

# THE VIOLATION OF CONSTITUTIONAL RIGHTS AND THE SEARCH FOR TRUTH IN THE CRIMINAL TRIAL

by

Stephen C. Thaman

## *I. Introduction*

The notions of “truth” and “evidence” have been inextricably intertwined in the history of Western criminal procedure, more so than ever since the ascension of inquisitorial criminal procedure on the European Continent in the late middle ages. The justice achieved by early customary and lay courts in pre-inquisitorial times often had little to do with either truth or evidence, except perhaps in cases involving “hand-having” thieves or “redhanded” assailants whose fates were sealed, often brutally, in “short shrift.” Restoring the peace between victim (or victim’s family or clan) and culprit enjoyed priority over the meticulous determination of “what happened” in the era of duels, swearing contests among compurgators and divine ordeals. Even when juries or Schöffengerichte replaced these primitive procedures, their roles had more to do with appraising whether the accused should be accepted back into the community and on what terms, than evidence analysis and truth determination.

It was with the “scientization” of criminal procedure and the displacement of lay judges and primitive decisionmaking by professional judges with “truth-seeking” inquisitorial powers of evidence gathering and preservation that the link between “evidence” and “truth” was soldered and took priority over more humane concerns of smoothing over the conflict the alleged wrongful act caused in the community. Of course, the ascension of inquisitorial procedure was dictated by the needs of the central powers of church and state which sought to subjugate local government and systems of dispute-resolution. The “truths” the governments sought to prove through their courts were often self-perpetuating myths or fictions upon which the central powers’ domination rested: the crimes which arguably gave rise to this system were crimes against the state or religion, which could not be proved adequately by mere witnesses or victims (there were none), but needed to be proved by judges learned in the science (or was it witchcraft) of the law secretly, without being interfered with by victims, accuseds, lawyers or the public.

But the dominance of inquisitorial procedure on the European continent did not, despite the advances in evidence-taking and the greater predictability of professional decisionmaking,

mean a humanization of the resolution of criminal disputes. Enlightenment thinkers complained that more terror and inhumanity was perpetrated by the administration of the law in these times than was committed by all crimes committed by common criminals. More innocent persons were convicted and sentenced to death in this era than in any era of European history, often based on confessions extorted through legalized torture or the threat thereof. This certainly made up for the amount of guilty persons who were probably exonerated pursuant to the irrational procedures of earlier customary law administered by law representatives of the community.

Thankfully, those days are long past (in most countries). Official torture in Europe disappeared by the end of the 18<sup>th</sup> and beginning of the 19<sup>th</sup> Centuries. Continental Europe, however, experienced political convulsions throwing most countries between the extremes of the absolute monarchist police state and liberalism, depending on the degrees of official lawlessness.<sup>1</sup> All pretenses of a state under the rule of law were then erased with the rise of Bolshevism in Russia, Nazism in Germany and its allied states, Fascism in Italy and Francoism in Spain.<sup>2</sup>

It was in reaction to these horrors that the protection of citizen's rights against the oppression of government gained the upperhand after 1945 in the promulgation of the International Declaration of Human Rights, the European Convention of Rights and Freedoms and finally the International Covenant on Civil and Political Rights. The countries emerging from the darkness of the first half of the 20<sup>th</sup> Century created new constitutions which reflected the primacy of the protection of the citizens against the violence and arbitrariness of the state. The later the emergence of the country from tyranny, normally the more advanced are the protections provided in the constitutions: one can compare the Italian and German Constitutions of 1949 with the Spanish Constitution of 1978 and finally the Constitutions of the countries

---

<sup>1</sup> In Spain, the periods of liberalism invariably coincided with attempts (some more successful than others) to introduce trial by jury, those of monarchic reaction with the abolition thereof. See Ley Orgánica 5/1995, de 22 de Mayo, del Tribunal del Jurado, BOE de 23 de mayo de 1995, "Exposición de Motivos" I, cited in LEY DE ENJUICIAMIENTO CRIMINAL Y LEGISLACIÓN COMPLEMENTARIA (17th ed. 2002), tecnos, Madrid, at p. 623-24.

<sup>2</sup> On the horrendous number of death penalties imposed for the most trivial of offenses during the 12 years of Nazi rule in Germany, *see* INGO MÜLLER, FURCHTBARE JURISTEN 135-74 (1989).

emerging from Soviet domination in 1989-91.

A similar explosion of new constitutions and criminal procedure reform was produced in the 1990's as Latin America emerged from decades of American-sponsored dictatorships which no longer served their one of their prime purposes, the brutal elimination of leftist movements, following the end of the cold war.

The American and English experiences are somewhat different. Of course England had no experience of Fascism and, due to its unique tradition, no written constitution or Bill of Rights listing specific protections for its citizens. Any protection given defendants in criminal cases was a product of the Common Law, decisions of judges in deciding particular cases. The American experience has some marked differences. The American Bill of Rights of 1791 was enacted at a time when Americans, after suffering what they thought were the oppressive and arbitrary laws of the Mother Country, wanted as little government influence in their daily lives as possible. Its purpose was to restrict the new federal government against passing any laws which would impact on the freedoms of the citizens of the thirteen states which made up the new Union.

But nearly all criminal cases in the U.S. were handled in the state courts. The States had their own constitutions which proclaimed similar rights, but they gave these rights varying interpretations which were beyond the control of the Federal Bill of Rights. Of course, until the end of the Civil War in 1865, African-American slaves had no rights whatsoever under the laws of the states or the federal government. Only with the enactment of the 14<sup>th</sup> Amendment to the U.S. Constitution in 1865, preventing the states from denying any person, including the freed slaves, of "due process of law" did the U.S. Supreme Court have leverage to affect the miserable treatment of Black Americans in the state courts (especially those of the Southern States). But it was only in the 1930's that the U.S. Supreme Court began overturning state criminal convictions based on torture and the use of other coercive tactics which undermine the freedom of will of the accused as "violations of due process." Oddly enough, the Supreme Court adopted much higher standards for the administration of criminal justice in its own courts. Already in 1914 the court adopted an exclusionary rule which prevented the use of evidence seized by Federal officials in violation of the Fourth Amendment. The problems this rule addressed were made abundantly clear:

"The tendency of those who execute the criminal laws of the country to obtain

conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.”<sup>3</sup>

It was only in 1948 that the Supreme Court announced that the protection of the Fourth Amendment against unreasonable searches and seizures or those based on warrants which lacked probable cause or a clear description of the places to be searched or the things to be seized was binding on the states and only in 1961 did it hold that evidence seized in violation of the Fourth Amendment could not be used in a criminal case at the state level.<sup>4</sup>

The first generation of human rights guarantees, including those which pertain to the investigation and adjudication of criminal cases, were entrenched on the European Continent as a response to the Fascist, Communist and other dictatorships or police states which had plagued that continent in the 20<sup>th</sup> Century. As with the later development in Latin America, the protections guaranteed to the accused can only be viewed as *restricting the powers of the state in the investigation and prosecution of criminal cases*. In the United States, on the other hand, the new protections proclaimed through the decisions of the Supreme Court in the 1960's under the leadership of Chief Justice Earl Warren, were also a response to the Civil Rights Movement in the 1950's and 1960's to abolish *apartheid* in the American South and to correct the regional injustices caused by racism in the administration of criminal justice. Again, the target was a *limitation of the powers of the police and government in the investigation and adjudication of criminal cases*.

It is in this context that the exclusionary rule must be analyzed. This article will deal with the two most critical areas in which exclusionary rules do their work: (1) where police violate the law in acquiring confessions from suspects and accuseds: and (2) where police acquire evidence by violating the constitutionally protected right to privacy in one's home or in one's private conversations.

---

<sup>3</sup> Weeks v. United States, 232 US 383 (1914)

<sup>4</sup> In the early part of the 20<sup>th</sup> Century the U.S. Supreme Court held the federal courts, which unfortunately exercised jurisdiction over only a minuscule percentage of the criminal caseload, to a much higher standard in the collection of evidence.

The confession was, during the reign of inquisitorial systems (and still is in most countries) the *queen of evidence*. Yet it is the type of evidence most indicative of violating the dignity of the person under investigation. The most egregious methods of extracting confessions, through torture, threats and other coercion, are prohibited in all civilized countries and are usually coupled with an automatic exclusionary rule which reaches the fruits of such statements. The more subtle undermining of the freedom of the suspect through police custodial interrogation, however, is still allowed in most jurisdictions, though such interrogation in most countries must be preceded by explicit admonitions of the right to remain silent and the right to speak with a lawyer. Only a few jurisdictions have gone so far as to say that police interrogation *per se* is an evil which cannot but undermine the freedom of the accused, making the fruits of such interrogations inadmissible in themselves. We will discuss the extent to which statements acquired in violation of the so-called *Miranda* protections are admissible and the extent to which the fruits of such statements may nonetheless be used in further investigation or proof of criminal offenses.

The right to privacy in one's home, one's communications, one's letters, was just as dear to the American colonists and the mother country as was the privilege against self-incrimination. The enshrinement of the right to privacy in modern human rights documents and constitutions also is a tribute to the egregious violations of the privacy sphere by police states and totalitarian dictatorships. This can be evidenced by the popular anti-totalitarian novels of the cold war period, *George Orwell's* "Nineteen Eighty-Four" and *Aldous Huxley's* "Brave New World." Although modern constitutions and human rights conventions universally require that any invasions of the home through searches, seizures or wiretaps be authorized by a judge<sup>5</sup> the former Soviet bloc countries have been slow to transfer the powers to authorize searches, seizures and wiretaps from the public prosecutor's office to the judiciary. But even where judicial authorization is required, many countries still allow evidence seized in violation of this constitutional right to be used to convict the person whose rights were violated and others. This article will discuss the extent to which evidence seized in violation of the requirement of a probable cause determination by a judge is nonetheless admissible in criminal proceedings,

---

<sup>5</sup> Serious exceptions to this rule have been included in the 2001 Patriot Act. See Stephen C. Thaman, *Patriot Act: L'impatto Dell'11 Settembre Sulla Procedura Penale Americana*, REVISTA ULTIMA RATIO, Vol. 0, 135, at pp. 137-44.

either through judicial discretion, assigning priority to law enforcement over civil rights, or by allowing police or prosecutors to avoid the requirement by claiming exigent circumstances.

In conclusion, the failure of modern democracies to seriously enforce their citizens' rights to human dignity and privacy by excusing systematic state violation of human rights in the so-called war against crime seriously undermines those states' claim to be "states under the rule of law." We find an ironical double-standard at work in the post-inquisitorial states which proclaim the primacy of the principle of material truth, the quintessential inquisitorial principle in criminal justice which is seldom given constitutional status, over the constitutional protections of the privilege against self-incrimination, the dignity of the human being, and the right to privacy in one's home, not to speak of the principle of legality and the state under the rule of law. In many of these countries, juries have been eliminated because of their unpredictability, because they have the implicit power to ignore the written positive law to reach what they believe are "just" results in the exercise of their lay commonsense.<sup>6</sup> Yet one will see in the analysis which ensues, that it is the professional judiciary which often creates "new unwritten constitutional principles" which clearly undermine universally recognized human rights guarantees in order to reach their desired goal: the conviction of every guilty person, regardless of the lawlessness of the state officials who investigated that person's crime.

This article will first address the general issue of exclusionary rules related to evidence gathered in violation of the law. Recently the exclusionary rule has been recognized as a constitutional right in many countries. Others have enacted statutory provisions in their codes of criminal procedures. Finally a third group of countries have developed a general jurisprudence in relation to the decision as to whether allow the use of illegally seized evidence.

Once these general approaches have been discussed, the article will first analyze the exclusionary rule in relation to confessions obtained in violation of the law. While confessions induced through coercion (not to speak of torture), threats, deception or promises are deemed to be involuntary and not usable across the board, there is still a question as to whether the investigative authorities may use the "fruits" of such confessions to discover new evidence,

---

<sup>6</sup> See Daryl Brown, *Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1175 (1997), on how this power is similar to the excluding of probative evidence.

witnesses, etc. to be used against the suspect.<sup>7</sup> Whether a confession was taken from a suspect before he/she was advised of the right to remain silent and the right to counsel (so-called *Miranda* rights) requires a more subtle analysis. We will discuss whether this “right” is of constitutional stature, whether violation of this rule leads to suppression of the statement itself and whether the police may use statements acquired in violation of the rule to discover other evidence.

The right to privacy will then be addressed, especially in relation to what are considered the two most serious invasions thereof: searches of the home and seizures therein and wiretapping or bugging of conversations in the home or other similarly private places. Again, the relative importance of these rights will be discussed in relation to the practice of the courts in relation to: (1) the usability of the physical evidence or conversations in criminal cases against the parties whose privacy was violated; (2) their usability against others whose immediate privacy rights were not violated; and (3) the usability of the fruits of these violations against either type of defendant.

