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THE EXCLUSIONARY RULE IN GERMANY

Craig M. Bradley*

The exclusionary rule that the Supreme Court has fashioned to suppress evidence obtained unconstitutionally is directed at least in part toward deterring police conduct that violates constitutional norms. Since the inception of the rule, the value and efficacy of a prescript that excludes otherwise relevant and probative evidence in a factfinding proceeding has been a subject of heated debate. In this Article, Professor Bradley examines the rather different exclusionary rules used in Germany. He argues that a comparison of exclusionary rules in Germany and the United States suggests that a number of different policies of a criminal justice system could inspire such rules but that the two countries share the ultimate goal of protecting the constitutional rights of the accused.

IN the ongoing debate over the continued existence and scope of the American exclusionary rule, critics of the rule, such as Chief Justice Burger, often have claimed that it is "unique to American jurisprudence."¹ The assertion that the United States is the only country with an exclusionary rule is an impressive one, and Judge Malcolm Wilkey is not alone in arguing that "one proof of the irrationality of the exclusionary rule is that no other civilized nation in the world has adopted it."² Defenders of the rule have been able to respond to this argument only by noting that other countries are often characterized by better police discipline, lower crime rates, or greater racial or social homogeneity than is the United States

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¹ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting).

² Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 215, 216 (1978); see also J. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 69 (1977) ("The constitutional exclusionary rules are for the most part an American peculiarity. Illegally obtained evidence is generally admitted not only in Germany and other continental legal systems, but also in England and the Commonwealth systems.").

and by suggesting that cross-cultural comparisons are therefore not meaningful.³

Both supporters and opponents of the American exclusionary rule thus appear to have accepted the claim that the rule is unique to the United States. But is it in fact true that no other country has an exclusionary rule? West Germany, for example, has been cited as a country in which there is essentially no exclusionary rule,⁴ but a closer examination suggests that this view is incorrect. On the contrary, German law may require the exclusion from criminal prosecutions of otherwise relevant and competent evidence solely because the use of such evidence would violate the constitutional rights of the accused.⁵

³ See, e.g., Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More than 'An Empty Blessing,'* 62 JUDICATURE 337, 348-49 (1979) (citing sources). More recently, Professor Kamisar has noted that Germany, at least, has a form of exclusionary rule. See Letter from Yale Kamisar to Michael Klipper, Chief Counsel, Subcommittee on Criminal Law, United States Senate Judiciary Committee (Mar. 30, 1982) (citing Volkmann-Schluck, *Continental European Criminal Procedures: True or Illusive Model?*, 9 AM. J. CRIM. L. 1, 15-16 (1981) (German exclusionary rule applies automatically to evidence extorted from accused through certain abusive means, and applies by discretion to evidence obtained from intrusion into "the constitutionally protected sphere of fundamental civil rights")), reprinted in *Hearings Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary on S. 101, S. 751, and S. 1995*, 97th Cong., 1st & 2d Sess. 527-28 (1982) [hereinafter cited as *Hearings*].

⁴ See, e.g., Wilkey, *supra* note 2, at 217. Several academics share this view:

With rare exceptions all evidence is admissible at trial [in Germany] if it has probative value, even if the methods by which it was obtained were illegal. A statement given during illegal detention may be used against an accused unless it was "coerced," in which case it will be excluded because it is unreliable, not because it was illegally obtained.

Goldstein & Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240, 261 (1977) (footnote omitted). Nevertheless, Langbein, as well as Goldstein and Marcus, concedes that coerced statements represent an exception to the nonexclusion principle. See J. LANGBEIN, *supra* note 2, at 69; Goldstein & Marcus, *supra*, at 261 n.54.

⁵ See Volkmann-Schluck, *Continental European Criminal Procedures: True or Illusive Model?*, 9 AM. J. CRIM. L. 1, 15-16 (1981). There is evidence that exclusionary principles operate in other continental systems as well. See, e.g., Weigend, *Criminal Procedure: Comparative Aspects*, in *ENCYCLOPEDIA OF CRIME AND JUSTICE* (S. Kadish ed. forthcoming 1983) (contraband obtained through illegal searches or seizures is excluded in cases of serious crime in France); see also Baade, *Illegally Obtained Evidence in Criminal and Civil Cases: A Comparative Study of a Classic Mismatch* (pt. 1), 51 TEX. L. REV. 1325, 1327-28 (1973) (in Great Britain, evidence obtained by the police in gross disregard of the accused's rights is excludable); Vouin, *France*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 275, 275-77 (1961) (although illegally seized evidence is not always excluded under French law, the conviction of a suspected person cannot be based on illegally obtained proof). See generally Baade, *Illegally Obtained Evidence in Criminal and Civil Cases: A Comparative Study of a*

The bases for evidentiary exclusion — termed *Beweisverwertungsverbote* in Germany⁶ — fall into two principal categories. The first is composed of two constitutional doctrines, the *Rechtsstaatsprinzip* and the *Verhältnismässigkeit*. Evidence obtained by means of brutality or deceit must be excluded under the *Rechtsstaatsprinzip* (principle of a state governed by the rule of law) to preserve the purity of the judicial process.⁷ If a German court determines that the evidence in question was not seized through brutality or deceit, it must then consider whether admission of the evidence would violate the constitutionally protected privacy interests of the defendant. Under the constitutional doctrine of *Verhältnismässigkeit* (principle of proportionality), German judges balance, on a case-by-case basis, the defendant's interests in privacy against the importance of the evidence and the seriousness of the offense charged.

In addition, various statutory provisions in the Code of Criminal Procedure concerning self-incrimination, wiretapping, and witness privileges require the exclusion of evidence under certain circumstances. Because these statutes are all founded on constitutional principles, they provide additional support for the assertion that otherwise competent and relevant evidence is excluded in Germany for constitutional reasons.

Classic Mismatch (pt. 2), 52 TEX. L. REV. 621 (1974) (discussing the exclusionary rule in civil cases in West Germany, Scotland, England, Canada, and the United States, and in criminal cases in the last three jurisdictions).

⁶ The term literally means "evidentiary use prohibition." It is employed in West Germany to cover all exclusions of evidence, including those based on competence or relevance. See, e.g., STRAFPROZESSORDNUNG [StPO] (Code of Criminal Procedure) §§ 250-251 (W. Ger.). Unless otherwise indicated, translations of the *Strafprozessordnung* are from THE AMERICAN SERIES OF FOREIGN PENAL CODES: THE GERMAN CODE OF CRIMINAL PROCEDURE (H. Niebler trans. 1965). When those translations are out of date or, in rare cases, at variance with the author's view of how a particular passage should be rendered in English, the author's translation is offered and noted. In this Article, the term "exclusionary rule" is applied only to the exclusion of presumptively relevant and competent evidence on constitutional grounds.

⁷ See Rogall, *Gegenwärtiger Stand und Entwicklungstendenzen der Lehre von den Strafprozessualen Beweisverboten*, 91 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZStW] 1, 12 (1979). This focus on the "purity of the judicial process" is similar to the approach to due process taken by the United States Supreme Court in *Rochin v. California*, 342 U.S. 165 (1952). In that case, the Court excluded evidence — obtained by state law enforcement officials who forcibly pumped the defendant's stomach — on the ground that permitting the use of such evidence in court would "afford brutality the cloak of law." *Id.* at 173. The *Rochin* Court's focus on "conduct that shocks the conscience," *id.* at 172, was later modified in *Mapp v. Ohio*, 367 U.S. 643 (1961), the decision that first applied the exclusionary rule to the states. Since *Mapp*, American courts have sought to determine whether a given search violates the detailed requirements of the fourth amendment as interpreted by the Supreme Court.

Despite this fundamental similarity between the functions of exclusionary rules in Germany and in the United States, however, the German rule serves ends that are quite different from those of its American counterpart. Most importantly, the principal focus of the German exclusionary decisions is not on deterrence,⁸ as has become the case in the United States.⁹ Even in cases in which violations of the *Rechtsstaatsprinzip* or of a specific statutory provision lead directly to exclusion, deterrence of future violations is not cited as the primary justification for the rule, though exclusion obviously has some influence on police conduct.¹⁰ This focus away from deterrence has a practical effect in exclusionary decisions involving the proportionality principle. When the police have not been guilty of brutality or deceit but have merely violated the rules of the Code of Criminal Procedure — by conducting a warrantless search when a warrant was mandated, for example — evidence will not be excluded on this basis alone. The criminal will not automatically go free simply because the constable has blundered.¹¹ Rather, the court will attempt to strike the optimum balance between the protection of the defendant's constitutional rights and the interests of effective law enforcement, without regard to the legality of the search or

⁸ Deterrence could hardly be the principal concern of a system that permits the use of illegally seized evidence in many cases. Moreover, German courts do not cite deterrence of police misconduct as a justification for exclusion. See, e.g., *supra* note 7; *infra* pp. 1043-47, 1062.

⁹ Although recent Supreme Court pronouncements suggest that the primary purpose of the American rule is deterrence of police misconduct, see, e.g., *United States v. Calandra*, 414 U.S. 338, 347 (1974), earlier decisions by the Court focused directly on the need to avoid the appearance of granting judicial sanction to official misconduct by admitting illegally obtained evidence. When the exclusionary rule was first established in *Weeks v. United States*, 232 U.S. 383 (1914), for example, the Court maintained that the integrity of the federal courts should not be compromised by the use of illegally obtained evidence. *Id.* at 392; see also *Hearings, supra* note 3, at 465, 498-500 (prepared statement of Prof. Yale Kamisar noting absence of any discussion of deterrence in the *Weeks* decision); Halpern, *Federal Habeas Corpus and the Mapp Exclusionary Rule After Stone v. Powell*, 82 COLUM. L. REV. 1, 5-12 (1982); Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 376-78 (1981).

This view was accepted by Chief Justice (then Judge) Burger in an article written in 1964, in which he succinctly described the early emphasis of the American exclusionary rule on the "purity of the judicial process": "The *Weeks* holding . . . rested on the Court's unwillingness to give even tacit approval to official defiance of constitutional provisions by admitting evidence secured in violation of the Constitution. The idea of deterrence may be lurking between the lines of the opinion but [it] is not expressed." Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1, 5 (1964).

¹⁰ See *infra* p. 1044 & note 57.

¹¹ This criticism of the American rule was first expressed by Justice (then Judge) Cardozo in *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

seizure.¹² As a result, the essential question in American suppression hearings — did the police break the rules?¹³ — does not figure in the calculus of German courts.¹⁴

This balancing approach has led many American commentators to conclude that there is no exclusionary rule in Germany. As noted above, however, the reality is considerably more complex. This Article analyzes the character of the various German exclusionary rules in an effort to demonstrate that the American approach cannot be dismissed as a mere

¹² An American court will necessarily apply a balancing test to determine whether a search or seizure is "reasonable," but this test collapses the questions of legality and admissibility and answers them simultaneously. Unlike their German counterparts, who will admit evidence that they concede was illegally obtained, American judges are constrained to find that evidence was procured legally as a condition of admitting it. See, e.g., *United States v. Ceccolini*, 435 U.S. 268, 278 (1978) (voluntary testimony held not to be "fruit of the poisonous tree"); *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (stop and frisk held to be legal). The Supreme Court has once upheld the use of evidence seized pursuant to an ordinance later declared unconstitutional, but it took pains to rule that the police action was legal under the circumstances. *Michigan v. De Fillipo*, 443 U.S. 31, 37 (1979). At procedural stages other than suppression hearings, the Court has been more willing to engage in balancing, but the balance weighs deterrent effects, not the degree of infringement of privacy. See, e.g., *United States v. Havens*, 446 U.S. 620, 626-28 (1980) (permitting admission of illegally obtained evidence for impeachment purposes); *Stone v. Powell*, 428 U.S. 465, 492-95 (1976) (balancing the "incremental deterrent effect" against "costs to other values vital to a rational system of criminal justice" in holding that convictions obtained by use of evidence gathered in violation of the fourth amendment are not ordinarily open to habeas corpus attack).

