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## An Empirically Based Comparison of American and European Regulatory Approaches to Police Investigation

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# AN EMPIRICALLY BASED COMPARISON OF AMERICAN AND EUROPEAN REGULATORY APPROACHES TO POLICE INVESTIGATION

*Christopher Slobogin\**

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## INTRODUCTION

This article takes a comparative and empirical look at two of the most significant methods of police investigation: searches for and seizures of tangible evidence and interrogation of suspects. It first compares American doctrine regulating these investigative tools with the analogous rules predominant in Europe. It then discusses research on the American system that sheds light on the relative advantages and disadvantages of the two regulatory regimes.

Any effort of this sort is rife with pitfalls. A comparative analysis based on a simple comparison of rules, without consideration of the cultural, systemic, and legal contexts, can be misleading. Similarly, social science conclusions about how certain procedures work in the American context do not necessarily transfer to European settings. These caveats are revisited throughout this article. They do not, however, outweigh the potential benefits that comparative empirical analysis brings to our understanding of criminal justice and how best to regulate the police.

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The following discussion divides into two parts: the first on search and seizure and the second on interrogation. Each part begins by recounting the relevant doctrine from the United States and from three representative countries in Europe: England, France, and Germany. It then explains why, in theory, one approach might be considered superior. Finally, each part examines empirical research on the American system that provides more insight into this issue, and ends by addressing the implications of that research for both the American and European approaches.

More often than not, the existing data call into question preconceived notions of what “works.” In particular, American reverence for search warrants, the exclusionary rule, and “*Miranda*” warnings may be based on significant misperceptions about the effect of these aspects of American criminal procedure. This conclusion suggests some possible hybrid approaches to police regulation that are presented in the final section of the article.

## I. SEARCH AND SEIZURE

### A. *United States Law*

The Fourth Amendment to the United States Constitution prohibits “unreasonable searches and seizures.” It also states “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.” Construing this language, the Supreme Court of the United States has established that, with some exceptions described below, every police action that constitutes a “search” for evidence of crime must be based on *probable cause*, usually defined as a level of certainty close to a more-likely-than-not standard.<sup>1</sup> Arrests must also be based on probable cause.<sup>2</sup> Furthermore, “subject only to a few specifically established and well-delineated exceptions,” all searches must be authorized by a judicially-issued *warrant* that meets the probable cause and particularity criteria.<sup>3</sup>

At the same time, the Court has announced exceptions to the probable cause and warrant requirements that are neither “limited” nor always “well-delineated.” The police only need reasonable suspicion—a level of certainty well below probable cause—to conduct a stop (as opposed to an arrest) or a frisk (a patdown for weapons), and no warrant is

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1. See WAYNE LAFAYE & JEROLD ISRAEL, CRIMINAL PROCEDURE § 3.3(b)(1984); see also, *Griffin v. Wisconsin*, 483 U.S. 877 (1987).

2. See *Henry v. United States*, 361 U.S. 98, 100 (1959).

3. *Katz v. United States*, 389 U.S. 347, 357 (1967).

required in this situation.<sup>4</sup> Nor is a warrant needed for contemporaneous searches of a validly arrested person or the area within the "armspan" of that person,<sup>5</sup> and further search of the premises in which an arrest takes place may occur on reasonable suspicion that confederates are hiding there.<sup>6</sup> Police also may dispense with a warrant when conducting a search while in hot pursuit of a suspect (unless the suspect has committed a minor crime and is in his home) and for most searches of cars that have been stopped, although probable cause is still required in both situations.<sup>7</sup>

Neither a warrant *nor* probable cause is required for a host of administrative searches such as health and safety inspections, drug testing of employees, and post-arrest inventory searches, although each type of search must be justified by a rational regulatory scheme.<sup>8</sup> Finally, some types of police action, such as going through garbage, flying over backyards, and most undercover activity, are entirely unregulated under the Fourth Amendment; these actions are not considered "searches" for Fourth Amendment purposes because they do not involve infringement on "reasonable expectations of privacy."<sup>9</sup> Similarly, a voluntary consent to a search surrenders any expectation of privacy one normally might have in the place searched.<sup>10</sup>

If search and seizure rules are violated, the typical remedy in the United States is exclusion of the evidence from the prosecution's case-in-chief, with the result that the charge against the defendant must often be dismissed.<sup>11</sup> Illegally seized evidence need not be excluded, however, if it was obtained in good faith reliance on a warrant, is used solely to impeach a defendant who has taken the stand, or would have been discovered through legal means in any event.<sup>12</sup> Furthermore, a defendant does not have "standing" to exclude illegally seized evidence if the search did not violate his own privacy but rather intruded only upon a third party's.<sup>13</sup>

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4. See *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968).

5. *Chimel v. California*, 395 U.S. 752, 763 (1969).

6. *Maryland v. Buie*, 494 U.S. 325, 327 (1990).

7. See CHARLES WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS* §§ 6-8 (4th ed. 2000).

8. *Id.* at ch. 13.

9. *E.g.*, *California v. Greenwood*, 486 U.S. 35, 37 (1988) (holding an individual has no expectation of privacy in contents of curbside garbage); *California v. Ciraolo*, 476 U.S. 207, 213-14 (1986) (holding flyovers of backyards are not a "search" within the meaning of Fourth Amendment); *Hoffa v. United States*, 385 U.S. 293, 302-03 (1966) (holding conversations with acquaintances do not receive Fourth Amendment protection).

10. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

11. See *Mapp v. Ohio*, 367 U.S. 643, 648 (1961).

12. WHITEBREAD & SLOBOGIN, *supra* note 7, at § 2.

13. *Rakas v. Illinois*, 439 U.S. 128, 129-30 (1978).

### B. European Law

Describing European search and seizure law is more difficult, both because many countries are involved and because the law is often not as well developed in some particulars (although, as noted below, it is much more specific in certain ways). To make the task more manageable, this discussion focuses on the laws of England, France, and Germany. Further, only an outline of that law, sufficient to enable comparisons with United States doctrine, is provided. Thus, from among the many differences between the European and American search and seizure regimes, this article focuses on two in particular: the use of warrants and the exclusionary remedy.

Those differences can be summarized briefly before giving more detail below. In all three European countries, warrants are not as important as they are in the United States, either because they are not required as often, or because they are issued on a showing of less than probable cause, or both. Similarly, European countries do not rely as heavily on exclusion as a means of sanctioning illegal searches and seizures, but instead resort to other remedial devices or do not sanction police misconduct at all.

In England, under the Police and Criminal Evidence Act of 1984 (PACE), warrants must be based on the equivalent of probable cause and may only be issued if the police can show that they seek either evidence of an offense involving more than five years imprisonment, or drugs or stolen property.<sup>14</sup> Warrants are required in the same circumstances in which they are required in the United States, with one significant exception. In the United States, as noted above, a search incident to a home arrest is limited to the arrestee's person, the area within the arrestee's armspan and, if police suspect a confederate is on the premises, areas in which that confederate might be hiding. Additionally, these searches must be contemporaneous with the arrest. In England, in contrast, police may conduct a *full* search of the arrestee's house without judicial authorization (although in some cases they must obtain a supervising inspector's authorization), so long as the search is for evidence related to the offense.<sup>15</sup> Furthermore, this warrantless search of the premises need not take place at the time of the arrest, but may be conducted some time later (perhaps up to a few hours later), and may even occur when the ar-

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14. Craig Bradley, *The Emerging International Consensus as to Criminal Procedure Rules*, 14 MICH. J. INT'L L. 171, 180-81 (1993).

15. Police and Criminal Evidence Act, 1984, c. 60 §§ 18(4-5), 32(2)(b) (Eng.) [hereinafter PACE].

rest takes place outside the home.<sup>16</sup> According to one study, only about 12% of premise searches conducted in England are based on a warrant and about 55% of the warrantless house searches are searches incident to arrest.<sup>17</sup>

In France most rules governing searches and seizures are found in the Code de Procédure Pénale (CPP). French police investigating a “recent” major felony (a “flagrant” offense) are never required to obtain a judicial order of the type envisioned under American law. Either they seek no authorization at all or an investigating judge delegates search authority to them through a “rogatory commission,” which “need not meet any degree of suspicion or specify the parties or places to be searched or things to be seized.”<sup>18</sup> For non-flagrant offenses, either consent or permission from a judge or his delegate is needed to conduct a search, but “no actual warrant or other detailed order needs to be issued”; furthermore, the “delegate” can be a prosecutor or upper level police officer who then supervises the investigation.<sup>19</sup> French law does, however, limit search authority to specialized “judicial police,” and requires that either the person whose premises are searched or other civilians be present during the search.<sup>20</sup>

Under the German Code of Criminal Procedure (CCP), the premises of an arrestee may be searched without a warrant.<sup>21</sup> Nor are warrants required in most other circumstances. The German Code permits forgoing a warrant not only in cases of “hot pursuit,” but also when there is “danger in delay.”<sup>22</sup> Although a three-decade old description of German law asserts that this latter concept is very narrowly defined,<sup>23</sup> a more recent review concluded that “the great majority of searches are conducted without any prior judicial authorization [because] police usually assume

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16. See MICHAEL ZANDER, *THE POLICE & CRIMINAL EVIDENCE ACT OF 1984* 51, 79 (2d ed. 1990).

17. VAUGHN BEVAN & KEN LIDSTONE, *A GUIDE TO THE POLICE AND CRIMINAL EVIDENCE ACT OF 1984* 45–46 (1985).

18. See Richard S. Frase, *France: Rules of Criminal Procedure*, in CRAIG BRADLEY, *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 153 (1999); see also CODE DE PROCEDURE PÉNAL, 1987, arts. 151–55 (English translation by Gerald Kock & Richard Frase, 1988) [hereinafter CPP].

