the description of "voluntariness" for the confessions test. Wigmore objected to the use of the term, "perceiving the inaptness of this term to voice a principle of trustworthiness."[133]

Charles T. McCormick, also an evidence scholar and Dean of the University of Texas School of Law, deemed the use of a deterrent basis for excluding evidence to

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[130] *Ziang Sung Wan*, 266 U.S. at 17 n.6.

[131] Roots, *supra* note 11 at 55, 59–60.

[132] John H. Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A. J. 479, 480 (1922).

[133] McCormick, *supra* note 19 at 452.

be far more compelling in cases of confessions than physical evidence. While the United States Supreme Court had not begun to describe the Fourth Amendment's exclusionary rule as a remedy needed to deter police misconduct, state courts and academic commentators had identified this justification for the rule. Prohibition demonstrated the necessity of deterrence to state courts and for McCormick, the national disgrace of the third degree justified extending this rule to confession practices. He observed that historically the rack and thumbscrew were seldom used because they had to be judicially authorized. Early twentieth-century tortures he observed, were far more prevalent because they were committed in secret by officers subject to no oversight:

> Certainly the right to be immune in one's person from the secret violence of police seems to be even more deserving of judicial protection than the constitutional immunity from searches and seizures. The courts and the legislature have increasingly come to believe that a privilege to have the fruits of such a search or seizure suppressed as evidence, is needed as a discourager of the practice. The reason for extending to the person from whom a confession has been wrung by torture, a similar privilege, whether the confession be true or false, is even stronger.[134]

Both the McCormick and Wigmore perspectives gained acceptance in various opinions of the United States Supreme Court that followed *Brown*'s ambiguous holding. As Otis Stephens thoroughly described his landmark work on the history of the Supreme Court's regulation of interrogations, the Court in the 1940s and 1950s sporadically introduced and subsequently rejected the idea that reliability was a basis for admitting a coerced confession.[135] By 1961 however, in *Rogers v. Richmond*, after years of internal debate about whether reliability was a consideration in evaluating the admissibility of confessions, the Court articulated a deterrent justification for confessions modeled after the Fourth Amendment's exclusionary rule that it had announced for federal cases in *Ziang Sung Wan.*[136]

Brown certainly started the Court down a path that led to a confessions rule modeled on the Fourth Amendment's exclusionary rule. It is also fairly clear that this was the Court's intent in *Brown*, despite its ambiguity and despite the Court's internal debate about the role of reliability in confessions cases. The context of the decision makes it hard to explain *Brown* as being driven by concerns about reliability, even though the suspects may well have been innocent. If it were a case about accuracy, one would have expected the Supreme Court to mention the substantial reliability questions such an interrogation method would raise about a false confession, and state courts were already screening confessions for reliability (*Brown* itself notwithstanding). Undeniably, however, *Brown* began a process by

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[134] *Id*. at 454–55.

[135] STEPHENS, *supra* note 4, at 31–62.

[136] Rogers v. Richmond, 365 U.S. 534, 543–44 (1961)

which the Court frequently addressed the role reliability played in our acceptance of interrogation methods. By 1961, the Court was willing to expressly state the conclusion that was practically inescapable from the authority offered in *Ziang Sung Wan* and the factual context of *Brown*, that the constitutional standard for the admissibility of a confession was "to be answered with complete disregard of whether or not [the suspect] in fact spoke the truth."[137] *Rogers v. Richmond*, decided the same year as *Mapp v. Ohio*, made it unmistakably clear that the Fourth Amendment's guarantee against unreasonable searches and the Fifth Amendment's confessions rule were to be applied to discourage police abuses even at the cost of the accuracy of the trial process. For twenty-four states, the Fourth Amendment version was a new requirement; with only occasional deviations by the Court, it is hard to argue that the Fifth Amendment version was not well in place since *Brown v. Mississippi.*

III. DETERRENT MODEL IN A WORLD OF DNA

A federally monitored, deterrent-based confessions rule had implications likely unforeseeable to Supreme Court justices who had lived through the Prohibition Era's legitimate fear of lawless police. Abandoning reliability as a consideration under the Due Process Clause gave judges the ability to monitor confession practices to prevent coercion but not falsehood. Prohibition shifted doctrines of criminal procedure from ensuring accuracy to deterring police misconduct. In the context of seizures of physical evidence, this new way of viewing the rules of evidence benefitted guilty suspects; in the context of interrogations, it harmed innocent suspects.