Even the good faith exception of *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981), does not go as far as the German approach, because the Germans do not consider the good faith of the police to be relevant. See *Project: Criminal Procedure*, 71 GEO. L.J. 339, 436-37 (1982). But see *Brewer v. Williams*, 430 U.S. 387, 420-27 (1977) (Burger, C.J., dissenting) (urging that a balancing test apply to permit admission of evidence when police misconduct is not "egregious").

¹³ The focus of American courts that have adopted the "good faith" exception to the exclusionary rule, see, e.g., *United States v. Williams*, 622 F.2d 830, 833 (5th Cir. 1980) (en banc) (opinion of Politz, J.), cert. denied, 449 U.S. 1127 (1981), is essentially the same. These courts also profess a deterrence rationale for exclusion, but note that "a 'police officer will not be deterred from an illegal search if he does not know that it is illegal.'" *Id.* at 842 (quoting Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736, 740 (1972)).

¹⁴ Three German courts, which are similar to American appellate courts, hear appeals for error and issue written opinions: the *Oberlandesgericht* (OLG) (high state court), of which there are 11 (one for each state) and which is the rough equivalent of a state supreme court; the *Bundesgerichtshof* (BGH) (high federal court or federal court of appeals), of which there is only one, divided into a civil and a criminal panel; and the *Bundesverfassungsgericht* (BVerfG) (federal constitutional court). There is no real equivalent to the United States Supreme Court; its function is divided between the BVerfG and the BGH. Under this division, the final interpretation of federal statutes (including the Code of Criminal Procedure) lies with the BGH, and the final interpretation of the constitution lies with the BVerfG.

aberration from universally accepted norms of law enforcement. In addition, an understanding of the operation of the German exclusionary rules may serve to broaden current debate by suggesting possible alternatives to the form the rule now takes in the United States.

I. EXCLUSION BASED ON CONSTITUTIONAL PRINCIPLES

The German Constitution (the Basic Law, or *Grundgesetz*) offers a solid foundation for the protection of individual liberty. Article 1 affirms as a fundamental principle that "the dignity of man is inviolable. To respect and protect it is the duty of all state authority."¹⁵ Article 2 establishes that "everyone has the right to the free development of his personality."¹⁶ More specifically, article 10 provides that "secrecy of the mail as well as secrecy of the postal service and telecommunications is inviolable. Restrictions may be ordered only on the basis of law."¹⁷ Likewise, article 13 states that "the home is inviolable" and that "searches may be ordered only by a judge."¹⁸

In the United States, the broad provisions of the Constitution are fleshed out primarily by judicial holdings that establish, for example, what constitutes an "unreasonable search" or an "involuntary confession."¹⁹ In Germany, as in all civil law countries, this task is performed by the legislature in a lengthy Code of Criminal Procedure — the *Strafprozessordnung* — that contains detailed provisions governing all phases of the criminal justice process and is applicable throughout the country. Theoretically, the courts clear up doubts concerning Code provisions only on a case-by-case basis, and their decisions have no precedential value. In practice, however, German courts rely on, distinguish, and overrule their prior opinions much as courts do in a common law jurisdiction.²⁰

¹⁵ GRUNDGESETZ [GG] art. 1(1) (W. Ger. 1949, amended 1973).

¹⁶ *Id.* art. 2, para. 1.

¹⁷ *Id.* art. 10.

¹⁸ *Id.* art. 13(1)-(2). There is an exception to this rule in the event of "danger in delay," in which case a search may be ordered "by other authorities provided by law." *Id.* art. 13(2); see *infra* p. 1038.

¹⁹ U.S. CONST. amends. IV-V; see, e.g., *Katz v. United States*, 389 U.S. 347, 351 (1967).

²⁰ German courts struggle to avoid the (theoretically nonexistent) *stare decisis* doctrine by emphasizing that "this case is limited to its facts" or that a prior case is inapplicable because "it arose in a different factual context." See, e.g., Judgment of May 26, 1976, Bundesverfassungsgericht [BVerfG], W. Ger., 42 Entscheidungen des Bundesverfassungsgericht [BVerfG] (decisions of the federal constitutional court) 212, 222 (imposing a specificity requirement on search warrants and distinguishing on its

Because the relevant constitutional doctrines play perhaps their most important role in search and seizure cases, it is useful to have some background understanding of the provisions of the Code governing searches and seizures. Although these rules are at times quite detailed, by American standards they offer remarkably little protection against the excesses of law enforcement authorities. For example, the dwelling and person of anyone "suspected" of a crime may be searched by the police "for the purpose of apprehending such person or if it may be presumed that such search will lead to the discovery of evidence."²¹ Although article 13 of the Basic Law provides that searches may be ordered only by a judge, that article and the Code permit searches to be ordered "by the prosecution and its auxiliary officials" (the police) if there is "danger in delay."²² Search orders (*Durchsuchungsbefehl*) need not be of any particular form,²³ need not be grounded on probable cause, and may be given orally — or simply dispensed with — if there is danger in delay.²⁴ Several specific restrictions in the Code do supplement these comparatively lenient rules, but those provisions are technical and do not alter the fundamental laxity of the statutory provisions.²⁵

facts an earlier case that had imposed no such requirement). See generally Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 496–97 (1975) (discussing how in practice, if not in theory, prior decisions of higher courts control decisions of lower courts in continental systems).

²¹ STPO § 102.

²² GG art. 13(2); STPO § 105. Danger in delay is similar to the exigent circumstances exception recognized in the United States. See, e.g., *Warden v. Hayden*, 387 U.S. 294 (1967). It is applied much more liberally in Germany, however, with the effect that the majority of searches are accomplished without a written warrant. Interview with a German Prosecutor (May 31, 1982); see Goldstein & Marcus, *supra* note 4, at 260–61. Because the police may in effect authorize themselves to conduct a search when there is danger in delay, the practical result of the rule is not to require a warrant at all in such instances.

²³ Under the *Rechtsstaatsprinzip*, however, the orders must meet certain basic requirements, such as those discussed at *infra* pp. 1039–40.

²⁴ 1 E. LÖWE & W. ROSENBERG, *DIE STRAFPROZESSORDNUNG UND DAS GERICHTSVERFASSUNGSGESETZ* § 105, ¶ 4 (23d ed. 1976) [hereinafter cited as LÖWE-ROSENBERG]. In practice, "[w]arrants are used more often for searches [than for arrests] but search without a warrant is unquestionably the dominant mode. Most searches are made with consent or incident to an arrest." Goldstein & Marcus, *supra* note 4, at 260–61.

²⁵ For example, searches of third-party residences may be undertaken only "if facts are present, from which it may be concluded that [the person or evidence] searched for is in the rooms to be searched." STPO § 103(I). This restriction does not apply, however, to rooms in which the accused has been arrested or into which he has been pursued. *Id.* § 103(II). Night searches of dwellings and business premises are authorized in exigent circumstances only. *Id.* § 104(I); see also C. ROXIN, *STRAFVERFAHRENSRECHT* 199–202 (17th ed. 1982) (citing authorities). Although there are a number of exceptions to this provision, see, e.g., STPO § 104(II), the restriction

Moreover, violation of these rules, lax as they are, does not necessarily result in the suppression of evidence.²⁶ Evidence thus obtained is excluded in Germany only if the court determines that permitting its use at trial would violate one of the two judicially recognized constitutional principles that also govern searches and seizures — the *Rechtsstaatsprinzip* and the principle of *Verhältnismässigkeit*. The former is similar to the American concept of “due process”:²⁷

[It] affords a fair trial before a legally appointed and independent judge in which constitutional guarantees are observed; specifically the dignity of the person, the right to free development of the personality, the freedom of the person, the equality before the law . . . as well as the prohibition against inhumane treatment. The right to a fair procedure also guarantees the accused the right to free counsel in serious cases if he can't afford to pay²⁸

The *Rechtsstaatsprinzip* forbids police brutality and deceit both in the seizure of evidence²⁹ and in interrogations.³⁰ It

on night searches contrasts sharply with the frequent absence of such prohibitions under American law. See MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § SS 220.2(3) & commentary (1975) (noting that, although 23 states forbid night searches absent special circumstances, 14 others explicitly permit them, and 12 states and the District of Columbia have no statute pertaining to night searches). The German Code also provides that the judge, the prosecutor, a municipal official (not a police officer), or “two members of the municipality” must be present at searches “if possible,” StPO § 105(II), and that the occupant is entitled to be present as well; if the occupant is absent, a representative shall be called “if possible.” *Id.* § 106(I). If police do not comply with this section — in other words, if it is possible to obtain witnesses and the police do not — the subject of the search has a legal right to resist the search and exercise self-defense, but police failure to comply with this provision will *not* result in exclusion of the evidence seized. See 1 LÖWE-ROSENBERG, *supra* note 24, § 105, ¶ 12 (citing cases). After a search, the person affected must be informed in writing of the reason for the search, and a list of things seized or a certificate that nothing incriminating was found must be issued on demand. StPO § 107. There are also detailed restrictions with regard to the treatment of private papers. See *id.* §§ 97, 110.

²⁶ See *infra* pp. 1040–41, 1046. The contrast with American search and seizure law is striking. Searches may be performed on mere “suspicion,” rather than probable cause, and a written search warrant is frequently not used at all in Germany. Most significantly for the purposes of this Article, violation of a search order requirement or failure to provide the required information does not lead to the exclusion of evidence derived from the search.

²⁷ The *Rechtsstaatsprinzip* derives from article 20 of the Basic Law, which provides that “[l]egislation shall be subject to the constitutional order; the executive and the judiciary shall be bound by law and justice.” GG art. 20, para. 3.

²⁸ T. KLEINKNECHT, STRAFPROZESSORDNUNG Einleitung ¶ 19 (33d ed. 1977) (citations omitted).

²⁹ Judgment of Mar. 17, 1971, Bundesgerichtshof [BGH], W. Ger., 24 Entscheidungen des Bundesgerichtshof in Strafsachen [BGHSt] (decisions of the federal appeals court panel for criminal cases) 125, 131.

³⁰ The rules forbidding brutality and deceit in interrogation are statutory, see

also requires that a search order specify the crime being investigated and the nature of the evidence being sought, at least when such disclosures would not unduly interfere with the investigation.³¹

Although evidence must be excluded if the seizure itself was in violation of the *Rechtsstaatsprinzip*,³² regardless of its probative value or the seriousness of the crime under investigation,³³ the practical effect of this broad exclusion is limited by the fact that the German courts analyze searches and seizures separately. Thus, in a case in which a search order violated the *Rechtsstaatsprinzip* because it failed to specify the crime being investigated and the evidence sought, this constitutional defect alone did not lead to suppression of the evidence seized pursuant to the order.³⁴ Instead, the seizure was evaluated independently of the illegal search to determine whether it had been accomplished through brutality or deceit.³⁵ The court reasoned that the question of the validity of the search itself was not properly presented,³⁶ because the seizure was the actual source of the evidence.³⁷ As a result, unconstitu-

STPO § 136a, but the statute in turn rests on constitutional principles. See *infra* pp. 1049-50.

³¹ Judgment of May 24, 1977, BVerfG, 44 BVerfG 353, 371; Judgment of May 26, 1976, BVerfG, 42 BVerfG 212, 220.

³² T. KLEINKNECHT, *supra* note 28, Einleitung ¶ 54.

³³ *Id.*; cf. *Rochin v. California*, 342 U.S. 165 (1952) (excluding brutally seized evidence on due process grounds in a decision preceding extension of the exclusionary rule to the states).

³⁴ See Judgment of May 24, 1977, BVerfG, 44 BVerfG 353.

³⁵ *Id.* at 371-72; see *infra* p. 1046. In this case, the seizure was held unconstitutional for essentially the same reason for which the search was held unconstitutional: the police were not investigating a specific crime, and a "fishing expedition" could not justify an action as intrusive as the seizure of the private medical records of a drug rehabilitation clinic. If, however, the police had found illegal narcotics rather than merely medical records, it is likely that the evidence would not have been suppressed, despite the defects in the search; in deciding in favor of exclusion, the court placed great emphasis on the private nature of the evidence seized.