19. Frase, *supra* note 18, at 154. See also, CPP, *supra* 18, at art. 76; CRAIG BRADLEY, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION* 119 (1993).

20. CPP, *supra* note 18, arts. 16–21, 95–97.

21. See CODE OF CRIMINAL PROCEDURE, § 102 (English translation by Horst Neibler, 1973) [hereinafter CCP]; see also Thomas Weigend, *Germany Rules of Criminal Procedure*, in CRAIG BRADLEY, *CRIMINAL PROCEDURE: A WORLDWIDE STUDY*, 194 n.27.

22. CCP, *supra* note 21, at § 104.

23. See GERHARD O.W. MUELLER & FRÉ LE POOLE-GRIFFITHS, *COMPARATIVE CRIMINAL PROCEDURE* 16–17 (1969).

that there is 'danger in delay.'"<sup>24</sup> Accordingly, perhaps only 10% of house searches are conducted pursuant to a warrant.<sup>25</sup> If there is any supervision of the search process, it is normally carried out by the prosecutor.<sup>26</sup> Furthermore, a "rather vague suspicion is a sufficient basis for search."<sup>27</sup> Like the French system, however, the target of the investigation or an adult relative is entitled to be present during the search.<sup>28</sup>

Differences in European and American sanctioning practices are even greater. In all three European countries, exclusion has become more common in recent years. But it is still extremely rare.<sup>29</sup> In England, exclusion is required only when, in the judge's discretion, admission of the evidence would make the proceedings unfair,<sup>30</sup> a provision which is generally interpreted to require exclusion only of unreliable evidence or evidence obtained through egregious police action.<sup>31</sup> While this rule does lead to exclusion of illegally obtained confessions with some regularity, evidence from illegal searches is routinely admitted.<sup>32</sup> Likewise, in France, there are a number of situations in which an illegality may lead to a "nullity," but virtually none of them involve searches and seizures.<sup>33</sup>

Germany's approach to exclusion is the most interesting. German courts balance the degree of intrusion and bad faith on the part of the police against the seriousness of the offense and the importance of the evidence. If the intrusion is great enough (e.g., seizure of a diary), exclusion may occur even if no illegality occurred. On the other hand, in

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24. Weigend, *supra* note 21 and accompanying text. In a recent decision, however, the German Supreme Court construed "danger in delay" more restrictively, and required 24-hour availability of judges, documentation of the reasons the police or prosecutor assumed there was danger in delay, and judicial review of the investigative decision. Federal Constitutional Court, decision of February 20, 2001 (BverfGE, Urt. V., 2 BvR 1444/00). It remains to be seen whether this decision will change police practice, because exclusion is still only required if police consciously violate the law. *Id.*

25. Weigend, *supra* note 21, at 194-95 n.32.

26. See Volker F. Krey, *Characteristic Features of German Criminal Proceedings—An Alternative to the Criminal Procedure Law of the United States?*, Address at Loyola University at Los Angeles (March 9, 1999), in 21 *LOY. L.A. INT'L & COMP. L. J.* 591, 597-98 (1999).

27. Weigend, *supra* note 21, at 193-94.

28. CCP, *supra* note 21, at § 106.

29. See generally, Bradley, *supra* note 14.

30. PACE, *supra* note 15, at § 78.

31. See David Feldman, *England: Rules of Criminal Procedure*, in CRAIG BRADLEY, *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 105.

32. See Zander, *supra* note 16, at 210.

33. See Frase, *supra* note 18, at 155-56 ("Most violations give rise to exclusion only if they are deemed to have violated 'substantial' provisions of the Code or other laws related to criminal procedure."). But see Walter Pakter, *Exclusionary Rules in France, Germany, and Italy*, 9 *HASTINGS INT'L & COMP. L. R.* 1, 37 n.266 (1985).

serious cases, exclusion of contraband or fruits and instrumentalities of crime is very unlikely, especially if the evidence is crucial.<sup>34</sup>

It has been alleged that European countries depend upon other means, such as internal police discipline, to ensure police adherence to investigative rules.<sup>35</sup> To date, however, virtually no information exists concerning how often, or even whether, police are disciplined for violations of search and seizures rules, as opposed to other types of transgressions.<sup>36</sup>

### C. An Empirical Analysis of the Differences

Under American theory, both warrants and exclusion are important, if not crucial, means of preventing police abuse of the search and seizure power. Justice Jackson best described the preference for warrants when he explained that the Fourth Amendment's protection "consists in requiring that . . . inferences [about criminal activity] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."<sup>37</sup> Similarly, although the Supreme Court has advanced a number of rationales to support the exclusionary rule over the years,<sup>38</sup> today the Court emphasizes that the rule's sole *raison d'être* is its efficacy at deterring police misconduct.<sup>39</sup>

Thus, an American lawyer might criticize European search and seizure law for its relatively nonchalant attitude toward warrants and exclusion. This criticism assumes, however, that warrants and the exclusionary rule *are* crucial mechanisms for controlling the police. Furthermore, it ignores the possibility that, even if warrants and exclusion are effective in this regard, their regulatory benefit is outweighed by their negative impact on crime control. A fair amount of research exploring these assumptions exists.

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34. See Bradley, *supra* note 14, at 208–12. See also Decision of the Federal Constitutional Court, 2d Senat, of Sept. 14, 1989 (BverfGE 80, 367) (holding diary of appellant, charged with killing a young woman, was admissible in large part because of the seriousness of crime and relevance of its contents to appellant's motivations).

35. John Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549, 1556–61 (1978).

36. Weigend, *supra* note 21, at 204 (asserting German disciplinary measures occur only in cases of police brutality); see *infra* note 91 (concerning France's administrative remedies).

37. Johnson v. United States, 333 U.S. 10, 14 (1948).

38. Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 ILL. L. REV. 363, 423–442 (describing Fifth Amendment, property, status quo ante, judicial review and due process theories supporting the rule).

39. See United States v. Calandra, 414 U.S. 338 (1973) (holding deterrence of police is the only basis for exclusion); see also, United States v. Leon, 468 U.S. 897 (1984); Arizona v. Evans, 514 U.S. 1 (1995).



*Warrants.* The most authoritative information about the warrant process in the United States comes from a seven-jurisdiction study conducted by the National Center for State Courts (NCSC). This study found that the "vast majority" of searches are conducted without a warrant,<sup>40</sup> a conclusion that directly undercuts Justice Jackson's suggestion that warrants play a significant role in regulating police behavior. Warrants do, however, figure prominently in searches of premises, universally considered the most private space.<sup>41</sup> Furthermore, the percentage of premise-searches conducted pursuant to a warrant in the United States, while unknown, is likely to be much higher than the twelve and ten percent figures in England and Germany reported above (given the law of search incident in those countries), and is undoubtedly higher than the analogous figure in France.

Whether warrants provide any real privacy protection is more difficult to tell. The NCSC study revealed that when police did seek a warrant, magistrates spent less than three minutes reviewing their application in 65% of the cases, devoted more than five minutes to the application in only 11% of the cases, and rejected only 8% of the applications.<sup>42</sup> A separate study found that judges are even less likely to reject law enforcement requests for electronic surveillance warrants; of the 20,107 applications submitted for such warrants at the federal level between 1968 and 1995, only 27 were denied, and none were denied between 1988 and 1995.<sup>43</sup> These findings suggest that magistrates usually "rubberstamp" police applications, and that the neutral, independent judgment of the type lauded by Justice Jackson rarely takes place. That conclusion is reinforced by the NCSC's finding that police often sought out particular magistrates believed to be friendly to police views on investigation.<sup>44</sup>

Another possible reason warrant applications are so rarely rejected, however, is that most of them are meritorious. The NCSC study found that officers routinely request that their supervisors or the prosecutor check their application before submitting it to the magistrate, that magistrates more than occasionally ask the police to provide additional information before issuing the warrant, and that only 5% of the warrants that are issued are subsequently found invalid.<sup>45</sup> Conceivably, a three-

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40. RICHARD VAN DUIZEND ET AL., L. PAUL SUTTON & CHARLOTTE A. CARTER, *THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS AND PRACTICES* 21 (1985).

41. *Id.* at 35.

42. *Id.* at 32-33.

43. CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE—REGULATION OF POLICE INVESTIGATION: LEGAL, HISTORICAL, EMPIRICAL AND COMPARATIVE MATERIALS* 192 (2d ed. 1998).

44. VAN DUIZEND, *supra* note 40, at 47-49.

45. *Id.* at 24-25, 31, 8-11.

minute review is all that is necessary in many cases, because police knowledge that a judicial officer will check their investigative efforts and reasoning, even if only in a cursory fashion, encourages genuine requests.

At least two theoretical reasons, both advanced by Professor Stuntz, support the belief that the warrant process discourages illegal searches.<sup>46</sup> First, the process may reduce judicial bias favoring the police, and therefore police reliance on such bias, because a magistrate grants or denies a warrant application *before* he knows whether the police will find the evidence. In contrast, judicial review of a warrantless search occurs *after* the search, typically during a hearing to suppress evidence. Because the magistrate in this hearing inevitably knows the police have found incriminating evidence, "hindsight reasoning," a phenomenon known to infect other assessments of police behavior,<sup>47</sup> may taint his probable cause determination. Second, the warrant process may reduce illegality by making police fabrication difficult, again because the probable cause determination occurs before the search takes place. In contrast, fabrication is relatively simple during *ex post* review of a warrantless search, when the officer can more easily concoct "justifications" for his actions based on known prior events.