Shifting the justification for the voluntariness test from ensuring accuracy to preventing coercion would not, by itself, have risked a greater number of false confessions being heard by juries and courts. When courts prior to *Brown* expressed concerns about a confession's accuracy, it was the nature of the interrogation that gave them pause.[138] Physical violence obviously raised such issues for courts, but so did a threat of some sort or a promise of leniency.[139] Reliability was a one-way ratchet; a corroborated coerced confession could be rescued from exclusion.[140] DNA exonerations in the latter part of the twentieth century revealed something that startled many. Even in the absence of coercive tactics, suspects falsely confess. Prior to these discoveries occasioned by advances in biological sciences, social scientists had no ability to study the circumstances that tend to prompt false confessions, and

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[137] *Id*.

[138] *See, e.g.*, People v. Loper, 112 P. 720, 725 (Cal. 1910) (the "horrors of the 'third degree' . . . throw great doubt upon [a confession's] reliability.").

[139] *See* Green v. State, 15 S.E. 10 (Ga. 1891) (observing that there was "considerable conflict" in what sort of promise was sufficient to render a confession inadmissible).

[140] *See* Catherine Hancock, *Due Process Before Miranda*, 70 TUL. L. REV. 2195 (1996).

courts therefore lacked tools to protect accuracy with anything other than the proxy of coercion.

This is not to say that the voluntariness rule, even after the Court concluded that it was not motivated by concerns of reliability, failed to address factors highly relevant to accuracy. The Supreme Court's evaluation of the voluntariness test following *Brown* looked at the suspect's individual vulnerability, his intellectual and psychological sophistication, as well as experience with the police. And regardless of a suspect's individual characteristics, the length and hours of the interrogation, access to sleep and food, and the environment of the interrogation were part of the legal assessment. Not surprisingly, studies have revealed that these factors are highly relevant in identifying false confessions. The voluntariness test therefore continued to protect defendants from inaccuracy even as it denied the prosecution the benefit of a confession merely because it was accurate.

The voluntariness test, however, came to be crushed under its own weight. For three decades following *Brown*, the Supreme Court accepted dozens of confessions cases.[141] As with any totality of the circumstances test, consistency is difficult to achieve.[142] The decisions in confessions cases should have been providing guidance for lower courts. The Supreme Court is an institution that establishes standards for lower courts to follow, not a court for the correction of errors. The number of cases the Court was accepting in this area reveals its interest in setting policy, but the fact-intensive nature of the questions presented by the cases prevented the creation of meaningful standards. The rarity of fact-specific cases in other contexts illustrates the tension the Court felt between feeling a need to influence policy in this area and the inability to identify meaningful standards. In the search and seizure context, by contrast, the Court in its history has taken very few cases considering whether, in the totality of the circumstances, probable cause existed.

The *Miranda* decision was the Court's answer to the administrability problem of the voluntariness rule but it had the effect of eliminating oversight of considerations informing accuracy.[143] In one way, there was nothing new about the *Miranda* decision. Two centuries ago, magistrates, who conducted interrogations until the mid-nineteenth century, were instructed to inform suspects of their right to silence during questioning, and as early as 1829, an American jurisdiction required magistrates to inform suspects of their right to counsel in these proceedings.[144] Decisions from the nineteenth century considered the fact that a suspect did not have counsel present during questioning as a factor that weighed against admissibility.[145]

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[141] *See id.*

[142] *See* Weisselberg, *supra* note 98 at 112 (describing *Miranda* as being motivated for a clearer rule than voluntariness had offered).

[143] *See* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning,* 119 HARV. L. REV. 1274, 1305 (2006) (*Miranda* is "the epitome of a judicially manageable standard.").

[144] *See* Wesley MacNeil Oliver, *Magistrates' Examinations, Police Interrogations, and* Miranda*-Like Rules in the Nineteenth Century*, 81 TUL. L. REV. 777, 802 (2007).

[145] *See, e.g.*, State v. Day, 55 Vt. 511 (1883) (lack of counsel relevant to voluntariness analysis); Coffee v. State, 6 So. 493, 513 (Fla. 1889) (observing lack of warnings and absence of counsel in

Despite these long-existing historical antecedents however, the *Miranda* decision radically changed the law. It not only attached new significance to the failure to provide warnings (a confession after *Miranda* could not be admitted without a warning and waiver), but the new rule had the practical effect of replacing the voluntariness test.