³⁶ *Accord* Judgment of May 26, 1976, BVerfG, 42 BVerfG 212, 218. In this earlier case, the court did not conclude that it would never exclude evidence on the basis of an illegal search, but found that the issue was not ripe.

³⁷ See Judgment of May 24, 1977, BVerfG, 44 BVerfG at 383-84. In view of the fact that the German Constitution guarantees the inviolability of the home — GG art. 13; see Judgment of May 26, 1976, BVerfG, 42 BVerfG at 219 — this distinction makes little sense. Breaking down the door of a house to find evidence is certainly as serious an intrusion as snatching the evidence from the defendant's hand. Because the German system provides alternate grounds to exclude evidence, however, this distinction does not create as much mischief in Germany as it might in the United States. This point is illustrated by the Supreme Court's decision in *Irvine v. California*, 347 U.S. 128 (1954). When police broke into the defendant's home and installed a microphone, the Court condemned the police behavior as a flagrant violation of the fourth amendment, *id.* at 132, but declined to exclude the evidence (the conversations

tional seizures will lead directly to suppression,³⁸ whereas unconstitutional searches and merely illegal seizures (those that violate the rules of criminal procedure) will not necessarily have that effect.³⁹

The second relevant constitutional principle is that of *Verhältnismässigkeit* (principle of proportionality).⁴⁰ Under this doctrine, the methods used in fighting crime must be proportional to the "seriousness of the offense and the strength of the suspicion"⁴¹ as well as to the constitutional interests at stake; thus, what would be appropriate in some cases may not be justifiable in others. The courts also employ a form of "least drastic means" analysis when assessing police actions under the principle of proportionality: if less intrusive measures will suffice, a greater intrusion will not be permitted.⁴² This approach is illustrated by the federal constitutional court's *Judgment of June 10, 1963*,⁴³ in which the taking of spinal fluid from a suspect to determine his possible insanity, though generally authorized by the Code of Criminal Procedure,⁴⁴ was held to be out of proportion to the misdemeanor charge against the suspect.⁴⁵

of the occupants), because the Court had not yet held the exclusionary rule applicable to the states. *Id.* at 132-34; see *Wolf v. Colorado*, 338 U.S. 25 (1949), *overruled by Mapp v. Ohio*, 367 U.S. 643, 665 (1961). In Germany, the courts would have no difficulty excluding such evidence, not because of illegal police behavior, but because private conversations in the home generally are not admissible, however obtained. See generally *infra* pp. 1044-46 (discussing the tape recording case).

³⁸ Judgment of May 24, 1977, BVerfG, 44 BVerfG at 383-84.

³⁹ Thus, a night search that is prohibited by StPO § 104, for example, can nevertheless yield admissible evidence unless use of that evidence would violate the principle of proportionality, see *infra* p. 1041.

⁴⁰ Although the principle of proportionality is also considered to be a component of the *Rechtsstaatsprinzip*, see K. HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 77 (12th ed. 1980), in the German decisions it is usually discussed as a separate principle.

⁴¹ T. KLEINKNECHT, *supra* note 28, Einleitung ¶ 20.

⁴² Judgment of Aug. 5, 1966, BVerfG, 20 BVerfG 162, 187; see also Carr, *Wiretapping in West Germany*, 29 AM. J. COMP. L. 607 (1981) (discussing application of this doctrine in wiretapping cases).

⁴³ BVerfG, 16 BVerfG 194.

⁴⁴

A physical examination of the accused may be ordered for the ascertainment of facts, which are important for the proceeding. For this purpose the taking of blood samples and other penetrations of the body, made by a physician pursuant to the rules of medical science . . . are permissible without the consent of the accused, provided no resulting detriment to his health is to be feared.

StPO § 81a.

⁴⁵ Judgment of June 10, 1963, BVerfG, 16 BVerfG at 202. Because this case arose on appeal from the order authorizing examination, the evidence was never obtained, and the question of suppression was not directly addressed. See also Judgment of Aug. 5, 1966, BVerfG, 20 BVerfG 162, 187 (holding that search of a press room

German courts therefore engage in a two-step analysis when addressing constitutionally based challenges to the use of evidence. First, the court determines whether the evidence at issue was seized or obtained in violation of the *Rechtsstaatsprinzip*. In cases in which there is a violation, the judiciary must exclude the evidence to preserve the purity of the judicial process (*Reinheit des Verfahrens*).⁴⁶ If the evidence is not excluded in the first step, the court then considers the principle of *Verhältnismässigkeit* (proportionality). Weighing the appropriate factors, the court decides whether to use the evidence in question. If the court determines that the individual privacy rights of the accused outweigh the societal interest in the presentation of all relevant evidence,⁴⁷ the evidence will be excluded — without considering whether the police originally obtained the evidence legally.

The mechanics of the German system are demonstrated by three cases in which the courts excluded a diary,⁴⁸ a tape recording of a private conversation,⁴⁹ and the files of a drug rehabilitation clinic⁵⁰ on the ground that use of the evidence in court would violate the privacy rights of the defendant. The courts reached these results even though the legality of the seizures was conceded in the first two cases. In the *Diary Case*,⁵¹ the federal court of appeals considered whether the defendant's diary was properly admissible in a perjury trial. The police had been given the diary by the wife of the defendant's paramour, in whose home it had been concealed. Applying the balancing test required by the principle of proportionality, the court reversed the defendant's conviction on the ground that using the defendant's private diary against her in court violated her privacy rights under articles 1 and 2 of the constitution.⁵² The court emphasized, however, that the mere

requires a higher standard of cause than do other searches; such a search "must promise success in producing appropriate evidence," rather than be grounded on mere suspicion.)

⁴⁶ But see Rogall, *supra* note 7, at 1, 12 (discussing and criticizing the focus on the purity-of-the-process doctrine).

⁴⁷ See generally 1 LÖWE-ROSENBERG, *supra* note 24, Einleitung ch. 14, ¶ 1 (observing that the search for truth in criminal investigations is limited by the commands of justice, which forbid investigatory means that "are unreasonable, violate the proportionality principle, offend human dignity, or are not related to the development of truth," and claiming that "[t]he exclusionary rules serve the purpose of enforcing these interests").

⁴⁸ Judgment of Feb. 21, 1964, BGH, 19 BGHSt 325.

⁴⁹ Judgment of Jan. 31, 1973, BVerfG, 34 BVerfG 238.

⁵⁰ Judgment of May 24, 1977, BVerfG, 44 BVerfG 353.

⁵¹ Judgment of Feb. 21, 1964, BGH, 19 BGHSt 325.

⁵² *Id.* at 326-27; GG art. 2, para. 2. The *Diary Case* was the first to hold explicitly that exclusion could be based on a violation of constitutional rights. The

fact that the defendant's privacy rights were implicated did not automatically require exclusion, and stressed that exclusion was appropriate in this instance because the gravity of the intrusion outweighed the minor nature of the criminal charge. The court suggested that a criminal's diary entries concerning his felonies, or a foreign agent's entries concerning his spying activities, would not be protected, because the interests of the state in prosecuting the offense would outweigh the privacy interests of the defendant.⁵³ Similarly, business papers that did not expose the personality of the author would not be excluded, because there would be no privacy interest to weigh against the state's interest in securing the admissibility of all relevant evidence.⁵⁴

This case illustrates some of the differences between the operation of exclusionary rules in Germany and in the United States. In the United States, the diary would have been admissible because it was obtained without police misconduct,⁵⁵ whereas a gun obtained pursuant to a defective search warrant would have been excluded.⁵⁶ In contrast, the diary was excluded in Germany, whereas an illegally seized gun would be admissible because its use would not interfere with the free development of the defendant's personality. Only a brutal or deceitful seizure that violated the defendant's most fundamental constitutional rights under the *Rechtsstaatsprinzip* would result in exclusion of a gun. A diary is subject to different treatment, however, because its use in court constitutes a harsh

court reached this result even though the exclusionary provisions of the Code of Criminal Procedure — for example, StPO § 136a, which excludes coerced confessions — were not applicable, *see infra* pp. 1049–62, and thereby prepared the way for the subsequent expansion of the exclusionary rule based on the broad constitutional principles discussed above. The basic concept of exclusion, however, is not a new one in Germany; it was first set forth in 1903. E. BELING, *DIE BEWEISVERBOTE ALS GRENZEN DER WAHRHEITSERFORSCHUNG IM STRAFPROZESS IN STRAFRECHTLICHE ABHANDLUNGEN* (THE EXCLUSIONARY RULES AS THE BORDERS OF THE SEARCH FOR TRUTH IN CRIMINAL PROCEDURE) Heft 46, at 37 (1903).

⁵³ Judgment of Feb. 21, 1964, BGH, 19 BGHSt at 331.

⁵⁴ *Id.*

⁵⁵ The diary would be admissible in the United States even if it were turned over to the police by a thief who had ransacked the defendant's home. *See* *Burdeau v. McDowell*, 256 U.S. 465, 476 (1921). The focus in the United States is on police misconduct, without regard to whether a substantial invasion of the defendant's privacy has occurred. *But see* Bradley, *Constitutional Protection for Private Papers*, 16 HARV. C.R.-C.L. L. REV. 461 (1981) (arguing that past Supreme Court decisions and constitutional theory provide support for the proposition that private papers should receive greater constitutional protection than do guns and narcotics).

⁵⁶ *See, e.g., Whiteley v. Warden*, 401 U.S. 560, 568–69 (1971) (excluding tools and old coins).

incursion on an individual's personal privacy, whether or not it was legally obtained.

By excluding a legally seized diary but holding that diaries or other private personal papers may be used as evidence in prosecutions of more serious crimes, the court in the *Diary Case* gave the police little guidance in deciding when such documents should be seized. As the case indicated, the admissibility of all evidence — unless seized in violation of the *Rechtsstaatsprinzip* or a statute requiring exclusion — is open to consideration by the court, which decides on an ad hoc basis whether to admit or exclude. Thus, the purpose of the German exclusionary rule is clearly not to deter police misconduct.⁵⁷ Instead, through balancing, the rule operates to maximize privacy interests consistently with society's interest in prosecuting serious crimes.⁵⁸

The dimensions of this protected sphere of personal privacy were further clarified in *Judgment of January 31, 1973*,⁵⁹ in which the federal constitutional court first employed a three-tiered analysis (*Dreistufentheorie*)⁶⁰ to determine whether evidence must be excluded because of its intrusive effect. A married couple, the B's, sold residential and business property to the defendant. The defendant arranged with the B's to understate the actual price on the contract so that the property would be valued at a lower figure for tax purposes. The defendant paid the difference (70,000 DM) to the B's in cash. Unknown to the defendant, the B's had tape-recorded some of the conversations relating to this tax fraud; they subsequently turned over the tapes to the police on their own initiative.⁶¹

The court identified three different levels of constitutional protection for evidence of this character.⁶² It observed that,

⁵⁷ See, e.g., Gössel, *Kritische Bemerkungen zum gegenwertigen Stand der Lehre von den Beweisverboten im Strafverfahren*, 34 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 649, 651 (1981). But see F. DENCKER, VERWERTUNGSVERBOTE IM STRAFPROZESS 52 & n.169 (1977). Dencker notes that some scholars contend that the rule should have a deterrent purpose, *id.* at 52 n.169, but concludes that it "is not possible to assume that the legislature created the 'evidence use prohibitions' for disciplinary reasons The disciplinary effect is only a welcome ancillary effect of the 'evidence use prohibitions' that are in existence for other reasons." *Id.* at 53, 55.

⁵⁸ The efficient administration of justice is itself a constitutionally guaranteed interest. Judgment of May 24, 1977, BVerfG, 44 BVerfG 353, 374.

⁵⁹ BVerfG, 34 BVerfG 238.

