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Exclusionary Rules in France, Germany, and Italy

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I. INTRODUCTION

This Article compares the use of unlawfully obtained evidence in France, the Federal Republic of Germany (Germany), and Italy. In all three countries, courts and legislatures have adopted exclusionary rules to deter due process violations during police interrogation, to insure that suspects are informed of their right to silence during interrogation, and to deter unlawful searches and seizures. These three countries have adopted exclusionary rules for the same reason that United States courts have done so: because no other remedy has adequately achieved these goals.

The history of each country has shaped the development of its exclusionary rule. French courts have implemented exclusionary rules for...
reasons of "public policy," the "rights of defense," and the "good administration of justice." These concepts are similar to United States notions of judicial integrity, defendants' rights, and due process. Germany, which had only a weak tradition of exclusion before World War II, has developed exclusionary rules to implement provisions in the 1949 Federal Constitution guaranteeing human dignity and the right to develop one's personality. Italy, which had no pre-War tradition of excluding evidence, has derived exclusionary rules from its 1948 Constitution to protect the civil rights of citizens against unlawful police activity.

In each country, exclusionary rules have emerged from distinct legal traditions and recent historical experiences. What all three countries have in common, however, is a desire to guarantee civil rights that were not adequately protected by alternate safeguards. France, Germany, and Italy have increasingly expanded the scope of their exclusionary rules to accomplish the three purposes described above. In contrast, recent United States Supreme Court decisions have limited the application of the exclusionary rule.3

Exclusion of illegally obtained evidence is neither a purely civil-law nor common-law remedy. The three civil-law countries discussed here have developed nondiscretionary exclusionary rules which make failure to exclude grounds for appeal. Common-law England4 and Canada5


have limited exclusionary rules, but oppose nondiscretionary exclusion except for due process violations during interrogation. Quasi-civil-law countries such as Scotland\(^6\) and Japan,\(^7\) as well as common-law Australia,\(^8\) have moved towards exclusion.

A form of the exclusionary rule was employed in France and Germany before the rule was adopted in the United States. In France, as early as 1672, a proceeding based on an illegal search was “nullified”\(^9\) which, in effect, excluded the evidence.\(^10\) Proceedings were nullified fre-

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\(^1\) Hastings Int'l and Comparative Law Review

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\(^2\) For evidence other than confessions, the Police & Criminal Evidence Act, 1984, Rule 78(1) allows the trial court to exclude evidence if admission would have “an adverse effect on the fairness of the proceedings.” For British civil cases, see infra note 295. The common law on confessions in the United States is discussed in People v. Ditson, 57 Cal. 2d 415, 436, 369 P.2d 714, 20 Cal. Rptr. 165 (1962).

\(^3\) When the Canadian Parliament drafted the Canadian Constitution of 1981, it rejected a rule that would have given judges discretion to include illegally obtained evidence in favor of a rule giving discretion to exclude unlawful evidence. The practical difference is that under the rule adopted by the Parliament, the accused has the burden of proving why unlawfully obtained evidence should be excluded, rather than the prosecution proving admissibility:

(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. (2) Where, in the proceedings described under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

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\(^6\) In Scotland, “evidence illegally or irregularly obtained is inadmissible unless the illegality or irregularity associated with its procurement can be excused by the court.” Research Paper by Sheriff MacPhail, para. 21.01 (April 1979), cited by Lord Scarman in R. v. Sang, [1979] 2 All E.R. 1222, 1247. This means that the prosecution has the burden of showing the court why it should exercise its discretion and admit the evidence. Meng Heang Yeo, Inclusory Discretion over Unfairly Obtained Evidence, 31 INT’L & COMP. L.Q. 392, 394 (1982).


\(^9\) See supra note 1.

Exclusionary Rules

Quently in the nineteenth century. In this century, the first French case to reverse a decision due to an illegal search and seizure occurred in 1910, four years before the first United States case. United States scholars recognized an exclusionary rule in West Germany only recently. Evidence obtained from an illegal search and seizure, however, was excluded in Germany as early as 1889. Italian law developed exclusionary rules in the 1970's to give effect to the liberal Constitution of 1948.

II. DUE PROCESS VIOLATIONS

Until modern times, the accused not only was expected to assist investigators and the court in his or her own conviction, but was forced to do so. To obtain confessions and other information, torture routinely was administered in the presence of a magistrate. This was an integral part of sixteenth and seventeenth century French, German, Italian, but not English, criminal procedure. During the eighteenth century, under the influence of the Enlightenment, judicially administered torture was

15. Judgment of Nov. 7, 1889, Reichsgericht in Strafsachen [RGSt], Ger., 20 Entscheidungen des Reichsgerichts in Strafsachen [Entscheidungen des RGSt] 91, 92 (1890) (“This illegally obtained evidence may not be produced at the trial nor used in the decision.”). All the translations in this Article are by the author.
abandoned as "cruel and useless." In practice, however, torture was often moved from the courtroom to the backroom of the police station.

The widespread use of brutal methods of interrogation by United States police investigators was revealed in the 1930's by the Wickersham Commission and other reports. A comparable situation existed in Europe even before fascism. Notwithstanding the fact that coercion was prohibited at every stage of French criminal investigations, dozens of reports during the 1930's revealed the systematic use by the police of threats, beatings, prolonged isolation, hunger and sleep deprivation. While French courts frequently excluded evidence obtained by illegal searches and seizures, coerced confessions did not receive the same attention. This was mainly because a court's decision regarding a coerced confession was not subject to appeal. In pre-War Germany and Italy, scholars and courts ignored the problem and accepted police practices without criticism. Pre-War criminal procedure manuals referred to coerced confessions only in the context of medieval practices. The pre-War German Supreme Court, the Reichsgericht, did not report a single case involving the coerced confession of an adult. Presumably,

19. 2 P. Fiorelli, LA TORTURA GUIDIZIA R NEL DIRITTO COMUNE 270 n.2 (1953).
22. Technically, coercion was prohibited whether the accused was being interrogated by the judicial police, state attorney (Procureur de la République), the magistrate who prepares the dossier for the trial court (juge d'instruction), or the President of the Tribunal that tries the case. Keedy, supra note 21, at 767.
23. Id. at 770.
24. See supra note 11.
25. Judgment of Dec. 27, 1935, Cass. crim., Fr., 1936 D.P. I 20, 22 (stating that a judge may consider the accused's confessions subsequent to an illegal search and seizure "if they can be considered to have been made without coercion"). (This is the only case listed in the DAL-LOZ TABLE ALPHABÉTIQUE 1845-1951 dealing with a coerced confession.) In practice, confessions were usually presumed to be freely given, see e.g., Judgment of Jan. 7, 1943, Cour d'appel, Grenoble, 1943 Sirey Jurisprudence [S. Jur.] 15. P. Mimin, commenting on the Judgment of Dec. 27, 1935, supra, elaborates: "it is pointless to propose a criterion for coercion since the Court of Cassation grants the trial court the sovereign power of deciding if the nullified acts influenced other acts (citations omitted). To say an act was coerced would depend on the circumstances of each case." Note of P. Mimin on Judgment of Dec. 27, 1935, Cass. crim., Fr., 1936 D.P. I 20, 21.
26. E.g., H. GERLAND, DER DEUTSCHE STRAFPROZESS 22 (1927). Section 343 of the German Code of Criminal Law (STRAFGESETZBUCH [STGB]) (1877) prohibited the use of force to obtain confessions. In practice it was never used. See infra note 27. There have been references to "unwritten rules" in Erbs, Unzulässige Vernehmungsmethoden: Probleme des § 136a, 4 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 386 (1951).
27. Only three cases of coerced confessions could be found in the Index to cases of the German Supreme Court before 1940 (REICHSGERICHT IN STRAFSACHEN GENERAL REGIS-
whatever violence occurred could be ignored. Italian courts and scholars also were silent concerning treatment of detainees, even after the post-War restoration of democracy in Italy. Thus, in a celebrated 1957 case, an extorted and unreliable confession was held admissible by Italy's highest court, the Court of Cassation. The court refused to examine the method by which the confession was obtained.

Today France, Germany, and Italy have introduced exclusion in varying degrees for due process violations. The French Assembly required exclusion of coerced confessions from 1981 to 1983. In 1950, soon after Germany ratified its Federal Constitution, exclusion for due process violations was added to the Code of Criminal Procedure of 1877

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<td>Judgment of May 22, 1894, RGSt, Ger., 25 Entscheidungen des RGSt 366 (1894);</td>
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<td>Judgment of Dec. 14, 1957 (Egidi), Corte cass., Italy, 1 Riv. ital. dir. pro. pen. 656 (1958), partially translated and summarized in M. Cappelletti &amp; W. Cohen, Comparative Constitutional Law 495 (1979) (admitting an extorted confession although contradicted by other evidence). This is the only case that 3 Vincenzo Manzini, Trattato di diritto processuale penale italiano 538 n.21 (6th ed. Turin 1970) could cite concerning a coerced confession. The first case in which a coerced confession was held inadmissible was the Judgment of April 14, 1970, Corte d'appello [Corte app.], Rome, 125 Giurisprudenza Italiana [Giur. Ital.] II 244, 254 (1973).</td>
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28. In this Article, the term “due process violations” refers to physical and psychological abuse of detainees by the police to obtain statements. The use of exclusion to sanction these violations was first enunciated in the United States in the case of Rochin v. California, 342 U.S. 165 (1952)(Frankfurter, J.). Frankfurter’s distaste for such methods may have been influenced by his own family's experiences under the National Socialists. Cf. M.E. Parrish, Felix Frankfurter and His Times 273 (1982). At first, a minority of Justices, including Frankfurter, were adverse to relying on “the vague contours of Due Process.” Haley v. Ohio, 332 U.S. 596, 602 (1948) (Frankfurter, J., concurring). Justice Black, in his Rochin concurrence, also criticized using the “nebulous standards” of the fourteenth amendment, when the Court might have relied instead on the fifth amendment. Rochin v. California, 342 U.S. 165, 175 (Black, J., concurring). After Rochin, however, the United States, and other countries, treated due process violations distinctly from self-incrimination problems.


(Strafprozessordnung, hereinafter StPO). The Italian Court of Cassation has not addressed due process violations since 1958, although a lower court has excluded a coerced confession. The disparity between the exclusionary rules in these three countries reflects different political forces unleashed after World War II and can best be examined historically.

A. France

At the close of World War II, France, like Germany and Italy, was in a state of economic and constitutional chaos. In Germany, the Allied High Command had the burden of restoring order. The United States had also proposed a provisional military government for France after liberation from the Vichy government. France, however, rejected Allied assistance in internal affairs and declared a provisional government in 1946. The Constitution of 1946 was designed to solve the constitutional crisis that followed dissolution of the Vichy regime. Its

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32. Strafprozessordnung [StPO] Feb. 1, 1877, 1877 Reichsgesetzblatt [RGBI] 253. Exclusion of involuntary statements was introduced in StPO § 136a, Sept. 12, 1950, 1950 BGBI 455, 484 § 129.


34. J.P. Rioux, La France de la Quatrième République, No. 1, L'Ardeur et la Nécessité 1944-1952, at 30 et seq. (1980). France suffered over 600,000 military and civilian deaths, the loss of one-fourth of its real estate, two-thirds of its railroad stations, track and rolling stock, and coal production.

35. Jones, Currency, Banking, Domestic and Foreign Debt, in Governing Postwar Germany 419 (E.H. Litchfield ed. 1953). By 1945, Germany had lost one-third of its real wealth, one-half of its production capacity, and was saddled with a public debt of RM 400 billion.

36. S.B. Clough, The Economic History of Modern Italy 286 (1964). Italy suffered the loss of 444,500 dead, one-third of its national wealth, 91% of its merchant fleet and trucks, and one-half of its cars and trains.

37. Litchfield, Political Objectives and Legal Bases for Occupation Government, in Governing Postwar Germany, supra note 35, at 3.


39. The French Resistance (Comité français pour la libération nationale or CFLN) declared itself the provisional government in March 1944. On June 2, the CFLN took the title Gouvernement provisoire de la République française (GPRF). P. Novick, supra note 38, at 38.

preamble reaffirmed political, economic, and social rights that had been violated by the Vichy government. These protections, however, were intended as legislative guidelines rather than as a bill of rights to be enforced by the judiciary.\footnote{Pelloux, \textit{La nouvelle Constitution de la France}, 1946 D. Chronique 81.}

The post-War government passed few provisions reforming criminal procedure. During World War II, a number of ordinary peace officers had been given investigative authority, a function traditionally reserved for the judicial police who serve the State Attorney (\textit{Procureur de la République}).\footnote{Patin, \textit{La restauration de la légality républicaine dans nos codes répressifs}, 1946 REV. SC. CRIM. 39, 47. About 5,000 police were suspended throughout France. P. Novick, \textit{supra} note 38, at 84. On the organization of French police today, see J. Aubert & R. Petit, \textit{La police en France} 110, 249 (1981).} After the War these men were purged or reassigned to their former duties. The authority of the judicial police, however, was not curtailed because they were needed to restore order. In 1944, almost ten thousand suspected collaborators had been executed without trial and judicial intervention was imperative to prevent further abuses. To achieve this objective without foreign aid like that imposed on defeated Germany, France chose to rely on its police, judiciary, and criminal codes.\footnote{J.P. Rioux, \textit{supra} note 34, at 54; B. Ledwidge, \textit{supra} note 38, at 204; P. Novick, \textit{supra} note 38, at 76, 96, 143. A. Werth, \textit{France} 1940-1955, at 286 (1956) (reporting that 5,234 summary executions were carried out before the Liberation, and 3,114 after the Liberation, without trial. After Liberation, 1,325 death sentences were passed by ad hoc tribunals).} Over one hundred thousand accused collaborators awaited trial, in addition to a huge backlog of common criminal cases. Early reform was a low priority. Moreover, the need for reform was not as great as in Germany\footnote{During the war, the German SS (\textit{Schutzstaffel}), originally Hitler's elite bodyguard, had taken control of all German police forces, including those assigned to public order and crime, and of the State Secret Police (\textit{Geheime Staatspolizei} or Gestapo). Both the SS and the Gestapo, as well as the \textit{Sicherheitsdienst} (SD), had extra-judicial special intelligence branches. For practices of the Gestapo in Germany, see infra notes 96-99. For the SS in France, see Lalanne & Baudry, \textit{Chronique de police}, 1948 REV. SC. CRIM. 115.} because the human rights abuses committed by French police during the War\footnote{Patin, \textit{La restauration de la légality républicaine}, 1946 REV. SC. CRIM. 39, 47.} were insignificant compared to the practices of German SS forces during the 1940-1944 occupation of France.\footnote{Lalanne & Baudry, \textit{supra} note 43, at 114. To exculpate themselves, local police attributed atrocities to the SS units. In fact, even the German military forces (\textit{Abwehr}) exculpated themselves in this fashion. R. Grunberger, \textit{A Social History of the Third Reich} 145 (1971).}

As a result of this history, due process violations typical of pre-War France continued after the War. During the late 1940's, French police
continued to use violence\textsuperscript{46} and torture,\textsuperscript{47} occasionally causing death.\textsuperscript{48} These practices occurred despite a statute prohibiting police from using unreasonable force in the exercise of their duties.\textsuperscript{49} In the 1950's the French judicial system was still burdened with many of the same problems it had known before the War: arbitrary arrests,\textsuperscript{50} poorly trained and underpaid officers,\textsuperscript{51} inadequate legal guidelines,\textsuperscript{52} and little political or judicial control over the police. The French Court of Cassation continued to ignore due process violations by the police, applying one standard for the judiciary and another for the police. Thus in 1952, the Court of Cassation excluded evidence illegally obtained by an examining magistrate (\textit{juge d'instruction}),\textsuperscript{53} the court, however, refused to nullify evidence\textsuperscript{54} when judicial police officers violated statutorily prescribed interrogation procedures.\textsuperscript{55}

Since 1954, no cases of physical abuse during interrogations have been published, although there is evidence that unjustified force occa-

\textsuperscript{46} See Judgment of Mar. 9, 1950, Cour d'appel, Bourges, 1950 J.C.P. II No. 5594 (arson suspect beaten by members of judicial police, Feb. 25, 1947).