Ultimately, however, whether illegal searches would increase if the warrant requirement were abolished or relaxed remains unknown. Although the NCSC study found that only approximately 12% of those warrant-based searches that were challenged were found invalid,<sup>48</sup> that failure rate is only slightly lower than the suppression rate of 14.6% for *all* searches.<sup>49</sup> Furthermore, even if police are found to violate the Fourth Amendment at a higher rate when they conduct warrantless searches, that differential could be due to a number of third variables, including a reviewing court's reluctance to second-guess a fellow judicial officer's warrant decision.

A warrant requirement may even *detract* from effective law enforcement. According to the NCSC study, drafting and submitting a warrant application may take as long as half a day (although the advent of telephonic warrants in some jurisdictions has significantly reduced

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46. William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 910-18 (1991).

47. Christopher Slobogin & Joe Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society"*, 42 DUKE L. J. 727, 765-768 (1993) (finding an inverse relationship between knowledge that evidence was discovered in a search and the level of intrusiveness associated with the search) [hereinafter Slobogin & Schumacher].

48. VAN DUIZEND, *supra* note 40, at 42.

49. Peter Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. BAR FOUND. RES. J. 585, 597 tbl.7 (1983).

that period).<sup>50</sup> If the only searches discouraged by this process are those for which the police lack probable cause, then the warrant requirement is functioning properly. But the requirement creates perverse incentives if the hassle of obtaining a warrant is discouraging police from conducting searches in cases where probable cause exists. The cumbersome nature of the process may even encourage illegal searches if police try to evade it through dubious consent searches or arrests staged in areas where warrants are not required (e.g., the car). As one officer quoted in the NCSC study stated, 98% of his searches were conducted after securing the target's "consent," sometimes obtained through (often unfounded) threats to secure a warrant unless the target granted entry.<sup>51</sup>

*Exclusionary rule.* Several types of research address whether exclusion of illegally obtained evidence deters police violations of the Fourth Amendment. One strain of empirical evidence consists of pre/post studies examining the effect of *Mapp v. Ohio*<sup>52</sup>—the Supreme Court decision making the exclusionary rule applicable to the states—on various aspects of police conduct such as warrant applications and arrest statistics. Another group of studies involves surveys of and interviews with police and other actors in the legal system about their search conduct and their attitudes toward the exclusionary rule. A third type of research tests police knowledge of Fourth Amendment rules, on the theory that a sanction meant to deter should create an incentive to know the relevant law.

Unfortunately, the pre/post studies were seriously flawed. Post-*Mapp* changes in the number of search warrants issued, arrest and conviction rates, or the amount of recovered stolen property and seized contraband—in theory, possible indications of the rule's effect—turned out to be influenced by a number of other variables as well. These include changes in crime rates, police priorities, and Fourth Amendment rules.<sup>53</sup> Poor record-keeping prior to *Mapp* also afflicted the studies.<sup>54</sup> These difficulties critically undermined pre/post research on the exclusionary rule. For instance, Professor Canon, although a supporter of the rule, felt compelled to conclude that his findings "do not come close to supporting a claim that the rule wholly or largely works."<sup>55</sup> Similarly, Dallin Oaks, a researcher who argued against retaining the exclusionary rule, admitted that his results "obviously fall short of an empirical sub-

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50. VAN DUIZEND, *supra* note 40, at 85–87, 149.

51. *Id.* at 17.

52. *Mapp v. Ohio*, 367 U.S. 643 (1961).

53. Thomas Y. Davies, Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 NW. L. REV. 740, 756–64 (1974).

54. See *United States v. Janis*, 428 U.S. 433, 451–52 (1976).

55. Bradley C. Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels: The Case of the Exclusionary Rule*, 5 AM. POL. Q. 57, 75 (1977).

stantiation or refutation of the deterrent effect of the rule.”<sup>56</sup> Such honesty by opponents in the debate over the exclusionary rule is commendable, but its import is distressing for those trying to devise policy. As Professor Davies concluded, “When all factors are considered, there is virtually no likelihood that the Court is going to receive any ‘relevant statistics’ which objectively measure the ‘practical efficacy’ of the exclusionary rule.”<sup>57</sup>

Interviews of police and other actors in the system also produced ambiguous findings about the consequences of the rule. Surveys conducted shortly after *Mapp* indicated agreement among attorneys and judges that exclusion had a greater impact on police behavior than the civil or criminal sanctions that had comprised the main method of sanctioning illegal searches and seizures before that case was decided.<sup>58</sup> That result, however, merely confirmed what the Court itself recognized in *Mapp*—that existing alternatives to the rule were “futile” as deterrents.<sup>59</sup> It did not show that the rule was *effective* at discouraging police misconduct, but only that it was superior to the toothless remedies that predated *Mapp*.

Interviews with police similarly suggest that the rule, while better than other devices at influencing their search behavior, may not be significantly better. For instance, such research often reports that police say they resent the rule or that they learned valuable lessons when evidence they seized was suppressed, findings which are said to indicate that the rule affects their actions.<sup>60</sup> Yet a survey of more than 200 police from two southeastern cities found that 19% admitted to conducting searches of “questionable constitutionality” at least once a month, and 4% said that they conducted searches they *knew* to be unconstitutional at least once a month, meaning that several hundred constitutionally suspect searches occur each year in just these two departments (out of over 15,000 nationwide).<sup>61</sup> Even more discouraging to proponents of the rule are the results of a survey of several hundred California police asking which

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56. Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 709 (1970).

57. Davies, *supra* note 53, at 763–64.

58. See Michael Katz, *The Supreme Court and the States: An Inquiry into Mapp v. Ohio in North Carolina. The Model, the Study and the Implications*, 45 N.C. L. REV. 119 (1966); Stuart S. Nagel, *Law and Society: Testing the Effects of Excluding Illegally Seized Evidence*, 1965 WIS. L. REV. 283, 302 (1965).

59. *Mapp v. Ohio*, 367 U.S. 643, 652 (1961) (noting other remedies had proven “worthless and futile”).

60. See Myron W. Orfield, Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1066–67 (1987).

61. Ronald L. Akers & Lonn Lanza-Kaduce, *The Exclusionary Rule: Legal Doctrine and Social Research on Constitutional Norms*, 2 SAM HOUSTON ST. U. CRIM. JUST. CENT. RES. BULL. 1–6 (1986).

remedy for illegal searches they preferred. Most officers picked the exclusionary rule, not only over damages (which would take money directly out of their pockets), but also over more training.<sup>62</sup> Apparently, the police would rather put up with the risk of exclusion than sit through a few more hours in the classroom.

One fairly robust finding of the pre/post research and survey studies is that *Mapp* at least brought about a significant increase in such training programs, presumably because prosecutors and police departments, worried about losing cases, wanted their officers to learn Fourth Amendment law.<sup>63</sup> The final category of research, examining the effectiveness of these programs, also produced frustrating results. One study involving over 450 officers found that officers as a group performed better than chance on only one out of six questions about search and seizure law.<sup>64</sup> A second study testing police knowledge found that the "average officer did not know or understand proper search and seizure rules" and that "supervisors or senior officers only achieved slightly improved scores."<sup>65</sup> A third study involving 296 officers demonstrated a "widespread inability to apply the law of search and seizure or police interrogation."<sup>66</sup> Lending credence to these findings are the observations of Professor Stephen Wasby, who studied numerous police training programs in the 1970s (before many of the exceptions to the exclusionary rule existed). Wasby concluded that "[r]ecruit training is sadly lacking in criminal procedure content" and that "[t]he spirit and tone of communication about the law, particularly when the law is favorable to defendants' rights, is often negative, with the need for compliance stressed only infrequently."<sup>67</sup>

Why does the exclusionary rule—which, after all, can result in the dismissal of serious criminal charges—have so little effect on individual officers or on training programs? Behavioral theory suggests one answer to this question. That theory posits that punishment, to be effective, must be frequent, consistent, immediate and intense.<sup>68</sup> The exclusionary rule, as applied in the United States, violates all of these precepts. First, ex-

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62. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669, 733 tbl.7 (1999).

63. See Yale Kamisar, *Remembering the Old World of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J.L. REFORM 537, 557–59 (1990).

64. William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311, 333 (1991).

65. Eugene Michael Hyman, *In Pursuit of a More Workable Exclusionary Rule: A Police Officer's Perspective*, 10 PAC. L.J. 33, 47 (1979).

66. Perrin, *supra* note 62, at 727.

67. Stephen L. Wasby, *Police Training about Criminal Procedure: Infrequent and Inadequate*, 7 POL'Y STUD. J. 461, 464–66 (1978).

68. JON L. WILLIAMS, *OPERANT LEARNING: PROCEDURES FOR CHANGING BEHAVIOR* 154–55 (1973).

clusion only occurs when there is a prosecution, which is an infrequent event; the vast majority of police-citizen encounters never progress beyond the street level.<sup>69</sup> Second, even when charges are brought, plea-bargaining often short-circuits them, perhaps as often as 90% of the time,<sup>70</sup> which frequently means that the validity of a search goes unchallenged. Further, as discussed earlier, when suppression hearings do take place, police fabrication and judicial hindsight bias often result in a finding for the prosecution in close cases. The many exceptions to the exclusionary rule—good faith reliance on a warrant, impeachment, inevitable discovery and lack of standing—also diminish the chance of exclusion. On those few occasions when suppression does occur, it may take place well after the illegal conduct and never be communicated to the officer.<sup>71</sup>

Finally, and probably most importantly, the exclusionary punishment is not directed at the officer or the department but at the prosecutor. Sociological research clearly establishes that a policeman is most interested in the “collar,” with conviction a distant and often irrelevant consideration.<sup>72</sup> That means that exclusion is a very indirect sanction on the average officer. For these and related reasons, the rule is not an effective behavior-shaping mechanism.<sup>73</sup>

Legitimacy-compliance theory, developed by Tom Tyler,<sup>74</sup> may provide another explanation for the relatively weak impact of the exclusionary rule. Legitimacy-compliance theory suggests that obedience to the law stems as much from respect for the law and those who promulgate it as from a fear of punishment for unlawful behavior. Because the rule “sanctions” the police by helping a guilty individual, and because it “punishes” virtually all police violations of the Fourth Amendment, even those that are inadvertent, officers may not perceive suppression of evidence as legitimate, even if they support the values underlying the Amendment. The previously reported resentment that police feel toward the rule, far from showing a willingness to comply with search and seizure

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69. Neil A. Milner, *Supreme Court Effectiveness and the Police Organization*, 36 LAW & CONTEMP. PROBS. 467, 476–78 (1971); WAYNE R. LAFAYE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 437 (Frank J. Remington ed., 1965).

70. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY xi–xii (1998) (stating plea bargain rate is approximately 93% in the federal system and approximately 91% among states).

71. Francis A. Gilligan, *The Federal Torts Claims Act—An Alternative to the Exclusionary Rule?*, 66 J. CRIM. L. & CRIMINOLOGY 1, 4 (1975) (“Neither the judge nor the prosecutor adequately explains a court ruling on the exclusionary rule so that it might be understood by the police officer.”).

72. See JONATHAN RUBENSTEIN, CITY POLICE 45 (1973).

73. See Slobogin, *supra* note 38, at 373–81, for an elaboration on these arguments.

74. TOM TYLER, WHY PEOPLE OBEY THE LAW (1990).

doctrine, might instead indicate disrespect for this method of enforcing the Fourth Amendment, and thus foster passive-aggressive resistance toward it. Such resistance might manifest itself through any number of mechanisms, including lying about probable cause or exigency, covering for other officers' transgressions, and simply avoiding prosecution when illegality cannot be hidden.<sup>75</sup>

None of this is meant to suggest that research and theory prove the exclusionary rule is inferior to other available means of controlling police misconduct. In the United States, civil, criminal, and administrative remedies for illegal searches and seizures are almost as impotent today as they were prior to *Mapp*.<sup>76</sup> Even when lawsuits or disciplinary actions against the police arise, proof of "good faith" generally prevents any remedy.<sup>77</sup> On those few occasions when a plaintiff convinces a jury to levy damages against a police officer, the department usually provides indemnification, significantly undermining the verdict's deterrent effect.<sup>78</sup> Thus, the exclusionary rule, despite its flaws, remains the most potent domestic remedy.

Perhaps for that reason, it is also the most "expensive." Estimates of convictions lost because of the rule range from 0.6% to 7.1%, depending upon the jurisdiction and type of crime.<sup>79</sup> Approximately 10,000 felons and 55,000 misdemeanants evade punishment each year because of successful Fourth Amendment suppression motions.<sup>80</sup> Other, more subtle, "costs" of the rule include the exacerbation of adversarial tensions between police, suspects, and attorneys because of the high stakes associated with illegal searches,<sup>81</sup> the distracting impact of suppression hearings on the quality of defense representation,<sup>82</sup> and the damage to courts and government generally resulting from public outrage at the

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75. See Slobogin, *supra* note 38, at 375–81, for an elaboration on these points.

76. *Id.* at 370–72.

77. See *Anderson v. Creighton*, 483 U.S. 635 (1987) (establishing good-faith exception under § 1983); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (establishing good faith exception under federal tort law).

78. See Daniel Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 283–85 (1988).

79. *Leon v. United States*, 468 U.S. 897, 907 n.6 (1984).

80. Thomas Y. Davies, *A Hard Look at What We Know (And Still Need to Learn) about the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611, 669–70 (1983).

81. WILLIAM T. PIZZI, *TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BEEN AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT* 40–42, 222–23 (1999).

82. William Stuntz, *The Uneasy Relationship between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 31–45 (1997).

benefit criminals receive when their charges are dismissed or reduced by exclusion.<sup>83</sup>

Existing alternatives to the rule are less costly on all these measures. In particular, they clearly sacrifice fewer convictions. It must be noted, however, that this difference results primarily from their inadequacy. An *effective* alternative to the rule, one which ensured that police did not violate the Fourth Amendment, would also result in at least some "lost" convictions, because it would scare police away from a certain number of searches and seizures that would have generated evidence of crime.<sup>84</sup>

#### D. *Implications of the Research*

Despite some good empirical efforts, we do not know how much extra protection a warrant provides, nor is there convincing evidence that exclusion deters police misconduct on a routine basis. The research does firmly suggest, however, that warrants raise police officers' "standard of care" when they decide whether to conduct a search,<sup>85</sup> and that the exclusionary rule is superior to existing means of deterring police conduct. Do these conclusions mean that the United States, which is relatively more invested in warrants and exclusion, does a "better" job at regulating searches and seizures than England, France or Germany? Perhaps so, but a definitive answer to such comparative inquiries must take into account cultural, systemic and legal differences.

First, various aspects of European culture may call for a different cost-benefit analysis than policymakers and citizens in the United States might make. European societies tend to be more homogenous than the United States, which may reduce concerns about discriminatory treatment by law enforcement.<sup>86</sup> Similarly, Europe's long tradition of centralized and often authoritarian regimes, as well as its relatively compact living conditions, may make its citizens more tolerant of strong police power and less concerned about privacy and autonomy.<sup>87</sup> Finally,

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83. John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1035-36 (1974).

84. Yale Kamisar, "Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule, 86 MICH. L. REV. 1, 47 n.211 (1987); Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL. L. REV. 1, 56 (1994).

85. VAN DUIZEND, *supra* note 40, at 148-49.

86. For instance, there is as yet no practice in Europe akin to stopping people for "driving while black," a widely documented phenomenon in the United States. Cf. David A. Harris, *The Stories, the Statistics and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999).

87. Slobogin & Schumacher, *supra* note 47, at 769. Providing indirect support for these speculations is a study which revealed significant differences between American and Australian subjects in their evaluations of the intrusiveness of various police search techniques, with the Americans routinely gauging those techniques to be more intrusive than their Australian counterparts. *Id.*



Europeans may trust authorities to a greater extent than Americans, meaning that they are more willing to believe, perhaps with good reason, that their police won't behave improperly.<sup>88</sup> Thus, any relatively greater leniency toward law enforcement that does exist in Europe may reflect entrenched cultural differences rather than a lesser regard for "fundamental" values.

Second, even if basic values concerning the relationship between the state and the individual were identical in the two societies, systemic differences between the United States and Europe might create a greater need for police regulation in the United States. Because of variations in education and training,<sup>89</sup> police in Europe may be more professional than American police and concomitantly less in need of monitoring. Higher crime rates and the prevalence of guns and drugs in the United States may place more pressure on American police to bend the rules, thus requiring harsher penalties for violation. The adversarial nature of the American criminal justice system itself may make police in the United States more aggressive, and therefore more in need of regulation than European police, who are immersed, at least in theory, in a tradition of relatively neutral inquiry.<sup>90</sup>

Third, comparisons of individual legal rules, such as the warrant preference and exclusion, can mislead because they ignore how other legal rules compensate for or interact with the rules in question. For instance, the requirements that searches be conducted by certain types of police or under the supervision of the prosecutor, that they be limited to serious crimes, that they be monitored by third parties, and that they be sanctioned administratively if illegal—all components of one or more European systems—do not exist in the United States, at least not on a national level. Some commentators question the extent to which these aspects of the European system provide any meaningful limitation on the police;<sup>91</sup> for example, as in the United States, internal and monetary

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88. See Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure*, 121 U. PA. L. REV. 506, 584 (1972).

89. Compare Thomas Feltes, *Police Research in Germany*, in COMMUNITY POLICING: COMPARATIVE ASPECTS OF COMMUNITY ORIENTED POLICY WORK (1993) (noting German police normally attend at least three years of academy) with U.S. Dep't of Labor, Occupational Outlook Handbook 302 (1996) (recognizing American police may attend no more than three months of training).

90. Damaska, *supra* note 88, at 584 ("The ideology supporting modern non-adversary procedure . . . exhibits much less distrust of police, prosecutors, judges, and public officials in general.").

91. Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out and Why Should We Care?* 78 CAL. L. REV. 539, 586 (1999) ("The French themselves are skeptical of [administrative] remedies.").

sanctions are rare in Europe,<sup>92</sup> and third party monitoring only influences the execution of a search, not the decision to carry it out (and may even *increase* illicit intrusion into privacy).<sup>93</sup> The point remains that comparisons of selected components of a system must be evaluated in context.

## II. INTERROGATION

### A. *United States Law*

Until the mid-1960s, judicial regulation of the interrogation process in the United States focused entirely on whether a suspect's statements were "involuntary" and thus inadmissible. As developed under the Fourteenth Amendment's due process clause, voluntariness analysis requires evaluating the "totality of the circumstances" in which the confession occurred, in particular the interaction between police conduct and the vulnerabilities of the suspect.<sup>94</sup> Thus, for instance, the United States Supreme Court has declared "involuntary" a confession obtained after a suspect was questioned continuously for 36 hours without rest or sleep,<sup>95</sup> as well as a confession obtained from a suspect who was informed that welfare for her children would be cut off and her children taken away from her if she failed to "cooperate."<sup>96</sup> While originally the Court seemed concerned that such techniques would produce unreliable confessions, by 1961 it excluded such confessions:

not because [they] are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and

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92. One might also question whether an exclusionary remedy will work in a system, such as exists in France and Germany, that exposes the decisionmaker to all the evidence accumulated during the investigation, regardless of how it was obtained, a fact police surely know. MIRJAN DAMASKA, *EVIDENCE LAW ADRIFT* 49–50 (1997) (suggesting that, given the fact that Continental judges, who operate without juries, hear about illegally seized evidence, "identity in the wording of Continental and Anglo-American exclusionary rules can . . . be deceptive"). As Professor Damaska also points out, however, continental decision makers have to justify their decision in writing without reference to illegally obtained evidence, so exclusion may still make convictions difficult despite the decision maker's knowledge of such evidence. *Id.*

93. See *id.* at 50–51.

94. *Fikes v. Alabama*, 352 U.S. 191, 197 (1957) ("The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing.").