⁶⁰ This term is that used by Gössel, *supra* note 57, at 655.

⁶¹ Judgment of Jan. 31, 1973, BVerfG, 34 BVerfG at 247.

⁶² A court will engage in this analysis only after determining that the seizure of evidence did not violate the *Rechtsstaatsprinzip*. In this case, of course, the seizure was not at issue.

in cases in which the use of evidence would violate the most basic or central rights of an individual (*Kernbereich*), "the dignity of the person is inviolable and prevails against all governmental power."⁶³ Such evidence, the court held, must be excluded, regardless of the seriousness of the charge. Although the court cited three articles of the Basic Law as sources of this inviolable "intimate sphere of the individual,"⁶⁴ these provisions are general and provide virtually no guidance concerning the boundaries of the *Kernbereich*.⁶⁵ In this instance, the court held that the taped conversations fell not within the inviolable inner sphere, but rather within a second, "private sphere" (*Privatbereich*), which could be intruded upon, but only in the event of an overriding public interest.⁶⁶ The privacy interests of the defendant did not automatically outweigh all other factors; instead, as in the *Diary Case*, they were subjected to a balancing process (*Abwägung*). The court concluded that the interests of the state in this case were not sufficiently strong to permit use of the tapes,⁶⁷ but cautioned that the result might have been different had the defendant been charged with a crime of violence rather than with tax fraud.⁶⁸

The court also outlined the scope of the third level of protection, which is applicable in all cases in which the private personality of the defendant is not revealed by the evidence in question. Because the defendant's privacy rights would not be violated by its admission, evidence falling into this category — such as a tape recording of a business meeting — could

⁶³ Judgment of Jan. 31, 1973, BVerfG, 34 BVerfG at 245.

⁶⁴ *Id.* (citing GG art. 1, para. 1 ("The dignity of man is inviolable. To respect it and protect it is the duty of all state authority."); *id.* art. 2, para. 1 ("Everyone has a right to free development of his personality, insofar as he does not infringe upon the rights of others or offend against the constitutional order or the moral code."); *id.* art. 19, para. 2 ("In no case may a basic right be infringed upon in its essential context.")).

⁶⁵ German courts have not yet excluded evidence on the ground that it falls within the *Kernbereich*. See Judgment of Nov. 8, 1978, Oberlandesgericht [OLG], Bayern, 51 NJW 2624, 2625. Evidence secured through the electronic bugging of a married couple's bedroom might be an example of the type of material that would fall within the *Kernbereich*.

⁶⁶ Judgment of Jan. 31, 1973, BVerfG, 34 BVerfG at 246-47.

⁶⁷ *Id.* at 248. This case arose when a public prosecutor sought a court order approving the seizure of documents. *Id.* at 242. The defendant appealed the order, and the case eventually reached the federal constitutional court. The court refused to admit the tapes as evidence, but did not prohibit the introduction of documents that were seized as a consequence of the delivery of the tapes to the police. Thus, the court did not bar the use of the questioned evidence as an investigatory tool, but only its direct use as evidence at trial.

⁶⁸ *Id.* at 248.

never be excluded under the proportionality principle.⁶⁹ The court reasoned that the conversation in the case before it was not such an unprotected matter, because only three individuals, rather than a large group of people, were involved.⁷⁰

In the two cases discussed above, the German courts engaged in an exercise foreign to American courts — excluding legally seized evidence on the ground that the evidence itself was too private to be used.⁷¹ The federal constitutional court extended this reasoning in *Judgment of May 24, 1977*,⁷² which involved the search and seizure of the medical records of a narcotics rehabilitation clinic. First, in declaring the search unconstitutional under the *Rechtsstaatsprinzip*,⁷³ the court noted that the search order failed to specify any particular crime as the subject of the investigation, to name any particular defendant, or to identify the evidence sought. Instead, the court found, the search was a fishing expedition for narcotics violations that might exist at the clinic.⁷⁴

The court's conclusion that the search was unconstitutional did not resolve the question whether the evidence could be used. Resolution of the exclusion issue depended on a finding either that the seizure was unconstitutional or that, balancing all the relevant factors, the privacy interests of the defendant outweighed the state's interest in using the evidence.⁷⁵ Because the seizure was not accomplished through brutality or deceit, and consequently did not violate the *Rechtsstaatsprinzip*, the court turned to the three sublevels of analysis used

⁶⁹ *Id.* at 247. In a subsequent case, the court called this third level the "*allgemeine Handlungsfreiheit*," or general freedom to act. *Judgment of May 24, 1977*, BVerfG, 44 BVerfG 353, 372-73. That is, one is free to hold business meetings, for example, but the discussions are not entitled to special constitutional protection.

⁷⁰ *Judgment of Jan. 31, 1973*, BVerfG, 34 BVerfG at 247. Actually, the court said that the "conversation took place under six eyes." *Id.*

⁷¹ *But see* *Boyd v. United States*, 116 U.S. 616, 630 (1886). In *Boyd*, the Court ordered the suppression of private papers on the ground that such evidence, by its nature, was too private to be used. The *Boyd* Court also found, however, that the means by which the evidence was obtained (a summons) was illegal.

⁷² BVerfG, 44 BVerfG 353.

⁷³ *Id.* at 373-74.

⁷⁴ *Id.* at 371.

⁷⁵ If the seizure had been accomplished through brutality (that is, if the seizure, as opposed to the search, had violated the *Rechtsstaatsprinzip*), any evidence seized would have been excluded. Although the unconstitutionality of the search under the *Rechtsstaatsprinzip* is not dispositive, this consideration clearly affects the outcome of the balancing test. Of course, if the challenged evidence had been illegal narcotics paraphernalia rather than medical records, there would have been no privacy issue, and the evidence would have been admissible despite the unconstitutionality of the search. *See Judgment of May 24, 1977*, BVerfG, 44 BVerfG at 383-84; *Judgment of Mar. 17, 1971*, BGH, 24 BGHSt 125, 131.

under the proportionality principle. The court held that the evidence in question, the medical records of the clinic's patients, fell into the second category of the *Dreistufentheorie*, the *Privatbereich*.⁷⁶ After weighing the competing interests of society in criminal prosecutions and of the individual in the development of his personality, the court noted that society also has a strong interest in encouraging people to seek treatment for narcotics addiction and other health problems.⁷⁷ The court concluded that this interest was a sufficient basis for exclusion of the medical records.⁷⁸ Once again, however, the court cautioned that in an investigation of serious crimes — or in a properly limited search for specific narcotics violations — seizure and use of such records might be appropriate.⁷⁹

Although these cases leave vague the boundaries of the various theories of exclusion, several significant points do emerge. The most notable is that deterrence of police misconduct is not the primary goal of the German exclusionary rules. Even when evidence is excluded because its seizure involved police brutality, the principal justification for exclusion is not to punish the police, but to maintain the integrity of the judicial process.⁸⁰ Similarly, under the proportionality principle, the

⁷⁶ Judgment of May 24, 1977, BVerfG, 44 BVerfG at 372.

⁷⁷ *Id.* at 375.

⁷⁸ *Id.* at 373.

⁷⁹ *Id.* at 379. In a similar case, the federal constitutional court held that information from a doctor's files concerning his treatment of the defendant, although not within the intimate sphere (*Intimsphäre*) — the court had not yet developed the term *Kernbereich* — were within the *Privatbereich* (private sphere) of the accused. Judgment of May 8, 1972, BVerfG, 32 BVerfG 373, 379. On balance, the court held, use of the files at the trial of the accused for extortion was reversible error, even though the files were seized pursuant to a valid search order. *Id.* at 379-80. This case shows that the court's balancing process will be resolved in favor of the defendant even in a case involving a charge as serious as extortion. See also Judgment of Jan. 15, 1970, BVerfG, 27 BVerfG 344 (files of a divorce proceeding held to fall within the *Privatbereich*).

⁸⁰ See generally Judgment of May 24, 1977, BVerfG, 44 BVerfG at 372 (criticizing not the police, whom the court considered out of its control, but the judge who issued the warrant). That deterrence of police misconduct is not the focus of the German decisions is further illustrated by Judgment of Mar. 17, 1971, BGH, 24 BGHSt 125, in which the federal court of appeals held that a blood sample taken from the defendant by a medical assistant on instructions of the police — in violation of § 81a of the Code of Criminal Procedure, which requires a doctor to take blood samples, StPO § 81a — could be used as evidence in a case involving drunken driving. The court concluded that the damage to the defendant's right of physical inviolability, see GG art. 2, para. 2, had already been done. It noted that admission of the evidence thus obtained would not further intrude on the defendant's body, that blood alcohol percentage was not a private matter, and that consequently there was no point in exclusion. Judgment of Mar. 17, 1971, BGH, 24 BGHSt at 131. The court held that such evidence could be excluded only if it were obtained in such an outrageous fashion — for example, through deliberate deceit (in this case, the police did not realize that

mere fact that a search violates the Code of Criminal Procedure is not determinative; the important question is whether the degree of intrusion upon the defendant's privacy rights can be justified in view of the nature of the offense charged. Although the German system admittedly offers less protection for civil liberties than does the American exclusionary rule, it also avoids the most objectionable feature of the American system — that a confessed murderer may be allowed to go free because of an error by the police — and may therefore command a greater degree of public sympathy and support.

The emphasis that these three cases place on protecting the privacy rights of criminal defendants from infringement in the courtroom — as opposed to deterring future police misconduct — results in a number of interesting divergences between American and German evidentiary doctrine. For example, evidence delivered to the police by private individuals may be suppressed in Germany if its admission in court would impinge on individual privacy.⁸¹ The Germans do not distinguish between private actions and police actions in this regard; the primary concern is the effect of using the evidence in court, not how it became available. In the United States, on the other hand, privately obtained evidence is admissible even if it has been acquired by means that would result in exclusion if employed by law enforcement officials.⁸² This difference in perspective is also reflected by the differing attitudes of American and German courts toward the admissibility of audio and video recordings. As a result of their concern with preserving the defendant's privacy rights, German courts tend to view such evidence with a certain amount of uneasiness, although this disfavor will not always result in exclusion.⁸³ American courts, on the other hand, have applauded the use of this type of evidence because of its unusually high probative value.⁸⁴

the medical assistant who drew the blood was not a doctor) — that its use in court would violate the *Rechtsstaatsprinzip*. *Id.* at 131-32. Under the same reasoning, the examination of a woman by a nondoctor, in violation of § 81d(1) of the Code, would not lead to the exclusion of evidence. 1 LÖWE-ROSENBERG, *supra* note 24, § 81d, ¶ 8. If deterrence of official misconduct were the focus of the German rule, such violations by officials would lead to exclusion.

⁸¹ See, e.g., Judgment of Feb. 21, 1964, BGH, 19 BGHSt 325 (the *Diary Case*), discussed at *supra* pp. 1042-44.

⁸² See, e.g., *Burdeau v. McDowell*, 256 U.S. 465 (1921) (privately obtained evidence is admissible even if evidence would have been inadmissible if obtained by the government).

⁸³ For example, use of a tape recording would be appropriate in a kidnapping case in which the phone calls of the kidnapper had been recorded. See Judgment of June 14, 1960, BGH, 14 BGHSt 358, 361; C. ROXIN, *supra* note 25, at 128.

⁸⁴ See, e.g., *United States v. Jannotti*, 673 F.2d 578, 604 (3d Cir.) (describing videotape evidence, in one of the Abscam cases, as "some of the most valuable tools

Finally, as the *Diary Case* illustrates, private papers are accorded greater constitutional protection in Germany than in the United States.⁸⁵

II. EXCLUSION BASED ON STATUTES

The exclusionary principles discussed in Part I are based directly on the German Constitution, not on the Code of Criminal Procedure; the Code does not require exclusion as a supplement to any of the general rules regarding searches and seizures. Other provisions of the Code,⁸⁶ however, contain specific exclusionary rules that prohibit the use in court of any evidence obtained through violation of those provisions. Although these provisions are statutory, they are nevertheless "constitutional" in character; each prohibition was established to protect specific constitutional rights. Thus, like the American exclusionary rule, these provisions operate to exclude otherwise competent and relevant evidence that is obtained through violations of constitutional rights. Because these statutory prohibitions operate more automatically than the judicial "balancing" doctrines discussed in Part I, they may be more effective in discouraging police misconduct. Any deterrent effect, however, is incidental to the fundamental purpose of protecting the privacy and dignity of the individual.