\textsuperscript{49} \textit{Code pénal} [C. Pén.] art. 86 (France). Art. 86 has never been invoked for due process violations during interrogation.

\textsuperscript{50} Ladhari, \textit{La liberté individuelle et ses garanties constitutionnelles}, 1952 D. Chronique 101, 102 n.9.

\textsuperscript{51} A. Mellor, \textit{La torture} 299 (2d ed. 1961); A. Mellor, \textit{L'Instruction criminelle} 241 (1952).


sionally is used. Instead, the focus of the controversy has shifted to the prolonged interrogation session known as the garde à vue. The garde à vue, literally a "keeping in sight," entails custodial detention until the suspect can be brought before the public prosecutor. Originally, the garde à vue applied to suspects apprehended while committing a crime. In 1903, a delay of up to twenty-four hours was permitted to allow transfer of these suspects to the Procureur who could release, provisionally release, or charge and begin judicial proceedings. In the 1930's and 1940's, French police prolonged the garde à vue beyond twenty-four hours if they felt a detainee was about to confess. In 1958 the garde à vue officially was sanctioned by articles 63 and 77 of the new Code of Criminal Procedure. Twenty-four hours was established as the statutory limit for a detention. The time period could be doubled by the Procureur. Extensions totalling seventy-two and even ninety-six hours currently are authorized for some crimes. There is no real penalty, however, for "unlawful" extensions beyond four days.

French police maintain that the garde à vue is an essential tool and early commentators accepted it as a "simple inconvenience." Current criticisms of the garde à vue have focused on four areas. First, it is seen

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57. The Procureur de la République technically is also a magistrate. The Procureur attends the same faculty as judges (L'École nationale de la Magistrature) and may in fact serve as a judge within the course of his or her career. Vouin, The Role of the Prosecutor in French Criminal Trials, 18 AM. J. COMP. L. 483 (1970).

58. Décret of May 20, 1903, art. 307, cited in Ladhari, supra note 50, at 103.

59. See supra note 22.

60. C. PR. PÉN. arts. 63 & 77 (Fr., 1958).

61. Merle, supra note 56, at 19.

62. CODE DE LA SANTÉ PUBLIQUE art. 627-1 (Law of Feb. 2, 1982, art. 39-V), 1981 Dalloz, Législation [D.L.] 90. The French bar and the police were divided as to when the garde à vue begins. Mimin, La nouvelle enquête policière, 1959 J.C.P. I No. 1500 n.11. The garde à vue may begin at any of these stages: (1) when the suspect is caught in the act; (2) when the suspect is first brought to the police station; (3) when the suspect voluntarily appears for questioning; or (4) when the suspicions of the police are aroused during interrogation. The Court of Cassation has now decided the garde à vue does not commence until the detainee is notified that it has begun. Judgment of March 23, 1982, reviewed in 102 Gaz. Pal. Recueil des Sommaires [Som.] 290 (1982).

63. See infra notes 77-87.

64. Judgment of Mar. 17, 1960, Cass. crim., Fr., 1960 J.C.P. II No. 11641, III(b) note P. Chambon ("une simple gêne").
as an infringement on personal liberty. Anyone in the hands of judicial police officers can be subjected to a garde à vue. This might include suspects arrested en flagrant délit, that is, actually committing or suspected of committing a crime. In addition, although the judicial police cannot arrest witnesses and interrogate them, witnesses who appear “voluntarily” may be detained and subjected to a garde à vue.

Until 1980, French courts had never questioned the validity of arrests en flagrant délit as a means of subjecting a suspect to a garde à vue. The Court of Cassation now requires some evidence of a crime before an arrest can justify an unwarranted search followed by an interrogation. The penalty for conducting an unjustified search and interrogation is exclusion. French scholars no longer believe that the garde à vue is a “simple inconvenience.” With respect to “voluntary” witnesses, however, no branch of the French government has shown any willingness to interfere with police discretion to carry out a garde à vue.

65. Only officers of the judicial police may conduct a garde à vue (C. PR. PÉN. art. 64), not the non-officers (agents) who assist them (C. PR. PÉN. art. 20).

66. Despite the fact that officers of the judicial police may not interrogate suspects “against whom there exists serious evidence indicating guilt” (C. PR. PÉN. art. 105, see infra note 198), they may do so in cases of “flagrant” crimes. Judgment of Aug. 11, 1980, Cass. crim., Fr., Bulletin des arrêts de la cour de cassation, chambre criminelle [Bull. crim.] No. 234 at 607, reviewed in 102 Gaz. Pal. Som. 290 (1982). The definition of “flagrant délit” in the Code (C. PR. PÉN. art. 53) is broad and covers suspects (1) caught in the act and (2) caught after pursuit with hue and cry (“par la clameur publique”). The definition reflects the summary procedure historically accorded criminals caught in the act. See Judgment of May 30, 1980, Cass. crim., Fr., 1981 D.S. Jur. 533 note W. Jeandidier; Mayer, Plaidoyer pour une redéfinition du flagrant délit, 1980 D. Chronique 99. The rationale behind allowing interrogation of suspects caught in flagrant délit is the necessity of preserving evidence which might be lost if the police had to wait for a juge d'instruction to hear the case. (For a similar summary proceeding at common law, cf. T.F.T. PLUCKNETT, CONCISE HISTORY OF THE COMMON LAW 430 (5th ed. 1956)). C. PR. PÉN. art. 53 also permits police interrogations (3) for suspects showing “traces or clues” (“traces ou indices”) suggesting participation in a crime. This provision is equivalent to interrogation for probable cause. It may be undertaken even without the need to preserve evidence. See infra note 261.


68. On the contrary, the Court of Cassation has the right to substitute new grounds for an arrest made on erroneous grounds even in a case when “flagrant délit” was not alleged. Judgment of Jan. 5, 1973, Cass. crim., Fr., 1973 D.S. Jur. 541.


70. J. PRAdEL, DROIT PÉNAL § 313, at 346 (1980).
A second criticism of the *garde à vue* is that it violates the suspect's legal defense rights. Under French law, suspects "against whom there is significant evidence of guilt" should not be interrogated by the police, but instead should be transferred to a *juge d'instruction* who must advise the suspect of the right against self-incrimination. The Court of Cassation has nullified evidence and trials based upon evidence obtained before such suspects were informed of the right against self-incrimination.

Third, critics charge that the *garde à vue* is inherently coercive. During the period of the *garde à vue*, the detainee is kept incommunicado and relentlessly questioned to the point of exhaustion. Psychological pressures designed to overbear the will of the suspect are acceptable. Some French police describe the *garde à vue* as "legitimate torture"; however, French courts have shown no interest in reviewing these techniques.

The fourth objection to the *garde à vue* is that legislative attempts to limit detention have been ignored. French police frequently disregard Code provisions concerning the preconditions and duration of the *garde à vue*. Most scholars have urged that courts use exclusion for Code violations; however, the Court of Cassation has consistently limited relief to individual criminal and civil actions against the police. This relief is illusory because penal sanctions for police violence have been restrictively interpreted by the courts. Furthermore, actions against

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71. *Le Droit de défense*, a widely used term in French law, includes various rights guaranteed to suspects by the Codes and case law. Examples include the right to remain silent, the right to counsel (and to be informed that this right exists), the right not to take an oath (i.e. the right not to tell the truth).

72. C. PR. PÉN. art. 105. See infra notes 191-206. Art. 152 forbids officers of the judicial police to interrogate a suspect after indictment.


74. This is grounds for exclusion in German law (StPO § 136a) and United States law (Miranda v. Arizona, 384 U.S. 436, 469 (1966); Mincey v. Arizona, 437 U.S. 385 (1978)).

75. 2 R. MERLE & A. VITU, *supra* note 52, § 952, at 168.


78. See *supra* note 76.

79. E.g., C. PÉN. art. 186. 2 P. BOUZAT & J. PINATEL, TRAITÉ DE DROIT PÉNAL ET DE CRIMINOLOGIE § 1302, at 1242 (2d ed. 1970) ("These penal sanctions are no more used than the disciplinary sanctions; in practice they serve no role other than intimidation.").
the police are time consuming, expensive, and difficult to prosecute. Suits against a juge d'instruction or a prosecutor who ordered a garde à vue are permitted under the Code of Criminal Procedure but these suits also have little chance of success. In theory, a Parisian magistrate is assigned to supervise current gardes à vue. In practice, the magistrate acts only when requested to do so and a detainee held incommunicado is in no position to contact the magistrate.

In the absence of judicial control, only administrative measures remain. Administrative controls within the police department, such as promotion incentives, may prevent gross abuses of detainees. Nevertheless, the primary concern of the police is to solve crimes, and they are unlikely to pay more attention to civil liberties than the courts.

The unwillingness of the Court of Cassation to nullify irregular gardes à vue reflects the entrenched power of the French police. In 1981 the legislature changed the Code of Criminal Procedure to allow exclusion for an irregular garde à vue. Under police pressure, however, these provisions were abrogated in 1983. The short-lived changes threatened to permit or even require the courts to examine police conduct inside the police station. Had these reforms lasted longer, they would have resulted in a fundamental shift in power. Thus, it appears that exclusion was rejected as a remedy for due process violations not because it was ineffective, but because it was too effective a deterrent.

80. The Procureur de la République may refuse to accept the case. If the Procureur refuses, a private party may bring an action civile (private prosecution) under C. PR. PÉN. art. 2, which the Procureur must be invited to join. C. PR. PÉN. art. 82. Grebing, supra note 56, at 36; Weigend, Prosecution: Comparative Aspects, in 3 Encyclopedia of Crime and Justice 1296, 1303 (S. Kadish ed. 1983). The action civile has the advantage of providing damages to the victim. The last reported suit against the judicial police for a garde à vue irregularity was in 1954 for a death that had occurred in 1946. Judgment of Feb. 18, 1954, Cass. crim., Fr., 1954 D. Jur. 165. 2 R. MERLE & A. VITU, supra note 52, at 916.


82. La défense baillistenée, supra note 56, at 110 (Report of M. Sadon, Procureur Général at Paris, related by Franck Natali (Evry)).


Exclusionary Rules

Exclusion for due process violations is rare in France.\footnote{85} The Court of Cassation has expanded the use of exclusion, based on rationales of public policy and the “good administration of justice,”\footnote{86} into areas where it was not provided for in the Code of Criminal Procedure. These extensions of the exclusionary rule, however, have not been applied to due process violations by the police.\footnote{87} As a result, detainees in France are generally treated far worse than suspects held by United States or German police interrogators.

B. Germany

Exclusion of statements obtained without due process was introduced in Germany in 1950\footnote{88} in reaction to the judicial system created under the National Socialists.\footnote{89} The main criticisms of the Nazi legal system can be summarized as follows: 1) The introduction of new criminal codes; 2) the creation of extraordinary People's Courts; 3) the Nazification of the judiciary; 4) the transfer of judicial functions to the police; and 5) the introduction of a new, state secret police force (Geheime Staatsspolizei or Gestapo) whose actions could not be challenged in either a judicial or administrative appeal.

In 1934 Hitler, as Reichskanzler, decreed new provisions that substantially changed the 1877 German Criminal Code and Code of Criminal Procedure.\footnote{90} The most radical innovation was the installation of so-called “People's Courts” (Volksgerichtshöfe) with unlimited and unappealable jurisdiction.\footnote{91} The People's Courts were to render decisions within twenty-four hours\footnote{92} and had to approve the choice of an attor-

In addition, the judiciary was subjected to a process of Nazification; nonconforming judges were removed, and Nazi zealots were appointed as presidents of most courts. Under the Nazis, many legal functions were taken out of the hands of the judiciary and given to the police. The Ministry of Justice directed police to make routine use of “intensified interrogations” (Verschärfte Vernehmungen). The State Secret Police (Gestapo) acted free of judicial restraints, and defendants acquitted by a court sometimes were murdered by Gestapo death squads, or arrested in court after acquittal and deported. On other occasions the courts themselves acquitted defendants and handed them over to the Gestapo for deportation.