Finally, an assessment of the international approaches will be made based on a balancing, or prioritization of the important constitutional and criminal procedure principles involved: the privilege against self-incrimination, the right to human dignity, the right to privacy and a sphere for the development of one’s personality, the prohibition of police lawlessness and the right to due process of law and a state under the rule of law on the one hand, and the principle of material truth, the duty of the state to protect its citizens (victims) on the other hand. The balance, according to the author, should be struck in favor of protecting the first set of overwhelmingly important values at the expense of the escape from punishment of an occasional lawbreaker, and the even less frequent failure to satisfy the desires of a victim to have his/her victimizer punished.<sup>8</sup>

## II. *General Principles for the Exclusion of Illegally Gathered Evidence*

---

<sup>7</sup> Are there “exigent circumstances” which will permit the violation of the protection of human dignity, and, if so, will the information gathered be usable against the person subject to these violations. May the evidence be used against a third party?

<sup>8</sup> In most countries, the overwhelming bulk of illegal searches and wiretaps involve crimes with no immediate victims, i.e., crimes of drug trafficking, money laundering, general organized crime. Confessions, however, are often introduced in cases involving true victims.

### A. Constitutional Principles Relating to Exclusion of Illegally Seized Evidence

A number of modern constitutions adopted by democratizing countries emerging from the clutches of totalitarian, authoritarian or dictatorial regimes have given constitutional status to the prohibition of the use of evidence illegally seized by law enforcement officials. For instance, Art. 50(2) of the Russian Constitution of 1993 provides: “In the realization of justice the use of evidence gathered in violation of federal law is not permitted.”<sup>9</sup> The Russian and Georgian constitutions, if taken literally, would be interpreted to mandate exclusion no matter how technical the violation of the rules laid out in the CCP. There have been attempts to limit the extent of this constitutional exclusionary rule to just “substantial” violations or those which affect constitutionally protected areas.<sup>10</sup> Similar constitutional exclusionary rules can be found in Latin American constitutions.<sup>11</sup> It is perhaps too early to characterize the constitutionalization of exclusionary rules as being a trend but in those countries where they are so anchored, it would have to be a weighty conflicting argument of constitutional magnitude to tip the balance from exclusion, especially if a constitutional right were the right that was violated.

The Canadian Charter of Rights and Freedoms incorporates an exclusionary rule but frames it in terms which require a weighing by the trial judge of the seriousness of the violation “where...a court finds that evidence was obtained in a manner that infringed or denied any of the rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.”<sup>12</sup>

An argument against the exclusionary rules assuming constitutional importance could be

---

<sup>9</sup> See also Art. 42(7) Constitution of the Republic of Georgia.

<sup>10</sup> See I.B. Mikhaylovskaya in LIDIYA B. ALEKSEEVA ET AL, *SUD PRISIAZHNYKH: POSOBIE DLIA SUDEY* 43 (1994).

<sup>11</sup> For example, Art. 29 of the Colombian Const. proclaims the complete nullity of evidence gathered in violation of due process. Oscar Julián Guerrero Perralta, *Colombia*, in *LAS REFORMAS PROCESALES PENALES EN AMÉRICA LATINA* 206 (Julio B.J.Maier et al eds. 2000). AD-HOC. Buenos Aires. See also Brazil, Fauzi Hassan Choukr, *Brasil*, *LAS REFORMAS PROCESALES PENALES EN AMÉRICA LATINA* 124, 136 (Julio B.J.Maier et al eds. 2000). AD-HOC. Buenos Aires.

<sup>12</sup> . § 24(2) Can. Charter of Rights and Freedoms

seen in the jurisprudence of the Eur. Ct. HR which has consistently refused to mandate exclusion of evidence even if it is obtained in crass violation of important rights otherwise protected by the ECHR. In *Schenk v. Switzerland*, a case involving an unlawful recording of a telephone conversation, the ECt.HR stated: “While Article 6 of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law.”<sup>13</sup> This refusal to deal with the question of exclusionary rules has continued in a string of recent cases condemning the absence of judicial authorization for wiretaps in England and Wales and the police’s secret use of such investigation methods.<sup>14</sup> In *Allan v. United Kingdom*, the court cited *Schenk* in holding: “It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the “unlawfulness” in question and, where violation of another Convention right is concerned, the nature of the violation found.”<sup>15</sup>

## B. Statutory Rules for Exclusion of Illegally Seized Evidence

### 1. “Nullities” in Inquisitorial Criminal Procedure

In Continental European criminal procedure certain errors in the gathering of evidence have traditionally led to “nullities” which could prevent the use of such evidence at the trial. The French Code of Criminal Procedure provides: “There is a nullity when a failure to recognize

---

<sup>13</sup> *Schenck v. Switzerland*, 13 E.H.R.R. 242 (1988) ¶ 46.

<sup>14</sup> *Khan v. United Kingdom*, 31 E.H.R.R. (2000); *Armstrong v. United Kingdom* (7.16.02); *Taylor-Sabori v. United Kingdom* (10.22.2002); *Allan v. UK* (11.5.02), ¶ 42; *Hewitson v. UK* (5.27.03).

<sup>15</sup> ¶ 42 *Allan v. United Kingdom* (11.5.02). Note how the test articulated by the ECt.HR could be read to allow the kind of analysis of the gravity of a violation permitted in § 24(2) of the Canadian Charter. The Canadian Supreme Court has held that § 24(2) does not confer a discretion on the judge but a duty to admit or exclude as a result of his finding of disrepute. “The decision whether to exclude depends on “all the circumstances” including the nature of the E, what Charter right was violated, whether the violation was serious or technical, willful or inadvertent, whether it occurred in circumstances of urgency, whether the evidence would have been obtained in any event, whether the offense was serious, and whether the evidence was essential to substantiate the charge.” *Queen v. Collins*, 33 C.C.C. (3d) 1, 12 (1987).

a substantial formality contained in a provision of the present Code or any other provision of criminal procedure has infringed on the interests of the party to which it applies.”<sup>16</sup> As a result of the “nullity” the “annulled acts or documents are withdrawn from the investigative dossier and filed with the clerk of the Court of Appeal.” It further provides: “It is prohibited to derive any information against the parties from the annulled acts or documents or parts of the acts or documents, upon the pain of disciplinary proceedings against the lawyers or judges.”<sup>17</sup>

In post-inquisitorial systems the withdrawal of the document memorializing the evidence is usually tantamount to declaring the complete non-usability of the evidence in the trial, especially since the investigative dossier is the exclusive repository of admissible evidence at the trial.<sup>18</sup> The French procedure seems to require the exclusion of all evidence derivative of the illegality as well, implying a strong *Fernwirkung*. To the extent it works in this way in practice is debatable. Other than nullities expressly provided by statute (*nullités textuelles*), the *nullités substantielles* under § 171 CPP (France) have been divided jurisprudentially into nullities affecting private interests and those affecting public order.<sup>19</sup> Pursuant to an amendment of the CPP-France in 1993, a nullity may only be recognized by a court if it “affects the interests of the party affected.”<sup>20</sup>

Certain other clarifications are necessary with respect to the withdrawing of documentary evidence of the investigative act from the investigative file. Clearly if the document is still in the dossier, the trial judge (or perhaps even lay judges) could become aware of the contents of the

---

<sup>16</sup> § 171 CPP (France)

<sup>17</sup> § 174(3) CPP (France).

<sup>18</sup> In systems where the written trial still dominates, such as in the Netherlands or the French trial in the correctional courts, documents could historically be read at the trial if they were prepared according to the rules laid out in the code of criminal procedure. This is now changing as a result of case law of the European Court of Human Rights which has held that the use of written statements, for instance, may violate Art. 6 of the E.C.H.R. See *Delta v. France*, 16 E.H.R.R. 574 (1993) and discussion in STEPHEN C. THAMAN, *COMPARATIVE CRIMINAL PROCEDURE: A CASEBOOK APPROACH* 125-35 (2<sup>nd</sup> ed. 2008)

<sup>19</sup> JEAN PRADEL, *PROCÉDURE PÉNALE* 596-99 (9th ed. 1997)

<sup>20</sup> § 802 CPP-France (text omitted).

document and it could affect their resolution of the case.<sup>21</sup>

The Italian Code of Criminal Procedure of 1988 (CPP-Italy) also recognizes the notion of “nullities,” proclaiming that “[f]ailure to observe the provisions established in the procedural acts is cause for a nullity only in the cases provided by law.”<sup>22</sup> Using the same terminology as the French Code, the Italian Code labels some nullities as those relating to public order (*ordine generale*) and lists violations relating to jurisdiction of the courts, the initiation of the case by the prosecutor and, what is relevant for the purposes of this study, “the intervention and assistance of a representative of the accused...” and of the aggrieved party.<sup>23</sup> Some of the nullities of general order, including the failure to appoint defense counsel, are considered “absolute” and non-remediable and must be raised *sua sponte* by the court, as well.<sup>24</sup> Another category of “relative nullities” must be raised by the parties during the preliminary investigation or they cannot be cause for reversal in cassation.<sup>25</sup> Relative nullities can be “sanitized” by waiver of the party affected or can be cured by the official who violated the law.<sup>26</sup> Finally, the declaration of a nullity seems to extend to the “fruits” of the illegal act: “The nullity of an act renders the subsequent acts invalid which depend on that declared null.”<sup>27</sup>

## 2. Absolute Exclusionary Rules

---

<sup>21</sup> In Germany, for instance, the document still remains in the file and may well influence judges in their judgments even if it is not mentioned in the judgment-reasons. Craig M. Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032, 1063-64 (1983).

<sup>22</sup> § 177 CPP-Italy

<sup>23</sup> § 178 CPP-Italy. The failure to request defense counsel

<sup>24</sup> § 179 CPP-Italy.

<sup>25</sup> § 181 CPP-Italy

<sup>26</sup> § 183 CPP-Italy

<sup>27</sup> § 185(1) CPP-Italy. Whereas the declaration of a “nullity” implies “the regression of the procedure to the stage or level at which the annulled act was carried out,” § 185(3) CPP-Italy, this regression does not apply to “nullities affecting the evidence.” § 183(4) CPP-Italy. § 206 CPP-France provides that the investigation chamber (*chambre de l’instruction*), in examining the “regularity of procedures submitted to it” shall, “if it discovers a reason for a nullity, pronounce the nullity of the act affected by it and, if it results from it, that of all or part of the ulterior procedural acts.” This would include the possibility of excluding “fruits.” PRADEL, *supra* note 19, at 604-05.

The statutory exclusionary rule in the 2001 Russian Code of Criminal Procedure (§ 75(1) UPK-RF) includes the same absolute language contained in Art. 50(2) of the Const. RF.<sup>28</sup> Similarly, the 1988 CPP-Italy provides for a sanction of “non-usability” in relation to “evidence acquired in violation of the prohibitions established by the law,” and suppression motions may be raised *ex officio* and at any stage of the proceedings.<sup>29</sup>

### 3. Exclusionary Rules for Serious (Constitutional) Violations

§ 11.1 of Spain’s Law on the Judicial Power restricts the types of violations which will lead to exclusion or non-use of evidence in providing: “Evidence obtained, directly or indirectly in violation of fundamental rights and liberties is without effect.”<sup>30</sup>

### 4. Exclusionary Rules Allowing the Court Discretion

In England and Wales, § 78 PACE 1984 provides: “(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. (2) nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.” The discretion given the judge by § 78 PACE has been described in the literature as “broad and unstructured” due to the plethora of factors which may be weighed in addition to the legality of the police actions: the seriousness of the offense, good faith of the officers, type of evidence and its reliability, existence of corroborative evidence, type of illegality and type of right infringed.<sup>31</sup> Nonetheless, it appears that the Eur.Ct. HR has accepted this vagueness as comporting with the requirements

---

<sup>28</sup> § 7 UPK RF provides: “Violation of norms of the current Code by the court, prosecutor, investigator, organ of the inquest or inquisitor during criminal proceedings results in declaration of the inadmissibility the evidence gathered thereby.”

<sup>29</sup> § 191 CPP-Italy. We will examine below how Italian jurisprudence has interpreted this clear statutory exclusionary rule in relation to the more traditional approach in relation to nullities.

<sup>30</sup> § 11.1 Ley Orgánica del Poder Judicial, LEY DE ENJUICIAMIENTO CRIMINAL Y OTRAS NORMAS PROCESALES 252 (10th ed. Julio Muerza Esparza ed. 2005)

<sup>31</sup> David Ormerod, *ECHR and the Exclusion of Evidence: Trial Remedies for Article 8 Breaches?*, [2003] CRIM. L. R. 61,64.

of “fairness” required by § 6 ECHR. Whether a trial can be “fair” when evidence used to convict was gathered in violation of substantial rights enshrined in the ECHR has been strongly doubted in dissents to the Court’s cases refusing to recognize the an exclusionary rule as part of Art. 6.<sup>32</sup>

### 5. Court-Made General Exclusionary Rules

While Germany has no general constitutional or statutory exclusionary rule or use-prohibition, the Supreme Court has excluded evidence after a complicated balancing process has been undertaken by the trial court.