A. Coerced Confessions

The most explicit German exclusionary rule is stated in section 136a of the Code of Criminal Procedure, which provides as follows:

I. The freedom of the accused to determine and to exercise his will shall not be impaired by ill-treatment, by fatigue, by physical interference, by dispensing medicines, by torture, by deception or by hypnosis. . . . [Threats of illegal treatment are also prohibited.]

II. Measures which impair the accused person's ability to remember or to comprehend are not permitted.

III. The prohibitions of subsections I and II apply irrespective of the accused person's consent. *Statements which*

possible"), *cert. denied*, 102 S. Ct. 2906 (1982); *People v. Teicher*, 52 N.Y.2d 638, 422 N.E.2d 506, 439 N.Y.S.2d 846 (1981) (videotaping of sex crime by dentist held reasonable under the fourth amendment).

⁸⁵ See *Bradley*, *supra* note 55; *cf. Andresen v. Maryland*, 427 U.S. 463 (1976) (authorizing the seizure and use of the defendant's private business papers).

⁸⁶ In the case of wiretaps, exclusionary rules appear in a separate statute. See *infra* pp. 1054-59.

*were obtained in violation of these prohibitions may not be used even if the accused agrees to said use.*⁸⁷

This provision is based on the constitutional principles that "the dignity of man is inviolable"⁸⁸ and that "everyone has the right to the free development of his personality."⁸⁹ It has been applied to exclude evidence in a wide variety of situations — a case in which the accused confessed after being arrested at 5:00 a.m. and deprived of sleep for thirty hours,⁹⁰ for example, and another in which the police confronted the accused with the corpse of the victim (the accused's own three-year-old son) to induce him to make a statement.⁹¹ Section 136a also forbids the use of lie detectors.⁹² Moreover, in combination with another section of the Code, section 136a prohibits the introduction of evidence obtained from witnesses by means that would violate section 136a if used against the accused.⁹³ If, however, the accused or the witness freely chooses to repeat a statement originally obtained in violation of the statute, the second statement may be used as evidence.⁹⁴

Because it is an automatic rule of exclusion, section 136a does not permit the balancing of criminal justice considerations and privacy interests that is possible under the principle of proportionality. Instead, all evidence obtained in violation of the statute must be excluded, regardless of its probative value or the seriousness of the case. Not surprisingly, the courts have taken a narrow view of the scope of this provision. To date, no fruit-of-the-poisonous-tree doctrine (*Fernwirkungseffekt*) attaches to section 136a violations, and illegally obtained

⁸⁷ StPO § 136a (emphasis added). Although the specific terms of § 136a apply only to examination of the accused in court, § 163a(III)–(IV) of the Code extends § 136a to examination by police and prosecutors.

⁸⁸ GG art. 1, para. 1; see Judgment of Feb. 16, 1954, BGH, 5 BGHSt 332, 333–34; T. KLEINKNECHT, *supra* note 28, § 136a, ¶ 1 (discussing the constitutional bases for § 136a).

⁸⁹ GG art. 2, para. 1; T. KLEINKNECHT, *supra* note 28, § 136a, ¶ 1.

⁹⁰ Judgment of Mar. 24, 1959, BGH, 13 BGHSt 60.

⁹¹ Judgment of Oct. 7, 1960, BGH, 15 BGHSt 187. The practice of confronting the accused with evidence — including, in some cases, corpses — is not completely forbidden. T. KLEINKNECHT, *supra* note 28, § 136a, ¶ 7.

⁹² See Judgment of Feb. 16, 1954, BGH, 5 BGHSt at 333–34 (asserting that the use of lie detectors overcomes the defendant's free will).

⁹³ StPO § 163a(V) (applying the requirements of § 136a, *inter alia*, to examination of witnesses or experts by police or prosecutors).

⁹⁴ Judgment of Apr. 30, 1968, BGH, 22 BGHSt 129, 134; see I. LÖWE-ROSENBERG, *supra* note 24, § 136a, ¶ 50. It has been held that, if the defendant appears to be under the influence of an earlier police misconduct when he repeats a statement, the second statement may not be used. Judgment of July 13, 1962, BGH, 17 BGHSt 364.

leads and clues may be used to uncover admissible evidence.⁹⁵ Section 136a also does not apply to statements or confessions made to third parties (*Drittwirkung*) unless those parties were acting at the instigation of the police.⁹⁶ Finally, the doctrine of *in dubio pro reo* (all doubts resolved in favor of the defendant) is not applicable to alleged section 136a violations.⁹⁷

The prohibitions of section 136a are widely accepted in Germany, and the police generally strive to obey them. A companion provision, however, has spawned considerably more controversy. Section 136 of the Code of Criminal Procedure, like the *Miranda* doctrine in the United States,⁹⁸ provides that "[i]t shall be pointed out to [the accused] that the law grants him the right to respond to the accusation, or not to answer regarding the charge, and at all times, even before his examination, to consult with defense counsel of his choice."⁹⁹ One of the more glaring examples of the courts' reluctance to enforce this rule is *Judgment of April 30, 1968*.¹⁰⁰ The defendant in that case, suspected of vehicular homicide, was unable to speak because of a jaw injury. He was nevertheless questioned in a hospital the day after the accident and made incriminating statements in writing without having been advised of his section 136 rights. The writing was not used in court, but a policeman testified to the defendant's declarations.¹⁰¹ The federal appeals court concluded after discussion that the legislature did not intend the absolute exclusionary rule of section 136a to apply to a violation of section 136, and thus a police violation of the latter would not result in exclusion.¹⁰²

⁹⁵ T. KLEINKNECHT, *supra* note 28, § 136a, ¶ 21. *But see* Judgment of Apr. 18, 1980, BGH, 29 BGHSt 244 (applying the fruit-of-the-poisonous-tree doctrine to a violation of the wiretap statute).

⁹⁶ *See* 1 LÖWE-ROSENBERG, *supra* note 24, § 136a, ¶ 6 (citing cases).

⁹⁷ Judgment of June 28, 1961, BGH, 16 BGHSt 164.

⁹⁸ *Miranda v. Arizona*, 384 U.S. 436, 469 (1966).

⁹⁹ StPO § 136(I). By its terms, § 136 applies only to the defendant's preliminary examination by a judge. Nevertheless, StPO § 163a(IV) specifically requires the police to advise the defendant of his rights under § 136(I) before any police examination of him.

¹⁰⁰ BGH, 22 BGHSt 129.

¹⁰¹ *Id.* at 172-73.

¹⁰² *Id.* at 174-75 (citing authorities). The court left open the possibility that a defendant might be so misled or confused by the police that his confession could be said to have been obtained by deception in the sense of § 136a, in which case the confession would be excluded. *Id.* at 175-76. The court cited Judgment of Aug. 30, 1967, OLG, Bremen, 20 NJW 2022. In that case, the court held that, when a defendant who has not been told of his rights and is in ignorance of them makes a statement to the police, use of that statement at trial constitutes reversible error because the statement was obtained by deception in violation of § 136a. It is not

This decision was the subject of considerable criticism in the legal literature,¹⁰³ and the court subsequently reconsidered the issue in a different context. In *Judgment of May 14, 1974*,¹⁰⁴ the federal appeals court held that the failure of a judge to instruct the defendant of his right not to testify at trial, an instruction required by section 243(IV) of the Code,¹⁰⁵ constituted reversible error.¹⁰⁶ The court placed the burden of proof on the defendant, however, to show that he had intended not to speak and that he had spoken only out of ignorance of his right to remain silent.¹⁰⁷ The court distinguished its earlier holding on the ground that the rules that govern testimony at trial are not necessarily applicable to pre-trial procedures, and asserted that the earlier case was still good law.¹⁰⁸ Some commentators have termed this distinction highly illogical and have suggested that the opinion should be interpreted to extend some aspects of the section 136a exclusionary rule to violations of section 136.¹⁰⁹ The courts have not considered the decision to mandate this result, however, and as a consequence the police continue to question suspects without warning them of their rights.¹¹⁰

clear that the federal appeals court, the final arbiter of statutory interpretation, is prepared to go this far.

¹⁰³ See C. ROXIN, *supra* note 25, at 129 (citing authorities).

¹⁰⁴ BGH, 25 BGHSt 325.

¹⁰⁵ Section 243(IV) of the Code provides that, at trial, "the defendant will be informed that he may, but need not, respond to the public charge." STPO § 243(IV).

¹⁰⁶ It is the normal practice at a German trial to question the defendant about his personal background before advising him of his right to silence. In this case, the defendant was charged with vehicular homicide. During the questions about his background, he related that he had previously been convicted of drunken driving, and the court relied on this admission in its written judgment. Unlike the American system, in which the basis of the jury verdict of "guilty" or "not guilty" remains unexplained, the German system requires the judgment to set forth in detail the facts and law that form the basis of acquittal or conviction. STPO § 267; see *infra* pp. 1063-64.

¹⁰⁷ Judgment of May 14, 1974, BGH, 25 BGHSt at 331-32. In certain misdemeanor cases, the defendant need not be represented by counsel. See STPO § 140. Presumably, in cases in which he is represented, it will be difficult for the defendant to succeed in claiming ignorance of his right to silence. The instant case was decided on an abstract question of law and did not reach the issue whether the defendant had actually been ignorant of his right to silence.

¹⁰⁸ Judgment of May 14, 1974, BGH, 25 BGHSt at 331.

¹⁰⁹ E.g., C. ROXIN, *supra* note 25, at 129.

¹¹⁰ This information is derived from interviews conducted by the author. Interview with a Former German Prosecutor (Apr. 30, 1982); Interview with a German Defense Attorney (June 1, 1982); Interview with a German Judge (June 1, 1982); Interview with a German Prosecutor, *supra* note 22. The police usually engage in "informal" conversation with the defendant "to get his side of the story." Only after this method has been exhausted do they inform him of his rights to silence and to counsel.

This widespread disregard of a specific command of the Code of Criminal Procedure¹¹¹ by the police raises an interesting point about the exclusionary rule. In the United States, where the rule is applied to violations of the *Miranda* requirements, police generally carry and use a "*Miranda* rights card"¹¹² — even though American police are thought to be

¹¹¹ At least one American scholar has written that the German courts exclude fewer types of evidence than do American courts because German police officers are more effectively deterred from misconduct by sanctions of their supervisors and investigatory bodies; consequently, a judicially imposed exclusionary penalty is not needed in Germany. See J. LANGBEIN, *supra* note 2, at 69. It is undoubtedly true that German police resort to brutality less than their American counterparts do (in part because they are confronted with less) and have a better relationship with the citizenry than is typical in the United States. Nevertheless, when it comes to following the rules governing police conduct as set forth by the legislature and the courts, empirical research suggests that the German police "are as willing as their American counterparts to disregard laws and regulations if it appears necessary to 'do the job.'" Weigend, *Continental Cures for American Ailments: European Criminal Procedure as a Model for Law Reform*, in 2 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 381, 398 (N. Morris & M. Tonry eds. 1980) (quoting Hinz, *Soziale Determinanten des 'polizeilichen Betriebs'*, in DIE POLIZEI: EINE INSTITUTION ÖFFENTLICHER GEWALT 135, 144 (Arbeitskreis Junger Kriminologen ed. 1975)).