95. *Ashcraft v. Tennessee*, 322 U.S. 143, 153 (1944).

96. *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963).

may not by coercion prove its charge against an accused out of his own mouth.<sup>97</sup>

Although the Court has never veered from this basic principle, it has since resorted to two other methods of regulating interrogation besides the due process clause. First, in 1964, the Court held that, under the Sixth Amendment's guarantee of assistance of counsel in all criminal prosecutions, suspects who have been formally charged are entitled to counsel during interrogation.<sup>98</sup> More importantly, two years later in *Miranda v. Arizona*<sup>99</sup> the Court held that, under the Fifth Amendment's "privilege against self-incrimination," any suspects subjected to custodial interrogation, even those *not* formally charged, have a right to remain silent and a right to counsel. The suspect also is entitled to four "warnings" before interrogation begins: that the suspect has a right to remain silent; that anything he says may be used against him; that the suspect has a right to counsel during interrogation; and that an attorney will be appointed if the suspect cannot afford one. If these warnings are not given, any statements obtained as a result must be excluded from evidence.<sup>100</sup> Even if the warnings are given, statements that are "involuntary" in the due process sense are excluded. Furthermore, a defendant who does talk has the right to end questioning at any time, and his refusal to answer questions may not be used against him in court.<sup>101</sup> These holdings were all designed to implement the Fifth Amendment's provision stating that "[n]o person . . . shall be compelled" to testify against himself.

Since *Miranda*, the Supreme Court has limited its holding significantly. First, police need not give the warnings when doing so would pose a threat to public safety because, for example, a suspect's silence might prevent police from discovering a dangerous weapon.<sup>102</sup> Second, although questioning must cease when the suspect asserts the right to counsel, if the defendant who has invoked that right reinitiates conversation—a concept the Court has defined broadly<sup>103</sup>—the police may continue questioning him.<sup>104</sup> Moreover, if the suspect merely asserts his right to remain silent (as opposed to his right to counsel), police proba-

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97. *Rogers v. Richmond*, 365 U.S. 534, 540–41 (1961).

98. *Massiah v. United States*, 377 U.S. 201, 204 (1964).

99. *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966).

100. *Id.* at 474–75.

101. *Id.* at 476.

102. *See New York v. Quarles*, 467 U.S. 649, 650 (1984) (adopting a "public safety" exception to *Miranda*).

103. *See Oregon v. Bradshaw*, 462 U.S. 1039, 1045–46 (1983) (holding defendant's statement "Well, what is going to happen to me now?" to be initiation under this standard).

104. *See Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981).

bly need not wait for the defendant to reinitiate conversation, so long as there is a reasonable interval between interrogations and they rewarn him.<sup>105</sup>

Third, the Court has sanctioned several forms of trickery after the warnings are given. For instance, on two occasions the Court held valid a confession given by a suspect who apparently thought that so long as his statements were not reduced to writing they could not be used against him, a misimpression the police failed to correct.<sup>106</sup> In another case, the Court upheld the confession of a suspect who was misinformed about the subject matter of the investigation.<sup>107</sup> The Court has also refused to exclude confessions obtained after police lied about finding fingerprints at the scene of the crime,<sup>108</sup> after they falsely told the suspect that his colleague had already confessed to the crime,<sup>109</sup> and after they deceived the defendant's attorney about when interrogation would take place.<sup>110</sup> Finally, a confession obtained by an undercover agent, even one posing as a cellmate, does not violate *Miranda*.<sup>111</sup> In each case, the Supreme Court reasoned that the police action was insufficiently coercive to violate the Fifth Amendment prohibition against compelled testimony.

Finally, as with the Fourth Amendment exclusionary rule, the Court has narrowed the scope of exclusion after a *Miranda* violation. Although a statement obtained by an unwarned suspect must be excluded from the prosecution's case-in-chief, the Court has not required exclusion of evidence obtained as a result of such a statement (e.g., a witness identified in the statement, or another confession given under the impression that the unwarned statement "let the cat out of the bag").<sup>112</sup> Furthermore, even a statement obtained in violation of *Miranda* is admissible for impeachment purposes.<sup>113</sup> Confessions that are

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105. See *Michigan v. Mosley*, 423 U.S. 96, 104–05 (1975) (upholding admission of statement obtained after defendant asserted right to silence, police returned two hours later and rewarned defendant, and then questioned defendant about another crime).

106. E.g., *North Carolina v. Butler*, 441 U.S. 369, 371–72 (1979) (upholding confession of defendant who agreed to talk but refused to sign a waiver of his rights, stating "I will talk to you but I am not signing any form"); *Connecticut v. Barrett*, 479 U.S. 523, 527 (1987) (upholding confession of defendant who refused to give a written statement in the absence of an attorney but was willing to make oral statements).

107. *Colorado v. Spring*, 479 U.S. 564, 577 (1987).

108. *Oregon v. Mathiason*, 429 U.S. 492, 495–96 (1977).

109. *Frazier v. Cupp*, 394 U.S. 731, 737–39 (1969).

110. *Moran v. Burbine*, 475 U.S. 412, 415–20 (1986) (finding no *Miranda* violation despite false police statements assuring defendant's attorney that his client would not be interrogated). However, the Court avoided deciding whether such misleading assertions violated due process. *Id.*

111. *Illinois v. Perkins*, 496 U.S. 292, 294 (1990).

112. *Oregon v. Elstad*, 470 U.S. 298, 311 (1985).

113. See *Harris v. New York*, 401 U.S. 222, 226 (1971).

involuntary in the due process sense as well as their fruits, however, continue to be excluded.<sup>114</sup>

### B. European Law

As with search and seizure doctrine, European interrogation rules differ significantly from their American counterparts. The following discussion will note most of these differences, but will concentrate on the warnings requirement, the use of trickery and taping during interrogation, and the remedy for violation of the rules. Like the discussion of search and seizure law, the description is necessarily brief, sufficient only to provide grounds for comparison with American law.

Of the three European countries, English interrogation law is the most elaborate. A defendant must receive a "caution" about the right to remain silent as soon as there are "grounds to suspect" him of criminal activity.<sup>115</sup> In contrast, only "custody" triggers *Miranda*, meaning that English police may be required to give warnings at an earlier point than American police. Beginning in 1994 with passage of the Criminal Justice and Public Order Act, however, English police must also inform the suspect that adverse inferences can be drawn from his silence.<sup>116</sup> Furthermore, although the suspect is entitled to counsel before and during interrogation, police need not tell him of that right until he is brought to the police station,<sup>117</sup> and this caution may be delayed if a superintendent or higher level officer decides that exercise of the right would lead to interference with evidence, harm to others, or escape of a suspect.<sup>118</sup> If the suspect does exercise the right to counsel, questioning must stop until an attorney has been consulted, except in urgent circumstances of the type just described.<sup>119</sup> Counsel may be present during the interrogation unless he begins answering questions for his client or in some other egregious way "prevents the proper putting of questions to his client."<sup>120</sup> Perhaps in part because of this latter provision, counsel in England often

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114. WHITEBREAD & SLOBOGIN, *supra* note 7, at § 16.05.

115. Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, 1991, § 10.1 (Eng.). Even questioning by an undercover agent, if it is particularly pointed, may require cautions. *See R. v. Bryce*, 4 All E.R. 567, 571-73 (1992).

116. *See* Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, 1991, § 10.4 (Eng.); *see also* Zander, *supra* note 15, at 303-11. Police may also continue questioning after assertion of the right to silence. ROYAL COMMISSION ON CRIMINAL JUSTICE: REPORT 56-57 (1993).

117. Zander, *supra* note 16, at 106. *See* PACE, *supra* note 16, at § 58.

118. *See* PACE, *supra* note 15, at § 58.

119. *See* Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, 1991, § 6.6 (Eng.).

120. *Id.* at §§ 6.9-6.11.

play a passive role during interrogation, and seldom terminate questioning.<sup>121</sup>

In addition to the cautions requirements, a number of other interrogation rules exist. All interviews in the police station must be tape-recorded, although interviews that take place elsewhere need not be.<sup>122</sup> After the defendant is formally charged, all questioning must cease unless the police seek information about other offenses.<sup>123</sup> Various rules govern how often the suspect receives breaks, food, and so on.<sup>124</sup> Finally, although trickery is not unknown in English interrogations,<sup>125</sup> English courts have declared that misrepresentation of available evidence and other types of deceit are not permissible.<sup>126</sup> Research suggests that use of such techniques is rare.<sup>127</sup>

Breach of these rules does not necessarily lead to exclusion of the confession, however. If the violation was inadvertent, a solicitor was present at the time, or the violation did not affect the suspect's decision to confess, exclusion is unlikely.<sup>128</sup> On the other hand, complete failure to caution a suspect and wrongful refusal of access to legal advice are substantial breaches that lead to exclusion. Intentional failure to abide by the recording requirements usually leads to exclusion as well.<sup>129</sup>

Prior to June, 2000, French suspects were accorded very little protection during interrogation. Although they had a right to remain silent, they were not told of that right, and were not entitled to consult counsel during the first 20 hours of detention.<sup>130</sup> Today they are informed of the right to silence and to consult counsel during detention.<sup>131</sup> Further, records are kept of these various warnings, as well as of the length of interrogation.<sup>132</sup> However, suspects are still not entitled to have counsel present during interrogation.<sup>133</sup> After charging, any interrogation that

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121. See John Baldwin, *Legal Advice in the Police Station*, 142 NEW L.J. 1762, 1763 (1992).