“The decision as to whether or not there will be a prohibition on use is made on the basis of a comprehensive balancing (...). The weight of the procedural violation as well as the importance for the legally protected sphere of the affected party must be considered and placed in the balance as well as the consideration, that the truth may not be investigated at any price (...). On the other hand, one must consider that prohibitions on use impeded the possibilities of determining the truth (...) and that the State according to the case law of the Constitutional Court must constitutionally guarantee an administration of justice which is capable of functioning without which justice cannot be realized (...) If the procedural provision which has been violated, does not, or not primarily, serve to protect the defendant, then a prohibition on use will be unlikely; On the other hand, a prohibition on use is appropriate, when the violated procedural provision is designed to secure the foundations of the procedural position of the accused or defendant in a criminal prosecution.”<sup>33</sup>

But even if the court finds that the violation is of the kind of importance which will give rise to a prohibition on use, such as violations of the personality interests of the defendant through seizure and use of diary entries to prove guilt, the court must still weigh the seriousness of the crime charged before deciding whether to exclude.

“If the accusation is less weighty, then the personality interest of the author if the writings will often prevail. In cases of probable cause that a serious attack on life, other important legal interests or the state or other serious attacks on the legal order have been committed, then the protection of the private life-sphere must give way. The balancing must be undertaken while taking into consideration the

---

<sup>32</sup> For instance, Loucaides, dissenting in Khan: “‘fairness’ when examined in the context of the ECHR implies observance of the rule of law and for that matter it presupposes respect of the human rights set out in the Convention. I do not think one can speak of a fair trial if it is conducted in breach of the law.” On the vagueness of the “fairness” standard of § 78 PACE, see Richard Mahoney, *Abolition of New Zealand’s Prima Facie Exclusionary Rule*, [2003] Crim. L. Rev. 607, at 610.

<sup>33</sup> BGHSt 38, 214, 218-22. English translation in THAMAN, *COMPARATIVE CRIMINAL PROCEDURE*, *supra* note 18, at 111.

interest in criminal prosecution in light of the importance of the constitutional right, whereby the alleged wrongful act, to the extent it can be judged, must also be considered.”<sup>34</sup>

The Australian High Court has also fashioned a general balancing test to determine the excludability of illegally seized evidence. The court should taken into consideration whether there was bad faith on the part of the police, the importance of the evidence, the seriousness of the offense, and the ease with which the law might have been complied with.<sup>35</sup> Exclusion is also mandated, according to a later decision of the Australian High Court, when “the public interest in maintaining the integrity of the courts and in ensuring the observance of the law and minimum standards of propriety by those entrusted with powers of law enforcement” requires it.<sup>36</sup>

In 2002 the New Zealand Court of Appeal has recently adopted a multi-factor “fairness” test which gives the trial judge broad discretion based on a list of criteria including the “seriousness of the offense” and the “importance of the evidence” and replaced a stricter *prima facie* test which had been in place since 1992 according to which it was presumed that illegally seized evidence was inadmissible, but the prosecution could rebut this presumption.<sup>37</sup> The reason for exclusion, both according to the overruled *prima facie* test and the new “fairness” test, is the “vindication of the right that has been breached”<sup>38</sup> and not, as with the U.S. Fourth Amendment exclusionary rule, the deterrence of the police.<sup>39</sup>

Among European courts, it seems as if the Spanish courts have given the most respect to

---

<sup>34</sup> BGHSt 19, 325,331. English translation in THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 18, 113.

<sup>35</sup> *Bunning v. Cross*, (1978) 141 C.L.R. 54, cited in Craig M. Bradley, *Mapp Goes Abroad*, 52 CASE WESTERN RES. L. R.375, 380 (2001).

<sup>36</sup> *Ridgeway v. the Queen*, (1995) 184 C.L.R. 19,38, cited in Bradley, *Mapp Goes Abroad*, at 380. In making the decision, the court must weigh the “nature, seriousness and effect of the illegal police conduct” and whether it was “encouraged or tolerated” police authorities or prosecutors. In this test, the unfairness to the accused is given little weight. *Id.*

<sup>37</sup> *Shaheed* [2002] 2 N.Z.L.R. 377, CA , cited in Mahoney, *supra* note 32, at 607.

<sup>38</sup> *Id.* at 610.

<sup>39</sup> *United States v. Leon*, 468 U.S. 897 (1984).

the commands of their apparently absolute statutory exclusionary rule. It is now accepted doctrine in Spain that the introduction of illegally seized evidence violates the presumption of innocence, equality of arms and the right to a fair trial. Illegally seized evidence may not serve to undermine the presumption of innocence because the allowance of law violations on the part of one party (prosecution) violates the equality of arms in the trial, making it unfair.<sup>40</sup>

The most famous language in American jurisprudence relating to the importance of exclusionary rules was articulated by Justice Louis Brandeis in his dissent in a case involving wiretapping by federal officials in violation of a Washington state law:

"Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means--to declare that the government may commit crimes in order to secure the conviction of a private criminal--would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."<sup>41</sup>

The dissent of Justice Oliver Wendell Holmes was no less direct:

"We have to choose, and for my part I think it is a less evil that some criminals should escape than that the govt should play an ignoble part..If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed." (...) "The reason for excluding evidence obtained by violating the Constitution seems to me logically to lead to excluding evidence obtained by a crime of the officers of the law."<sup>42</sup>

### III. THE EXCLUSION OF ILLEGAL CONFESSIONS AND THEIR FRUITS

#### A. Rules for Involuntary Confessions

The use of torture as a means of gathering evidence was long ago abolished in Europe

---

<sup>40</sup> See Decision of March 26, 1996 (Spanish Constitutional Court), *BJC 180, 133*, atg 137-38, English translation in THAMAN, *COMPARATIVE CRIMINAL PROCEDURE*, *supra* note 18, at 115-17.

<sup>41</sup> *Olmstead v. United States*, 277 US 438, 468 (1928), Brandeis dissenting

<sup>42</sup> 277 U.S. at 470, Holmes dissenting.

and is, along with other cruel and inhuman treatment, prohibited by national constitutions<sup>43</sup> and international human rights conventions.<sup>44</sup> Any such measures would in all civilized countries lead to exclusion of any statement obtained thereby. Thus § 136a StPO-Germany prohibits the use of maltreatment, fatigue, physical intervention, the administration of substances, torture, deception, hypnosis, threats to apply measures not applicable according to the rules, or promises of a benefit not provided by law. The law also includes its own exclusionary rule.<sup>45</sup> The new Russian CCP prohibits the use of force, torture or other brutal or degrading treatment and generally prohibits “the realization of acts and the taking of decisions which degrade the honor of the participants in criminal procedure and treatments which degrade human dignity or create danger to his life or health.”<sup>46</sup>

The issue which concerns us here, is whether the “fruits” of statements gathered against the will of the defendant through the use of force, threats, deception or unlawful promises may be used to investigate the crime under investigation or crimes against others. **Under the English Common Law the inadmissibility of a confession acquired through means which make it involuntary had no effect upon the admissibility of other evidence gathered as a result of the confession.**<sup>47</sup> The untrustworthiness of a coerced confession should not taint physical evidence which is found, for instance.<sup>48</sup> Early U.S. Supreme Court decisions followed

---

<sup>43</sup> See Art. 15, Const-Spain; Art. 13(44), 27(2) Const. Italy; Art. 21(2) Const.-RF.

<sup>44</sup> Art. 57 Universal Declaration of Human Rights; International Covenant on Civil and Political Rights; Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, Art. 7. For a collection of these texts, see M. CHERIF BASSIOUNI, THE PROTECTION OF HUMAN RIGHTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE: A COMPENDIUM OF UNITED NATIONS NORMS AND STANDARDS 21-39 (1994). EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, Art. 3.

<sup>45</sup> Similar rules may be found in § 64(3) CPP-Italy.

<sup>46</sup> § 9 UPK-RF

<sup>47</sup> Although there has been a prohibition on the use of “involuntary” confessions, whether acquired through torture, threats or promises, since the early 18<sup>th</sup> Century, *R. v. Warickshall*, 1 Leach 263, 264, 163 Eng. Rep. 234, 235 (O.B. 1783), this prohibition did not extend to the fruits of such confessions. JOHN H. LANGBEIN, *ORIGINS OF ADVERSARY CRIMINAL TRIAL* 218-29 (2003).

<sup>48</sup> WAYNE R. LAFAYE ET AL, *CRIMINAL PROCEDURE* 519 (3<sup>rd</sup> ed. 2000). Coerced

this rationale, but as the due process theory became more sophisticated, and confessions began to be suppressed not because of untrustworthiness but because of the illegality of the police interrogation practices,<sup>49</sup> the court began to question the admissibility of the fruits. To this day the position of the U.S. Supreme Court is unclear on this issue.<sup>50</sup>

On the other hand, a court in California has allowed a juvenile witness, who was forced to give an incriminating statement against a third party, to testify against the third party, finding that the defendant had no “standing” to challenge the illegal police conduct in relation to the juvenile witness.<sup>51</sup> Following the invasion of Afghanistan in December 2001 and the capture of Taliban and other fighters and their incarceration at Guantanamo Naval Base in Cuba by the U.S. Government, it has been tacitly admitted by government officials that at least subtle means of torture or coercion have been used to gather information which might be used in trials, military or otherwise, against higher ranking Taliban or Al Qaeda officials.<sup>52</sup> Indeed, the recent case of a German law student has again raised this question in Germany.<sup>53</sup>

---

confessions were originally not admissible solely on evidentiary grounds, because they were not deemed to be reliable. *Hopt v. People of Territory of Utah*, 110 U.S. 574 (1884).

<sup>49</sup> Justice *Frankfurter* expounded: "Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency." *Rochin v. California*, 342 U.S. 165, 173 (1952). And he reiterated in *Watts v. Indiana*, 338 U.S. 49, 55 (1949): "The Due Process Clause bars police procedure which violates the basic notions of our accusatorial mode of prosecuting crimes and vitiates a conviction based on the fruits of such procedure. We apply the Due Process Clause to its historic function of assuring appropriate procedure before liberty is curtailed or life is taken."

<sup>50</sup> LAFAVE ET AL, *supra* note 48, at 519. *LaFave et al* are of the opinion that all fruits of such involuntary confessions should strictly be excluded. *Id. See Oregon v. Elstad*, 470 U.S. 298 (1985), indicating that “fruits” will not be excluded if the statement was not “involuntary” in the sense of the due process analysis.

<sup>51</sup> *People v. Badgett*, 41 Cal.Rptr.2d 635 (Cal.App. 1995).

<sup>52</sup> See Scott Shane, *Soviet-style “Torture” becomes “Interrogation,”* NEW YORK TIMES, June 3, 2007  
[http://www.nytimes.com/2007/06/03/weekinreview/03shane.html?\\_r=1&ref=us&oref=slogin](http://www.nytimes.com/2007/06/03/weekinreview/03shane.html?_r=1&ref=us&oref=slogin)

<sup>53</sup> See Florian Jessberger, *Bad Torture—Good Torture?* in 3 J. INT’L CRIM. JUSTICE 1059-

## B. Exclusion of Statements and “Fruits” following so-called *Miranda* violations

Most European jurisdictions now require that persons subject to police interrogation be admonished of their right to confer with counsel before being interrogated and of their right to remain silent.<sup>54</sup> In the landmark case of *Miranda v. Arizona*<sup>55</sup> in 1966, the U.S. Supreme Court limited the requirement of such admonitions to cases in which the suspect was in “custody,” explaining that “without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.”<sup>56</sup> In interpreting the provisions incorporating its *Miranda* rights,<sup>57</sup> German courts have extended their protection to any cases in which the person questioned can be considered to be a suspect in the commission of the crime, regardless of whether he is in custody or not.<sup>58</sup> Thus it is not only the coercion of police custody which requires such admonitions. The German Supreme Court expostulates:

“The principle, that no one must testify against himself in a criminal proceeding, that is, that everyone has a right to remain silent, belongs to the recognized principles of criminal procedure (...). It has found a positive expression in Art. 14(3g) of the International Covenant on Civil and Political Rights (...). The recognition of this right to remain silent reflects the respect given to human dignity (...). It protects the personality rights of the accused and is a necessary component of a fair trial (...).<sup>59</sup>

---

73 (2005) <http://jicj.oxfordjournals.org/cgi/reprint/3/5/1059> For a case which has allowed testimony of a witness found as a result of a coerced confession, see BGHSt 34, 362, 364 (1987), cited in Thomas Weigend, *Germany*, in *CRIMINAL PROCEDURE. A WORLDWIDE STUDY* 197 (Craig M. Bradley ed. 1999).

<sup>54</sup> For a survey of the state of the law in comparative perspective, see Thaman, *Miranda in Comparative Perspective*, 45 ST. LOUIS U. L. J. 581 (2001).

<sup>55</sup> 384 U.S. 436 (1966).

<sup>56</sup> 384 U.S. at 467. In Spain, admonitions also appear to be required only when the suspect is in custody. § 520(1)(a-c) LECr-Spain.

<sup>57</sup> §§ 163(1)(4), 136(1) StPO-Germany.