Though *Miranda* itself claimed only to be creating a prophylactic rule to ensure that confessions were admissible, "[i]f warnings were delivered by the police and a waiver was given or signed, it is almost impossible to persuade a judge that the resultant confession is voluntary," as Steven Duke has observed.[146] Three justices, all at different points on the political spectrum, have drawn similar conclusions. Justice Souter has described a waiver of the rights of silence and counsel to be a "virtual ticket of admissibility" for a confession.[147] Justice Thurgood Marshall observed that cases in which a defendant is able to "make a colorable claim that a self-incriminating statement was 'compelled' despite the fact that law enforcement adhered to the dictates of *Miranda*, are rare."[148] Chief Justice Rehnquist recognized that while "the requirement that *Miranda* warnings be given does not, of course, dispense with the voluntariness requirement," he quoted Justice Marshall to conclude that a defendant would seldom be successful in demonstrating his confession was involuntary if he waived his rights to silence and counsel.[149]

As judges and commentators have observed, in many ways *Miranda* fails in its civil libertarian goals.[150] Justice White insightfully recognized in his dissent in *Miranda* that the same sort of custodial pressures apply when police seek a waiver during the interrogation itself.[151] In each instance, the suspect is separated from society in a police-dominated environment. Suspects who would have the heartiness to assert their *Miranda* rights in this setting are not likely to be the ones who would feel an interrogation's coercive pressures most acutely. Law and order critics of *Miranda* lament confessions that are lost because of the rule. But there is a seemingly stronger civil libertarian concern. The most vulnerable of suspects waive these protections. Not only does *Miranda* not limit the coercive brunt of interrogations, it practically creates a presumption of admissibility for those very confessions that may be inaccurate.

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interrogation as relevant to voluntariness analysis); Ford v. State, 21 So. 524 (Miss. 1897) (observing absence of counsel and lack of warning in proceeding before magistrate relevant to finding defendant's statement involuntary).

[146] Steven Duke, *Does Miranda Protect the Innocent or the Guilty*, 10 CHAP. L. REV 551, 562 (2007).

[147] Missouri v. Seibert, 542 U.S. 600, 608–09 (2004).

[148] Berkemer v. McCarty, 468 U.S. 420, 433 (1984).

[149] Dickerson v. United States, 530 U.S. 428, 444 (2000).

[150] *See, e.g.,* Duke, *supra* note 146 and *Miranda v. Arizona*, 384 U.S. 436, 533–34 (1966) (White, J., dissenting).

[151] *Miranda*, 384 U.S. at 533–34 (White, J., dissenting).

For those rare times when a court considered the voluntariness of a confession after a waiver, the Supreme Court in *Colorado v. Connelly* concluded that concerns that the statement might be false would not provide a basis for exclusion. This was a logical extension of *Richmond*'s rejection of reliability as a basis for the constitution's confessions rule. A mentally ill individual approached an officer in *Connelly* and, having heard voices, confessed to murder. A version of the confessions rule that concerns itself with deterring police misconduct, not accuracy, has nothing to say about the admissibility of such a statement, as the Court ruled. The statement "might prove to be quite unreliable," the Court held, "but this is a matter to be governed by the evidentiary laws of the forum . . . and not the Due Process Clause of the Fourteenth Amendment."[152]

State and federal evidence codes, however, stack the deck in favor of admissibility. Probative evidence is admissible—and certainly a suspect's confession is probative—unless "substantially outweighed" by the risk of "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[153] A group of evidence scholars have argued persuasively that courts should rethink this highly deferential approach when there are concerns about the accuracy of a confession.[154] Further, as Brandon Garrett has demonstrated, there is a real concern that interrogation techniques that are not "coercive," as that term has been understood in the case law, will yield confessions that are not only false but have the appearance of reliability.[155] If interrogators feed particularly vulnerable suspects details of a crime over an extended period of interrogation, the suspects will sometimes not only confess but do with a richness of detail that will leave a jury or reviewing court with little doubt of the suspect's guilt. Certain types of interrogation practices that would not trigger coercion concerns have also been demonstrated to produce false confessions, especially for young or lower-functioning suspects who have been interrogated at length.[156] Asking leading questions that assume incriminating facts and falsely informing a suspect that evidence points to his guilt risks a wrongful conviction, but does not create the sort of coercive atmosphere that *Brown*'s progeny condemns.[157] By embracing a deterrent model for the limits on police interrogations, analogous to the one used for the regulation of the Fourth Amendment, the Court created a new vision of criminal

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[152] Colorado v. Connelly, 479 U.S. 157, 167 (1986).