122. See PACE, *supra* note 15, § 60.

123. See Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, 1991, § 11.4 (Eng.).

124. *Id.* at §§ 8.6, 12.2.

125. See Mark Berger, *Legislating Confession Law in Great Britain: A Statutory Approach to Police Interrogations*, 24 U. MICH. J.L. REFORM 1, 23-24 (1990).

126. Feldman, *supra* note 31, at 111-12.

127. See John Baldwin, *Police Interview Techniques: Establishing Truth or Proof?*, 33 BRIT. J. CRIMINOLOGY 325, 331 n.27 (1993); see also, *R. v. Kirk*, 1 W.L.R. 567 (C.A. 2000) (excluding confession obtained after police misled suspect about seriousness of charge).

128. Feldman, *supra* note 31, at 113-14.

129. See *id.*; see also Bradley, *supra* note 14, at 188-89.

130. Frase, *supra* note 18, at 158-59.

131. CPP, *supra* note 18, at § 63-1. French law was amended in June, 2000 to require these warnings. *Id.*

132. Frase, *supra* note 18, at 159.

133. *Id.*

takes place will usually be conducted by a judge (who is permitted to tell the suspect that silence will be used against him), but further police interrogation is not barred. The defendant has a right to counsel during these post-charge sessions with the police, unless he waives it or the lawyer fails to appear.<sup>134</sup> Exclusion for violations of these rules is rare, but has occurred when counsel was not provided after the 20-hour period, the 48-hour rule was violated, or detention rights were not recited.<sup>135</sup>

In Germany, as in England, suspects must be informed of the right to remain silent and the subject matter of the investigation whenever they are the focus of an investigation.<sup>136</sup> Police must also inform suspects of their right to consult a defense attorney prior to interrogation.<sup>137</sup> However, suspects have no right to counsel *during* interrogation and the state need not provide one for them if they are indigent. Furthermore, German courts routinely admit evidence obtained during "informal" interviews that take place before the administration of warnings, apparently on the ground that the interviewees are not treated like suspects during these conversations.<sup>138</sup> If the suspect indicates a desire to remain silent, police may continue to question the suspect and can inform him of the disadvantages of remaining silent.<sup>139</sup> Formal charging does not change these rules; police may continue interrogation.

German courts have also developed special rules with respect to use of deception. Affirmative misrepresentation is barred, and misimpressions about the law must also be corrected.<sup>140</sup> Although undercover work is permitted under some circumstances, questioning by undercover agents in jail is prohibited, on the ground it violates the rules of detention.<sup>141</sup>

With respect to sanctions, exclusion is mandated when the police fail to advise of the right to silence or counsel, unless the person is shown to have already known of these rights.<sup>142</sup> Additionally, German courts exclude confessions when police use certain techniques, such as hypnosis or illegal promises, regardless of whether the resulting confession is co-

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134. *Id.* at 160.

135. *Id.* at 161–62. JEAN PRADEL, *PROCEDURE PENALE* 398 (9th ed. 1997).

136. CCP, *supra* note 21, at § 136.

137. *Id.*

138. *See* Weigend, *supra* note 21, at 200–01.

139. *Id.* at 201–02. If, on the other hand, the suspect requests counsel, police must stop questioning unless the suspect "expressly declares" a willingness to continue. *See* Stephen C. Thaman, *Miranda in Comparative Law*, 45 ST. LOUIS U. L.J. 581, 602 (2001).

140. *See* Weigend, *supra* note 21, at 202–03.

141. Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT'L & COMP. L. REV. 317, 333, 336–37 (1995); CCP, *supra* note 21, at § 136a.

142. Weigend, *supra* note 21, at 204; Bradley, *supra* note 14, at 215.

erced.<sup>143</sup> Exclusion for violation of other rules, such as those banning deception, may depend upon the seriousness of the case and the importance of the evidence.<sup>144</sup> Further, the fruits of illegally obtained confessions, even those that are coerced, need not be excluded.<sup>145</sup>

### C. An Empirical Analysis of the Differences

There are at least three independent reasons for telling a suspect he has a right to remain silent when police attempt to interrogate him. The *Miranda* Court reasoned that knowledge of the right and the ability to exercise it in unfettered fashion counteracts the "compulsion inherent in custodial surroundings."<sup>146</sup> The assurance of silence also lets the guilty defendant know that he is not confronted by the "cruel trilemma" of choosing between self-accusation, fabrication or some type of sanction for silence.<sup>147</sup> Finally, the right to silence warning reminds the *police* that they may not resort to the inquisitorial practice of relying on the defendant for their information. The warning thus also protects the innocent, who otherwise might be subjected to prolonged interrogation by officers accustomed to depending upon confessions as their main source of evidence. As Dean Wigmore put it, "[i]f there is a right to an answer, there soon seems to be a right to the expected answer—that is, to a confession of guilt."<sup>148</sup>

For the same sorts of reasons, the *Miranda* Court believed that suspects are entitled to counsel during interrogation and to be told of that right. Without counsel present, suspects might become confused, on their own or with help from the police, about the scope of their right to silence. They also need help assessing the advisability of confessing. Finally, of course, counsel's presence should alleviate the coercive atmosphere of the stationhouse.<sup>149</sup>

*Miranda* and its progeny implement these goals only imperfectly, however. The suspect is not told that he has a right to terminate questioning at any time. Furthermore, the suspect can waive the rights to silence and counsel relatively easily; indeed, as indicated above, even a waiver obtained through trickery is valid, if it is not "coerced." Finally,

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143. CCP, *supra* note 21, at § 136a.

144. See Federal Court of Appeals, 3d *Senat* (panel), decision of April 9, 1986 (BGHSt 34, 29) (excluding statements obtained by deception but reserving whether different result would be required if resolution of serious accusation could only be achieved by means of proof not permitted by CCP).

145. Weigend, *supra* note 21, at 203–04.

146. *Miranda v. Arizona*, 384 U.S. 436, 458 (1966).

147. See *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

148. JOHN WIGMORE, ON EVIDENCE 309 (3d ed. 1960).

149. See *Miranda*, 384 U.S. at 466 ("[Counsel's] presence would insure that statements made in the government-established atmosphere are not the product of compulsion.").



the suspect is not told that statements made in response to illegal questioning can still be used for impeachment purposes, or that the fruits of such statements are admissible.

Despite the many loopholes in the *Miranda* regime, it appears to control certain facets of the interrogation process better than either English or German law, and clearly places more restrictions on police questioning than French law. In England, police may tell the suspect that silence may be used against him, an action that is strictly forbidden in the United States on the ground that it would eviscerate the right to silence. In France, questioning may continue after a request for counsel, again something American law prohibits unless the defendant reinitiates, on the theory that invocation of the right to counsel indicates the defendant has decided he cannot face the police alone.<sup>150</sup> In France and Germany, police may bar counsel from the interrogation, again in contrast to United States law. Finally, illegally obtained incriminating statements are excluded more frequently in the United States, where good faith failure to give warnings is not excusable, and verbal fruits of coerced interrogations are always excluded.<sup>151</sup>

On the other hand, England and Germany, and perhaps France, put more limitations on the use of trickery or, as Professor Vrij puts it, on "American-style" questioning.<sup>152</sup> While American courts focus on whether interrogation techniques are "coercive," and often find that trickery is not, European law appears to be less fixated on coercion per se and more focused on the propriety of police conduct. Furthermore, the taping requirement in England, designed to provide accurate information about the interrogation process, clearly exceeds American constitutional requirements. Finally, unlike English and French law, American constitutional law neither imposes finite time limits on interrogation sessions nor requires any particular type of record keeping.

These observations about the differences between the various countries raise several empirical issues. The following four issues are arguably the most important. First, does the warnings regime of *Miranda* and its progeny better alleviate coercion than either a no-warnings regime (pre-2000 France) or a quasi-warnings regime where the suspect is told silence may be used against him (England)? Second, what is the impact of "trickery" on suspects? Third, what is the impact of taping on

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150. See *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981) (equating invocation of counsel with "desire to deal with police only through counsel").

151. WHITEBREAD & SLOBOGIN, *supra* note 7, at § 16.05.

152. Albert Vrij, 'We Will Protect Your Wife and Child, But Only If You Confess': Police Interrogations in England and the Netherlands, in *ADVERSARIAL V. INQUISITORIAL TECHNIQUES: PSYCHOLOGICAL PERSPECTIVES ON CRIMINAL JUSTICE SYSTEMS* 8 (Peter J. Koppel & Stephen D. Penrod eds., in press 2002) (manuscript on file with author).

suspect and police behavior? Finally, what is the “cost” of the *Miranda* regime, especially in terms of lost convictions?

Each question poses empirical difficulties. The research tentatively suggests, however, that the *Miranda* regime better protects against compelled statements than either a no-warnings or quasi-warning approach, while exacting a relatively small cost on crime control. The research also suggests that trickery is an effective way of obtaining confessions and that taping increases police ability to obtain incriminating statements. Although most of these studies originated in the United States, research from England is also occasionally noted in the following discussion.

*Coercion with and without Miranda.* No easy way of quantifying “coercion” in the interrogation context exists because the concept is so difficult to define and because, even if defined uniformly, its subjective nature makes measurement challenging. Present research at best provides information that can act as a proxy for assessing coerciveness. Professors Meares and Harcourt have identified three such proxies: knowledge of rights, number of interrogations conducted, and confession rates.<sup>153</sup> This proxy information suggests, but does not prove, that *Miranda* has diminished the coerciveness of police interrogations in the United States.

First, more suspects and more police know of the right to remain silent and right to counsel now than before *Miranda*. Police routinely read suspects their rights,<sup>154</sup> and more than 80% of the population at large are familiar with them.<sup>155</sup> If the three rationales for *Miranda* described above are correct, then knowledge of these rights, by itself, should reduce the coercive aspects of interrogation.