At the end of World War II, the Allies established military courts in Germany, though not in France and Italy, and carefully screened the civilian police before rearming and reinstating them. Nevertheless, the Germans themselves did not have complete confidence in their own police forces after the War. Thus, the German Legislature (Bundestag) added an exclusionary statute, StPO section 136a, to its Code of Criminal Procedure, which had been reinstated in 1950 in its pre-1933 form. The original justification for an exclusionary statute was to prevent repetition of the practices that had occurred under the National So-

93. Id. art. IV § 3.
94. Gesetz zur Wiederherstellung des Berufsbeamtentums, April 7, 1933, 1933 R Gi 175 (Ger.). Loewenstein, Justice, in GOVERNING POSTWAR GERMANY, supra note 35, at 246 n.42.
95. Kempner, Police Administration, in GOVERNING POSTWAR GERMANY, supra note 35, at 403, 406.
96. “Intensified interrogations,” including excessive exercise, sleep deprivation and canings (up to 20 or 25 were permitted without medical supervision), were ordered for Marxists, resistance members and other anti-social elements. R. Grunberger, supra note 89, at 126; P. Hoffmann, supra note 89, at 521; Wagner, supra note 89, at 303.
97. P. Hoffmann, supra note 89, at 242; R. Grunberger, supra note 89, at 110, 124, 357, 447.
98. P. Hoffmann, supra note 89, at 527; Wagner, supra note 89, at 301.
99. Wagner, supra note 89, at 301 n.47.
101. For early Bundestag history, see Dorr & Bretton, Legislation, in GOVERNING POSTWAR GERMANY, supra note 35, at 207, 208.
102. StPO § 136a, Sept. 12, 1950, 1950 BGBl 455, 484 § 129. StPO § 136a requires the exclusion of all statements obtained through coercion (ill-treatment, fatigue, drugs, torture, deception or hypnosis) even if the accused should later consent to their use. This last provision was evidently intended to avoid apparent “consent” induced by the fear that coercion would be introduced if the accused retracted. For a French example, see Judgment of Mar. 9, 1950, Cour d’appel, Bourges, 1950 J.C.P. II No. 5594.
cialists. The courts also initially rationalized this statute by recalling the "painful experience" of the past. Only later, when these fears had subsided, was the deterrence rationale replaced by a constitutional one: the guarantee of human dignity.

Exclusion was a new approach in German law, stemming from fears of fascism. The novelty of an exclusionary rule is evident from the fact that German law, unlike French law, did not have a doctrine of nullities to exclude illegally obtained evidence. The only recorded case in which exclusion was used occurred in 1889 and involved a search and seizure problem. This case, however, effectively was negated in 1914. Exposure to common-law systems may have influenced the development of a German exclusionary rule, but fear of the German police was probably a more significant factor. Although the Allies had restaffed police forces with men who had been cleared of Nazi charges, many of those remaining had served during the Hitler era. Despite

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107. GG art. 1 (W. Ger.).

108. "Because of our recent past experience, we saw no other possibilities to avoid repetitions." Statement by Representative Greve, supra note 104.

109. For early examples of exclusion through nullification, see Judgment of April 30, 1857, Cour impériale, Fr., 1859 D.P. II 205; Judgment of Jan. 19, 1866, Cass. crim., Fr., 1867 D.P. I 505, 509 (principle accepted); Judgment of Feb. 4, 1898, Cour. cass., Fr., 1898 D.P. I 229 (omission of "right to counsel" warning).

110. Italy borrowed its concept of nullifying improper procedures (e.g., CODICE DI PROCEDURA PENALE [C.P.P] arts. 184, 189, 412, 471) from France. Presutti, Legalità e discrizionalità nella disciplina delle nullità processuali penali, 19 RIVISTA ITALIANA DI DIRITO E PROCEDURA PENALE [RIV. IT. DIR. PROC. PEN.] 1178, 1186 n.32 (1976).

111. Judgment of Nov. 7, 1889, Reichsgericht in Strafsachen [RGSt], Ger., 20 Entscheidungen des RGSt 91 (1890).

112. Judgment of June 3, 1913, RGSt, Ger., 47 Entscheidungen des RGSt 195 (1914). The Reichsgericht, while declaring that the "prohibition against a seizure contains in it the prohibition against using it as evidence," nevertheless permitted use of illegally obtained letters because the judge had read the letters and should not have to go through the "worthless formality" of returning them and demanding them again. The result of this rejection in 1913 of a "fruit of the poisonous tree" doctrine was that Germany did not have another exclusion case until after World War II. An early argument for exclusion, E. BELLING, DIE BEWEISVERBOTE ALS GREIZEN DER WAHRHEITSFORSCHUNG IM STRAFPROZESS, in 46 STRAFRECHTLICHE ABHANDLUNGEN 37 (1903), received little attention until after the War.


114. Kempner, Police Administration, in GOVERNING POSTWAR GERMANY, supra note 35,
police retraining programs designed to instill public service values, abuses such as warrantless searches continued.\(^\text{115}\)

It was impossible during the brief period of the Allied Occupation\(^\text{116}\) to reverse all the authoritarian practices of the German police, some of which pre-dated the Hitler era.\(^\text{117}\) Nevertheless, in Germany, unlike France, Allied influence and the discredited status of the police forces created a new practice and philosophy in criminal procedure at a critical stage in its development. As a result of the Nazi experience, German police today exercise comparatively little political influence.\(^\text{118}\) Furthermore, a strong and independent judiciary was able to implement the exclusionary statute, placing it on a constitutional footing in 1954,\(^\text{119}\) and applying it in all cases by the close of the decade.\(^\text{120}\)

StPO section 136a was originally aimed at involuntary confessions, but its uses have expanded greatly over the past three and one-half decades. Judgments of the 1950's frequently dealt with physical coercion, including deprivation of sleep\(^\text{121}\) or cigarettes,\(^\text{122}\) or the use of truth serum.\(^\text{123}\) During the 1960's the German Supreme Court, the Bundesgerichtshof (BGH), dealt with more subtle problems including infliction of

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115. *Id.* at 410-11. In Bavaria in 1948, 42,228 out of 50,033 searches were conducted without warrants. Warrantless searches remain a problem in Germany. *See infra* note 332.

116. The Occupation Statute of 8 April 1949 (Washington)/11 April 1949 (Berlin) granted the Federal and state governments "full legislative, executive and judicial powers in accordance with the Basic Law and with their respective constitutions." The Statute is reprinted in *GOVERNING POSTWAR GERMANY*, *supra* note 35, at 616-18.


120. *See* Judgment of March 4, 1958, BGHSt, W. Ger., 11 Entscheidungen des BGHSt 211 (1958); Judgment of March 24, 1959, BGHSt, W. Ger., 13 Entscheidungen des BGHSt 60 (1960).


mental distress,\textsuperscript{124} coercion by third parties,\textsuperscript{125} and promises of advantage.\textsuperscript{126}

Since the 1970's, however, the BGH has increasingly relied on STPO section 136a for evidence not obtained by "due process violations" during interrogation within the original meaning of section 136a. Thus in 1978, a confession obtained by an impermissible wiretap was held inadmissible even though the accused had not been mistreated during interrogation. To reach its conclusion, the BGH drew an analogy to section 136a, which barred an involuntary confession even if the accused later consented to its use. The BGH held that just as coercion will make "later statements" inadmissible, so the illegal wiretap rendered the confession inadmissible.\textsuperscript{127} In a remarkable extension, the BGH recently applied section 136a provisions forbidding "deception" ("\textit{Tauschung}") in obtaining confessions to statements obtained by the police through an unwarranted, though otherwise permissible,\textsuperscript{128} wiretap.\textsuperscript{129} In this case, a Turkish-speaking German police officer induced the accused to make statements on the telephone concerning a drug smuggling operation. The combination of section 136a and the absence of a warrant made the statements inadmissible. The court did not decide whether the absence of a warrant alone would have sufficed to exclude the evidence.

While previous decisions concentrated on STPO section 136a as a means of preventing due process violations before trial, one court of appeals has invoked it to influence the behavior of the trial court rather than the police. The Dusseldorf Court of Appeals has forbidden courts to draw any conclusions from the refusal of the accused to speak to the

\begin{itemize}
\item \textsuperscript{124} Judgment of Oct. 7, 1960, BGHSt, W. Ger., 15 Entscheidungen des BGHSt 187 (1961) (accused forced to view his victim's corpse).
\item \textsuperscript{125} Judgment of June 28, 1961, BGHSt, W. Ger., 16 Entscheidungen des BGHSt 165 (1962) (accused must prove that coercion by foreign police took place).
\item \textsuperscript{126} Judgment of Sept. 14, 1965, BGHSt, W. Ger., 20 Entscheidungen des BGHSt 268 (1966).
\item \textsuperscript{127} Judgment of Feb. 22, 1978, BGHSt, W. Ger., 27 Entscheidungen des BGHSt 355, 359 (1978). This case introduces a "fruit of the poisonous tree" doctrine. \textit{(See infra} notes 373-381). In fact, the text of § 136a does not exclude "later statements" ("\textit{spätere Aussage}"), but the same statements first made under coercion and then made freely.
\end{itemize}
police, since this would limit the accused's freedom of decision during interrogation.\textsuperscript{130} STPO section 136a also has general implications for other areas of criminal procedure. For example, plea bargaining could never be legitimized by a German court since any confession to a lesser crime that was induced by the promise of advantage would automatically be inadmissible even if the accused were to consent to a guilty plea.\textsuperscript{131}

In Germany, arbitrary prolongations of arrest and mistreatment of suspects are no longer considered a problem. There would be little advantage in prolonging detention beyond the permitted twenty-four hours\textsuperscript{132} because any statement obtained thereafter would be excluded under section 136a. The introduction of this crucial passage in 1950 has enabled German courts to improve the defendant's rights to a degree unknown in France and Italy.

C. Italy

Because the Italian legislature has taken steps to assure the rights of the accused at every stage of the criminal proceeding,\textsuperscript{133} Italy has produced little case law on due process violations.\textsuperscript{134} The explanation for the small number of cases is that Italy has greatly restricted police interrogation.\textsuperscript{135}

The restrictions on police interrogations were a belated reaction to fascism. Reform of criminal procedure did not begin in Italy immediately after World War II because there were no occupation forces to help maintain law and order. As a result, what the Germans feared would happen if they did not adopt an exclusionary statute did happen in Italy: suspects were grossly abused while in custody\textsuperscript{136} despite provisions in the


\textsuperscript{132} STPO § 128 stipulates the detainee must be brought before a judge (or released) "at the latest, on the next day."


penal code\textsuperscript{137} and the Constitution\textsuperscript{138} designed to protect detainees.

Italy was not subjected to foreign occupation for two reasons: first, its citizens had played a large role in their own liberation; and second, human rights violations by Italian Fascists were comparatively benign. After the invasion of Sicily in July 1943, the Allies attempted to establish an Allied Military Government but lacked sufficient manpower.\textsuperscript{139} Moreover, as a result of the cooperation of Partisan forces in the liberation of Italy,\textsuperscript{140} the Allies decided that an occupation government was unnecessary\textsuperscript{141} because many Italians were anxious to assist in the overthrow of the fascist regime. These Partisans became a unifying force to Italians from all political groups, and under the impetus of this spirit of unity, the Italian monarchy was replaced by the Italian Republic, and the liberal Constitution of 1948 was established.

Italy emerged from World War II scarred but with its legal institu-
tions intact. Having experienced eighteen months of civil war between the Allied-equipped Partisans and German-backed Fascists, Italy was dependent on its own police and judiciary to restore order and punish criminals and collaborators. The Christian Democratic leader, Alcide De Gaspari, officially turned punishment of Fascists over to the ordinary courts on January 1, 1945. Police techniques, however, could not be reformed immediately. In fact, many Fascist police laws remained on the books until abrogated a decade later by the Italian Constitutional Court and the reforms of the 1950's.

Exclusion, at first, played no role in post-War criminal procedure. Some considered it absurd to treat relevant evidence as juridically nonexistent. This position was restated by the Court of Cassation in 1957, when it refused to exclude a coerced confession. In 1960 an eminent Italian criminal proceduralist, Franco Cordero, took issue with the concept of exclusion which he observed in French, German, and United States law. Cordero believed that exclusion would lead to a tyranny of procedural technicalities. Even as Cordero wrote, however, there was reason to consider police behavior in the production of evidence. Because of a marked swing to the political right in 1960, Italian democracy was threatened. In reaction, Italian courts for the first time began to apply penal sanctions to police officers who obtained confessions through force and who carried out illegal searches and seizures. Today, criminal prosecution is still available for gross police abuses; however, since the introduction of exclusion for due process violations, omission of

142. C. Delzell, supra note 141, at 509.
149. H.S. Hughes, supra note 140, at 213; D.M. Smith, supra note 140, at 498.
right to silence warnings, and search and seizure violations, no criminal actions against the police have been reported. One inference that can be drawn is that Italy has decided it is more efficient to exclude evidence than to prosecute the police.

Exclusion was made possible by two far-reaching decisions of the Italian Constitutional Court. In contrast to the French Conseil constitutionnel, which has the power to examine the conformity of legislation with the French Constitution before promulgation, the Italian Constitutional Court has had powers of judicial review since 1956; it is empowered to review actual cases. The Court's purpose is to supplement the more conservative, technically-oriented Italian judiciary with a body of judges attuned to the values of the liberal Constitution of 1948. The Court's 1968 and 1969 decisions, guided by Italian legal scholarship of the 1960's, held that the suspect's constitutional rights, including the right to counsel, had to be respected in the police investigative stage as well as in the judicial stage of criminal proceedings.

The Rome Court of Appeals reacted immediately to these two decisions by excluding evidence based on a due process violation. Since 1970, however, no due process cases have been reported. The Italian legislature, encouraged by the Constitutional Court's 1968 and 1969 decisions, has severely limited the authority of the police to interrogate

153. See supra note 133.
155. COSTITUZIONE art. 134 (Italy).
159. Judgment of April 14, 1970, Corte app., Rome, 125 Giur. Ital. II 244, 254 (1973): [I]f the trial court did not deepen its inquiry concerning this procedural outcome of unquestioned seriousness, this court has the duty to affirm that a judge cannot and must not, in order to influence his [free] conviction [of the evidence] in any way, as to the guilt of the accused person, make use of statements— whether true or not— which are the fruit of physical or moral violence. This is prohibited not so much by the law, but rather by the Constitution and the rules which ought to control a democratic government such as that of our Republic.

In American terms this is the rationale of judicial integrity.

160. Allegations of police "torture" are now considered newsworthy. See CORRIERE DELLA SERA, March 23, 1982, at 1.
prisoners. In 1969 the legislature attempted to prohibit police from interrogating arrested suspects; however, Italian police continued to interrogate suspects to obtain "spontaneous statements," which the Court of Cassation held admissible in 1971 and 1974.

Today, exclusion plays a central role in Italian law in controlling police interrogations. After 1974, the judicial police were no longer permitted to conduct a formal interrogation of a suspect unless the suspect's attorney was present. The inadmissibility of statements—though not of all evidence—obtained through a police interrogation is now firmly established in Italian law. To enable the police to collect essential information, police were permitted, after 1978, to make "summary inquiries" in the absence of the suspect's attorney. But the statements obtained through "summary inquiries" may not be included in the suspect's dossier or referred to in testimony.