<sup>58</sup> BGHSt 38, 214, 218.

<sup>59</sup> BGHSt 38, at 224-225. English translation in THAMAN, *COMPARATIVE CRIMINAL PROCEDURE*, *supra* note 18, at 111.

Because *Miranda* rights, as interpreted by the German Supreme Court, are “designed to secure the foundations of the procedural position of the accused” and are meant to protect the dignity and personality rights of the defendant, their violation will lead to the non-usability of the statements acquired in violation thereof.<sup>60</sup> Although the *Miranda* Court clearly held that the admonitions were required by the 5<sup>th</sup> Amendment to the U.S. Const.<sup>61</sup> the Supreme Court gradually began stripping the *Miranda* warnings of their constitutional status and once having such delegitimized them, it began crafting exceptions which would allow statements acquired in violation thereof to be admissible.<sup>62</sup> In *Michigan v. Tucker*<sup>63</sup> Justice *Rehnquist* maintained that the *Miranda* warnings were mere “procedural safeguards” and “not themselves rights protected by the Constitution but were measures to insure that the right against compulsory self-incrimination was protected, and then held that for this reason, the “fruits” of confessions obtained in violation of *Miranda* could be used at trial to convict the confessor.<sup>64</sup> In *Oregon v. Elstad*<sup>65</sup> Justice O’Connor allowed use of a confession obtained after proper warnings even though it was arguably the “fruit” of a previous confession made in violation of *Miranda*, claiming that: “[t]he Miranda exclusionary rule sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation.”<sup>66</sup>

In 2000 then Chief Justice *Rehnquist* beat back a challenge to the power of the Supreme Court to

---

<sup>60</sup> BGHSt 38, at 218-22.

<sup>61</sup> Because the U.S. Supreme Court does not have the power to dictate non-constitutionally based evidentiary rules to the states.

<sup>62</sup> For instance, in *Harris v. New York*, 401 US 222 (1971), the Supreme Court held that statements acquired in violation of *Miranda* could be used to impeach a defendant if he testifies contrary to the content of the illegally acquired statement.

<sup>63</sup> 417 U.S. 433 (1974)

<sup>64</sup> 417 U.S. at 444. The police gained knowledge of the identity of a witness from the unlawful confession who later testified against the defendant at trial.

<sup>65</sup> 470 US 298 (1985)

<sup>66</sup> 470 U.S. at 306. For the second confession to be admissible, neither confessions could have failed under the “voluntariness” due process test, i.e., have been the product of coercion, deception, threats, etc. *Id.* at 318.

impose the *Miranda* rights if they were not of constitutional stature by retracting the aforementioned language in *Tucker* and other cases and ruling that *Miranda* warnings were indeed required by the Constitution.<sup>67</sup> Once this decision was reached, defendants against whom the “fruits” of confessions gained in violation of *Miranda* had been used to convict them, appealed, claiming that the rule in *Tucker* was no longer valid. Some courts have maintained that *Tucker* survived the decision in *Dickerson* and that fruits of *Miranda*-defective confessions were still usable.<sup>68</sup> Others have held that the fruits of *Miranda*-defective confessions, such as a gun obtained through information in such a confession, must be suppressed if the violation of *Miranda* was intentional.<sup>69</sup> A plurality of the U.S. Supreme Court recently held that the “fruit” of a negligent *Miranda* violation would however still be admissible in court.<sup>70</sup> Similarly, some courts have continued after *Dickerson* to allow the use of otherwise valid confessions which were the “fruit” of *Miranda*-defective statements, whereas others have held that the constitutional underpinnings of *Miranda* now make such confessions also non-usable.

Because of the jurisprudence permitting use of evidence received as a “fruit” of failing to admonish suspects before being interrogated, police in the U.S. began routinely to intentionally refuse to administer *Miranda* warnings in order to get information to help them in the investigation. While some courts nevertheless allowed the statements to be used to impeach a testifying defendant or as a source for “fruits” to help in the investigation,<sup>71</sup> other courts are taking a stricter approach to intentional police violation of the law and refusing any use of statements or “fruits” resulting from such illegal interrogations.<sup>72</sup> The U.S. Supreme Court

---

<sup>67</sup> *Dickerson v. United States*, 530 U.S. 428 (2000).

<sup>68</sup> In *State v. Yang*, 608 N.W.2d 703 (Wis. Ap. 2000), a Wisconsin appellate court allowed a gun discovered following a *Miranda*-defective confession to be used, as long as the statement was “voluntary” according to the due process test. Cf. *Taylor v. State*, 553 S.E.2d 598 (Ga. 2001); *State v. Walton*, 41 S.W.3d 75 (Tenn. 2001); *United States v. Sterling*, 283 F.3d 216 (4<sup>th</sup> Cir. 2002); *United States v. DeSumma*, 272 F.3d 176 (3d Cir. 2001).

<sup>69</sup> *United States v. Faulkingham*, 295 F.3d 85 (1<sup>st</sup> Cir. 2002).

<sup>70</sup> *United States v. Patane*, 542 U.S. 630 (2004).

<sup>71</sup> *People v. Peevy*, 953 P.2d 1212 (Cal. 1998) (may use statement to impeach).

<sup>72</sup> *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9<sup>th</sup> Cir. 1999)(allowing civil suit against officers based on the practice); *State v. Sosinski*, 750 A.2d 779

recently adopted this approach in a case where the “fruit” of the statement taken in intentional violation of the *Miranda* rules was a second statement which preceded proper *Miranda* admonitions.<sup>73</sup>

In dealing with the repercussions which ensue from failing to advise a suspect of the right to remain silent and the right to counsel before an interrogation, the issue of the constitutional stature of the so-called *Miranda* warnings appears to be crucial. The German Supreme Court has recognized the constitutional stature of the warnings and has concluded that the statements themselves may not be used because of the importance of the warnings in protecting the procedural status of the accused. But it has not extended this evidentiary prohibition to the “fruits” of the confession, whether in the form of physical evidence or subsequent confessions.<sup>74</sup> § 11.1 LOPJ-Spain would clearly exclude both a confession and the “derivative evidence” if those courts find the warnings to be constitutionally rooted.<sup>75</sup> And U.S. jurisprudence places great emphasis on the constitutional underpinnings in deciding whether the “fruits” of statements given in violation of the admonition requirement may be used at trial.

The Italian CCP at first glance provides for the greatest protection of the suspect-accused when confronted by the specter of police interrogation. Even spontaneous admissions made by persons to the judicial police or a judge may not be used even though the person was not being

---

(N.J. App. 2000)(no use of statement or fruits).*Garvin v. Farmon*, 258 F.3d 951 (9<sup>th</sup> Cir. 2001)(no use of “fruits”). The court stated: “The Constitution is not a set of rules that the government is free to violate so long as it is willing to do without the evidence so obtained.” In *People v. Neal*, 72 P.3d 280(Cal. 2003), the California Supreme Court held that statements gathered in violation of *Miranda* could be used for no purposes where the police grossly pressured the suspect to talk and ignored both his right to remain silent and to counsel. The Court distinguished the *Peevy* case, claiming the police conduct there was much less egregious. In *State v. Knapp*, 666 N.W.2d 881 (Wis. 2003), the Wisconsin Supreme Court held that *Dickerson* overruled the *Elstad* decision and that subsequent confessions which are “fruits” of *Miranda* defective confessions may no longer be used. The Missouri Supreme Court has ruled that the *Elstad* rule will not apply where the police intentionally violated *Miranda* in order to acquire the first statement. *State v. Seibert*, 93 S.W.3d 700 (Mo. 2002).

<sup>73</sup> *Missouri v. Seibert*, 542 U.S. 600 (2004).

<sup>74</sup> THEODOR KLEINKNECHT ET AL, STRAFPROZEBORDNUNG 469 (note 20b) (43d ed. 1997).

<sup>75</sup> However, some voices in the literature find that, despite *Miranda* violations, the fruits would still be admissible, though could not be the only support for a conviction. VICENTE GIMENO SENDRA ET AL., DERECHO PROCESAL PENAL 507 (1996) (Colex). Madrid.

questioned as a suspect.<sup>76</sup> Suspects must be advised of the right to remain silent and that all they say can be used against them and the statute requires exclusion if the admonitions are not given.<sup>77</sup> The police, however, are permitted to gather “summary information” from suspects, even those arrested *in flagrante*. Although this must generally be done with obligatory assistance of counsel,<sup>78</sup> the police may gather “information and tips” from suspects in the absence of defense counsel though “no record or use may be made of the information and tips gathered in the absence of defense counsel.”<sup>79</sup> The “information and tips” gathered by police may, however, be freely used in ways that do not prejudice the declarant, for instance, against third parties,<sup>80</sup> but may also be used for the purpose of justifying a search or seizure or an order of pretrial

---

<sup>76</sup> §§ 63, 350(7) CPP-Italy. In Germany spontaneous admissions may be used even if no warnings have been given. BGH NJW 1990, 461, and courts allow lengthy “informal” interviews with suspects before informing them of their rights and admit information obtained in the course of such talks as evidence. BGH NStZ 1983, 86. Called “informativische Befragung”. Weigend, *Germany*, *supra* note 53, at 200-201. Cf., RAIMUND BAUMANN & HARALD BRENNER, *DIE STRAFPROZESSUALEN BEWEISVERWERTUNGSVERBOTE*. 79 (1991)(Boorberg) (Stuttgart, Munich, Hanover).

<sup>77</sup> § 64 CPP-Italy. Although the failure to advise a suspect of the right to remain silent is considered by some Italian courts to not constitute a nullity, C.Cass. VI, 11.12.91, voices in the literature dispute this, claiming the failure should constitute a nullity of general order leading to exclusion. Marilena Colamussi, *Interrogatorio dell'imputato ed omesso avvertimento della facoltà di non rispondere*, in *PERCORSI DI PROCEDURA PENALE. DAL GARANTISMO INQUISITORIO A UN ACCUSATORIO NON GARANTITO* 19.(Vincenzo Perchinunno, ed. 1996)(Giuffrè). Milan. Denial of the right to consult with counsel does, however, constitute a nullity of general order leading to exclusion., Marilena Colamussi, . *In tema di deducibilità della nullità derivante dalla violazione del diritto dell'imputato in stato di custodia cautelare di conferire con il proprio difensore* in *PERCORSI*, *supra* at 37. That violations of § 64 CPP-Italy do not result in suppression of the fruits, *see* Elizabeth M.T. Di Palma, *Riflessioni sulla sfera di operatività della sanzione di cui all'art. 191 c.p.p.*, in *PERCORSI*, *supra* at 115.

<sup>78</sup> § 350(2-3) CPP-Italy. Even before the adoption of the 1988 CPP, the 1930 CPP was interpreted to also prohibit any use whatsoever of statements taken in the absence of counsel. , Craig M. Bradley, *The Emerging International Consensus as to Criminal Procedure Rule*, 14 *MICH J. INT'L L.* 171, 218-19 (1993).

<sup>79</sup> § 350(5-6) CPP-Italy

<sup>80</sup> GIOVANNI CONSO & VITTORIO GREVI, *COMMENTARIO BREVE AL NUOVO CODICE DI PROCEDURA PENALE* 143, 387 (4<sup>th</sup> ed. 2002) (CEDAM, Padua).

detention.<sup>81</sup> The information gleaned from a non-usable statement may also be used to develop leads in an investigation and there are no strict restrictions in this matter against use of evidence developed from the leads.<sup>82</sup> A statement, otherwise non-usable, may however, as in the U.S., be used to impeach the defendant if he testifies at trial in a contrary manner.<sup>83</sup>

Although the right to remain silent is not what it used to be in England and Wales, for one's silence may be used against oneself at trial,<sup>84</sup> the English Courts will on occasion suppress confessions, but primarily when the defendant is denied the right to consult with counsel before being interrogated.<sup>85</sup> For instance, in one case the English Court of Appeal suppressed a confession obtained properly because it was the fruit of a previous confession obtained in violation of the right to consult with counsel per § 58 PACE.<sup>86</sup> In Canada suspects possess full, unrestricted *Miranda* rights as in the U.S.<sup>87</sup> Canadian courts have also suppressed the "fruits" of

---

<sup>81</sup> *Id.* at 390.

<sup>82</sup> *Id.* at 400. According to one commentator: "The legislator wanted to protect from self-incrimination a declarant without rendering completely non-usable the declarations made previously." Paolo Di Geronimo, *Quale regime probatorio per le dichiarazioni rese successivamente alla mancata interruzione ex art. 63 comma 1 c.p.p.?* CASSAZIONE PENALE. 2001. No. 5 #747, at 1543, at 1545.

<sup>83</sup> §§ 350(7), 503(3) CPP-Italy. Rachel VanCleave, *Italy*. in CRIMINAL PROCEDURE. A WORLDWIDE STUDY, *supra* note 53, at 264.