Second, evidence suggests that police conduct proportionately fewer interrogations since *Miranda*, which at least one study attributes to *Miranda*’s warning regime.<sup>156</sup> If that conclusion is right, then *Miranda* reduces compulsion during interrogation by reducing the opportunity for its occurrence.

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153. Tracy L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 758–768 (2001).

154. See Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 276 (1996).

155. See Samuel Walker, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950–1990*, at 51 (2000); see also Richard A. Leo & George C. Thomas III, *Preface to THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING* at xv (Richard A. Leo & George C. Thomas III eds., 1998) (asserting “[s]chool children are more likely to recognize *Miranda* warnings than the Gettysburg Address”).

156. Paul G. Cassell & Bret S. Hayman, *Police Interrogations in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 854–58 (1996).

Third, a considerable amount of pre/post research indicates that confession rates dropped after *Miranda*, although debate over precisely how much continues. After considering twelve studies and excluding three of them as unreliable, Professor Cassell concluded that the reduction in confessions resulting from *Miranda* averaged 16.1%.<sup>157</sup> Professor Schulhofer, examining the same studies and excluding five of them as unreliable, concluded that *Miranda* reduced the confession rate between 6.7% and 9.1%, and argued further that the reduction may have been as low as 4 to 5% if certain other adjustments were made.<sup>158</sup> Even the lower figures show that *Miranda* has had some effect on the interrogation process.

One might wonder, however, why *Miranda* has not had a greater impact on the confession rate. After all, a rational guilty person who is told that he may remain silent and consult an attorney would presumably decide not to confess, at least until he had met with an attorney. At least three motivations for talking under such circumstances have been suggested: a belief that confession will bring a better deal, the stress that accompanies detention, and the natural urge to talk.<sup>159</sup> All three of these phenomena may lead to a confession without police prompting. On the other hand, police can also take advantage of these vulnerabilities, which leads to the next topic.

*Trickery and Confessions.* As used here, trickery consists of an outright fabrication or a failure to correct a misimpression that is not "coercive," as defined by the U.S. Supreme Court. For comparative purposes, understanding the impact of such deceitful techniques is most important, because they are allowed in the United States but limited to varying degrees in European countries. Examples of trickery, already noted, include false statements that a co-defendant confessed or that certain evidence was found at the scene of the crime, and continued questioning after the suspect has demonstrated he believes oral statements are inadmissible. Showing false sympathy for the suspect, a technique widely recommended in American police manuals,<sup>160</sup> would also constitute trickery under this definition. In contrast, telling the suspect that he does not have a right to remain silent or a right to

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157. Paul G. Cassell, *Miranda's Costs: An Empirical Reassessment*, 90 Nw. U. L. REV. 387, 395-417 (1996).

158. Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw. U. L. REV. 500, 539-41 (1996).

159. Vrij, *supra* note 152, at 2. Despite *Miranda*, physical coercion still occasionally occurs and may also induce a suspect's confession. See AMNESTY INTERNATIONAL, UNITED STATES: A BRIEFING FOR THE UN COMMITTEE ON TORTURE 14-15 (2000) (detailing recent use of torture during interrogation in the United States).

160. See FRED E. INBAU, JOHN REID & JOSEPH P. BUCKLEY, CRIMINAL INTERROGATION AND CONFESSIONS 96-99 (3d ed. 1986).

counsel—in other words, lies about Fifth Amendment law—would not be permissible, because such statements recreate the coercive atmosphere the warnings are designed to diminish. Additionally, lies that are tantamount to threats—for instance, a false statement that the suspect's spouse will be detained or harmed if a confession is not forthcoming—are clearly coercive in the due process sense and should not be viewed as “American-style” questioning.<sup>161</sup>

Observational research suggests that trickery, so defined, can be very effective at obtaining confessions. Professor Leo found in his study of 182 interrogations that the only variables significantly related to a successful interrogation are the number of psychological tactics interrogators employ and the length of the interrogation.<sup>162</sup> In another article, he describes several successful trickery techniques; foremost among these strategies are the creation of a relaxed, friendly atmosphere, de-emphasis of the warnings' importance, and persuading the suspect that talking is in his legal interest.<sup>163</sup> Even more recently, in an article tellingly entitled “Adapting to *Miranda*,” Professor Leo, along with Professor White, described a number of other ways in which the police work around *Miranda*'s strictures.<sup>164</sup>

This research suggests why *Miranda* has not caused confession rates to fall more precipitously. In the wake of that decision, police may have abandoned their most coercive techniques, but at the same time devised more subtle ways of obtaining confessions. What we do not know is whether or how often such trickery induces innocent persons to confess. Although many false confessions have been documented,<sup>165</sup> most were obtained under conditions and in response to police techniques more “coercive” than the type of trickery at issue here.<sup>166</sup>

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161. Cf. Vrij, *supra* note 152, at 10 (suggesting the United States permits such questioning).

162. Leo, *supra* note 154, at 275.

163. Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 660–65 (1996).

164. Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with Obstacles Posed by Miranda*, 84 MINN. L. REV. 397 (1999) (describing techniques ranging from manufacturing of evidence to the “pretended friend” technique).

165. See generally, Saul M. Kassir, *The Psychology of Confession Evidence*, 52 AM. PSYCHOL. 221 (1997) (documenting dangers of confession evidence); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998) (discussing falsely induced confessions).

166. See Laurie Magid, *Deceptive Police Interrogation Practices: How Far is Too Far?*, 99 MICH. L. REV. 1168, 1194 (2001) (“[T]he studies on false confessions fail to prove, or even strongly to suggest, that a significant number of persons have been wrongly convicted because of false confessions obtained by police using deceptive interrogation techniques.”).

*The Effect of Taping.* A National Institute of Justice survey provides the most detailed information on the American experience with taping interrogations. That survey found that, although not constitutionally required to do so, at least one-sixth of American police and sheriff's departments' audio or videotape interrogations on a mandatory or discretionary basis.<sup>167</sup> Despite initial reluctance, most police officers eventually found that taping improved interrogation practices, facilitated the introduction of confessions into evidence, and made those confessions more convincing in court. From this account, one might conclude that taping *improves* confession and conviction rates. In fact 59.8% of the departments surveyed stated that taping increased the amount of incriminating information obtained from suspects.<sup>168</sup> Reports on the English experience similarly indicate that, at worst, taping has not diminished the confession rate.<sup>169</sup> At the same time, audio or videotaping would presumably reduce egregious police behavior (including illegal trickery techniques) while the tape is running.

Of course, the tape is not always running. As noted above, in the United States taping is discretionary in many of the departments that use it. In England, the taping requirement only applies to interviews in the stationhouse. Many interviews in England take place in the field, a practice that taping may actually encourage.<sup>170</sup>

*Costs of Miranda.* As with the Fourth Amendment exclusionary rule, important to any assessment of *Miranda's* impact is its effect on law enforcement's ability to solve crime. The previously recited data on the drop in confessions post-*Miranda* may furnish some indirect information on that score. But the conclusion that *Miranda* reduces confession rates does not dictate the conclusion that it also reduces conviction rates. Police unable to get a confession might resort to other investigative techniques to obtain the evidence necessary for conviction. Indeed, that is one of the rationales underlying *Miranda*—the hope that its warnings requirement will sway police from their tendency to engage in inquisitorial practices.

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167. WILLIAM GELLER, POLICE VIDEOTAPING OF SUSPECT INTERROGATIONS AND CONFESSIONS: A PRELIMINARY EXAMINATION OF ISSUES AND PRACTICES (1993).

168. *Id.* at 54, 107-49.

169. See generally, Albert Vrij, *Interviewing Suspects*, in PSYCHOLOGY AND LAW: TRUTHFULNESS, ACCURACY AND CREDIBILITY 133-35 (A. Mermon, Albert Vrij, & R. Bull eds., 1998) (discussing protections offered by taping confessions).

170. Stephen J. Moston & Geoffrey M. Stephenson, *Helping the Police with their Enquiries Outside the Police Station*, in SUSPICION AND SILENCE: THE RIGHT TO SILENCE IN CRIMINAL INVESTIGATIONS 50-65 (D. Morgan & G. M. Stephenson eds., 1994); Michael McConville, *Video Taping Interrogations: Police Behaviour On and Off Camera*, 1992 CRIM. L. REV. 532, 546 (1992).

Unfortunately, a clear empirical picture of *Miranda*'s effect on conviction rates does not exist. Professors Cassell and Schulhofer have debated this issue as well. Combining his estimate that *Miranda* caused a 16.1% drop in confessions with an estimate that confessions are needed to convict in 24% of cases in which interrogations occur, Cassell concluded that *Miranda* caused a lost conviction in 3.8% of cases in which police resorted to interrogation.<sup>171</sup> Schulhofer, using his lower estimate of the reduction in confessions caused by *Miranda*, as well as a lower figure for the necessity of confessions (19%), concluded that, at most, *Miranda* brought about a 1.1% drop in convictions.<sup>172</sup>

Cassell also attempted to calculate *Miranda*'s effect on clearance rates, which report the number of crimes solved (through conviction or otherwise). He initially suggested that *Miranda* caused a drop in clearance rates from approximately 60% to approximately 45%,<sup>173</sup> a conclusion Schulhofer disputed on several grounds.<sup>174</sup> Later, using a more sophisticated regression analysis, Cassell and Fowles concluded that *Miranda* produced a 6.7% drop in the clearance rate for total violent crimes, and a 2.3% drop in the clearance rate for total property crimes.<sup>175</sup> Applying slightly different statistical methods to the same data, Professor Donohue agreed that around 1966, when *Miranda* was decided, there was a statistically significant drop in clearance rates with regard to larceny and total violent crimes, but concluded that no such drop occurred in connection with other property crimes or for the individual crimes comprising the category of total violent crimes (murder, robbery, rape, and assault). He also pointed out Cassell's failure to account for the impact of unquantifiable variables that might cause reduced clearance rates, such as changes in police reporting of crime.<sup>176</sup>

Other possible costs of *Miranda* can be imagined. Perhaps, for instance, *Miranda* distracts reviewing courts from the primary goal of inhibiting coercive police techniques. Some evidence suggests that, once police show they administered warnings to a suspect, further judicial

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171. Cassell, *supra* note 157, at 484.