III. EXCLUSION FOR FAILURE TO WARN OF THE RIGHT TO SILENCE

The suspect's right to refuse to answer the questions of police investigators is a basic premise of European, as well as Anglo-American law. The right to silence is derived from the older notion of the right against self-incrimination, first mentioned by the medieval theologian St. John Chrysostom and included in Gratian's Decretum and medieval legal

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167. In the Judgment of April 19, 1978, Corte cass., Italy, 132 Giur. Ital. II 219, 222 (1980), however, the court said, "no one has ever doubted that elements can emerge from declarations [in a summary inquiry] for or against the accused."


169. GRATIAN, DECRETUM 2D PART. CAUSA 33, QU 3 (de poenitentia) 87, 1 CORPUS IURIS CANONICI 1184 (E. Friedberg ed. 1879), cited in Riesenfeld, supra note 168, at 118 n.81.
The right against self-incrimination was adopted in England for all courts about 1660 and in the United States by the fifth amendment to the Constitution.

In *Miranda v. Arizona*, the United States Supreme Court interpreted the constitutional right against self-incrimination to include the right to remain silent during police interrogation. Since *Miranda*, United States law has required that, upon arrest, police inform suspects of their rights to remain silent and to counsel. In France, an 1897 statute required that a suspect receive a right to silence warning at the first appearance before a magistrate. In Germany, according to a law of 1877, the suspect was asked to respond to charges at the first judicial hearing. In 1913, the Italian Legislature rejected the requirement of a right to silence warning at a suspect’s first appearance before a magistrate.

The idea of requiring the police, as well as the judiciary, to warn suspects of the right to silence is a post-War development. Modern laws concerning exclusion for failure to warn of the right to silence can be summarized as follows:

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172. *Miranda v. Arizona*, 384 U.S. 436 (1966). Experience has shown that unless a suspect is informed of the right to remain silent, the right is rarely exercised. Almost invariably, suspects believe they are required to respond to investigators and that questioning can continue until they have responded. Id. at 468. See Ackermann, Garanties de la défense pendant la procédure préliminaire, 24 Revue Internationale de Droit Pénal 71, 87 (1953).

173. 384 U.S. at 468.

174. Law of Dec. 8, 1897, art. 3, 1897 D.P. IV 119. "At this first appearance, the magistrate will ascertain the identity of the accused, inform him of the crimes attributed to him, and receive his statements, after having warned him that he is free not to make any." This is the basis of C. Pr. Pén. art. 114 (1958).

175. STPO § 136 (Feb. 1, 1877, 1877 RGBI 278, Ger.) ("The accused is to be asked whether he wishes to respond to charges.").

176. C.P.P. art. 261 (Italy, 1913) required that "the investigating magistrate request that the accused defend himself and present evidence in his favor, warning him that even if he did not respond the inquiry would proceed anyway." Proposals for a clear-cut warning of the suspect’s right not to respond were defeated in the Italian Parliament. Grevi, Considerazioni preliminari sul diritto al silenzio dell'imputato nel "nuovo" 3° comma dell' Art. 78 C.p.p., 13 Rev. It. Dir. Pro. Pen. 1119, 1122 nn.8 et seq. (1970).
### EXCLUSION FOR OMISSION OF RIGHT TO SILENCE WARNING

<table>
<thead>
<tr>
<th>Interrogator</th>
<th>FRANCE</th>
<th>GERMANY</th>
<th>ITALY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Police</td>
<td>yes¹⁷⁷</td>
<td>discretionary¹⁷⁸</td>
<td>(not applicable)¹⁷⁹</td>
</tr>
<tr>
<td>Investigating Magistrate</td>
<td>yes¹⁸⁰</td>
<td>undecided¹⁸¹</td>
<td>yes¹⁸²</td>
</tr>
<tr>
<td>Trial</td>
<td>no¹⁸³</td>
<td>yes¹⁸⁴</td>
<td>no¹⁸⁵</td>
</tr>
</tbody>
</table>

Neither the United States nor the European countries have proposed that exclusion for failure to warn be replaced by an alternate remedy such as disciplining the police. Since no alternative to exclusion has been suggested, the question has become whether, rather than how, to punish omissions. In this debate, United States and European law begin with opposite premises. Critics of the United States exclusionary rule argue that the Constitution does not require a right to silence warning by the

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¹⁷⁸. StPO § 163aIV requires police to give a § 136 right to silence warning. In its Judgment of June 7, 1983, BGHSt, W. Ger., 31 Entscheidungen des BGHSt 395 (1983), 3 NStZ 565 (1983), 38 JZ 716 (1983), the BGH held that an unintentional omission was not grounds for automatic exclusion. For further discussion of this case, see infra note 218.
¹⁷⁹. C.P.P. art. 78.3 (Law of Dec. 5, 1969, n.932 Art. 3, 1969 Gaz. Uff. 941). This section applies only to non-arrested suspects. The judicial police are forbidden to interrogate arrested suspects except in cases of “necessity and urgency,” C.P.P. art. 225 bis. Since art. 225 bis forbids such statements to be used on pain of nullity, a warning would be irrelevant. See supra notes 166-67.
¹⁸⁰. C. PR. PÉN. arts. 105, 114. See infra notes 191-206.
¹⁸¹. Judgment of May 14, 1974, BGHSt, W. Ger., 25 Entscheidungen des BGHSt 325, 331, 27 NJW 1570, 1571 (1974). The main functions of the German pretrial magistrate, the Ermittlungsrichter, include interviewing witnesses, and were extended to public prosecutors in the 1975 revisions of the StPO, StPO § 160, Jan. 7, 1975, 1975 BGBl 129, 160. The role of the Ermittlungsrichter was thereby greatly reduced. Lampe, Ermittlungszuständigkeit von Richter und Staatsanwalt nach den I. St. VRG, 28 NJW 195 (1975).
¹⁸³. C. PR. PÉN. art. 328. There is no right to silence during the trial in France. The accused may not refuse to take the stand and inferences may be drawn from silence. 2 R. MERLE & A. VITU, supra note 52, at 718.
¹⁸⁴. StPO § 243; Judgment of May 14, 1974, BGHSt, W. Ger., 25 Entscheidungen des BGHSt 325, 331 (1975) (Omission of warning required by StPO § 243 IV is appealable error if warning was necessary to inform the accused of his or her defense possibilities, and he or she would have refused to make a declaration on the matter.)
police and that the warning requirement has placed a substantial burden on local law enforcement efforts.\textsuperscript{186}

European Codes expressly require a right to silence warning, but scholars and courts have debated whether this statutory right should be enforced. Legal scholars in France, Italy, and Germany favor exclusion to enforce the relevant Code provisions.\textsuperscript{187} French courts require exclusion for intentional omissions,\textsuperscript{188} but permit a good faith exception. German law now allows exclusion even when the omission was unintentional.\textsuperscript{189} Italian law requires exclusion and employs a fruit of the poisonous tree doctrine to prevent admission of evidence derived from illegally obtained statements.\textsuperscript{190}

A. France

Since 1897, French law has required that suspects charged with a crime be warned of their rights to silence and counsel at the first appearance before a magistrate.\textsuperscript{191} Under the 1958 Code of Criminal Procedure, the \textit{juge d'instruction} must inform the suspect of the charges against him or her, and warn of the rights to silence and counsel.\textsuperscript{192} Statements by a suspect who wishes to proceed without counsel, or whose counsel fails to appear, are admissible.\textsuperscript{193}

In \textit{Fesch}, a 1955 decision, a decade before \textit{Miranda}, the Court of Cassation attempted to extend similar rights to uncharged suspects held for police interrogation.\textsuperscript{194} Before 1955, French law required that a right to silence warning be given only to those actually charged with a crime. No warning was required for those detained as “voluntary” witnesses\textsuperscript{195}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{186} See, \textit{e.g.}, New York v. Quarles, 104 S. Ct. 2626, 2635 (1984) (O'Connor, J., concurring).
\item \textsuperscript{187} See infra notes 201 & 218 (France), 216 & 218 (Germany).
\item \textsuperscript{188} Judgment of Feb. 13, 1975, Cass. crim., Fr., 1977 J.C.P. II No. 18727, \textit{erratum} II No. 18746 \textit{bis}.
\item \textsuperscript{189} See infra note 219.
\item \textsuperscript{191} Law of Dec. 8, 1897, art. 3, 1897 D.P. IV 119 (warning); Judgment of Feb. 4, 1898, Cass. crim., Fr., 1898 D.P. I 229 (nullity for failure of \textit{juge d'instruction} to advise of right to counsel).
\item \textsuperscript{193} 2 R. \textit{MERLE} & A. \textit{VITU}, \textit{supra} note 52, § 1172, at 432.
\item \textsuperscript{194} Judgment of June 16, 1955 (\textit{Fesch}), Cass. crim., Fr., 1955 J.C.P. II No. 8851 note R. Vouin.
\item \textsuperscript{195} See supra note 67. In \textit{Fesch}, \textit{supra} note 194, the Court of Cassation attempted to protect the rights of witnesses held for questioning by the \textit{juge d'instruction} or by judicial police acting on a letter rogatory issued by a \textit{juge d'instruction}. See infra note 207.
\end{enumerate}
\end{footnotesize}
or arrested en flagrant délit and held for questioning.\textsuperscript{196} Thus, through the technique of delayed charging (inculpation tardive), the police or a magistrate could continue to interrogate a suspect without giving a right to silence warning. In \textit{Fesch}, the Court of Cassation required exclusion if the delay "had the result of evading the protections guaranteed by the Law of 1897."\textsuperscript{197} The \textit{Fesch} decision precipitated a storm of police protest. After much debate, in 1960 the French Assembly replaced the \textit{Fesch} rule with article 105 of the \textit{Code de procédure pénale}, which set forth a good faith test and required exclusion only for intentional delays in indictments.\textsuperscript{198}

French police have vigorously opposed, as an interference with effective investigative methods,\textsuperscript{199} administration of the right to silence warning\textsuperscript{200} and the \textit{Fesch} exclusionary rule, even as transformed by the 1960 statute. For different reasons, legal scholars also oppose the subjective standard set forth in the 1960 statute. They argue that limiting exclusion to bad faith violations is an unwise accommodation to the police, made at the expense of the "rights of the defense" guaranteed to all suspects. One scholar, Professor Vouin, argues for a return to the objective \textit{Fesch} standard which required exclusion based on the "result" rather than the "intent" of the officer.\textsuperscript{201}

The Court of Cassation has enforced the 1960 statute and has used

\begin{footnotes}
\item[196] See supra note 66.
\item[197] In \textit{Fesch}, supra note 194, the exclusion took the form of nullifying the procedure from the moment of the first illegal interrogation.
\item[199] Lambert, \textit{L'article 105 du Code de procédure pénale}, 93 Gaz. Pal. II 583, 587 (1973). Lambert opines that art. 105 requires the police to inculpate innocent parties. While some alternative to premature charging may be desirable, see Jonquères, \textit{Inculpation et mise en cause}, 93 Gaz. Pal. II 461 (1973), this would not seem to justify the judicial police intentionally delaying charging when there is clear evidence of guilt.
\item[200] A typical art. 105 warning provides:
\begin{quote}
We hereby warn you that in the present state of the inquiry, serious and consistent evidence of guilt has been found against you. As required by art. 105 of the Code of Criminal Procedure, which we now read to you, we are breaking off this interrogation and we are going to bring you before the juge d'instruction. Quoted in A. Mayer-Jack, note on Judgment of Feb. 13, 1975, Cass. crim., Fr., 1977 J.C.P. II No. 18727 at II. The police cannot avoid this protection by testifying orally about statements later annulled. Judgment of June 30, 1981, Cass. crim., Fr., 1981 J.C.P. IV No. 341.
\end{quote}
\item[201] Vouin, supra note 198, at 2.
\end{footnotes}
exclusion for bad faith omissions of the right to silence warning after a formal inquiry has been opened. The Court has refused, however, to exclude statements obtained by the judicial police before a formal inquiry, even if the police intentionally delayed charging to avoid a right to silence warning.\(^\text{202}\) This double standard has been criticized by legal scholars.\(^\text{203}\) Moreover, scholars argue that abuses will continue because of the preponderant role of the judicial police in screening cases before they reach the public prosecutor or the juge d'instruction. Reformers, therefore, continue to argue for a complete separation of the administrative and the judicial police, with the latter under the control of the state attorney and the Ministry of Justice as was done in Belgium.\(^\text{204}\)

In summary, the right to silence warning in France differs from the United States *Miranda* warning in several respects. First, the warning need not be given to detainees during a preliminary inquiry before an official investigation by the prosecutor begins. Second, even if an inquiry has begun, the juge d'instruction or the judicial police need not administer a right to silence warning unless they believe they have a strong case against the suspect. Third, the warning constitutes a decisive break, and statements following the warning cannot be admitted into evidence.\(^\text{205}\)

French and United States procedure are similar as both countries use exclusion to ensure that a suspect is informed of his or her rights. While French courts have not explicitly stated that deterrence is the rationale behind article 105, the 1960 statute is clearly aimed at police conduct. It seems apparent that French police would not be so opposed to article 105 exclusion if it did not interfere with their conduct.\(^\text{206}\)

### B. Germany

The right to silence warning has long been part of German law, at least in theory. Originally, however, a warning was required only in limited circumstances. The Code of Criminal Procedure of 1877 required


\(^{204}\) Grebing, supra note 56, at 33.

\(^{205}\) Statements obtained after the warning has been given are excluded. This does not affect the admissibility of statements made before the warning if the charging was not intentionally delayed to deprive the suspect of the rights of defense. Judgment of June 16, 1981, Cass. crim., Fr., 1983 D.S.I.R. 76.