One study found that 65% of German police officers agreed that police work cannot be performed properly if officers always adhere to the letter of the law. Hinz, *Das Berufs- und Gesellschaftsbild von Polizisten*, in DIE POLIZEI: SOZIOLOGISCHE STUDIEN UND FORSCHUNGSBERICHTE 122, 141 (J. Feest & R. Lautmann eds. 1971). Hinz also found the "police world view" to be that "there are a lot of people in the world who enjoy the protection of constitutional rights who don't deserve them." Hinz, *Soziale Determinanten des 'polizeilichen Betriebs'*, in DIE POLIZEI: EINE INSTITUTION ÖFFENTLICHER GEWALT 135, 144 (Arbeitskreis Junger Kriminologen ed. 1975). Another study found that the police regard constitutional rights of the accused as "impediments" to the efficient performance of their duties, impediments to be "gotten around" whenever possible. W. STEFFEN, *ANALYSE POLIZEILICHER ERMITTLUNGSTÄTIGKEIT AUS DER SICHT DES SPÄTEREN STRAFVERFAHRENS* 190 (1976). The impression gained by the author in interviews with prosecutors, defense attorneys, and judges is that police discipline is effective in punishing police who are corrupt or who beat up suspects (and that, consequently, these problems occur infrequently in Germany) but that it has no effect on conduct such as failing to warn suspects of their constitutional rights or conducting overly broad searches. Indeed, such police conduct is apparently rather widespread in Germany and seems to be encouraged by the police hierarchy. See *id.* at 188-90; sources cited *supra* note 110.

¹¹² The author makes these observations about police behavior on the basis of his experience as an Assistant United States Attorney in Washington, D.C. See also *Hearings*, *supra* note 3, at 38 (prepared statement of Stephen H. Sachs, Attorney General of Maryland) (discussing the day-to-day deterrent effect of the exclusionary rule through prosecutorial oversight of police activities). Similarly, as Professor LaFave points out, the deterrent effect of the exclusionary rule on police

is certainly suggested by such post-exclusionary rule occurrences as the dramatic increase in the use of search warrants where virtually none had been used before, stepped-up efforts to educate the police on the law of search and seizure where such training had before been virtually nonexistent, and the creation and development of working relationships between police and prosecutors to

less disciplined than their German counterparts.¹¹³ This fact suggests that, at least in cases in which obeying the rules will not seriously impede the investigatory process,¹¹⁴ an exclusionary rule can effectively conform police behavior to the requirements of the law. Certainly, there is no other readily apparent reason that the organized and disciplined German police widely ignore certain rules while their more unruly American counterparts generally follow them.

B. Violation of Wiretap Laws

Under the German Constitution, "[s]ecrecy of the mail as well as secrecy of the postal services and of telecommunications is inviolable. Restrictions may be ordered only on the basis of (statute) law."¹¹⁵ Wiretapping was flatly prohibited until 1968, when a series of antiterrorist measures — including a statute authorizing the use of wiretaps — was enacted in response to an upsurge in terrorist activities.¹¹⁶ Germany's wiretap statute is divided into two parts. The first part, called the G10 law (because it relates to article 10 of the *Grundgesetz*, or Basic Law), deals with wiretapping for intelligence and national security purposes. The second part, section 100a of the Code of Criminal Procedure,¹¹⁷ deals with wiretapping for law enforcement purposes.¹¹⁸

Intelligence authorities may undertake G10 wiretaps only when there is a factual basis for suspicion that one of a specified list of criminal offenses involving a threat to national

ensure the obtaining of evidence by means which would not result in its suppression.

1 W. LAFAVE, SEARCH AND SEIZURE § 1.2, at 26-27 (1978) (citations omitted).

¹¹³ See, e.g., J. LANGBEIN, *supra* note 2, at 69.

¹¹⁴ If conformity to the rules would force police to forgo evidence, the exclusionary rule would have no effect. The rule simply creates a risk that evidence will be lost later in court, as opposed to the certainty that it will be lost if police pass it up. As police are well aware, the risk usually can be greatly reduced by fabrication. See J. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 214-15 (2d ed. 1975).

¹¹⁵ GG art. 10.

¹¹⁶ *Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses*, in 1968 BUNDESGESETZBLATT, TEIL I [BGBl] (compilation of federal statutes and decrees) at 949 (W. Ger.). The law provides that mail may be intercepted under the terms provided for wiretapping. See generally Carr, *Wiretapping in West Germany*, 29 AM. J. COMP. L. 607 (1981) (detailed discussion of German wiretap laws).

¹¹⁷ StPO § 100a (translation of the author).

¹¹⁸ This bifurcation is similar to that in the United States, in which wiretapping for law enforcement purposes is addressed in title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1976 & Supp. V 1981), and wiretapping for intelligence purposes is addressed in the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1811 (Supp. IV 1980).

security has been or is being committed.¹¹⁹ The G10 law contains a specific exclusionary rule providing that evidence obtained through wiretapping may be used only in the investigation and prosecution of one of these crimes.¹²⁰ Wiretaps for law enforcement purposes may be performed under section 100a of the Code of Criminal Procedure when there are "definite facts on which to base the suspicion"¹²¹ that one of a number of specified crimes has been committed.¹²² Although this part of the statute does not contain an explicit exclusionary rule, it is settled that, as is true of the G10 law, evidence obtained by wiretap may be used only to prosecute one of the listed offenses.¹²³

The German courts have held that the wiretap statutes are subject to a stringent exclusionary rule, including a version of the fruit-of-the-poisonous-tree doctrine. They have reasoned that the authorities must be held to the letter of the law because, except as specifically provided by statute, the constitutional prohibition of wiretapping remains firm. Ambiguous cases tend to be resolved in favor of the continuing vitality of the constitutional provision.¹²⁴ An example of this judicial firmness is *Judgment of February 22, 1978*,¹²⁵ in which the federal appeals court considered the presumptively legal wiretap of A, who was suspected of participating in a criminal conspiracy (a listed offense under section 100a of the Code). The tape revealed only evidence of a nonlisted crime. A was arrested; the tape was played; and A confessed. He repeated

¹¹⁹ 1968 BGBl, G10, art. 1, § 2, at 949. This list has been strongly criticized for overbreadth. See Carr, *supra* note 116, at 614 (citing authorities).

¹²⁰ 1968 BGBl, G10, art. 1, § 7(3), at 950. This paragraph further provides that, if after a wiretap has been undertaken to investigate one of the listed crimes, evidence is obtained of certain other serious crimes (listed in § 138 of the Criminal Code, STRAFGESETZBUCH [STGB] (Criminal Code) § 138 (W. Ger.)), this evidence may also be used. Carr is thus incorrect in his assertion that "the German wiretapping statutes contain no provisions regulating either the admissibility of conversations recorded by wiretapping or defining the extent to which or circumstances in which recorded conversations or derivative evidence may be or become inadmissible," Carr, *supra* note 116, at 638.

¹²¹ StPO § 100a (translation of the author). Note the difference between the standards for a search warrant ("A search may be made . . . if it may be presumed that such search will lead to the discovery of evidence." StPO § 102), an intelligence wiretap ("a factual basis for suspicion," 1968 BGBl, G10, art. 1, § 2, at 949), and a law enforcement wiretap ("definite facts on which to base the suspicion," StPO § 100a (translation of the author)). This last standard appears to be similar to probable cause.

¹²² The listed crimes include counterfeiting, narcotics offenses, and murder. StPO § 100a (translation of the author).

¹²³ Judgment of Feb. 22, 1978, BGH, 27 BGHSt 355; see T. KLEINKNECHT, *supra* note 28, § 100a, ¶ 11.

¹²⁴ See, e.g., Judgment of Apr. 18, 1980, BGH, 29 BGHSt 244, 249.

¹²⁵ BGH, 27 BGHSt 355.

the confession before a judge and affirmed that no pressure had been brought on him to confess.¹²⁶ Nevertheless, the appellate court not only excluded the tapes themselves, but also excluded both confessions as, in effect, direct fruits of the poisonous tree. The court limited the reach of its holding, however, by observing that, although an interrogation could not be based on improper evidence, *clues* obtained from a wiretap could be used for further investigation, even of non-listed offenses.¹²⁷

This narrow view of the fruit-of-the-poisonous-tree doctrine was subsequently expanded in a case involving the news magazine *Der Spiegel*.¹²⁸ *Der Spiegel* had published an article on the surveillance of an atomic physicist by the federal Office of Constitutional Protection.¹²⁹ The article was based largely on leaked government files, and suspicion concerning the source of the leaks fell on a journalist, *F*, who was a former employee of the Office. A G10 wiretap was ordered on *F*'s phone on the basis of suspicion of anticonstitutional sabotage,¹³⁰ a listed offense under the statute. Monitored conversations led law enforcement officials to believe that *F* had hidden incriminating documents at his sister's home. A search order was obtained; the home was searched; and incriminating documents from the Office of Constitutional Protection were found and seized. Unfortunately for the authorities, these documents in-

¹²⁶ *Id.* at 356. The second confession would therefore have been admissible had this case involved a violation of STPO § 136a.

¹²⁷ Judgment of Feb. 22, 1978, BGH, 27 BGHSt at 357-58. In the United States, in contrast, the fruit-of-the-poisonous-tree doctrine would require not only that a confession obtained by confronting the defendant with illegally acquired evidence be suppressed, but also that use of any clues gathered by illegal police practices be forbidden.

The "fruit of the poisonous tree" doctrine is in no sense limited to cases in which there has been a violation of the Fourth Amendment. It has been utilized with respect to other kinds of constitutional violations as well, such as unconstitutionally conducted lineups and unconstitutionally obtained confessions. It has also been employed where the secondary evidence was derived from violation of non-constitution limitations that are commonly implemented by an exclusionary rule, such as statutory restrictions upon wiretapping and the *McNabb-Mallory* rule regarding prompt production of a federal arrestee before a magistrate.

3 W. LAFAVE, *supra* note 112, § 11.4, at 613-14 (footnotes omitted).

¹²⁸ Judgment of Apr. 18, 1980, BGH, 29 BGHSt 244. Because German case names do not include party names, cases are referred to by informal names. Thus, the case involving the seizure of the diary, Judgment of Feb. 21, 1964, BGH, 19 BGHSt 325, discussed at *supra* pp. 1042-44, is referred to as "the *Diary Case*." Because it involved the news magazine *Der Spiegel*, this case is referred to by that name.

¹²⁹ The German Office of Constitutional Protection, or *Bundesverfassungsschutzamt*, is similar to the Federal Bureau of Investigation in the United States but has more limited powers.

¹³⁰ StGB § 88.

criminated *F* only with respect to certain lesser crimes not listed in the G10 law.¹³¹ He was convicted of a lesser offense on the basis of these documents.

On appeal, the court assumed *arguendo* that the original wiretap was legal,¹³² and observed that evidence obtained directly from the wiretap could not be used to prosecute a nonlisted crime. In this case, however, the evidence was obtained indirectly, through the use of clues received from the wiretap; no actual wiretap evidence was offered in court or used to extract a confession. Nevertheless, the court excluded the documents. It noted that the G10 law contains a specific exclusionary provision and touches on a basic constitutional right.¹³³

The courts have taken only a somewhat more permissive approach in cases involving the use of wiretap evidence against third parties. In *Judgment of March 15, 1976*, the federal court of appeals held that evidence obtained during a legal wiretap of *B* could be used against *A* (who was speaking to *B*'s wife on the phone), even though there was no prior suspicion concerning *A*.¹³⁴ Although the courts have not dealt with a case in which a wiretap was ordered on the basis of insufficient evidence, the holding of the *Spiegel* case — that wiretap evidence must be excluded unless obtained strictly according to the terms of the statute — would presumably govern in this situation as well.

These decisions demonstrate that the lenient approach that the German courts normally take to police violations of search and seizure rules is abruptly discarded when wiretaps are involved. Because the wiretap statute carves out a limited exception to a specific constitutional prohibition, it must be strictly construed. Thus, even if the police conform to the precise terms of the statute in implementing a wiretap, any resulting evidence will be automatically excluded if it does not relate to a listed offense. This rigorous approach stands in

¹³¹ The documents suggested that *F* might have violated StGB § 353, the Official Secrets Act.