<sup>84</sup> Suspects are warned in the following fashion: "You do not have to say anything. But it may harm your defence if you do not mention, when questioned, something which you later rely on in court." § 10.4 Code of Practice C. PACE (England), *see* THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 18, at 90. The use of one's silence following such warnings has been upheld by the Eur. Ct. HR in *Murray v. United Kingdom*, 22 E.H.R.R. 29 (1996) in the context of a trial by a professional judge, but was held to violate the right to a fair trial in another context before a jury. *Condrón v. United Kingdom*, 31 E.H.R.R. 1 (2001). THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 18, at 171-77.

<sup>85</sup> § 58 PACE-England guarantees the suspect a right to consult with counsel before being interrogated.

<sup>86</sup> *R. v. McGovern*, [1991] Crim. L. R. 124, 124-25, reprinted in THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 18, at 121-22. Cf. Bradley, *Mapp*, *supra* note 35, at 386.

<sup>87</sup> Canada also does not allow undercover police or informants to subvert the admonition regime, *The Queen v. Herbert*, 77 C.R. (3d) 145, as may be done before a prisoner is charged in the U.S. *Illinois v. Perkins*, 496 U.S. 292 (1990). Bradley, *Mapp*, *supra* note 35, at 384. On the

confessions obtained in violation of the right to counsel.<sup>88</sup> While Australia now recognizes *Miranda* rights, failure to abide by them does not necessarily even lead to exclusion of the statement taken.<sup>89</sup>

Unlike the prohibition against the use of torture, threats, force or other methods which render confessions “involuntary” or otherwise untrustworthy, which usually brings with it a prohibition on use of the “fruits” of such confessions as well and will lead to suppression of physical evidence gathered as a result of the information contained therein, the constitutional protection against unknowingly speaking to police in a an otherwise non-coercive situation,<sup>90</sup> which impacts on procedural fairness and notions of the dignity of the person, that he or she should only knowingly help the prosecuting authorities secure a conviction, has generally not been treated as seriously in the sense that police may still get benefit, through use of the fruits to develop investigative leads or find physical evidence or witnesses.

Once police are aware of this “loophole” American experience shows that they will intentionally violate important constitutional rights if they think they can nevertheless gain useful information in so doing. The broader the loophole and the more discretion given courts to interpret it, the more will constitutional rights be ignored by investigative authorities. We will address this issue later in the context of the abuse of using the exigent circumstances exception to the warrant requirement in dwelling search cases.

---

other hand, the police may return to try to question a suspect after he or she has attempted to speak with, or has spoken with counsel, *Id.*, a practice similar to that in Germany. BGHSt 42, 170, 171, 173-74, English version in THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 18, at 87-88. The police may not do this in the U.S. *Edwards v. Arizona*, 451 U.S. 477 (1981).

<sup>88</sup> Bradley, *Mapp*, *supra* note 35, at 383.

<sup>89</sup> Bradley, *Mapp*, *supra* note 35, at 381.

<sup>90</sup> Since police custody is inherently coercive, *Miranda v. Arizona*, 384 U.S. at 467, and since admonitions need only be given when a person is in custody, 384 U.S. at 444, U.S. law has distanced itself from the theory that the decision on whether to talk to police in general is linked to constitutional protection of important personality rights. Where this is the case, such as in Germany, warnings must be given whenever suspicion focuses on a suspect whether he or she is in custody or not. BGHSt 38, 214, 215, 218. This approach has also been adopted in England and Wales, THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 18, at 92, in Italy, § 63 CPP-Italy, as well as in Australia, *Van der Meer v. The Queen*, (1988) 82 A.L.R. 10, 18, cited in Bradley, *Mapp*, *supra* note 35, at 381.

Clearly if bad faith is shown by the police in failing to give proper admonitions, then all fruits of statements thus acquired should be suppressed, regardless of how important the case is or there will be nothing to deter police from undermining the constitutional fabric of the political and social system. Yet it is the rare police officer who will admit that his ignoring of *Miranda* warnings was intentional, and it is the rare judge who will reject a claim of inadvertence by a police officer if given under oath at a motion to suppress evidence.<sup>92</sup>

The solution which will best prevent the undermining of important personality rights of citizens in the investigation of criminal offenses would be to make *all* confessions of suspects-accused-defendants and the fruits derived from them inadmissible *per se*, unless they were made in the presence of defense counsel, following proper *Miranda*-type warnings.<sup>93</sup> I would further recommend that confessions be used only to the benefit of the person giving them<sup>94</sup> and thus should be subject to negotiations as are guilty pleas in the U.S. and trial-simplifying confessions in *Absprachen* in Germany.<sup>95</sup>

#### IV. THE EXCLUSION OF EVIDENCE FOLLOWING VIOLATION OF PRIVACY RIGHTS

##### A. Constitutional Protection of Privacy in the Dwelling and in Private Communications

---

<sup>92</sup> On the problem of police lying in American suppression hearings and the willingness of judges to base their rulings on obvious prevarications, see Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 388; Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 20-22 (2001).

<sup>93</sup> In regimes like the U.S. where the suspect may waive his right to counsel, the voluntariness of such waivers, especially when given in custody, are suspect for the same reasons that the voluntariness of statements taken in custody are considered to be. Progressive in this respect is a provision in the new Russian CCP which makes any statement given by the defendant to pretrial investigators in the absence of defense counsel inadmissible, whether or not the suspect purportedly waived the right to counsel, if the defendant recants the confession in court. § 75(2)(1) UPK-RF. This is a welcome innovation in a country otherwise known for the brutality of its police interrogators. See in general CONFESSIONS AT ANY COST. POLICE TORTURE IN RUSSIA (Human Rights Watch 1999).

<sup>94</sup> In Italy, the defendant's interrogation is considered to be only a tool in his or her defense, see § 65(2) CPP-Italy, THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 18, at 103.

<sup>95</sup> See Stephen C. Thaman, *Gerechtigkeit und Verfahrensvielfalt*, in RECHT—GESELLSCHAFT—KOMMUNIKATION. FESTSCHRIFT FÜR KLAUS F. RÖHL 313-14 (Stefan Machura & Stefan Ulbrich eds. 2003) (Nomos, Baden-Baden); Thaman, *Miranda in Comparative Law*, *supra* note 54, at 622-24.

The inviolability of the dwelling and of one's private communications with others rank among the most cherished rights of citizens in democratic countries. They are enshrined in all major human rights conventions.<sup>96</sup> Many democratic constitutions not only proclaim the right to privacy in general, but explicitly require judicial authorization for searches of dwellings<sup>97</sup> and seizure of things therein, and for the interception and recording of postal, telegraphic, telephonic or electronic communications.<sup>98</sup> Most democratic countries have also enacted legislation requiring judicial authorization for searches and seizures,<sup>99</sup> interception and seizure of private communications,<sup>100</sup> and in many cases also seizure and reading of private writings.<sup>101</sup> The inviolability of the home and private communications may, of course, be "violated,"<sup>102</sup> in the investigation of criminal cases if it is "necessary" "in a democratic society..to defend order, prevent punishable acts..., etc."<sup>103</sup> Democratic constitutions usually require that a judge decide if

---

<sup>96</sup> Cf. Art. 8, ECHR; Art. 17, IPCPR; Art. 12(1) Universal Declaration of Human Rights; Art. 11, American Convention on Human Rights.

<sup>97</sup> Georgia (Art. 18 Const.); Germany (Art. 13(1,2) Const.); Italy (Art. 14 Const.); Lithuania (Art. 21 Const.); Russia (Art. 25 Const.); Spain (Art. 18(2) Const.); Ukraine (Art. 30 Const.) United States (Const. IV Amend.). Constitutional provisions checked in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds.).

<sup>98</sup> Georgia (Art. 20 Const.); Lithuania (Art. 22 Const.); Russia (Art. 23 Const.); Spain (Art. 18.3 Const.); Ukraine (Art. 31 Const.); United States Const. IV. Amend., as interpreted in *Katz v. United States*, 389 US 347 (1967);

<sup>99</sup> See for instance: England (§ 8 PACE); Germany (§§ 98, 105 CCP); Italy (§§ 244, 247, 253 CPP); Latvia (§ 168 CCP); Russia (§§ 12, 177(5), 182(3) CCP, § 8 LOIA-RF); Spain (§§ 546, 550 CCP).

<sup>100</sup> See for instance: France (§ 100 CPP); Germany (§ 100b(2) CCP); Italy (§ 267(1-3) CCP); Latvia (§ 136 CCP); Russia (§§ 13, 185, 186 CCP, § LOIA-RF); Spain (§ 579 CCP); 18 U.S.C. § 2510 ff.

<sup>101</sup> See for instance: Germany (§ 97 StPO); Spain (§ 573 CPP).

<sup>102</sup> As to the "violability" of the so-called "inviolable" rights, see Andrés de la Oliva Santos, *Sobre la ineficacia de las pruebas ilícitamente obtenidas*, TRIBUNALES DE JUSTICIA, No. 8-9. Aug-Sept. 2003, 1, at 5.

<sup>103</sup> Art. 8(2) ECHR. Necessity is, in the criminal law, a weighty standard. Another's life may only be taken in defense of one's own if there is a necessity to do so. If that necessity is now shown, the slayer is guilty of murder or manslaughter. The same holds for commission of a crime

this “necessity” exists<sup>104</sup> and without judicial authorization, searches of dwellings are *prima facie* illegal.<sup>105</sup> The influence of the Eur. Ct. of HR has been especially strong in the regulation of wiretapping and bugging. In a number of cases it has held that national legislation violates Art. 8 ECHR and has emphasized the need for specific legislation to replace even adequate regulation of the material in the jurisprudence of the highest court of the countries.<sup>106</sup> The United

---

under the necessity defense, where it is clear that the person claiming necessity cannot have brought about the necessity with his or her own acts. Need cites.

<sup>104</sup>Georgia (Art. 18 Const.); Germany (Art. 13(1,2) Const.); Italy (Art. 14 Const.); Lithuania (Art. 21 Const.); Russia (Art. 25 Const.); Spain (Art. 18(2) Const.); Ukraine (Art. 30 Const.)United States (Const. IV Amend.). Constitutional provisions checked in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds.). Art. 14 Const.-Italy refers back to the CPP-Italy which allows searches of dwellings pursuant to a reasoned judicial authorization based upon “reasonable cause” (*fondato motivo*) that a person or things related to a crime are to found in a place. § 247 CPP-Italy.

<sup>105</sup>Although the ECHR does not explicitly require judicial authorization, its case law has tended to impose such a requirement. In three cases involving searches authorized and carried out by French customs officials, the Eur. Ct. HR ruled that Art. 8 was violated due to the absence of judicial authorization. *Funke v. France*, 16 EHRR 297, 329 (1993); *Mialhe v. France*, 16 EHRR 332, 354 (1993) and *Cremieux v. France*, 16 EHRR 357, 376 (1993). The Eur. Ct. HR, however, failed to find a violation of Art. 8 when an official of the Swiss Telecommunications Service authorized and carried out a search of a home for unauthorized telephone equipment, where a reasoned order was required and the search was very carefully delimited. It held: “it must be particularly vigilant where, as in the present case, the authorities are empowered under national law to order and effect searches without a judicial warrant. If individuals are to be protected from arbitrary interference by the authorities with the rights guaranteed under Article 8, a legal framework and very strict limits on such powers are called for.” *Camenzind v. Switzerland*, 28 EHRR 458, 475-76 (1999). The Fourth Amendment also allows searches of homes under administrative search warrants issued and carried out by regulatory officials if the searches are limited to enforcing adherence to administrative regulations and are strictly limited by a plan. *Camara v. Municipal Court*, 387 US 523 (1967). In the area of wiretaps and bugging, the Eur. Ct. HR has also stressed that judicial authorization is a normal prerequisite for ordering such measures, though it did approve, under a law preceding the current German statute requiring judicial authorization, approval given by a parliamentary committee. *Klass v. Germany*, 2 EHRR 214, 235 (1978). The extension of wiretap authorization to executive officials in the U.S. in a number of areas pursuant to the Patriot Act can be seen as a serious undermining of the requirement of judicial authorization. *See Thaman, Patriot Act, supra* note 5.

<sup>106</sup>For instance, the French scheme was ruled in violation of Art. 8 ECHR in *Kruslin v. France*, ¶ 34, Series A, No. 176, 12 EHRR 547, although the French investigating magistrate was held to be a sufficiently independent magistrate to issue such warrants. France then amended its law, adding § 100 CPP-France. The Spanish law has also been held to violate Art. 8,

Kingdom, however, still allows police officials to order wiretaps and has been continuously condemned by the Eur. Ct. HR on this account.<sup>107</sup>

A universal exception to the requirement of antecedent judicial authorization is when there are emergency circumstances which will not tolerate delay.<sup>108</sup>

#### B. *The Requirement of Probable Cause*

For a home to be searched for evidence (or suspects) related to crime there must first be “necessity” expressed by a sufficient amount of suspicion that particularly described objects or persons will actually be found in a particular dwelling. Some statutes attempt to articulate a sufficiently substantial level of suspicion “that a crime has been committed and that particular evidence related to the crime” can be found in a particular place. An example of this is the American use of the term “probable cause.”<sup>109</sup> On the other hand, in Spain and Germany it

---

Valenzuela Contreras v. Spain, 28 E.H.R.R. 43 (1998) even though the Eur. Ct. HR has conceded that its highest courts have corrected many of its deficiencies in their jurisprudence. See also Prado Bugallo v. Spain (Feb. 18, 2003).