\(^{206}\) Hence this author disagrees with Weinreb's conclusion: "the exclusion of evidence is not applied as a remedy for police misconduct in France as it is here." Langbein & Weinreb, Continental Criminal Procedure: Myth and Reality, 87 Yale L.J. 1549, 1554 (1978).
that a judge warn a suspect of the right to silence, but did not require a
warning from the police or prosecutor. The 1877 provision, applicable at
the first judicial interrogation of the suspect, provided that "[t]he accused
is to be asked whether he wishes to respond to charges." 207 This proce-
dure, like the Italian one, did not necessarily convey that the suspect was
free not to respond. 208 In 1964, however, the legislature, inspired by
French law, rewrote the provision to require that the accused be in-
formed of the right to remain silent and the right to legal counsel at the
first judicial hearing. 209 Additionally, a provision was enacted which
also required the public prosecutor and the police to warn suspects of
their rights. 210

At first, these code sections were considered advisory rather than
mandatory. In 1968 the BGH held that because the legislature did not
provide for exclusion for failure to warn, a lack of judicial compliance
would not automatically result in exclusion of an in-court confession. 211
Legal scholars criticized the court's interpretation of the Code of Crimi-
nal Procedure, 212 arguing that the legislature's intent was to provide the
accused with a choice not to speak. If the warning was not mandatory,
and failure to warn did not result in exclusion, scholars contended that
choice was removed and due process (rechtsstaatliche Strafverfahren)
violated.

In 1974 the BGH accepted these arguments and held that the right
to silence warning was mandatory for the judicial phase of the proceed-
ings. 213 The court reasoned that the legislature's purpose was to ensure

207. StPO § 136 (Feb. 1, 1877, 1877 RGBI 278).
208. See supra note 176 and accompanying text.
At the beginning of the first hearing the accused is to be told what crime he is ac-
cused of and what criminal statutes are involved. He is to be warned that under the
law, he is free to respond to the charges or to say nothing concerning the matter, and
at any time, even before his hearing, to consult with defense counsel of his choice.
Id. French influence is recognized in the Judgment of May 14, 1974, BGHSt, W. Ger., 25
Entscheidungen des BGHSt 325, 330 (1975) (citing C. PR. PPaN. art. 114).
210. StPO § 163a IV: "At the first hearing of the accused by police officers, the accused is
to be informed what acts he is accused of. In addition, at the hearing by police officers § 136 I
(2-4), II and III and § 136a shall apply."
211. Judgment of May 31, 1968, BGHSt, W. Ger., 22 Entscheidungen des BGHSt 170, 175
212. See Grünwald, Beweisverbote und Verwertungsverbote im Strafverfahren, 21 JZ 489,
495 (1966); Grünwald, Comment on Judgment of April 30, 1968 [22 Entscheidungen des
BGHSt 129 (1969)] (StPO § 163a violation), 23 JZ 750, 752 (1968).
213. "To treat the requirements of StPO § 136 I(2) and § 243 IV(1) as mere regulations
["Ordnungsbestimmungen"] does not comply with their meaning." Judgment of May 14, 1974,
BGHSt, W. Ger., 25 Entscheidungen des BGHSt 325, 327 (1975). For the idea that a fair trial
a fair procedure as required by principles derived from the basic notion of the Rechtsstaat. (The Rechtsstaat is a German constitutional principle requiring the State to observe its own laws in the legislature and in the courts.) To achieve this end, a judicial right to silence warning had to be compulsory and backed by exclusion. The court did not hold that a failure to administer the required warning would result in exclusion in every case, however. Statements would be excluded only when the omission affected the outcome; for example, where the accused was not represented by counsel. 214

The BGH decision explicitly left open the question of omissions of the right to silence warning before trial. 215 Most commentators believe that omissions during police interrogation should be treated in the same manner as judicial omissions 216 because the intent of the legislature was to protect the suspect at all stages. Restricting the warning requirement to the trial stage is illogical because once the police have ignored their duty to warn the suspect of the right to silence, a subsequent judicial warning may be a meaningless formality.

In 1983 the BGH considered the question of police warnings. Two lower courts had excluded admissions made in response to a police inquiry in the suspect's home. 217 The BGH reversed, noting that the legislature had not required exclusion for omission of a right to silence warning by the police. 218 The BGH held that although an unintentional

("rechtsstaatlichen fairen Verfahrens") requires giving the accused the right to decide whether to remain silent, see id. at 330.

214. Several commentators attacked the limited scope of the decision, arguing that the accused should be given an official warning at every procedural stage at which he or she testifies. See, e.g., Fezer, Grundfälle zum Verlesungs- und Verwertungsverbot im Strafprozess, 18 JURISTISCHE SCHULUNG [JUS] 104, 107 text accompanying note 46 (1978).


216. See K.H. Gölser, Strafverfahrensrecht 189 (1977); H.-H. Kühne, Strafprozesslehre 313 (2d ed. 1982); C. Roxin, Strafverfahrensrecht 129, 133 (17th ed. 1982); see also BGH Justice K. Boujong in Karlsruher Kommentar zur Strafprozessordnung § 136 Rdn. 27, at 419 (G. Pfeiffer ed. 1982). A simple solution for all countries would be to imitate the example of the Institut für Rechtsmedizin in Munich, (Frauenlobstr. 7a), where blood samples are taken when a person is suspected of drunk driving, and where the text of STPO § 136 is posted in large letters. Photo in ADAC MOTORWELT 44 (March 1983). Additional information kindly provided by Kriminaloberrat Kirchmann of the Munich Polizeipräsidium to Professor Claus Roxin, Juristische Fakultät, Munich.


218. The BGH's reasoning has not been accepted without criticism. K. Meyer (Chief Justice, Kammergericht, Berlin) explained why exclusion was made explicit by the legislature for STPO § 136a but not for § 136. According to Justice Meyer, it went without saying that statements would be excluded if the accused objected to their use on the basis of a violation of
omission\textsuperscript{219} by the police does not mandate exclusion, a trial judge has the discretion to exclude. According to the court, “the trial judge is not prevented from evaluating, especially critically, the circumstances and the content of a statement made without the previous warning.”\textsuperscript{220} Thus a trial judge cannot be reversed for ignoring relevant evidence if that evidence was received after an unintentionally omitted warning. Other criteria for the exercise of judicial discretion have been left for future development. In view of the BGH’s concern for effective law enforcement,\textsuperscript{221} German law would probably permit postponement of a warning when public safety was at risk.\textsuperscript{222} Despite the caution of the BGH decision,\textsuperscript{223} the trend in Germany appears to favor exclusion. German scholars have been highly critical of the BGH’s reluctance in this decision to enforce the StPO warning requirements.\textsuperscript{224} In view of the authority which scholarly law carries in Germany, it is reasonable to infer that when an omission has been intentional or occurs after an arrest, lower courts, and ultimately the BGH, will require exclusion to give effect to Code provisions requiring a right to silence warning by the police.

C. Italy

To protect the privilege against self-incrimination,\textsuperscript{225} Italy requires a right to silence warning at every stage of the criminal procedure.\textsuperscript{226} Although arrested suspects should not be interrogated by the police at

\begin{footnotesize}
\textsuperscript{219} The BGH has left open the necessity of exclusion for omissions of the warning. It seems likely that if the warning were omitted after an arrest, the omission would not be considered “unintentional.”
\textsuperscript{221} Id.
\textsuperscript{223} Under the facts of the Judgement of June 7, 1983, BGHSt, W. Ger., 31 Entscheidungen des BGHSt 395, 396 (1983), German police observed that a man was driving a car erratically. The owner of the vehicle was traced and interviewed in his home shortly thereafter, where he admitted having driven the car. Even on these facts, where there was neither an arrest nor custody, the trial and the lower appellate court favored exclusion of the suspect’s admission.
\textsuperscript{226} See supra notes 134-35.
\end{footnotesize}
length, a suspect who is summoned rather than arrested may be ques-
tioned on the theory that coercion is less likely to occur. Nevertheless, even the summoned suspect is given the rights to counsel and to remain silent. A witness need not receive a warning; however, in Italy, there is less incentive than in France to delay charging to obtain statements without having to inform a suspect of his or her rights to counsel and to remain silent, because the courts treat statements obtained before the warning as "unusable in any way."

The extent of the exclusion required by the words "unusable in any way" must be interpreted in light of Italy's strong "fruit of the poisonous tree" doctrine. The current view is that all evidence derived from unlawfully obtained statements is inadmissible. Italian courts require exclusion of derived evidence not only for statements obtained from witnesses before administration of a right to silence but also for other types of illegally obtained evidence.

IV. SEARCH AND SEIZURE VIOLATIONS

No aspect of the exclusionary rule has aroused more opposition in the United States than its use for search and seizure violations and illegal wiretaps. In recent years, the Burger Court has repeatedly restricted the application of the exclusionary rule. Despite the distinct histories and social needs of the countries under discussion, there has been remarkable convergence in recent years in the development of exclusionary rules re-

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227. For a description of the law before the 1978 modifications, see Scaparone, supra note 136, at 582. See also supra notes 166, 179.
228. C.P.P., art. 78.3.
230. In Italy, unlike in France (see supra notes 199-203), there has been scarcely any discussion of declarations made before charging. This author was able to find only a single case note: Rubiola, Inutilizzabilità delle dichiarazioni rese dall'indiziato prima di essere divenuto tale, 127 Giur. Ital. II 431 (1975).
231. C.P.P. art. 304.3.
234. V. GREVI, NEMO TENETUR SE DETEGERE 195 (1972). The older view of Cordero, supra note 140, at 54, rejecting exclusion for derived evidence, has been abandoned.
lating to search and seizure violations. Clearly, the rule is not unique to the United States. In France, where freedom of expression has remained relatively intact, the main focus of the courts since the Revolution of 1789 has been the protection of the domicile. German law has focused on privacy of communication and thought. Developments in these two countries have been very gradual, beginning in France with minor crimes, and in Germany with civil cases. By contrast, exclusion came to Italy as a "legal transplant." Although it was unknown in that country before 1970, it was accepted in one decade by the courts, legislature, and scholars for even the most serious crimes.

While France, Germany, and Italy exclude evidence obtained through illegal searches, each country has reached this result in its own way. France has relied on its own traditions, while Germany and Italy have developed exclusionary rules based on their constitutions.

A. France

1. Search and Seizure

The sanctity of the domicile has been protected in France since the French Revolution. Today, in theory, strict penal sanctions apply to officers who enter private dwellings through the use of deceit, threats, or force, and who enter houses between 9 p.m. and 6 a.m. In practice, however, penal sanctions are never used against the police.

Searches of the domicile were nullified in France as early as 1910. The background leading to nullification can be summarized briefly. In 1808 the Code of Criminal Investigation interpreted the constitutional protection of the domicile as prohibiting police entry into a house, shop, or building, unless judicial authorization was first obtained. The Code

238. Judgment of Nov. 7, 1889, RGSt, Ger., 20 Entscheidungen des RGSt 91 (1890).
239. A. WATSON, LEGAL TRANSPLANTS passim (1974). Even a cursory reading of the Italian legal literature previously referred to reveals the extent to which Italian jurists have acquainted themselves with comparative law. See Scaparone, supra note 136; Codero, supra note 148; Cappelletti, supra note 156; M. CAPPHELLETTI, supra note 157; Grevi, supra note 166.
240. CONSTITUTION of Dec. 13, 1799 (22 frimaire VIII) art. 76 (France), in 12 J.B. DUVERGIER, COLLECTION COMPLTÈTE DES LOIS 20, 25 (Paris 2d ed. 1835).
241. C. PÉN. art. 184. The JURIS-CLASSEUR PÉNAL at art. 184 p.36 (1984) lists no cases brought against police officials under this article.
242. C. PR. PÉN. art. 59.
243. See supra note 79.
245. CODE D'INSTRUCTION CRIMINELLE (1808), reprinted in 15 J. DUVERGIER, COLLECTION COMPLTÈTE DES LOIS 319 (1836).
permitted an exception for crimes in progress. French courts first hinted, as early as 1857, that a nonconsensual, unauthorized police entry into the home could lead to a nullity. In 1882 the Court of Cassation declared a “nullity based on public policy” when forestry police failed to report an unwarranted search within the required twenty-four hours. Evidence from an unauthorized police search was nullified in a misdemeanor case (délit) by the Court of Cassation in 1910. The same result was reached in criminal cases in 1926 and 1935. Even during World War II, the Court of Cassation excluded evidence because a warrant (commission rogatoire) issued to the judicial police failed to specify reasons for the search. In the 1953 case Isnard, the Court of Cassation extended exclusion to all illegal searches performed by the judicial police with insufficient warrants. In addition, the Isnard case reaffirmed a strong “fruit of the poisonous tree” doctrine to exclude confessions resulting from illegal searches. Isnard, however, also made a much criticized concession to the French police and permitted search warrants for specific infractions to be issued without the name and address of the party to be searched. This rule meant French police could carry blank warrants and avoid the intervention of a neutral and detached magistrate before a search took place. The intent of the Isnard rule was to avoid delay and permit the police to carry out searches when a crime was in progress. The result, however, was that almost no additional unlawful

246. CODE D’INSTRUCTION CRIMINELLE art. 16. (now replaced by C. PR. PEN. art. 59).
247. Judgment of April 30, 1857, Cour impériale, Fr., 1859 D.P. II 205. Although the CODE D’INSTRUCTION CRIMINELLE provisions called for a nullity, the court treated failure to protest as tacit consent. See unsigned casenote, id.
256. See State Counsel's Brief, supra note 252, at 2, col. 2.
257. Professor Caleb Foote (School of Law, University of California, Berkeley) informed the author that it was also common practice for police in Philadelphia, Pennsylvania to carry a book of signed, undated, blank warrants during the 1950’s.
search and seizure cases were reported until 1980.258

In 1977, the Conseil constitutionnel declared unconstitutional legislation which would have permitted police to search any vehicle on a public road.259 Commentators had read this decision as extending to vehicles the same protection that had been granted previously to domiciles.260 The warrant requirements for domiciles do not apply, however, when police alleged probable cause for a search under the flagrant délit provisions of the Code of Criminal Procedure.261 This loophole appears to have been closed by the Gomez-Garzon decision of May 30, 1980.262 In that case, Parisian police, acting on "confidential information," entered Gomez's hotel room looking for drugs; instead they found stolen watches. While in police custody, Gomez allegedly admitted using cocaine. The Court of Cassation refused to admit evidence obtained from the search and the subsequent confession because, prior to the search, the police had no information that a crime was in progress. Thus, under current French law, a warrantless search cannot be justified by mere pre-search suspicion or post-search evidence. The nullification was justified in the decision on the basis of a lack of conformity with the Code search and seizure and the flagrant délit provisions.263 As previously noted for garde à vue violations, however, lack of conformity with established Code procedures does not automatically lead to a nullity.264 The real

258. The author has found only one reported case between 1953 and 1980: Judgment of June 19, 1957, Cass. crim., Fr., 1957 D. Jur. 564 (invitation to enter does not constitute consent to a search).