¹³² Judgment of Apr. 18, 1980, BGH, 29 BGHSt at 246.

¹³³ *Id.* at 249–50. The court noted that most discussion of the *Fernwirkungseffekt*, or fruit-of-the-poisonous-tree doctrine, had focused on the indirect use of coerced confessions obtained in violation of StPO § 136a. Judgment of Apr. 18, 1980, BGH, 29 BGHSt at 248. The court noted the split among scholars concerning whether the fruit-of-the-poisonous-tree doctrine should apply to violations of StPO § 136a, and cited Knauth, *Beweisrechtliche Probleme bei der Verwertung von Abhörmaterial im Strafverfahren*, 31 NJW 741 (1978), and F. DENCKER, *supra* note 57, at 76–80, which suggest that the doctrine should also apply to cases involving confessions obtained in violation of StPO § 136a.

¹³⁴ Judgment of Mar. 15, 1976, BGH, 26 BGHSt 298. In cases of this type, however, *A* must be charged with a listed offense.

sharp contrast to the Supreme Court's decision in *Scott v. United States*,¹³⁵ which held that even blatant violation by federal agents of the statutory "minimization" requirement of title III of the Omnibus Crime Control and Safe Streets Act of 1968¹³⁶ would not require exclusion if the challenged wiretap was reasonable on the whole.¹³⁷ The *Scott* majority performed much as the German courts do in search and seizure cases: it found that a seizure (the wiretap) in violation of the applicable statutory rules was "reasonable" under the constitutional standard, and therefore held that exclusion was not necessary.¹³⁸

Thus, "technical" search and seizure violations result in exclusion in the United States, and "technical" wiretapping violations result in exclusion in Germany — but not vice versa. This distinction suggests that the decision to adopt a stringent exclusionary rule may reflect the relative importance of particular values within a given legal system. Although both the German and the American Constitutions contain explicit provisions guaranteeing the physical inviolability of the home, the comparative laxity of the requirements governing searches in the Code of Criminal Procedure — as well as the absence of an exclusionary remedy for violation of these rules — implies that German legislators and judges place a much lower value on protecting the security of the home than do their American counterparts.¹³⁹ Wiretapping, on the other hand, is appar-

¹³⁵ 436 U.S. 128 (1978). In *Scott*, virtually all of the petitioner's conversations over a one-month period were intercepted, although only 40% of the conversations related to narcotics.

¹³⁶ Under American law, wiretaps must be "conducted in such a way as to minimize the interception of communications not otherwise subject to interception." 18 U.S.C. § 2518(5) (1976).

¹³⁷ 436 U.S. at 138–39. In fact, the Supreme Court's approach in *Scott* resembles the German courts' balancing approach in search and seizure cases. The apparent anomaly — the American courts' engaging in a balancing exercise — may be partly explained by the fact that the German wiretap law contains an explicit exclusionary rule, whereas the law at issue in *Scott* did not. Nonetheless, the holding of the Supreme Court, that violation of a specific statutory command is not itself constitutionally unreasonable, is similar to the German approach in nonwiretap cases.

¹³⁸ See also *United States v. Caceres*, 440 U.S. 741, 755–57 (1979) (holding that an electronic surveillance by the Internal Revenue Service, performed in violation of Service regulations, would not lead to suppression if the surveillance on the whole was "reasonable").

¹³⁹ It is not readily apparent why the German courts do not emphasize the inviolability of the home. One possible explanation is that Germany is significantly more crowded than the United States. Because few of them live in single-family dwellings, Germans might have a lesser expectation of privacy in their homes than Americans do. Moreover, because Germans have more respect for the police (and a better disciplined police force), they might not be as disturbed as Americans are by the thought of police officers' looking through their homes for evidence.

ently regarded as a more serious intrusion upon individual rights in Germany than it is in the United States, as the specific proscription in the German Constitution suggests. Therefore, wiretapping is subject to a stricter exclusionary rule in the former country than in the latter.

C. Violations of the Rights of Witnesses

The German Code of Criminal Procedure also contains a series of rules protecting witnesses who enjoy a privileged personal or professional relationship with the accused. These privileges exist for the benefit of the witness and may be waived by him over the objection of the defendant.¹⁴⁰ A failure by the authorities to advise the witness of his rights, however, will result in exclusion of any statement he has given, even though the statutes contain no explicit exclusionary provision.¹⁴¹ Because these statutory rules explicate constitutional principles¹⁴² and because their violation leads to the exclusion of otherwise competent and relevant evidence, they are appropriate for inclusion in this discussion.

Section 52(I) of the Code of Criminal Procedure provides that fiancés, spouses (including divorced spouses), and anyone

¹⁴⁰ See, e.g., Judgment of May 12, 1922, Reichsgericht, Ger., 57 Entscheidungen des Reichsgerichts in Strafsachen [RGSt] (decisions of predecessor to federal appeals court) 63, 64; 1 LÖWE-ROSENBERG, *supra* note 24, § 52, ¶ 22. The German rule differs from the American approach, in which the spousal and attorney-client privileges are privileges of the defendant. See MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 83, at 169-70 (2d ed. 1972).

¹⁴¹ Judgment of Mar. 16, 1977, BGH, 27 BGHSt 139, 141. If a witness is not warned of his right to refuse to make a statement against his brother (the accused), the defendant is permitted to suppress the witness' statement at trial. German cases do not explain why the accused may exclude his brother's pretrial statement, obtained without warning in violation of StPO § 52, but may not exclude his *own* statement, obtained without warning in violation of StPO § 136. See *supra* pp. 1051-52. It is probable that use of the brother's statement in court is thought likely to cause additional damage to the familial relationship, whereas use of the defendant's own statement does not further interfere with his statutory right to have been informed of his right to remain silent at the time of interrogation. Nevertheless, because the failure to warn also trenches upon the defendant's privilege against self-incrimination at trial, as the United States Supreme Court recognized in *Miranda v. Arizona*, 384 U.S. 436 (1966), this formulation is not entirely satisfactory.

¹⁴² GG art. 1, para. 1 (providing that the dignity of man is inviolable); *id.* art. 2, para. 1 (protecting the free development of the personality). In the case of family members, a third constitutional provision provides that "marriage and family are under the special protection of the state." *Id.* art. 6, para. 1; see T. KLEINKNECHT, *supra* note 28, § 52, ¶¶ 1-3; H. KÜHNE, STRAFPROZESSUALE BEWEISVERBOTE UND ART. 1 I GRUNDGESETZ 64 (1970); cf. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE, *supra* note 140, §§ 87, 98 (describing the uncertain common law roots of the American attorney-client and doctor-patient privileges). The German privileges have a constitutional basis; their American counterparts do not.

related directly to the accused by blood, marriage, or adoption (or related collaterally by blood to the third degree or by marriage to the second degree) are entitled to refuse to testify.¹⁴³ These persons must be instructed, before interrogation, concerning their privilege to refuse to testify,¹⁴⁴ and they may revoke a waiver of the privilege at any time during their interrogation.¹⁴⁵ Failure to warn a witness of this right will result in exclusion of his statement from evidence upon motion of the defendant, either at the intermediate proceeding or at trial.¹⁴⁶ These provisions provide a more extensive testimonial protection for the family than is found in American law.¹⁴⁷

Moreover, section 53 of the Code of Criminal Procedure provides that a large number of individuals who either have or have had a professional relationship with the defendant, including dentists and tax advisers as well as doctors and lawyers, are similarly privileged.¹⁴⁸ This provision is subject to an exclusionary rule similar to that applied in section 52. An example of the operation of this privilege is *Judgment of May 12, 1922*,¹⁴⁹ in which the court held that statements obtained during interrogation of the defendant's doctor, without advising him of his right to refuse to speak to the authorities, could be suppressed at trial on motion of the defendant.¹⁵⁰

¹⁴³ In addition, StPO § 81c provides that a privileged person may also refuse a physical examination aimed at obtaining evidence against the accused. StPO § 81c(III). Again, failure to warn the witness of his right to refuse will result in exclusion. See 1 LÖWE-ROSENBERG, *supra* note 24, § 81c, ¶ 61 (citing cases). All nonprivileged witnesses may be examined without their consent only to verify whether there is a specific trace or consequence of a punishable act on their body. StPO § 81c(I).

¹⁴⁴ StPO § 52(II).

¹⁴⁵ *Id.*

¹⁴⁶ The right to silence of a relative of the accused is a fundamental right of the relative founded on the *Rechtsstaatsprinzip*. Judgment of July 3, 1962, BGH, 17 BGHSt 337, 348.

¹⁴⁷ Cf. McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE, *supra* note 140, § 80, at 166 (marital privilege fails if any third party, including a child of the marriage who is old enough to understand, is present at the communication).

¹⁴⁸ StPO § 53(I). The list also includes members of the *Bundestag* (the German parliament), tax advisers, accountants, pharmacists, and members of the media to whom the suspect might have given information. Section 53a(I) of the Code provides that the assistants of some of these people are also privileged. StPO § 53(a)(I).

¹⁴⁹ Reichsgericht, Ger., 57 RGSt 63, 64.

¹⁵⁰ *Id.* The defendant's right to demand that fair procedures be used against him does not enable him to suppress statements of witnesses (other than those of privileged persons, such as a relative or a lawyer) who have not been warned by the police of their own privilege against self-incrimination, a warning required by StPO § 55. See Judgment of Jan. 21, 1958, BGH, 11 BGHSt 213. The court explained that this privilege was too far removed from the sphere of legal protection surrounding the defendant to allow him to protest its violation. *Id.* at 216-18. This decision has been

If a witness falling into one of the categories described in section 52 or 53 gives a statement to the police and then decides that he does not want to testify at trial, his statement cannot be read into evidence.¹⁵¹ Nor can the police testify concerning the existence or content of such a statement.¹⁵² Hence a strict exclusionary rule, not specifically dictated by the statute, applies to exclude prior statements to the police, including those given with proper warnings, if the privileged person elects not to testify at trial. In contrast, the American system permits neither the defendant nor a privileged witness to prevent the admission of a statement obtained legally by the police.¹⁵³

Further protection for the defendant's privacy is supplied by section 97, which provides that written communications between the accused and a privileged person are not subject to seizure.¹⁵⁴ Although the testimonial privileges afforded by sections 52 and 53 specifically provide for the exclusion of relevant testimony, the provisions of section 97 contain no

vigorously criticized. See, e.g., Gössel, *supra* note 57, at 652-53. Nevertheless, the result — which amounts to a denial of standing — makes more sense in Germany, where the focus of exclusion is on shielding the privacy rights of the defendant, than it would in the United States, where the Supreme Court has asserted that the basis of the exclusionary rule is deterrence of police misconduct, see *United States v. Calandra*, 414 U.S. 338, 347-48 (1974), and has nevertheless refused to deter such misconduct in certain cases in which it found that the defendant lacked standing. See, e.g., *Rakas v. Illinois*, 439 U.S. 128, 133-38 (1978). See generally Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 356-72 (1974) (discussing the role of deterrence in the Supreme Court's fourth amendment jurisprudence).

¹⁵¹ StPO § 252. This rule applies even if the witness becomes engaged to the accused (and hence privileged) after giving his initial statement to the police. Judgment of June 20, 1979, BGH, 1980 NJW 67, 68.

¹⁵² Judgment of Jan. 15, 1952, BGH, 2 BGHSt 99. There is one exception: if a statement was made before a judge, the judge may testify about its contents. *Id.* at 101; see T. KLEINKNECHT, *supra* note 28, § 252, ¶¶ 2-8 (citing cases). If a privileged witness dies before trial, his earlier statement to the police may be used, assuming that he knowingly waived his right to silence when he gave the statement. StPO § 251(I)(1); T. KLEINKNECHT, *supra* note 28, § 252, ¶ 4.

¹⁵³ Cf. *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring exclusion of statements illegally obtained).