<sup>107</sup> Khan v. U.K. (5.12.00); Armstrong v. UK (7.16.02); Taylor-Sabori v. United Kingdom; Allan v. UK (11.5.02). Russia has finally implemented the requirement in Arts. 23, 25 Const.-RF of judicial authorization for searches and interception of communications new Code of Criminal Procedure which passed in 2001. §§ 12, 13, 29, 177(5), 182, 186 UPK-RF.

<sup>108</sup> Art. 13(2) Const. Germany makes an exception for “danger in delay;” Art. 18(2) Const. Spain for “flagrant crimes.” U.S. case law also allows searches without warrants in connection with flagrant crimes, or “hot pursuit,” as long as the case is a serious one, for the “Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others.” Warden v. Hayden, 387 U.S. 294 (1967). Entry of residences without a warrant is not allowed if the crime is not of major importance, Welsh v. Wisconsin, 466 U.S. 740 (1984). Although the Supreme Court has been reluctant to allow police to enter a house following an arrest for drug sale in front of the house on the sole claim that “evidence could be destroyed or removed,” Vale v. Louisiana, 399 US 30 (1970), lower courts are becoming more amenable to this police justification for such searches. United States v. MacDonald, 916 F.2d 766 (2d Cir. 1990). The President of the U.S. is authorized to order wiretaps in cases involving national security and espionage, 18 U.S.C. § 2511(3) and traditional exigent circumstances doctrine applies as well in normal emergency situations. Cf. State v. DeLuca, 775 A.2d 1284(N.J. 2001) (activation of pager without judicial authorization to locate robbery get-away driver to locate suspect in shooting).

<sup>109</sup> U.S. Const. IV. Amend. This has been interpreted to mean “a fair probability” that a crime has been committed (or is in the process of being committed) and that evidence, fruits, instrumentalities of the crime may be found in a particular place. Illinois v. Gates, 462 U.S. 213 (1983). In England “reasonable grounds” are required, § 8 PACE-England, which is similar to

appears that almost any suspicion, however slight, will suffice to authorize a search of a dwelling. The requirements for securing judicial authorization for conducting a wiretap or bugging a private space are often stricter. Italy, for instance, requires “grave indicia”<sup>110</sup> of the commission of a particularly serious offense and the measure must be “absolutely indispensable” to the investigation.<sup>111</sup>

Even if law enforcement officials acquire judicial authorization for a search in a country with no requirement of a strong suspicion, such as in Germany, in many cases there will be no “necessity” to infringe on the privacy rights of persons because the suspicion is too minimal to guarantee a predictable likelihood of success in the search. Where the investigating official authorizes his or her own search, as in Spain or France which still use the investigating magistrate, there is not even a neutral detached official not “engaged in the often competitive enterprise of ferreting out crime” to dispassionately evaluate the request.<sup>112</sup>

The requirement of a significant level of suspicion before violating the constitutional rights of citizens, coupled with a independent judicial verification of this suspicion should be the two indispensable requirements for a finding of “necessity” required to authorize the government’s search of a private home or the interception of private communication. In countries where the level of suspicion is not spelled out in sufficient detail, the role of judicial control becomes even more urgent.<sup>113</sup> Not only should the magistrate require more than a

---

the Italian *fondato motivo* . § 247(1) CPP-Italy.

<sup>110</sup> § 267(1) CPP-Italy. Although the U.S. Supreme court once indicated that the “probable cause” standard for wiretaps was higher than that for normal searches, *Berger v. New York*, 388 U.S. 41 (1967), courts now tend to apply the same standard. LA FAVE ET AL, *supra* note 48, at 265-66.

<sup>111</sup> § 267(1) CPP-Italy. In Germany, “certain facts must justify the suspicion” that the defendant has committed certain serious crimes and that “the investigation of the case or the determination of the whereabouts of the accused would be unsuccessful or made substantially more difficult by using other means.” § 100a StPO-Germany. U.S. law requires the order for interception to appraise “whether or not other investigative procedures have been tried or failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous,” 18 U.S.C. § 2518(l)(c),(e), an added protection not required in search warrants.

<sup>112</sup> *Johnson v. United States*, 333 US 10 (1948).

<sup>113</sup> A warrant for a search or seizure of a dwelling may issue “when it is suspected that the search will lead to finding evidence.” § 102 StPO-Germany. In Spain for such a search the

“mere” suspicion or hunch, but he or she should have sufficient detail from the police or prosecutor to be able to adequately describe the things to be seized and the places to be searched and should provide reasons why the information gives rise to a “strong suspicion” that the things will be in the described places. Thus, even if a judge has authorized a search warrant, if, in retrospect, the evidence did not warrant a finding of the requisite level of suspicion, then the search still violates the constitutional right.<sup>114</sup> Where the level of suspicion required is very low or non-existent, the requirement of a judicial warrant is still important to document the fact that there was some evidence, some articulation by the searching officers and that the search is not seeking to validate itself retroactively based on what was actually turned up.<sup>115</sup>

### C. *The Exception for Exigent Circumstances*

To adequately protect the constitutional right of privacy, the exception for exigent circumstances or “danger in delay” should be narrowly construed to prevent large scale evasion of the requirement of judicial authorization as has been the case in Germany. Although it was well-known that police seldom if ever acquired search warrants in Germany<sup>116</sup> and always

---

investigating magistrate need only have “indications that the defendant or effect or instrumentalities of crime, or books, papers or other object which can serve to solve and prove it.” § 545 LECr-Spain. On the almost non-existent requirement of probable cause in Germany, *see* Weigend, in Bradley, at 193. Cf. The CPP-France tersely expostulates: “Searches are effectuated in all places where objects may be found which would be useful in ascertaining the truth.” Investigating magistrates need not articulate any level of suspicion and there is no requirement to particularly describe the places to be searched or things to be seized. Richard S. Frase. *France* in CRIMINAL PROCEDURE. A WORLDWIDE STUDY, *supra* note 52, at 153.

<sup>114</sup> Where a judge erroneously issues a search warrant based on insufficient evidence in the U.S. the search violates the Fourth Amendment. But if the police officer who requested the warrant “in good faith” believed there was sufficient evidence, then the evidence seized is still usable at the trial. If the police officer mislead the officer with false or reckless information, or if there was obviously insufficient evidence that should have been apparent to the police officer, then the evidence will be suppressed. *United States v. Leon*, 468 U.S. 897 (1984). A recent case, however, indicates that, in the future, the U.S. Supreme Court may refuse to suppress evidence if it was gathered negligently in violation of the Fourth Amendment, as long as the police conduct did not rise to the level of deliberateness, recklessness or gross negligence. *Herring v. United States*, 129 S.Ct. 695 (2009).

<sup>115</sup> Andreas Ransiek, *Durchsuchung, Beschlagnahme und Verwertungsverbot*, DER STRAFVERTEIDIGER, Vol. 10 (2002), 565, at 569.

<sup>116</sup> BVerfGE 103, 142, at 152. Weigend, *supra* note 53, at 194-95, estimated that only 10% of searches are conducted with warrants. A similar situation existed in the U.S. until the

(successfully) defended their searches with a perfunctory incantation of the words “danger in delay” without having to explain why such danger actually existed, and the courts winked at this sleight of hand, claiming the trial judge had such a broad discretion that it could not be reviewed on appeal.<sup>117</sup> The German Constitutional Court finally took note of this scandalous situation in 2001 and has attempted to put new teeth into the German right to privacy by limiting the exigent circumstances exception to cases where the grounds therefor are clearly documented, as well as the inability to get judicial authorization before the evidence was in danger of disappearing.<sup>118</sup> In this respect, it is suggested that “danger in delay” and “exigent circumstances” should be limited to two types of fact situations, the “flagrant crime” indicated in the Spanish Constitution [footnote omitted] and the real “emergency situation” involving threat to human life or health. The “flagrant crime” situation would apply to “hot pursuit” cases<sup>120</sup> where, for instance, the suspicion that drugs are to be found in a house arise when the purported traffickers, knowing they have been surveilled or likely to be tipped off, retreat into a house with the drugs. If the suspicion of the presence of drugs comes as a result of an investigation, then in principle a warrant must be obtained.<sup>121</sup> The police may not also “create” the need for exigent

---

exclusionary rule became applicable to the states in *Mapp v. Ohio*, 367 US 643 (1961).

<sup>117</sup> Ransiek, at 566. Citing cases. In effect, only the most arbitrary searches led to exclusion of evidence. *Id.*

<sup>118</sup> BVerfGE 103, 142 (Feb. 20, 2001)

<sup>120</sup> See *Warden v. Hayden*, *supra* note 108.

<sup>121</sup> In search cases, where the crime suspected consists in the possession of the item which is the goal of the search, probable cause to arrest is tantamount to probable cause to search. Yet in these cases, probable cause to arrest-search cannot be identical with probable cause to charge, unless the suspicion turns out to be correct. Thus, if a search is unconstitutional and the evidence suppressed, the case must be dismissed. In cases involving taking of statements following an arrest, there *should be* sufficient evidence to charge before the person is arrested. An arrest should never be predicated on the notion that probable cause will be provided by the fruits of the arrest in the form of a confession or leads from an illegal confession. Thus, the “probable cause” to search-arrest in the possession case means that, if the evidence giving rise to probable cause, such as an informant’s participation in a sale of drugs in the house, or a repairman’s viewing of drugs in the house is believed, that is tantamount to the testimony of a victim to a robbery or an eyewitness to a murder. Only in most jurisdictions the drugs must be seized to corroborate the suspicion.

circumstances by, for instance, walking up to the target house and announcing they are present so as to create the possibility of destruction of evidence.<sup>122</sup> True emergency circumstances such as danger to life or limb are the other situation which should obviate the necessity of looking for a magistrate.<sup>123</sup>

Thus, to underline the importance of the constitutional right to privacy in one's home the exception, or from the police perspective, the "loophole" must be securely plugged. Exigent circumstances should be strictly limited to flagrant "sudden" cases (not manufactured flagrancy) and real emergencies involving human life and limb. The recent German Constitutional Court decision will hopefully pave the way for German courts and law enforcement officials to finally heed the dictates of the German constitution and to get search warrant.

#### *D. Absolute Exclusionary Rules for Violations of Constitutional Privacy Rights*

This analysis of the strength or weakness of exclusionary rules in relation to violation of privacy rights will presume one of two situations: (1) there was no judicial authorization for the dwelling search or interception and there were no sufficient exigent circumstances: or (2) there was judicial authorization but based on insufficient "probable cause" or suspicion. Either of the above situations would seem to clearly mandate exclusion in those countries with constitutional or statutory exclusionary rules in cases of violations of important constitutional rights.<sup>124</sup>

---

<sup>122</sup> *United States v. Timberlake*, 896 F.2d 592 (D.C.Cir. 1990); *Dunnuck v. State*, 786 A.2d 695 (Md. 2001)(knocking on door without warrant). Decision of Dec. 12, 2002 (German Constitutional Court), 3.Kammer des 2. Senats, NStZ, Vol. 6 (2003), at 319. But see *United States v. MacDonald*, 916 F.2d 766 (2d Cir. 1990), allowing creation of the exigent circumstances if done without violating the law. *People v. Hull*, 41 Cal.Rptr.2d 99 (Cal.App. 1995), where police use ephemeral fluorescent dust on bait speakers which created exigency to enter house without warrant. *United States v. Cephas*, 254 F.3d 488 (4<sup>th</sup> Cir. 2001) (anonymous tip, knock on door, reveals exigent circumstances).

<sup>123</sup> For cases basing the exigent circumstances exception on reports of missing persons, ongoing violence, kidnappings: *Brimage v. State*, 918 S.W.2d 466 (Tex.Crim.App. 1996); *State v. Carlson*, 548 N.W.2d 138 (Iowa 1996); *People v. Ray*, 981 P.2d 928 (Cal. 1999); *State v. Weas*, 992 P.2d 221 (Kan. App. 1999); *U.S. v. Salava*, 978 F.2d 320 (7<sup>th</sup> Cir. 1992); *People v. Molnar*, 774 N.E.2d 738 (NY 2002); *State v. Nemeth*, 23 P.3d 936 (N.M.App. 2001); *State v. Gilbert*, 942 P.2d 660 (Kan.App. 1997); *Tierney v. Davidson*, 133 F.3d 189 (2d Cir. 1998).