261. Crimes are considered "flagrant" (i.e. obvious) in three senses: (1) when the perpetrators are caught in the act or just afterwards (in American terms—"red-handed"); (2) shortly after the act, bearing evidence ("hot pursuit"); and (3) if the deed becomes "obvious" after police are invited into a private area by the occupant. Note W. Jeandidier on Judgment of May 30, 1980 (Gomez-Garzon), Cass. crim., Fr., 1981 D.S. Jur. 533, 534. Prior to Gomez-Garzon, French courts had accepted the fiction that a crime is "obvious" when the police entered without an invitation, and a crime was underway in the sense of (1) or (2), even though the crime was not obvious until they discovered it.


263. C. PR. PEN. arts. 56, 76 and 53.

264. The French law of nullities in criminal procedure is one of the less clearly defined areas of the law. Judgment of Mar. 14, 1974, Cass. crim., Fr., 1974 D.S. Jur. 604, 605 note J. Rovert. In addition to those nullities prescribed by the Code of Criminal Procedure, the Court
justification for exclusion was the long line of French search and seizure cases in which evidence was excluded.\textsuperscript{265} Gomez was not intended to establish a new basis for exclusion but to close a loophole. Since Gomez the Court of Cassation has reaffirmed exclusion for search and seizure violations and lower courts have excluded evidence even for good faith violations of the search and seizure provisions stipulated by the Code of Criminal Procedure.\textsuperscript{266}

2. Wiretaps

The French, like the Germans and the Italians, have shown an aversion to electronic surveillance.\textsuperscript{267} Until the much-criticized Tournet decision in 1980,\textsuperscript{268} it was uncertain that wiretaps were legal at all. Although the Criminal Court of the Seine in Paris had consistently admitted wiretap evidence, even for minor crimes such as illegal bookmaking,\textsuperscript{269} appellate courts rejected electronic surveillance as unreliable\textsuperscript{270} or "indelicate."\textsuperscript{271} Legal scholars also were unsure whether wiretaps were legal, but noted the tendency in foreign law to require judicial authorization for a wiretap.\textsuperscript{272}

In Tournet, the Court of Cassation, for the first time, upheld an authorized wiretap against a charged suspect.\textsuperscript{273} The court reasoned that article 81 of the Code of Criminal Procedure permits the juge
d'instruction to employ any useful methods to ascertain the truth, presumably including wiretaps.\textsuperscript{274} The \textit{Tournet} decision implies, however, that the evidence obtained from an unauthorized tap will be excluded.\textsuperscript{275} This implication is consistent with the French legislature's attitude towards electronic surveillance.\textsuperscript{276} Unlike the German\textsuperscript{277} and Italian\textsuperscript{278} legislatures, the French legislature has never provided for legal wiretaps.\textsuperscript{279}

In conclusion, because electronic surveillance is disfavored in France,\textsuperscript{280} French law has produced few exclusion cases concerning wiretaps. If evidence from an unwarranted wiretap is offered in the future, in all probability it will be excluded.

B. Germany

1. Legally Unobtainable Evidence

Historically, Germany has resisted exclusion of evidence obtained through illegal searches and seizures.\textsuperscript{281} The reluctance to use exclusion

\textsuperscript{274} Id. (at close of the judgment).

\textsuperscript{275} \textit{Tournet} held that a juge d'instruction could order a wiretap. Judgment of Oct. 9, 1980, Cass. crim. Fr., 1981 D.S. Jur. 332. In a more recent case, the Court of Cassation held a wiretap could only be ordered by a juge d'instruction on probable cause justifying opening an investigation for a specific infraction, and that the tap must be under his control, without any artifice or compromise of defendant's rights. Judgment of July 23, 1985 Cass. crim., Fr., unpublished, abstract at 1985 J.C.P. IV No. 338 (authorized copy on file at the Hastings International and Comparative Law Review). Nullities for irregularities by a juge d'instruction have long been a part of French law. See, e.g., Judgment of June 12, 1952, Cass. crim. Fr., 1952 J.C.P. II No. 7241. If a juge d'instruction must authorize a wiretap, it follows \textit{a fortiori} that he cannot make use of evidence gathered by the police through a wiretap which he did not authorize.

\textsuperscript{276} For a recent survey, see Kayser, \textit{L'interception de communications téléphoniques par les autorités publiques françaises}, in \textit{MÉLANGES DÉDIÉS À JEAN VINCENT} 169 (1981).

\textsuperscript{277} \textit{STRAFGESETZBUCH} [\textit{STGB}] § 298, 1967 BGBI I 1360 (W. Ger.) (superceded by \textit{STGB} § 201, 1975 BGBI I 56) (requiring criminal penalties for recording without consent).

\textsuperscript{278} C.P.P. art. 226 bis (Law of April 8, 1974, n.97 art. 5, 1974 Gaz. Uff. 510) allows wiretaps for crimes punishable by more than five years imprisonment, drug cases, arms and explosive infractions, contraband, and threats made by telephone.

\textsuperscript{279} \textit{CODE CIVIL} art. 368 make no exception for police officials. One court has even allowed the criminal prosecution of a court official (huissier) for violating telecommunication laws by manually transcribing a phone call. Judgment of Jan. 5, 1978, Cour d'appel, Besangon, 1978 D.S. Jur. 357.

\textsuperscript{280} While French law was excluding tape recordings as unreliable (see supra note 270), United States federal courts were developing criteria to determine authenticity. United States v. McKeever, 169 F. Supp. 426, 430 (S.D.N.Y. 1958), rev'd on other grounds, 271 F.2d 669 (2d Cir. 1959) ("McKeever factors").

for illegal searches was due not only to police resistance to warrants, but also to the basic philosophy of German criminal law and procedure. German theory favors strict enforcement of laws and the rule of compulsory prosecution ("Legalitätsprinzip") requires the public prosecutor to pursue every significant crime. This rule was proposed originally in the nineteenth century to free the newly instituted public prosecutor’s office from political pressure and was observed closely until the rise of National Socialism. The "rule of compulsory prosecution" was itself a reflection of the "theory of absolute punishment" embodied in Kant’s famous dictum requiring execution of the last murderer in prison as a duty of a society before that society disbands.

Although many German prosecutors still adhere to compulsory prosecution even in minor matters, it has become less significant as alternate remedies such as community work, payments to victims or charities, and fines have been employed. In addition, state interests such as testimonial immunity and, more importantly, constitutional values, have weakened the rule of compulsory prosecution. Respect for human dignity and the right of personality development guaranteed by the Basic Law (the German Constitution), as well as the values of private and family life protected by the European Human Rights Convention, have led the courts to balance mandatory prosecution against the

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282. See supra note 115.
283. StPO § 152 (1877).
287. R. GRUNBERGER, SOCIAL HISTORY, supra note 89, at 90.
288. I. KANT, DIE METAPHYSIK DER SITTEN 199 (Königsberg ed. 1797): Even if that civil society dissolved itself with the consent of all its members (as for example in the case of a people inhabiting an island resolving to separate and scatter themselves throughout the world) the last murderer remaining in prison ought to be executed before the resolution were carried out.
289. C. ROXIN, STRAFVERFAHRENSRECHT 65 (17th ed. 1982).
290. GG art. 2, § 1 (W. Ger.): “Everyone has the right to the free development of his personality in so far as this does not injure the rights of others and does not conflict with the Constitutional order or moral law.”
right to privacy. To protect these rights, German courts have created a
category referred to here as "legally unobtainable evidence."

Legally unobtainable evidence stands on the borderline between
privileged and illegally obtained evidence. It is excluded not only be-
for his private and family life, his home and his correspondence." European Convention, supra art. 8, para. 1.

293. German law, like United States law, protects communications between family members as well as those between certain professionals and their clients. In the United States, spouses have a privilege not to reveal communications between themselves. In California, for example, witnesses can refuse to testify against a spouse. See CAL. EVID. CODE § 970 (West 1966).

By contrast, in Germany, witnesses have more than a privilege; they have a right not to testify (StPO § 52 Zeugnisverweigerungsrecht) and must be informed of this right on pain of exclusion. Judgment of Aug. 3, 1977, BGHSt, W. Ger., 27 Entscheidungen des BGHSt 231 (1978) (exclusion for failure to warn fiancée of her right to refuse to testify). While German privileges leave little discretion to the court, they do leave much discretion to the witness.

There is no German parallel to the California privilege which allows a defendant to pre-
vent a spouse from disclosing confidential communications made during the marriage. See CAL. EVID. CODE. § 980 (West 1966). Family members are free to disclose any information they wish. A scholar recently argued against a privilege or a right to silence for family members, fearing this would hinder prosecution when a child molestation or other injury occurs within the family. R. RENGIER, DIE ZEUGNISVERWEIGERUNGSRECHTE IM GELTENDEN UND KÜNFTIGEN STRAFVERFAHRENSGERECHT 110, 254 (1979). Special legislation, however, could easily deal with the situation where there has been a showing of a crime against a family member. See, e.g., CAL. EVID. CODE § 985 (West 1966).

Professional advisors have a corresponding "right to refuse to testify" similar to that granted to family members. StPO §§ 53, 53a. The German Supreme Court has held, however, that clients may not suppress testimony if the professional advisor decides not to exercise the right not to testify. Judgment of Jan. 12, 1956, BGHSt, W. Ger., 9 Entscheidungen des BGHSt 59 (1957) (lawyers); Judgment of Oct. 28, 1960, BGHSt, W. Ger., 15 Entscheidungen des BGHSt 200 (1960) (physicians). These judgments antedate important decisions excluding evidence; nevertheless, for the time being, they are still good law. Indeed, since the 1975 revision of the Code of Criminal law (StGB § 203) the law no longer imposes a minimum fine or prison term for professional advisors who betray their clients.

It is submitted that current German law on "rights not to testify," both for family members and professional advisors, is inconsistent with the concept of the "intimate sphere" for private communications protected by the decisions of the Federal Supreme Court and the Federal Constitutional Court. The courts have held that protection of the "intimate sphere" requires exclusion of clandestine tape recordings to protect privacy. By the same token, the law should protect not only the rights of a potential witness to hear confidential statements; it should protect the rights of an individual to make statements without fear that advisors or family members will be free to disclose information later.

In no other environment is the protection of confidential statements more necessary than within the family. Similarly, for professional advisors, the ability of the German doctor to betray a patient is no longer consistent with current constitutional standards or with the new bases which have been proposed for StGB § 205 and StPO § 53. Formerly, a physician's "right not to testify" (StPO § 53) and the correlate protection of professional records (StPO § 97) were labelled "highly personal" rights. The rights did not survive the physician. Judgment of Nov. 17, 1936, RGSt, Ger., 71 Entscheidungen des RGSt 21 (1938). More recently, however, these rights have been given a constitutional basis, to protect the privacy and right to personality development of the patient and remain even after the death of the physicians.
cause of the method by which it is obtained, but also because of its content. The evidence itself need not be privileged; however, the evidence is unobtainable because unacceptable methods are used to acquire it. For example, a witness may testify to a conversation, but the same conversation cannot be recorded and offered as evidence. Evidence obtained through unacceptable methods may be excluded even without state action, in criminal as well as civil cases.

The Germans, like the French, have shown considerable hostility towards "bugging," and many of the German exclusion cases have involved unlawful tape recordings. In 1957, the BGH sustained an attorney's right not to make a closing argument until a radio station had removed its recording equipment. Recording without consent became illegal in 1967, but even before this time, the courts began excluding recordings in civil cases. After a Berlin appellate court permitted indirect use of secret tapes in 1955, the BGH barred the use of recordings.


Current law thus takes the contradictory position of authorizing the physician or the physician's successor to withhold medical records for the purpose of protecting the patient's constitutional rights, but still giving the physician the prerogative to violate these rights. If, as the German courts hold, the purpose of StPO § 53 is to protect the patient by excluding this evidence, then the decision to withhold medical records should be left to the patient and enforced by the courts, as is done in the United States and France. See, e.g., CAL. EVID. CODE 993(a) (West 1966). Blondet, Le secret professionnel, in LA CHAMBRE CRIMINELLE ET SA JURISPRUDENCE: RECUEIL D'ETUDES EN HOMMAGE A LA MEMOIRE DE MAURICE PATIN 199, 204 (1965); Gulpe, Le secret professionnel en droit francais, in 25 TRAVAUX DE L'ASSOCIATION HENRI CAPITAN: LE SECRET ET LE DROIT 105 (1974). Judgment of May 10, 1900, Cass. crim., Fr., 1901 S. Jur. I 161, 167 col. 3.

294. Judgment of May 20, 1958, BGHZ, W. Ger., 27 Entscheidungen des BGHZ 284, 285 (1958): "The rules of Articles 1 and 2 of the Basic Law . . . bind not only the state and its organs, but are to be observed by everyone in private law matters." See also Judgment of Feb. 21, 1964, BGHSt, W. Ger., 19 Entscheidungen des BGHSt 325, 326 (1964) ("Diary case").

295. The German approach to exclusion in civil cases should be distinguished from the British approach. In Britain, there is a trend to exclude evidence obtained through unacceptable means in civil, but not criminal, cases. The rationale for exclusion is equitable grounds: a party cannot ask for justice unless it has clean hands. Tapper, Privilege and Confidence, 35 MOD. L. REV. 83, 87 (1972). Baade, Illegally Obtained Evidence in Criminal and Civil Cases: A Comparative Study of a Classic Mismatch II, 52 TEX. L. REV. 621, 640-43 (1974). In German law, as will be seen, "clean hands" is not a relevant issue. In the United States evidence is only rarely excluded in civil cases, usually in divorce cases, e.g., Williams v. Williams, 8 Ohio Misc. 156, 221 N.E.2d 622 (1966); Markham v. Markham, 272 So. 2d 813 (1973).


297. StGB § 298, supra note 277.

in civil cases. The BGH reasoned that the constitutional right to personality development requires freedom of expression; this development would be impossible if private conversations are allowed to be recorded without consent.\textsuperscript{299}

The extension of this doctrine to criminal cases occurred at the same time that the United States Supreme Court accepted exclusion, suggesting that, directly or indirectly, United States law influenced German developments. Two cases illustrate this change.