[153] FED. R. EVID. 403.

[154] Richard A. Leo et al., *Promoting Accuracy in the Use of Confessions Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMP. L. REV. 759, 796 (2013).

[155] Brandon L. Garrett, *The Substance of False Confessions,* 62 STAN. L. REV. 1051 (2010).

[156] George C. Thomas, III, *The Criminal Procedure Road Not Taken: Due Process and the Protection of the Innocent*, 3 OHIO ST. J. CRIM. L. 169, 192 (2005).

[157] Allison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 RUTGERS L. REV. 943 (2010); Welsh S. White, *Confessions in Capital Cases*, 2003 U. ILL. L. REV. 979, 1021 (2003).

procedure that would later allow wrongful convictions to fall between the constitutional cracks.

If the pretrial process does not screen out false confessions, then accuracy must be evaluated through the trial process. It may not seem problematic to let a jury consider the value of a piece of evidence, but confessions are uniquely problematic. Juries attach particular weight to confessions; many jurors believe that such statements are necessarily accurate because a suspect would not falsely incriminate himself.[158] Expert testimony can assist jurors in understanding the phenomenon of false confessions, though most courts have concluded that their possibility is not beyond the ken of average jurors.[159] And courts generally do not permit an expert to opine on the accuracy of a particular confession.[160] Under the pre-*Miranda* voluntariness test, or a version of the test modified to consider reliability-undermining factors such as leading questioning or presenting the suspect with falsified evidence of his guilt, a judge presented with the issue may well find the confession sufficiently problematic to be inadmissible. A jury considering this same confession, especially one without the benefit of expert testimony, may well find the defendant guilty beyond a reasonable doubt. At the same, however, *Miranda* requires a court to exclude a confession if a suspect was not given the opportunity to prevent the questioning from occurring in the first place.

The *Miranda* scheme, which replaced the voluntariness test with a warning and waiver requirement, was intended to prevent coercion in interrogation rooms. It can certainly be argued, as it was then argued by Justice White in dissent, that it fails to achieve even that goal. But as reliability had been discarded as a goal of the constitutional regulation of confessions, the fear that false confessions might be overlooked was not even a consideration. When squarely presented with a question about the admissibility of an unreliable confession obtained without coercion, or even interrogation, the Court in *Connelly*, writing in an era prior to DNA exonerations, concluded that reliability was not a constitutional concern. *Ziang Sung Wan, Brown,* and their progeny had long since shifted the Court's perspective from accuracy to preventing abuses.

IV. CONCLUSION

Precedent allows our history to cast long shadows. Prohibition understandably led courts to find a way to curb illegal searches that were causing widespread public outrage. Preventing misconduct became more important than the accuracy of judicial proceedings, something critics of the exclusionary rule frequently decry.

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[158] Jacqueline McMurtrie, *The Role of Social Sciences in Preventing Wrongful Convictions*, 42 AM. CRIM. L. REV. 1271, 1280 (2005).

[159] *Id*. at 1285; Janet C. Hoeffel, *The Gender Gap: Revealing Inequities in Admission of Social Science Evidence in Criminal Cases,* 24 U. ARK. LITTLE ROCK L. REV. 41, 67 (2001).

[160] *See* David A. Perez, *The (In)Admissibility of False Confession Expert Testimony*, 26 TOURO L. REV. 23 (2010).

One can imagine, however, that the interest in curbing an epidemic of unlawful searches outweighed society's interest in successfully prosecuting every bootlegger. A broader principle was extracted from the Prohibition Era. Constitutional criminal procedure provided a method of regulating other types of police misconduct. In context, expansion of the exclusionary rule made sense. Though examining the question more closely, it is likewise hard to quibble with a court denying police an incentive to torture a suspect, even if a guilty murder suspect is freed. A narrow focus on the issue at hand, however, generated less-than-nuanced rules. Prohibition gave us a new model for criminal procedure. Deterrence replaced rather than supplemented accuracy in a world that understandably fixated on liquor searches and rampant torture. DNA exonerations have revealed that there were unintended consequences to rejecting what had, prior to Prohibition, been the goal of criminal procedure—an accurate judicial process.