¹⁵⁴

The following objects are not subject to seizure:

1. written communications between the accused and persons who may refuse testimony pursuant to § 52 or § 53, subs. I, clauses 1 to 3;
2. notes, made by persons specified in § 53, subs. I, clauses 1 to 3 concerning information confided to them by the accused, or concerning other circumstances to which their right to refuse testimony pertains;
3. other objects including records of medical examinations, covered by the privilege as to the persons mentioned in § 53, subs. I, clauses 1 to 3, to refuse testimony.

StPO § 97(I).

explicit exclusionary rule, and violation of a rule governing searches and seizures by the police does not necessarily lead to exclusion.¹⁵⁵ Nevertheless, this protection gave rise to the initial judicially created exclusionary rule in Germany in 1889, some twenty-five years before the American rule was first enunciated in *Weeks*.¹⁵⁶ In *Judgment of November 7, 1889*,¹⁵⁷ the defendant was charged with a crime that involved writing an anonymous letter. The police conducted a properly authorized search of the home of the defendant's parents and seized a letter from the defendant to his parents. The letter was admitted at trial simply as a handwriting exemplar, not for its content, and the defendant was convicted. Basing its decision on the prohibition of seizure of written communications between the accused and his relatives, the court reversed and held that such evidence not only could not be seized, but also could not be used at trial.¹⁵⁸

The principal function of the exclusionary rules concerning witness privileges, like that of the other rules discussed above, is not to deter police misconduct, but to maintain a suitable balance between the defendant's privacy and relational rights and the state's interest in prosecuting crime. The courts' method of striking this balance is illustrated by *Judgment of March 28, 1973*,¹⁵⁹ in which the federal appeals court held that evidence seized in violation of section 97 may be used at trial if it later develops that the owner of the documents in question was an accomplice of the defendant — even if the police were unaware of this fact at the time of the seizure.¹⁶⁰ Because privacy is the principal concern of the German system, the courts focus their attention on the known facts at the time of the most significant invasion of privacy — the time when the evidence is to be used at trial. A deterrence-oriented system, in contrast, would have excluded the evidence on the ground that the police acted wrongfully based on what they knew when the documents were originally seized.

¹⁵⁵ See *supra* pp. 1040-41.

¹⁵⁶ *Weeks v. United States*, 232 U.S. 383 (1914).

¹⁵⁷ Reichsgericht, Ger., 20 RGSt 91.

¹⁵⁸ *Id.* at 92. This case remains good law. See 1 LÖWE-ROSENBERG, *supra* note 24, § 97, ¶ 62.

¹⁵⁹ BGH, 25 BGHSt 168.

¹⁶⁰ *Id.* at 170. Restrictions concerning seizures of paper do not apply if the "persons entitled to refuse testimony are suspected of being a participant, accessory or receiver." SrPO § 97(II).

III. PROCEDURAL WEAKNESSES OF THE GERMAN SYSTEM

Certain characteristics of the German system arise from the central role played by the judge in German criminal trials, and detract from the effective operation of the German exclusionary rules. The judge, not the attorneys, is the principle presenter of evidence.¹⁶¹ He prepares the case in advance by reading through the entire file, including evidence that has been or will be "excluded" from use at trial.¹⁶² There is no jury at the trial itself, and any motions for the suppression of evidence that the defense might wish to raise are presented to the same panel of judges¹⁶³ that will ultimately decide the case.¹⁶⁴ If any of these requests is granted, the presiding judge instructs the other judges to disregard the excluded evidence;¹⁶⁵ the trial proceeds; and the panel then decides the issue of guilt or innocence.

Although this procedure might discourage some suppression motions,¹⁶⁶ it is not as empty as it might sound. In Germany, the verdict of the court must be justified by a written opinion setting forth the reasons for the decision in detail.¹⁶⁷ If suppressed evidence constitutes a substantial part of the prosecution's case, the court may not be able to defend a guilty

¹⁶¹ "The presiding judge conducts the trial; he examines the defendant and he receives the evidence." STPO § 238(I).

¹⁶² Although there is no express authorization for this practice, it is universally understood that *nothing* is excluded from the file. Interview with a German Judge, *supra* note 110; Interview with a German Prosecutor, *supra* note 22.

¹⁶³ The least serious criminal cases are tried before a single judge. GERICHTSVERFASSUNGSGESETZ [GVFRG] (court organization law) § 25 (W. Ger.); see T. KLEINKNECHT, *supra* note 28, at 1029. A court (*Schöffengericht*) composed of one professional judge and two lay judges (ordinary citizens) sits in more serious cases. GVFRG § 29. In the most serious cases, tried in the *Grosse Strafkammer* (great criminal chamber), the court is composed of three professional and two lay judges. GVFRG §§ 74, 76. The chief judge typically designates one of the two associate judges to study the case before trial and to draft an opinion afterward. See J. LANGBEIN, *supra* note 2, at 62-63. At least two-thirds of the court must agree on a guilty verdict at each of these levels. STPO § 263(I).

¹⁶⁴ STPO § 304; see GVFRG § 73; 1 LÖWE-ROSENBERG, *supra* note 24, § 98, ¶ 54. Because the lay judges do not have access to the file, evidence that is suppressed before trial might not come to their attention. There is nothing, however, to stop the presiding judge from telling them about it during the secret decisionmaking process.

¹⁶⁵ See sources cited *supra* note 110. But cf. *Bruton v. United States*, 391 U.S. 123, 137 (1968) (recognizing the futility of such an instruction).

¹⁶⁶ If the exclusionary claim is not raised in court, the lay judges will not have the disputed evidence called to their attention as evidence that the defense attorney is especially eager to keep out. Interview with a German Defense Attorney, *supra* note 110.

¹⁶⁷ STPO § 267.

verdict in writing and may be forced to acquit¹⁶⁸ — regardless of the court's own feelings about the defendant's guilt. If, however, the suppressed evidence is not obviously necessary to support a finding of guilt but is in reality the dispositive factor in the minds of the fact finders — as might be true with regard to a confession supported by sufficient, but not overwhelming, evidence — defendants who should have been acquitted may be convicted nonetheless. This weakness is not a function of the exclusionary rules themselves, however, but rather of the structure of the trial process in Germany.

IV. CONCLUSION

The case law and statutes discussed in this Article clearly establish that, contrary to the traditional view, Germany in fact has a well-developed system of exclusionary rules founded on constitutional principles and statutory provisions. The German and the American exclusionary rules both reflect the fundamental principle that relevant evidence must occasionally be excluded to safeguard constitutional rights, but the rules sometimes differ significantly in the scope of protection that they afford. The German rule, for example, is less stringent than the American rule in excluding evidence derived from improper searches of the home, and the failure to give *Miranda*-type warnings to suspects generally will not result in exclusion in Germany. On the other hand, in comparison to their American counterparts, the German courts afford significantly greater protection to witnesses with personal or professional ties to the defendant and are stricter in suppressing evidence obtained in violation of wiretapping statutes. The German courts have also defined a doctrine of personal privacy that will cause certain private material, such as diaries, to be excluded even when such material has been obtained legally. The two systems converge, however, in their treatment of coerced confessions and evidence obtained through brutality or deceit.

The mechanics of the German and American systems also reflect both similarities and differences. Germany's statutory exclusionary rules operate automatically, much like the American rule: if the police have violated the law, any resulting evidence will be excluded without regard to other considerations. In cases in which general constitutional principles are the basis for exclusion, however, the only police conduct that

¹⁶⁸ Although such acquittals are unusual, they are not altogether unknown. See sources cited *supra* note 110.

leads to automatic exclusion in Germany is a seizure that violates the *Rechtsstaatsprinzip* through brutality or deceit. In all other situations, in dramatic contrast to the American system, the fact that evidence was legally or illegally obtained is not dispositive. The decision to admit or suppress will be determined by balancing the relative importance of the defendant's privacy rights against the seriousness of the offense charged.

Would some variant of the German system be workable and effective in the United States? Some aspects of the German system certainly offer an appealing contrast to the current operation of the American exclusionary rule. The German approach avoids the most serious objection to the American system — the release of dangerous criminals simply because of what frequently are technical blunders by law enforcement officials. In cases that do not involve a statutory exclusionary rule, neither mistakes by the police nor even intentional violations of the Code of Criminal Procedure automatically result in exclusion, particularly in cases involving serious crimes. Nonetheless, because evidence that is obtained through gross abuses — such as police conduct involving brutality or deceit — is excluded by the *Rechtsstaatsprinzip*, the German system avoids the other extreme as well — sacrificing fundamental constitutional rights in the name of “law and order.” The German approach is also attractive because it recognizes the importance of preserving the defendant's privacy rights, even when the challenged evidence has been legally obtained. Finally, because the American fact finder is not made aware of excluded evidence, the concepts underlying the German system might operate more effectively under the American system than they do in Germany itself.

Of course, there would be serious problems with any attempt to adopt some variant of the German system for use in the United States. Whatever the deterrent effect on police misconduct of the American exclusionary rule,¹⁶⁹ the balancing approach employed by the German courts would have a lesser effect. The German system also reflects a comparative indifference to the legality of the original search, an indifference that is not in keeping with established traditions in this country. Other aspects of the German system — such as the ex-

¹⁶⁹ Studies of the deterrent effect of the American rule are inconclusive. Compare S. SCHLESINGER, EXCLUSIONARY INJUSTICE 50-56 (1977) (concluding that rule has not been an effective deterrent), with Kamisar, *Is the Exclusionary Rule an “Illogical” or “Unnatural” Interpretation of the Fourth Amendment?*, 62 JUDICATURE 67, 70-73 (1978) (challenging the validity of studies that dispute the rule's deterrent effect).

tensive familial privileges — may also reflect cultural traditions that have little applicability in the United States.¹⁷⁰

Another difficulty with seeking to adapt the German approach to American conditions arises out of an important structural difference between the federal systems of the two countries. Although Germany, like the United States, is a federal republic, its criminal law and procedural rules are promulgated nationally. Thus, the German national legislature can pass rules of criminal procedure that apply in all of the *Länder* (states). In the United States, on the other hand, there are serious questions whether Congress has the power to impose criminal procedural rules on the states.¹⁷¹ Thus, the “rules” governing searches and seizures, interrogations, and the like in the United States have been the products of the Supreme Court’s constitutional interpretation; to break the rules is to violate the Constitution. Although German courts can therefore distinguish between rule-breaking and constitutional violations under the proportionality principle and apply an exclusionary rule only in the latter category,¹⁷² American courts lack the legal basis for drawing distinctions between “more and less serious” constitutional violations in applying the rule.¹⁷³

The existence of a detailed system of exclusionary rules in Germany suggests that the *Weeks* rule is neither a bizarre aberration nor the only form that a viable exclusionary rule can take. It indicates that exclusionary rules are a reflection of shared democratic principles, even though the rules’ particular provisions vary according to context and tradition. The German experience thus represents an important reference point that can help to free the ongoing debate over the American exclusionary rule from its current rigidity.

¹⁷⁰ A strong concern for familial rights is pervasive in German law. For instance, StPO § 395(II) provides that the parents, children, brothers, sisters, or spouse of a homicide victim may join as intervenors in the public charge. *See generally* J. DAWSON, GIFTS AND PROMISES 127 (1980) (discussing the traditional importance of the family in German estate distribution).

¹⁷¹ *Cf.* National League of Cities v. Usery, 426 U.S. 833 (1976) (invalidating extension of federal minimum wage and maximum hour provisions to state and municipal employees on grounds of state sovereignty and local autonomy).

¹⁷² The German courts do not, however, take full advantage of this dichotomy; as noted, they admit evidence that is the product of unconstitutional searches on the theory that only the seizure, and not the search, actually produces the evidence. *See supra* pp. 1046–47.

¹⁷³ *See, e.g.,* Whiteley v. Warden, 401 U.S. 560 (1971) (holding that probable cause must appear on the face of the search warrant and, if it does not, that evidence obtained pursuant to that warrant must be excluded, even if police had probable cause).