In its decision of June 14, 1960,\textsuperscript{300} the BGH considered the admissibility of privately recorded secret tapes in a criminal action against an attorney who allegedly solicited a bribe to suppress his client's testimony. The court considered the admissibility of the tapes both to impeach the victim's testimony and to convict the attorney. With regard to impeachment, the court relied on the principle of personality development, and excluded the tapes, finding they had been prepared to undermine the victim's credibility.\textsuperscript{301} The court did not decide whether a tape might be used \textit{defensively} to protect rights or redress a crime (defensive use was prohibited in 1973).\textsuperscript{302} Nor did the court permit the use of the tapes against the attorney, relying on principles of human dignity, the right against self-incrimination, and the right to silence. The court recognized that exclusion might deprive the state of the best or only means of solving a crime. Nevertheless, it concluded that the Code of Criminal Procedure "\textit{does not require that the truth be won at any price.}"\textsuperscript{303}

Exclusion based on personality development was first extended to personal papers in the famous \textit{Diary Case} of 1964.\textsuperscript{304} In that case, a school teacher, called as a witness in the adultery trial of her former lover, denied involvement with him and was later convicted of perjury on the basis of her own diary. The BGH reversed, forbidding any use of the diary. The court balanced the crime of perjury against the right to per-

\textsuperscript{301} Judgment of June 14, 1960, BGHSt, W. Ger., 14 Entscheidungen des BGHSt 358, 362 (1960).
\textsuperscript{303} Judgment of June 14, 1960, BGHSt, W. Ger., 14 Entscheidungen des BGHSt 358, 364-65 (1960).
sonality development guaranteed by the German Basic Law and the Human Rights Convention and held that "within certain boundaries" the interest in protecting privacy superseded that of fighting crime. Noting that absolute exclusion for due process violations and other grounds existed by statute, the court concluded that protection of personal papers could be made effective only through a similar exclusionary rule.

The Diary Case extended exclusion in three important respects. First, it protected personality development in a criminal case. Second, it rejected a state action requirement for exclusion. Third, it established the concept of a protected area within which evidence was unobtainable. This protected area is not a physical, but a psychological space, reserved for intimate communications, including communications with oneself. No other legal system has an equivalent concept. For example, in the United States, neither the fifth amendment nor the fourth amendment presently protects private papers or diaries.

The greatest extension of exclusion based on personality development was made by Germany's highest court, the Federal Constitutional Court, in its January 31, 1973, decision. This decision dealt with several conflicting interests. The complainant had been convicted of tax evasion, forgery, and fraud in a real estate transaction. He asked the Federal Constitutional Court to exclude the major piece of evidence against him, tapes of the transaction made secretly by the vendors to protect themselves. The trial and appellate courts had admitted the tapes because the complainant's constitutional right to personality development

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305. Judgment of Feb. 21, 1964, BGHSt, W. Ger., 19 Entscheidungen des BGHSt 325, 329 (1964) ("in bestimmtem Umfange"). The use of a personal diary as evidence appears only slightly less extreme when it is remembered that their use was evidence under the Nazis, R. GRUNBERGER, supra note 89, at 120, and are still admissible in United States law, I LAFAVE, SEARCH AND SEIZURE § 2.6 n.123 (1978).


307. Id. (citing StPO § 136a).

308. Id.

309. Id. Exclusion is limited to diaries with "highly personal contents." The BGH saw no room for exclusion for non-personal diaries comprising mere records kept by businesspersons, spies, or criminals.

310. See Anderson v. Maryland, 427 U.S. 463 (1976). See also I LAFAVE, supra note 305, at § 2.6(e) nn. 123 et seq. According to judges and scholars in the United States, fourth amendment protection could be extended to evidence such as diaries and personal papers; however, no court has yet done so. Id. at § 2.6 nn.130 et seq.


312. Id., 34 BVerfGE at 243.
was outweighed by private and public interests.  

The Constitutional Court reversed and excluded the tapes, establishing two levels of privacy. At the first level, the Court established an absolutely protected area which could not be invaded for any reason: "Even the predominating interests of the general public cannot justify an intrusion in the absolutely protected nucleus [Kernbereich] of private life. There can be no balancing [of public and private interests] according to the standards of the proportionality principle." "Highly personal matters" were thus absolutely protected by articles I and II of the Federal Constitution. The Court made no effort to define "highly personal matters," leaving this definition to later cases.  

At the second level, certain personal matters were given protection unless a compelling state interest exists. The court found the tapes were protected at this second level of privacy because preventing tax evasion was not a preponderant governmental interest. As examples of preponderant state interests which would override the second level of privacy, the Court cited major crimes involving loss of life or limb or a threat to the democratic order.

While defendants in civil cases occasionally claim the protection of the principles of human dignity and personality development, these cases are rare. As in France, Italy, and the United States, exclusion in Germany is now principally sought in criminal actions.  

Recently the BGH has begun to apply exclusion time to evidence acquired through police electronic surveillance. In its decision of March
16, 1983, the BGH held that evidence obtained accidentally when the legally tapped phone of a married couple was left off the hook could not be used. 321 For the first time, the BGH invoked the "absolutely protected area" referred to by the Federal Constitutional Court in 1973 322 and held that rights to human dignity and personality development required some "space" (Raum) where a married couple could share their experiences, feelings, opinions, and emotions free of state interference. 323 While the holding was limited to married couples, much of the language refers to privacy in general and could be extended easily to unmarried couples or others engaged in private conversation. In any event, the court's willingness to exclude evidence of a major crime obtained in the course of an authorized wiretap represents an important shift in German policy.

Protection of privacy in Germany extends to areas not covered by existing United States law. At the same time, the German practice of limiting exclusion to "legally unobtainable evidence" has several disadvantages. First, the parameters of this protection are difficult for lawyers and judges to define. Unlike the exclusionary rules of France, Italy, and the United States, which guarantee freedom from specified intrusions, the German rule guarantees freedom to develop one's personality. While it may be relatively simple to recognize violations of persons, houses, papers, and personal effects, 324 more imagination is required to discover the potential for self-development in a given situation. Appellate courts, therefore, have refused some claims for exclusion. 325

An additional weakness of German law is that excluding "legally unobtainable evidence" has little deterrent effect on the police or prosecutors. Before evidence can be excluded, an official has to obtain and review it. Not only is the desired protection violated by the official reviewing the evidence, but police or prosecutors may feel compelled to obtain evidence to decide if it is usable. Thus, they may be deterred from using evidence but not from seeking it.

324. U.S. CONST. art. IV.
325. See supra notes 319-20.
2. Illegally Obtained Evidence

Because of theories of absolute punishment and mandatory prosecution, German law has been more hostile to exclusion for search and seizure violations than France, Italy, and the United States. Past decisions of the German courts established limits on using evidence but not on obtaining it. For example, a Wiesbaden court held that evidence that could be obtained with a warrant could be obtained with a defective one.\textsuperscript{326} Taken to its logical conclusion, this rule would make warrants unnecessary.

A growing minority of German criminal proceduralists believe that exclusion of illegally obtained evidence should be imposed for search and seizure violations.\textsuperscript{327} Many German opponents of exclusion did not dispute its effectiveness in the United States, but argued exclusion should not be extended in Germany because of basic differences between German and United States law and society.\textsuperscript{328} A substantial number of German specialists in criminal procedure, however, now believe that United States principles, including the "fruit of the poisonous tree" doctrine, should be incorporated into German law.\textsuperscript{329} Apparently, penal measures designed to protect suspects' rights\textsuperscript{330} and to protect against illegal searches have proved inadequate.\textsuperscript{331} Recently, the German Bar has grown critical of the unlimited search authority of police officials.\textsuperscript{332}

\textsuperscript{326} Judgment of March 3, 1978, Landgericht, Wiesbaden, 32 NJW 175 (1979), criticized in 33 NJW 1053 note H.-H. Kühne (1979). Indeed, in Switzerland, the Federal Supreme Court has articulated such a rule: legally obtainable evidence is admissible even if illegally obtained. See Judgment of May 9, 1973, Bundesgericht, Switz., 99 Entscheidungen des Schweizerischen Bundesgerichtes 12, 15 (1973); Judgment of Nov. 9, 1978, Obergericht, Zurich and Bundesgericht, 77 SCHWEIZERISCHE JURISTEN-ZEITUNG 130, 131 § 1, 132 § 4(b) (1981). The result of the Swiss rule is that in the absence of effective administrative controls, the police would be foolish to risk seeking a warrant. At best, the magistrate could only tell them to do what they wanted to do anyway. At worst, they would risk making themselves liable to a charge of abuse of authority. This is precisely what happened to Italian police officers who insisted on examining a typewriter after they had been denied a warrant. Judgment of Dec. 10, 1960, Trib., Benevento, 113 Giur. Ital. II 144, 149 (1961).


\textsuperscript{328} 2 Löwe-Rosenberg, Kommentar zur StPO § 136a Rdn. 52 (18th ed. 1978).

\textsuperscript{329} 2 Löwe-Rosenberg, Kommentar zur StPO § 136a Rdn. 66 at n.153 (24th ed. 1984).

\textsuperscript{330} StGB § 343 (1877), amended Jan. 7, 1975, 1975 BGBl I 76.

\textsuperscript{331} Formerly StGB § 342 incorporated § 123 (unwarranted intrusion into a dwelling) for police searches. StGB § 342 is entirely omitted from the current version of the code. Amendment of Jan. 7, 1975, 1975 BGBl I 76.

\textsuperscript{332} Achenbach, Verfahrenssichernde und vollstreckungssichernde Beschlagnahme im Strafprozess, 29 NJW 1068 (1976). Kohlmann, Beschlagnahme, 1982 DIE WIRTSCHAFT-
Some district courts, recognizing that abuses occur, have begun to exclude evidence from illegal searches.

One of the first exclusion cases occurred in Bonn. In late April 1980 nine officers of the German tax bureau entered a lawyer's office seeking information concerning the lawyer's bank account. With a warrant to conduct only a limited search, and without probable cause to widen its scope, the officers seized documents including private correspondence and extended their investigations into the lawyer's home and bedroom. The lower court denied the lawyer's request for the return of his papers. The Bonn district court (Landgericht) reversed, holding the papers could not be considered as evidence and were to be returned, because the seizure had violated article 13 of the Constitution, which protects the inviolability of the home. This decision represents a significant shift in the German law of criminal procedure. Previously, article 13 was never mentioned in German exclusion cases; the older cases relied on the constitutional right to personality development guaranteed by article 2. The Bremen district court has followed the Bonn court's lead and invoked article 13 to reverse a conviction based upon evidence obtained through a search that exceeded the confines of the magistrate's warrant.

The most original aspect of the Bonn decision was the court's emphasis on how the evidence had been obtained, rather than on the content of the evidence. The Bonn court took the view that to exclude evidence a court should weigh not only the seriousness of the accused's crime and the intrusion on privacy interests, but also the seriousness of the police misconduct. Finding that the officers' search was in flagrant excess of the warrant, the Bonn court relied on the minority deterrence rationale for excluding evidence. According to the court, gross or intentional violations of an officer's duty of due care will lead to exclusion, and

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333. Judgment of July 1, 1980, Landgericht, Bonn, 1 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT UND INSOLVENZPRAXIS [ZIP] 805, 807-08 (1980), 34 NJW 292 (1981). The issue was framed as to whether the evidence could be considered rather than whether it was to be excluded, because the petitioner had requested return of the documents before charges were brought. On searches of lawyers' offices, see Krekeler, supra note 332.


335. Id. at 807.


the greater the illegality, the more necessary exclusion becomes.\textsuperscript{338}

The Federal Constitutional Court also appears to be leaning towards exclusion of illegally obtained evidence. In the Judgment of May 5, 1977, the court considered the admissibility of medical records seized at a drug rehabilitation center,\textsuperscript{339} and excluded the records because of the invasion of the sphere of privacy protected by articles I and II of the Basic Law. Before reaching this issue, however, the court considered the legality of the nighttime search as an alternative ground for exclusion. The court found that the drug rehabilitation center qualified as a "home," protected by the search and seizure statute;\textsuperscript{340} here the search satisfied the requirements of the statute. However, the court's analysis of this issue suggests that the search would have been invalid and the evidence excluded on statutory grounds if these requirements had not been met.

In summary, German law has now developed a system of exclusion to deal with various types of unlawful evidence. Recent decisions indicate that the BGH now recognizes that illegal searches by the police occur,\textsuperscript{341} and the current trend is to expand the use of exclusion to deter misconduct by police or other state officials.\textsuperscript{342} Before long, the BGH will be faced with the same dilemma as lower courts and courts in France, Italy, and the United States: whether to admit and justify the use of illegally obtained evidence or to exclude it. From the perspective of this comparative law scholar, the latter alternative appears more likely.

C. Italy

1. Wiretaps

Under the influence of United States law, Italian scholars have ad-


\textsuperscript{340} Id. at 369.


vocated exclusion of illegally obtained evidence for several decades.\textsuperscript{343} As in Germany, the first search and seizure cases involved electronic surveillance rather than physical searches.\textsuperscript{344} In 1970, the Italian Constitutional Court stated that judicial evaluation of the evidence "presupposes that that evidence not be forbidden by law."\textsuperscript{345} This dictum from the Court was welcomed by scholars as the first step towards an exclusionary rule.\textsuperscript{346} Wiretap exclusion, and exclusion in general, received its greatest impetus, however, in the Marazzani decision of April 6, 1973, when the Constitutional Court announced that as a matter of constitutional law evidence from unwarranted taps would be inadmissible.\textsuperscript{347} The Court emphasized "the principle that action calculated to violate the fundamental rights of a citizen cannot be used as a justification and basis for a prosecution against he who has suffered these unconstitutional actions."\textsuperscript{348} Commentators greeted this decision as a major step in the development of constitutional and procedural law.\textsuperscript{349}

Although in Marazzani the court rejected a challenge to the admissibility of an authorized wiretap, it indicated in the future it would exclude evidence from illegal wiretaps. Following this decision, the legislature in 1974 passed a statute, which had retroactive effect,\textsuperscript{350} excluding unlawfully intercepted communications.\textsuperscript{351} Despite some resistance from some lower courts as late as 1978,\textsuperscript{352}

\textsuperscript{343} Cappelletti, Efficacia di prove illegittimamente ammesse e comportamento della parte, 7 RIVISTA DI DIRITTO CIVILE 556 (1961). Vigoriti, Prove illecite e costituzione, 23 (n.s.) RIV. DIR. PROC. 64 (1968).


\textsuperscript{347} Judgment of April 6, 1973, No. 34, Corte cost., Italy, 18 Giur. Cost. 316 (1973), 96 Foro It. I 951 (1973), translated in M. Cappelletti \& W. Cohen, supra note 28, at 497. The decision followed the German Federal Constitutional Court Judgment of Jan. 31, 1973, 34 BVerfGE 238, supra note 302. This reflects the legal climate at the time, but the possibility of a direct influence is strengthened by the fact that the case originated in the German speaking section of Italy (Bolzano).