<sup>124</sup> This would include Spain, Italy and Russia, among other countries. The U.S. wiretapping legislation includes a statutory exclusionary rule, 18 U.S.C. §§ 2515, 2518(10)(a). While the language of this provision seems to make it a stricter rule than that recognized for normal Fourth Amendment violations, courts have gradually begun to interpret it in most

## E. Theories Rejecting Exclusion as a Consequence of Violations of Privacy in the Home

### 1. The Seizure is Not a Fruit of the Unlawful Search

Another hurdle in the way of enforcement of an exclusionary rule in search and seizure cases has nothing to do with police abusing otherwise justified exceptions to the warrant requirement. It is a doctrine firmly in place in Italy and accepted by courts in Germany, whereby the seizure, say, of drugs, following an illegal search is deemed not to be a “fruit of the poisonous tree” to use the now universally known expression of Justice Frankfurter.<sup>125</sup>

The Italian courts reason, that since § 253(1) CPP-Italy requires the judicial authorities (and the police) to seize the *corpus delicti* of a crime, that is, fruits and instrumentalities and contraband, then such *legal* seizure cannot be vitiated by an antecedent completely illegal search, be it without probable cause or judicial authorization.<sup>126</sup> The courts have held that searches and seizures have different juridical presuppositions and functions and cannot be viewed as linked due to their convergence in reality.<sup>127</sup> Although § 191 CPP-Italy seems quite straight-forward in prohibiting the use of any evidence collected in violation of prohibitions established by law, the courts hyper-technically construe the language to defeat its very goal by saying that “non-usability” only applies in relation to evidence gathered in violation of an “express or implicit prohibition” and not to evidence “where a mere formality of acquisition has not been observed.”<sup>128</sup> The courts then say that the language of the code which says that a “nullity” will also effect the validity of the evidence seized as a direct result thereof<sup>129</sup> does not apply to non-

---

respects in a similar manner. LA FAVE ET AL, *supra* note 48, at 287-90.

<sup>125</sup> Nardone v. United States, 308 US 338 (1939).

<sup>126</sup> Cass. (3.27.96), Giust. Penale 1997, 138, 140, 144-45, English translation in THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 18, at 122-24.

<sup>127</sup> Dec. 4.24.91, Cass. pen. 92, 1879, cited in CONSO & GREVI, *supra* note 80, at 550. This decision also provides that any illegality in the means of acquisition of the seizable object (the search) should be punished by disciplinary or penal means. *Id.*

<sup>128</sup> CONSO & GREVI, *supra* note 80, at 392

<sup>129</sup> § 185(1) CPP-Italy. The French provision which seemingly provides for exclusion of fruits of nullities, § 206 CPP-France, *supra* at , has been occasionally used to suppress evidence, for instance, a confession which followed an illegal search suppressed in a 1955 case. PRADEL, *supra* note 20, at 605.

usability.<sup>130</sup>

German doctrine also does not see an inexorable link between an illegal search and the seizure of the object, which was the precise goal of the search in the first place.<sup>131</sup> German courts will suppress the item seized if there was an independent prohibition on seizing the item, for instance, because it is protected by a privilege.<sup>132</sup> The argument that the seizure of the very thing which is the object of the illegal search is not a direct result of the antecedent illegality is scholarly, legalistic nonsense. It is an example of the courts either ignoring the plain meaning of constitutional or statutory law or intentionally subverting it in order to achieve a goal, the conviction of a guilty person at any cost, which is no longer the purported goal of criminal procedure. It is clear that the prohibition of the violation of privacy of the dwelling or of the confidentiality of communications is not only rooted in the protection of privacy, but it constitutes a prohibition of seizures in those spaces, in the words of *Ransiek* a prohibition on the state's power of gathering information. Search and seizure cannot be logically separated into different actions with different motivations.<sup>133</sup>

If one equates a “search” with an attempt to gather information, then the artificial separation of search and seizure falls away. The object seized is of no use as proof of anything without the testimony of the searching officer as to the details of the search: where he found it,

---

<sup>130</sup> CONSO & GREVI, *supra* note 80, at 399.

<sup>131</sup> The German Constitutional Court also made it clear that use-prohibition will not be the regular, “normal” result of an unconstitutional search. BVerfG NJW 1999, 273, 274. BVerfG NSTZ 2000, 488, 499; StV 2000, 233, 234. The German Supreme Court in 1989 held that legal errors in the search do not lead to non-use. BGH NSTZ 1989, 375, 376. It postulated: “..when no legal hindrances to the issuance of a search warrant would have existed and the seized objects as such were legally accessible for use as pieces of evidence” there will be no exclusion. Cited in *Ransiek*, *supra* note 115, at 566.

<sup>132</sup> BGH 18, 227, cited in KLEINKNECHT/ MEYER/MEYER-GÖBNER, STRAFPROZEBORDNUNG 287 (47<sup>th</sup> ed. 1997); BAUMANN & BRENNER, *supra* note 76, at 120-122; Craig M. Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1031, 1040-41 (1983).

<sup>133</sup> *Ransiek*, *supra* note 115, at 568. At least one section of the Italian Supreme Court has rejected the prevailing absurdity and recognizes a strict functional relationship between the act of searching and the seizure. Dec. of March 13, 1992 (Cass. Pen. 93, 393 and Dec. of 12.10.90; 2.28.94, 5.12.94, (Annuale nel Proc. Pen. 95, 711). Cited in **CONSO & GREVI, *supra* note 80, at 550.**

when he found it, who was present, etc.

## 2. Doctrines of Inevitable Discovery

Whether a court will “balance” a serious constitutional violation against the search for truth in the criminal trial at all, it seems that all courts will entertain an argument that the evidence would have been found anyway without the violation. In the United States this doctrine has two manifestations. The courts will allow evidence that has been discovered through an illegal “search” if it is “seized” through an independent legal means.<sup>134</sup> The courts will also admit evidence which is seized illegally, if it would have inevitably been discovered through legal means.<sup>135</sup> Both of these doctrines have been recognized and applied by the Spanish courts despite their absolute statutory exclusionary rule.<sup>136</sup> The doctrine of “inevitable discovery,” however, can serve as a gaping loophole in the constitutional protections if interpreted in too broad a manner. Some American courts have recognized this exception if the police were already in the process of getting a search warrant (and the judge would hypothetically have issued it) when they searched due to, for instance, circumstances later determined not to have been exigent.<sup>137</sup> However the most dangerous extension of this notion of

---

<sup>134</sup> This doctrine of “independent source” is applied in cases where there have been two searches, an illegal one and a legal one, independent of the illegality. It is applied, for instance, when police discover the presence of evidence illegally, but actually seize it pursuant to a search warrant based on information they possessed before the illegal search. *Segura v. United States*, 468 U.S. 796 (1984); *Murray v. United States*, 487 US 533 (1988)

<sup>135</sup> This doctrine of “inevitable discovery” is applied where there is only one search and seizure, but other investigative procedures independent of the illegality *would have* discovered the evidence legally. *Nix v. Williams*, 467 US 431 (1984). In a recent case, the U.S. Supreme Court held that a violation of one requirement of the Fourth Amendment, that police knock and announce their presence before forcibly entering a dwelling, does not lead to inevitable exclusion of the evidence seized, if the warrant was otherwise valid and based on probable cause. The evidence found, then, not the “fruit” of the violation in execution of the warrant, but of the valid warrant, and would have “inevitably” been found when the warrant was served. *Hudson v. Michigan*, 126 S.Ct. 2159 (2006).

<sup>136</sup> *See* Decision of June 5, 1995 (Spanish Supreme Court), RJ 1995. No. 4538, 6058, at 6060, English translation in THAMAN, *COMPARATIVE CRIMINAL PROCEDURE*, *supra* note 18, at 118-19.

<sup>137</sup> *United States v. Cabassa*, 62 F.3d 470 (2d Cir. 1995); *United States v. Whitehorn*, 829 F.2d 1225 (2d Cir. 1987) (search warrant signed after the search); *United States v. Curtis*, 931 F.2d 1011 (4<sup>th</sup> Cir. 1991).

a “hypothetical independent source” is when the court allows the introduction of evidence because probable cause allegedly existed and the police would have gotten a warrant and the warrant would have been approved.<sup>138</sup> The German Courts have apparently used this latter rationale to justify their refusal to enforce the privacy requirements of Art. 13 Const-Germany with an exclusionary remedy. Clearly such a justification would completely undermine the constitutional requirement of judicial warrant.<sup>139</sup>

Both the hyper-extended inevitable discovery doctrine and the sophistic attempt to separate the search from its intended goal, the seizure, reveal an innate aversion among professional judges to rules of law which will undermine their quest to ascertain the truth, even if the evidence which would help them was obtained in violation of important rights that lie at the basis of the legal order.<sup>140</sup>

### 3. Balancing Tests

If a violation committed during a search is not of constitutional stature and exclusion is otherwise not mandated by statute, then most courts will admit the evidence without more. Once a constitutional violation has occurred (i.e., a search without a search warrant or without probable cause) then proponents of strong exclusionary rules would say that the “balancing” has already been done and the evidence is excluded.<sup>142</sup> However, even where it is admitted that the

---

<sup>138</sup> Although this is occasionally recognized, *see* *United States v. Buchanan*, 910 F.2d 1571 (7<sup>th</sup> Cir. 1990), the prevailing view in the U.S. is that the warrant requirement would be meaningless if this exception were accepted. American courts have also rejected this argument when attempted to show that the evidence would “inevitably” have been discovered. *United States v. Johnson*, 22 F.3d 674 (6<sup>th</sup> Cir. 1994); *United States v. Echegoyen*, 799 F.2d 1271 (9<sup>th</sup> Cir. 1986); *State v. Handtmann*, 437 N.W.2d 830 (N.D. 1989); *United States v. Brown*, 64 F.3d 1083 (7<sup>th</sup> Cir. 1995).

<sup>139</sup> *See* Ransiek, *supra* note 115, at 566.

<sup>140</sup> It is ironic that it is often in those countries which abolished jury trial because juries will sometimes ignore the law to reach a desired goal, acquittal, which they think will better serve justice in the case, where judges are allowed to do the very same thing to achieve the opposite goal, the obtainment of a conviction. Only when appellate courts do this, it *becomes the law*. On how juries ignored the law in ancient times, thereby leading to changes in the substantive law, for instance, of self-defense in homicide cases, see THOMAS ANDREW GREEN. *VERDICT ACCORDING TO CONSCIENCE. PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800* 33, 98 (1985) (Univ. of Chicago)(Chicago, London).

<sup>142</sup> Ransieck, *supra* note 115, at 569.

search is unconstitutional, some countries will nonetheless give the judge discretion to admit the evidence despite an illegality of constitutional magnitude.<sup>143</sup>

American courts will balance in cases involving dwelling searches only when the searching officer *has* secured judicial authorization. If the officer “in good faith” felt he had sufficient evidence to amount to “probable cause” then the evidence will be admissible despite the error by the issuing magistrate.<sup>144</sup> Indeed, the “good faith” of the officer is a factor in most balancing tests that will lead to admission despite the constitutional violation.<sup>145</sup>

Balancing tests, however, also tend to take into consideration the seriousness of the charged (or suspected offense) and the importance of the evidence to the prosecutor in making his or her case. This is, in effect, suspending the exclusionary remedy in the most serious cases in which higher penalties are imposed, thus, in a sense, exalting the inquisitorial task of determining the truth over the constitutional protection of privacy.<sup>146</sup>

---

<sup>143</sup> Among such tests are the “fairness of the proceedings” balancing tests per § 78 PACE-England and the test developed in New Zealand by court decision in 2002. *Supra* note 37.

<sup>144</sup> *United States v. Leon*, 468 U.S. 897 (1984). This exception is justified by the purported purpose of the Fourth Amendment exclusionary rule, which is to deter the police and not judges. A police officer who believes he is acting in good faith cannot thus be deterred. But see the critique, that this will place a premium on poor training of the police. Mahoney, *supra* note 32, at 611.

<sup>145</sup> *Id.* at 610; Ransieck, *supra* note 115, 15 566 (Germans will only exclude if it is a gross violation and intentional avoidance of judicial authorization).

<sup>146</sup> See Mahoney, *supra* note 32, at 611, citing a New Zealand case which holds that exclusion criteria should be stricter the higher the more serious the crime and the higher the threatened penalty. *Goodwin* [1993] 2 N.Z.L.R. 153, 171, CA. An American professor has called for a suspension of the exclusionary rule altogether in the investigation of certain extremely serious cases. John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1046-49 (1974). The general German balancing test, *see supra*, takes this approach. The German Constitutional Court has in its jurisprudence, thus, identified a new constitutional principle, that of the state’s duty to provide an effective administration of justice. One sees here how the German “social state” works to the detriment of the individual claiming a violation of a personal **right**. Italian courts have also invented a constitutional principle called the “principle of non-dispersion of evidence” which has been used, along with the principle of material truth, to invalidate exclusionary rules relating to prior testimony in the original version of the 1988 CPP-Italy. See Dec. 24 (Jan. 31, 1992), *Giur. Cost.* 1992, 129; Dec. 255 (June 3, 1992), *Giur. cost.* 1992, 1961. For discussion, *see* Alessandro Honert, *Der italienische Strafprozess: die Fortentwicklung einer Reform*, 106 ZStW 427, 434-36 (1994).

In countries using a wide-open “fairness” based balancing test, exclusion of evidence gathered as a result of an illegal search of a dwelling is seldom suppressed.<sup>147</sup>

F. *Use of Information from Suppressed Communications to Further the Investigation*

As with *Miranda*-defective confessions, illegally intercepted communications, even though suppressed and unusable as evidence against the person whose rights were violated, are still useful for gathering further physical or testimonial evidence which could be used against the affected person. The murder weapon with the defendant’s fingerprints on it will damn the defendant just as readily as his confession of guilt, whether told to an interrogator or overheard on the telephone. Clearly if the “fruits” of unlawful wiretaps or bugs may be used to convict a person, then there would be no incentive for law enforcement officials not to secretly wiretap or bug private places without probable cause or judicial authorization due to the derivative usefulness of this investigative tool. Indeed, criminal investigators in the Soviet Union and its successor states secretly overheard millions of telephone conversations which aided them in prosecuting actual or imagined criminals, as long as they could claim (or invent) a link to the incriminating evidence which would allow them to keep the wiretapping secret.

Both Germany and the U.S. have held, for instance, that the use of recordings of illegally intercepted conversations during interrogation will taint any incriminating statements made by the suspect when confronted with the illegally seized evidence.<sup>149</sup> In Germany, however, the testimony of witnesses who were discovered through an illegal interception has been admitted.<sup>150</sup> There are differences in opinions, however, in the U.S. as to whether an illegally

---

<sup>147</sup> No suppression in such cases had been heard of in Australia until the 1990's, when in the case of *George v. Rockett*, (1990) 93 A.L.R. 483, evidence was suppressed which had been found pursuant to a search warrant based on a perfunctory affirmation of “reasonable grounds for suspicion” with no further facts. Bradley, *Mapp*, *supra* note 35, at 381. In Canada courts accept the “good faith” exception and will normally not suppress if the police had probable cause, even if no warrant was acquired. *Id.* at 383-84.

<sup>149</sup> *Gelbard v. United States*, 408 U.S. 41 (1972) (allowing witness before the Grand jury to refuse to answer questions related to the illegally intercepted conversations); and BGHSt 27, 355, 357-58 (1978), English translation in THAMAN, *COMPARATIVE CRIMINAL PROCEDURE*, *supra* note 18, at 119-21.

<sup>150</sup> BGHSt 32, 68 (1983), see Weigend, *supra* note 53, at 197. Cf. *Michigan v. Tucker*, 417 U.S. 433 (1974), which refused to suppress testimony of a witness found through a *Miranda*-defective confession.

intercepted conversation may be used to impeach a testifying defendant.<sup>151</sup>

According to § 11.1 LOPJ-Spain, however, physical evidence found as a result of a constitutional violation in the area of interception of conversations (lack of judicial authorization, lack of probable cause) has been held to be “fruit of the poisonous tree” and not usable during the trial.<sup>152</sup>

### G. Use of Illegally Seized Objects or Information Against Third Parties

According to the jurisprudence of the U.S. Supreme Court, only persons whose rights were violated during the illegal investigative action may move to suppress the evidence gathered as a result thereof.<sup>153</sup> This exception to the exclusionary rule essentially permits intentional violations of the constitutionally protected privacy of citizens whenever more than one person can be found in the area to be searched, or where the target of the investigation is a person who is not present.<sup>154</sup> The evil of this approach was articulated in a long-since overruled decision of the California Supreme Court: “It virtually invites law enforcement officers to violate the rights of third parties and to trade the escape of a criminal whose rights are violated for the conviction

---

<sup>151</sup> This was allowed in relation to physical evidence seized in violation of the Fourth Amendment, *United States v. Havens*, 446 US 620 (1980). Although some courts have interpreted the statutory exclusionary rule in the U.S. wiretapping law, as prohibiting impeachment by using illegally intercepted conversations, *People v. In re A.W.*, 982 P.2d 842 (Colo. 1999), some federal courts have allowed such use. *United States v. Baftiri*, 263 F.3d 856 (8<sup>th</sup> Cir. 2001). Cf. *LA FAVE ET AL*, *supra* note 48, at 287.

<sup>152</sup> See Juan-Luis Gomez Colomer, *La intervención judicial de las comunicaciones telefónicas a la luz de la jurisprudencia*, *REVISTA JURÍDICA DE CATALUNYA*, No. 1 (1998), 145, at 162-63,

<sup>153</sup> *Rakas v. Illinois*, 439 U.S. 128, 132 (1978). The German *Rechtskreistheorie* reaches a similar conclusion. See CLAUS ROXIN, *STRAFVERFAHRENSRECHT* 166 (24<sup>th</sup> ed. 1995); cf. ERNST BELING, *DIE BEWEISVERBOTE ALS GRENZEN DER WAHRHEITSERFORSCHUNG IM STRAFPROZESS* 35 (1903).

<sup>154</sup> For instance, the U.S. Supreme Court has ruled that only the owner of a vehicle has an expectation of privacy therein. *Rakas v. Illinois*, 439 U.S. 128, 148 (1978). In relation to dwelling searches, only the residents of a dwelling or overnight guests have a reasonable expectation of privacy, and thus “standing” to complain of illegal searches. *Minnesota v. Olson*, 495 U.S. 91, 96-97 (1990), and not persons who are only involved in illegal enterprises during the day. *Minnesota v. Carter*, 525 U.S. 83, 90 (1998)

of others by the use of the evidence illegally obtained against them.”<sup>155</sup>

## V. CONCLUSION

The rise of “human rights” today is a direct result of the terror of the first half of the 20<sup>th</sup> Century. In the fascist, communist or otherwise authoritarian dictatorships of that period, the people were constantly subject to raids, informants and torture. In the administration of criminal justice, the principle of material truth was king. This investigation has shown, however, that it still is on its throne, often to the detriment of more important human rights which protect human dignity and privacy. A legal system, which employs explicit loopholes or vague balancing principles in order to use evidence gathered directly or indirectly by means of unconstitutional acts of its investigative organs, only with difficulty incorporates the spirit of a state under the rule of law.

As long as such loopholes exist, constitutional rights will be routinely violated by state officials. Especially in systems where the trial judge is also obligated to ascertain the material truth of the charges, such judges will instinctively give priority to the principle of material truth in exercising its Herculean balancing act and neglect its role as guarantor of freedom. When investigative organs and trial judges carry out the same task—the determination of truth—the neutrality of the trial judge is undermined, because the truth will always trump the human rights of the accused. Especially physical evidence, whether legally or illegally gathered, always speaks the truth. Therefore, the judicial balancing required in many of the aforementioned systems, should never be carried out by an inquisitorial trial judge, but rather by a neutral judge of the investigation, or liberty judge.

The protection of privacy and the right to silence, which are today anchored in modern constitutions and human rights conventions, must be recognized as foundations of the state under the rule of law. Exceptions, which have always existed, should therefore be recognized only in narrow, carefully delineated situations, that is, when other basic rights of equal rank are in play, which, in my opinion, would only be when life, liberty or substantial property interests are threatened.<sup>156</sup> The exceptions for “exigent circumstances” or “inevitable discovery” should therefore be applied in a much stricter fashion in cases involving invasions of privacy, so that

---

<sup>155</sup> *People v. Martin*, 290 P.2d 855, 857 (Cal. 1955).

<sup>156</sup> The US Supreme Court crafted an exception to the requirement of *Miranda*-warnings, when a danger to life or health is at issue. *New York v. Quarles*, 467 U.S. 649, 655-56 (1984).

they may not be abused by law enforcement officials.<sup>157</sup> Furthermore, any defendant should be able to challenge the legality of the acquisition of evidence used against him, regardless of whether his rights were violated. Only thus will the police have an incentive to obey the constitution.

The best way to prevent violations of the personality rights of citizens which are protected by the right to silence, would be to introduce a strict exclusionary rule which would apply to all statements or confessions as well as their fruits, if they were not given in the presence of defense counsel after having been advised of the right to remain silent.<sup>158</sup> In addition, confessions should be treated exclusively as *defense evidence*<sup>159</sup> and should be negotiated with the public prosecutor as are plea bargains in the U.S. and the German confession bargains, or *Absprachen*. Furthermore, they should *always* bring about a reduction of the maximum sentence.<sup>160</sup>

If law enforcement organs carry out their duty to ascertain the truth, and if they seek the maximum sentence due to the grave nature of the defendant's acts, then they should abide strictly by the rule of law during the investigation and not rely on the help of the defendant in his own condemnation. If, on the other hand, the prosecution requires the help of the suspect-accused in order to determine the truth of the matter, it must be ready to offer lenience to encourage such co-operation. One need only consider the South African Truth and Reconciliation Commission as an example of reaching truth through the offer of lenience. The same logic should apply if police without probable cause, exigent circumstances or a search warrant ask the suspect for consent to search her home. The suspect should then be advised of the right to refuse to acquiesce to such a search,<sup>161</sup> and should be given the opportunity to

---

<sup>157</sup> For instance, the lack of an available magistrate (for instance in the nighttime) should never be recognized as an exception to the requirement of judicial authorization of search warrants. Stephan Beichel & Jörg Kieninger, '*Gefahr im Verzug*' auf Grund *Selbstausschaltung des erreichbaren, jedoch 'unwilligen' Bereitschaftsrichters?*, NEUE ZEITSCHRIFT FÜR STRAFRECHT (NSTZ), 2003/1, 10, at 11.

<sup>158</sup> A good example of such a provision is that of § 75(2)(1) of Russia's 2001 Code of Criminal Procedure which prohibits use of any confession given in the absence of counsel, when the defendant retracts the confession at a later date during the preliminary investigation or the trial, even if he or she "voluntarily" waived the right to counsel before being interrogated.

<sup>159</sup> One finds this approach in § 65(2) CCP-Italy).

<sup>160</sup> Thaman, *Gerechtigkeit*, *supra* note 95, at 314-15.

<sup>161</sup> Such warnings are required per § 4.1 Code of Practice B, PACE-England (2002), and § 766

consult with counsel as to the advisability of granting such consent.<sup>162</sup>

A dismissal or acquittal in a criminal proceeding, even when the evidence seems to point to the guilt of the accused, violates no fundamental human rights. The victim of an act of violence remains a victim, even when the defendant is convicted! In the case of victim-less crimes against social order, as in the case of narcotics offenses, law enforcement agencies have a broad swath of discretion anyway, i.e., in which neighborhoods they send police, against which gangs or groups they direct their energies, under what conditions they use undercover agents, etc. The legislator has, as well, a broad discretion as to which victimless acts should be criminalized, treated as administrative violations, etc.<sup>163</sup> The argument, for instance, of the German Constitutional Court, that violations of the constitution should be tolerated, because the demands of a “well-functioning administration of justice” weigh more in the balance, can no longer be accepted. It is time to recognize that constitutions and human rights conventions were designed historically to protect citizens against over-zealous law enforcement organs, but never the opposite: an effective administration of justice at the expense of human rights. If crimes cannot be investigated without human rights violations, this is because the State invests too little in law enforcement: too little in personnel, their education, and in modern crime-detection technology. If one looks at it in this way, law enforcement was already ineffective before human rights were violated.

The judiciary should be advised not to use at times absurd contortions of logic to avoid the protection of constitutional rights. To maintain that a seizure of an object which was the goal of an unconstitutional search, is not the direct result of the constitutional violation, can only be treated as pseudo-scientific legal hair-splitting, which ends in the standing of the constitution on its head.<sup>164</sup> The search for truth, which does not enjoy constitutional status, is thereby elevated

---

Code de Procédure Pénale (France). In the U.S. such warnings are not required. *Schneckloth v. Bustamante*, 412 U.S. 218 (1973).

<sup>162</sup> See Decision of July 8, 1994 (Spanish Supreme Court), RJ 1994, No. 6261, 7983, 7983-84, English translation in THAMAN, *COMPARATIVE CRIMINAL PROCEDURE*, *supra* note 18, at 55.

<sup>163</sup> With more than two million citizens behind bars in the U.S., the majority because of victimless crimes, it is no exaggeration to say that the acquittal of a guilty person should be seen as a positive social act. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *YALE L. J.* 677, 715 (1995)

<sup>164</sup> Civil law judges like to criticize the jury court because of “jury nullification,” the jury’s power to ignore the law and acquit in order to reach a result they believe is just. I see the same

to a status higher than that of the protection of privacy, which prohibits the State from gathering evidence in those private areas which are necessary for the free development of the human personality,<sup>165</sup> as well as the protection of the right to silence, which protects the human dignity of the suspect from state-induced self-destruction.

---

predilection among these judges, who are more than willing to negate the constitution in order to achieve the opposite result, to achieve a guilty judgment that would otherwise not be possible. At any rate, the Italian judiciary has, with its high court jurisprudence, effectively “nullified” the categorical evidentiary use-prohibition which the legislator intended in § 191 CCP-Italy. On the role of jury nullification in the U.S., see Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1173-75 (1997).

<sup>165</sup> Ransiek, *supra* note 115, at 568.