\textsuperscript{349} Grevi, supra note 346, at 338.


exclusion of evidence from some unwarranted taps is now accepted. The Court of Cassation has applied the rule broadly and some courts have used the exclusionary statute to prohibit other types of electronic surveillance.\footnote{353} Courts have also excluded the "poisonous fruit" of illegal wiretaps,\footnote{354} and evidence obtained from legal wiretaps for crimes other than the one for which the tap was authorized.\footnote{355}

2. Illegal Search and Seizure

Italian, like French and German law, has several statutes designed to prevent illegal searches and seizures. Article 13 of the Italian Constitution forbids detaining or searching persons without judicial authorization.\footnote{356} Article 14 prohibits house searches except in the manner and under the circumstances provided by law.\footnote{357} The Code of Criminal Procedure requires twenty-four hours' advance judicial authorization for house searches.\footnote{358} In cases of crimes in progress or escapes, the police may undertake searches without judicial authorization, but the Code requires post-search justification.\footnote{359} The Penal Code also provides criminal penalties for public officials who enter a dwelling without authorization. In practice, however, these criminal provisions are never invoked.\footnote{360} Italian scholars, therefore, have long advocated the use of nullities for unwarranted searches.\footnote{361} In September 1973, shortly after Marazzani, Italian examining magistrates began excluding evidence from illegal searches. The principle of exclusion of evidence from illegal searches now has been affirmed repeatedly by the Court of Cassation.\footnote{362}

\footnote{356} COSTITUZIONE art. 13.3 (Italy).
\footnote{357} Id. art. 14.2.
\footnote{358} C.P.P. art. 332.1
\footnote{359} C.P.P. arts. 224.1 and 224.2. See P. GUALTIERI, PERQUISIZIONI ED ISPEZIONI DEI POLIZIA 26 (1979).
\footnote{360} C.P. art. 615 (Penalties of up to one year imprisonment for entry without formalities, up to five years for abuse of authority in entering). In the only criminal case found by this author, intent could be clearly proven because the police officers had been denied a warrant by a magistrate. Judgment of Dec. 10, 1960, Trib., Benevento, 113 Giur. Ital. II 144 (1961).
\footnote{361} See P. GUALTIERI, supra note 359, at 48 n.62 and authorities cited therein.
Developments in the Italian exclusionary rule must be appreciated in the context of two factors. First, there is the traditional doctrine of "free evaluation of the evidence," under which judges should not be encumbered in evaluating evidence by *a priori* rules. Second, there is the passage, in 1978, of special anti-terrorist legislation permitting extensive searches. Many feared this special legislation would encourage police arbitrariness and judicial laxity. The Court of Cassation has continued to hold, however, that:

Once the nullity of a search has been ascertained on the basis of C.P.P. Art. 185, the consequences cannot be avoided. That is, if the act of the search was void, the efficacy of the seizure is no longer discussable, and thus the evidence gained from the seizure cannot be used.

Despite the emergency measures of 1978 and a tradition of free evaluation of the evidence, the exclusionary rule has been adopted by Italian scholars and courts. The conclusion of the United States scholar, Kaplan, that "the exclusionary rule is hardly a facet of American jurisprudence which has aroused admiration the world over," is today in need of correction. Since Kaplan wrote in 1974, scholars in Italy have followed the United States rule with interest and admiration. Although the United States exclusionary rule was not the first, it has extend to other parts of the procedure, but involves only the evidentiary elements derived from it).

363. Free evaluation of evidence was first instituted in France after the Revolution to replace the medieval system of legal proofs that required judges to mechanically weigh evidence or count witnesses (e.g., one baron as equivalent to six commoners). Cappelletti, *Social and Political Aspects of Civil Procedure*, 69 Mich. L. Rev. 847, 849 (1971). Free evaluation left judges to believe or disbelieve evidence according to their "inner conviction." Under French influence, it penetrated German law (StPO § 261) and Italian law. H. Nagel, *Die Grundzüge des Beweisrechts im Europäischen Zivilprozess* 257 (1967); M. Nobili, *Il Princípio del libero convincimento del giudice* (1974). Free evaluation has been criticized in Italy where it has been used to admit illegally obtained evidence. G. Leone, *Manuale di Diritto Processo Penale* 429 (9th ed. 1975), or "poison fruit," Pisapia, *La protection des droits de l'homme dans la procédure pénale*, 49 Revue Internationale de Droit Pénal 181, 213 (1978).


been emulated even in those countries with longstanding statutory sanc-

tions for police lawlessness. The French, German, and Italian experi-

ciences suggest that penal measures to protect civil liberties are inadequate

substitutes for exclusion.

V. "FRUIT OF THE POISONOUS TREE" DOCTRINE

A. France

Without a "fruit of the poisonous tree" doctrine, exclusion of evi-
dence, whether illegally obtained or "legally unobtainable," has little de-
terrent effect. France, which has the oldest system of exclusion in
Europe, has long applied a "fruit of the poisonous tree doctrine." The
doctrine was explained by one French scholar in 1936: "when one act of
procedure is null, the others are not touched, except those which have
their origin in the nullified act." Currently, judgments will be nullified
in France if the court testimony or evidence in the dossier has been
tainted by illegality.

In contrast, Germany and Italy, which have less experience with
illegally obtained evidence, were uncertain of the effect exclusion should
have on derivative evidence. In their uncertainty, the two countries went
to opposite extremes.

B. Germany

At first, German scholars believed that evidence that was illegally
obtained or "legally unobtainable" should not have a "distant effect"
(Fernwirkung), that is, a tainting effect, on derived evidence. Many

369. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). The phrase "fruit of
the poisonous tree" was first used with respect to illegally obtained evidence in Nardone v.
United States, 308 U.S. 338 (1930).

tion provides extensive citations).


d'Accusation, Paris, 1975 J.C.P. II No. 18020 (2e espèce); Judgment of Feb. 18, 1982, Tribunal
Grenoble, 1943 S. Jur. 15 (confession considered independent evidence) with Judgment of May
search not admitted).

373. For examples of the older view, see 2 LÖWE-ROSENBERG, KOMMENTAR ZUR STRAF-
PROZESSORDNUNG § 136a, Rdn. 66 (24th ed. 1984). The trend in favor of Fernwirkung is no
doubt related to recognition of police abuses of civil rights, see, e.g., Judgment of Sept. 8, 1971,
Kammergericht, Berlin, 25 NJW 1971 (1972) (alleged radical searched five times in one year,
German scholars now fear, however, that exclusion will be undermined without a "distant effect."\(^{374}\)

Until recently this debate was a hypothetical one because evidence had been excluded in only a few criminal cases.\(^{375}\) Nevertheless, in a February 22, 1978, decision, the Second Senat of the Bundesgerichtshof in Strafsachen [BGHSt] excluded tainted evidence.\(^{376}\) In that case, investigators obtained a confession after playing a taped telephone conversation. The investigators did not use force or deception but the recording itself, made in violation of the Federal wiretap statute,\(^{377}\) was illegal. The Second Senat of the BGHSt excluded all statements obtained as a result of playing the tape, although it permitted investigators to follow leads suggested by the tape.\(^{378}\) In its decision of April 18, 1980, however, the Second Senat of the BGHSt limited the extent to which investigators could pursue leads obtained from illegal evidence\(^ {379}\) and officially recognized exclusion based on Fernwirkung for some illegally obtained evidence.

There are still critics of Fernwirkung, even within the BGH.\(^ {380}\) Nevertheless, the majority of German scholars are convinced of the need for some limits on tainted evidence.\(^ {381}\)

contrary to lawful procedures: use of pass-key before requesting normal entry, warrant not signed, search-victim not permitted to be present during operation).


379. Judgment of April 18, 1980, BGHSt 2. Sen., W. Ger., 29 BGHSt 244 (1980), 33 NJW 1700 (1980)(the excluded evidence was obtained indirectly through a violation of the constitutionally protected secrecy of the mail). The extent to which indirectly obtained evidence will be suppressed in future cases will depend on each situation and the type of exclusionary rule violated.

380. Judgment of Aug. 24, 1983, BGHSt 3. Sen., W. Ger., 3 NStrZ 275 (1984) (illegal tap did not influence subsequent confession; procedural errors have no Fernwirkung on remainder of the process; the evidence probably would have been discovered even without the wiretap).

C. Italy

Article 189 of the Italian Code of Criminal Procedure states that a nullity at one stage of the criminal procedure invalidates later stages.\textsuperscript{382} Originally, this provision was intended to apply to "essential" procedures, such as interrogation of the accused\textsuperscript{383} and the subpoena to appear in court.\textsuperscript{384} Some courts, however, in applying article 189 to illegally obtained evidence, have nullified not only the evidence but every aspect of the procedure.\textsuperscript{385} In reaction to such drastic extensions of article 189, Italian courts required a "logical connection"\textsuperscript{386} between the illegally obtained evidence and the subsequent procedure. Regardless of the merit of this approach, which has now been abandoned,\textsuperscript{387} the result was that illegally obtained evidence was admitted.\textsuperscript{388}

An alternate approach, favored by scholars following the United States example,\textsuperscript{389} excluded evidence without nullifying the entire procedure.\textsuperscript{390} The Court of Cassation now holds that article 189 of the Code of Criminal Procedure "presupposes" a distinction between "propulsive acts" (procedures which move the process forward, such as a summons to appear) and "acts for the acquisition of evidence." Complete nullification of later stages is justified for irregular "propulsive acts," whereas irregularities in the acquisition of evidence render only that evidence "unusable."\textsuperscript{391}

In summary, German and Italian law began at opposite ends of the spectrum but reached a conclusion similar to that reached in France and the United States: exclusion requires not only that improperly acquired evidence "shall not be used before the court, but also that it shall not be used at all."\textsuperscript{392} Considering the historical, procedural, and social differ-

\textsuperscript{382} C.P.P. art. 189 (1930) ("The nullity of a procedure, when it is so declared, renders null succeeding acts derived from it.").
\textsuperscript{383} C.P.P. arts. 184-189 (1930).
\textsuperscript{384} C.P.P. art. 179 (1930).
\textsuperscript{387} The court explained further that the relationship between the nullity and other acts must be "causal" and not "accidental." \textit{Id.}. It is perhaps not possible to do justice to this analysis on the basis of the extract printed in Casalinuovo, supra note 386.
\textsuperscript{388} Judgment of July 13, 1979, Corte d'Assise Appello, Turin, 132 Giur. Ital. II 174 n.6 (1980).
\textsuperscript{389} Amodio, \textit{Diritto al silenzio o dovere di collaborazione} 29 RIV. DIR. PRO. 408, 419 (1974).
\textsuperscript{390} Judgment of Feb. 9, 1979, Corte cass., Italy, 132 Giur. Ital. II 324 (1980).
\textsuperscript{391} \textit{Id.} at 325.
\textsuperscript{392} Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).
ences between the countries discussed here, it is remarkable that this convergence has occurred.

VI. PROCEDURAL BARRIERS TO EXCLUSION: FRANCE AS AN EXAMPLE

In France, evidence is excluded through a complicated process. Nullities required by the Court of Cassation, such as for search and seizure violations, may be raised at trial. Other nullities, due to omission of a warning through delayed charging or improper interrogation of a witness, must be raised before the juge d'instruction. The juge d'instruction is incapable of declaring the existence of a nullity; if the juge d'instruction feels exclusion is required he or she may refer the matter to an appellate bench, the chambre d'accusation, for determination. Many French lawyers have not yet developed the expertise to handle this process, which even specialists describe as "obscure." In addition, practical barriers to requesting a nullity remain. The complexity of the nullification process, combined with the difficulties in obtaining bail may discourage some defendants from seeking exclusion for fear of prolonging incarceration.

Despite these barriers, evidentiary nullities have increasingly been sought and granted in the past decade. Legislation passed in 1975 attempting to limit nullities to cases in which "the interests of the party concerned are affected" has apparently had little effect.


VII. CONCLUSION

United States lawyers can learn the following lessons from criminal law and procedure in France, Germany, and Italy. First, there is nothing unique to the United States about exclusion of illegally obtained evidence. Exclusion was discussed by European scholars and courts decades before it became a part of United States law, and has been employed in many countries to ensure judicial integrity, raise standards of police behavior, and protect civil liberties.

Second, with regard to due process violations, exclusion was incorporated into German law because no alternative methods were available to control police abuses; however, it was rejected by French courts which preferred not to limit the police interrogation. Italian law adopted the most radical solution and banned police interrogation of suspects entirely.

Third, with regard to Miranda warnings, the civil law provides a reminder that the purpose of a right to silence warning is to ensure not only that a suspect’s statements are voluntary, but also that they are made with an understanding of legal rights. On the other hand, the “good faith exception” adopted in France for omission of the right to silence warning is fraught with danger. Based on this exception, statements to French police are admissible unless the police intentionally withhold the warning. This exception was a political concession to police investigators and is condemned by French legal scholars. Since the warning is required in France at a much later stage of the criminal procedure, the good faith exception is of little relevance to the United States experience. In Germany, the BGH’s decision of June 7, 1983, gives trial judges discretion to inquire into police compliance with the statutory requirement and thereby deters future violations.

Fourth, the increased use of exclusion by courts to deal with search and seizure violations, even in legal systems with longstanding statutes designed to curb police misconduct, indicates that it is an essential tool for reform in criminal procedure. The degree to which exclusion does deter police abuses is difficult to determine on the basis of appellate cases. Some German courts and scholars have explicitly stated that the goal of exclusion is deterrence.

In summary, comparative law suggests that exclusion is a remedy arising not only from the United States Constitution, but also from the constitution of any legal system that respects civil liberties and human rights. Whether current trends in the United States will affect continental law is difficult to predict, but reforms will probably continue in
France where exclusion and civil liberties are deeply rooted. Exclusion in Germany is also solidly founded in the Basic Law; however, the absence of foreign models may slow developments there and in Italy.

Comparative law also plays a role in suggesting new paths for United States lawyers. French and German law protect interests not currently protected in the United States. For example, temporary residences such as hotel rooms, private papers, and medical evidence are better protected in the civil-law countries than in the United States.

To be sure, numerous countries have rejected exclusion. In any constitutional system, exclusion requires a commitment to the rights of privacy, defense, and other civil rights. It is no accident that only those countries with strong civil rights values and independent judiciaries have made this commitment.

399. See supra note 262.
400. See supra note 304.