172. Schulhofer, *supra* note 158, at 545.

173. Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 NW. U. L. REV. 1084, 1089 (1996).

174. Stephen Schulhofer, *Miranda and Clearance Rates*, 91 NW. U. L. REV. 278, 281-82 (1996).

175. Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1082 (1998).

176. John J. Donohue, *Did Miranda Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147 (1998). One other commentator has concluded that Cassell's attempt to deduce *Miranda*'s effect through clearance rate analysis is impossible. Floyd Feeney, *Police Clearances: A Poor Way to Measure the Impact of Miranda on the Police*, 32 RUTGERS L.J. 1 (2000).

inquiry into police actions is sometimes cursory.<sup>177</sup> Similarly, the police themselves may be less diligent about regulating their behavior in a *Miranda* regime, thinking that their legal obligations end after they give the warnings. These hypotheses, however, remain largely speculative. A more obvious cost is that *Miranda* requires the government to provide counsel to indigent defendants at a much earlier stage in the criminal process than was previously the case.

#### D. Implications of the Research

This summary of the research suggests that, compared to a regime in which no warnings are given, such as existed in France prior to 2000, the *Miranda* regime alleviates the coercive aspects of the interrogation process. The *Miranda* regime probably also marginally compromises police ability to solve crimes compared to a no-warnings system. But *Miranda* appears to have reduced inappropriate pressure to confess in a large number of cases without sacrificing an equivalent number of convictions.

A comparison of the warnings regime that exists in the United States to the quasi-warnings regime in England is harder to make, because the latter approach at least apprizes the suspect of the rights to silence and counsel, albeit in a fashion that significantly diminishes their worth. In theory, the quasi-warnings regime is closer to a no-warnings regime than a warnings regime. Statistics on confession rates, however, suggest the quasi-warnings approach may not be much different from *Miranda*, at least as the latter approach is implemented in the United States. Professor Thomas, surveying a number of American studies, estimated the average post-*Miranda* confession rate to be 50% to 55%,<sup>178</sup> while Professor Leo found a 64% confession rate among his sample,<sup>179</sup> and Cassell concluded the rate to be much lower than 50%.<sup>180</sup> To compare those rates with England's, it is instructive to look at pre-PACE data (when no cautions were required), data from 1986 to 1994 (when cautions were required and adverse inferences could not be drawn) and post-1994 data (the regime described above). Before cautions were required in England,

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177. George C. Thomas III, *The End of the Road for Miranda v. Arizona?: On the History and the Future of the Rules for Police Interrogation*, 37 AM. CRIM. L. REV. 1, 18 (2000) ("Once a suspect waives *Miranda* (and most do) the routinized *Miranda* ritual lulls judges into admitting confessions with little inquiry into voluntariness.").

178. George C. Thomas III, *Dialogue on Miranda—Plain Talk About the Miranda Empirical Debate: A "Steady-State" Theory of Confessions*, 43 UCLA L. REV. 933, 958 (1996).

179. Leo, *supra* note 154, at 300–01.

180. Cassell, *supra* note 157, at 459.

confession rates were between 65% and 75%.<sup>181</sup> After 1986, they fell significantly to between 40% and 50%.<sup>182</sup> After 1994, the one reported study indicated that the confession rate rose again to 58%.<sup>183</sup>

If the post-1994 confession rates in England are essentially the same as the post-*Miranda* confession rates in the United States, and assuming variables other than legal rules have no effect (an admittedly significant assumption), either the quasi-warnings used in England are not as compulsive as earlier conjectured or the greater use of trickery in the United States makes up the difference. The reasons for rejecting the first explanation (i.e., the cautions in England essentially tell the suspect he should not exercise his right to remain silent) and for accepting the second explanation (i.e., trickery has been a successful interrogation technique) have already been advanced.<sup>184</sup> If one accepts those reasons, a crucial normative question arises: Despite the likelihood that such a move would reduce the confession rate significantly, should trickery be prohibited (at the same time, perhaps, that taping is mandated to ensure that such a prohibition is followed)?

This is not the place to answer this question in full. I have recently advanced the argument that trickery that is not coercive may be permissible during custodial interrogation (although I would define coerciveness more broadly than the Court). Based on the work of moral philosopher Sissela Bok, I contended that if the police have probable cause to believe in the suspect's guilt (which is normally the case when custodial interrogation occurs), they may treat him as an "enemy," a situation in which Bok, normally hostile to deceit, would permit it.<sup>185</sup> However, others disagree with this position, contending that it distorts Bok's premises and undermines the trust that is essential to good police work and to a well-functioning society.<sup>186</sup> Inter-national differences might also affect this analysis. Perhaps Americans, whose "rampant individualism"<sup>187</sup> helped create an adversarial process which more than

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181. Gordon Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 HASTINGS L.J. 1, 127 (1986).

182. GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS: CONFESSIONS AND TESTIMONY* 324 (1992); Baldwin, *supra* note 127, at 335 (examining confession rates between 1989-90).

183. Gordon Van Kessel, *European Perspectives on the Accused as a Source of Testimonial Evidence*, 100 W. VA. L. REV. 799, 829 n.129 (1998).

184. See *supra*, notes 160-166, and accompanying text.

185. Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 ORE. L. REV. 775 (1997).

186. See Margie Paris, *Lying to Ourselves*, 76 ORE. L. REV. 817 (1997) and Robert Mosteller, *Moderating Investigative Lies by Disclosure and Documentation*, 76 ORE. L. REV. 833 (1997).

187. David H. Bayley, *Ironies of Law Enforcement*, in 3 POLICE & LAW ENFORCEMENT, 15, 19 (Robert J. Homant & Daniel B. Kennedy eds., 1980).



occasionally leads to distortions of truth, are more comfortable with trickery than Europeans and thus more willing to endorse deceitful techniques.

Cultural and legal differences might also inform an analysis of whether a quasi-warnings regime is fundamentally unfair or unduly coercive. For historical reasons, European legal culture may be less bothered by a greater level of police coercion. Further, given the adjudicatory procedures followed on the Continent (although not in England, where the quasi-regime is most strongly ensconced), police coercion may be relatively irrelevant to the suspect. In both France and Germany, defendants are expected to testify at their trial and reveal information relevant to sentencing as well as guilt, because the same trier of fact decides both issues after a unitary trial. In addition, in both countries early cooperation guarantees lighter sentences.<sup>188</sup> This combination of pressures may be far more effective at motivating suspects to talk than anything the police do.

### CONCLUSION

On paper, American search and seizure rules that express a preference for warrants and require exclusion when illegality occurs provide greater protection of privacy than do European search and seizure rules. Likewise, in theory, the *Miranda* warnings regime protects autonomy to a greater extent than European interrogation rules. In practice, the American rules are not as potent as American courts and society seem to believe, in part because of legal loopholes, and in part because the police work around them. Consequently, the impact of American regulation of police investigation does not differ exceedingly from the impact of the less restrictive European regimes. For the same reason, the American rules are less "costly" to law enforcement than some contend.

Borrowing from both American and European traditions, consider briefly various alternative regulatory systems that might better regulate the police without destroying their investigatory effectiveness. In the search and seizure context, warrants might be required whenever possible, on the ground that their *ex ante* nature eliminates judicial hindsight bias, foils police who want to lie, and improves the standard of care exercised by police who conduct searches. However, to alleviate the burden of consulting a magistrate, warrants could be issued (as they sometimes are in France and Germany) by prosecutors, who are more involved in

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188. Van Kessel, *supra* note 183, at 833–35 (describing components of European system).

the investigation process and more accessible. To reduce any tendency of these individuals to favor the police, evidence obtained as a result of an invalid warrant would be excluded, a sanction that has a much more direct effect on prosecutors than it does on either police or magistrates.

Alternatively, one could imagine a system with relaxed substantive search and seizure rules similar to those in European countries, but with a meaningful damages sanction requiring individual officers to pay for bad faith violations and the police department to pay for all other violations. Such a regime might deter officers more effectively than the exclusionary rule, while simultaneously encouraging them to seek warrants as insulation from liability. It would also create a stronger incentive for departments to develop serious training programs to reduce their officers' ignorant mistakes. Exclusion would not need to be a remedy, although a German-style rule that suppressed evidence obtained through particularly intrusive or offensive police actions might nicely supplement such a regime.<sup>189</sup>

In the interrogation context, the United States might combine a *Miranda* warnings requirement with the requirement that *all* interrogations be taped, an evidentiary ban on statements not on tape (about which the suspect must be told), and rules governing the length of interrogation and related matters. At the same time, police could be permitted to engage in trickery that is not coercive, a category that would become better defined as courts examine these techniques via audio or videotape. Alternatively, as some suggest,<sup>190</sup> the United States could abolish custodial interrogation or render it irrelevant by providing that the only admissible incriminating statements are those obtained by a magistrate, who would conduct questioning immediately after arrest with defense counsel present. To facilitate information gathering, the magistrate would be allowed to advise the suspect that silence might increase suspicion, a process which is similar to the judicial questioning procedure that takes place in France (except that France also accepts statements made during police interrogation). Although this procedure undermines the right to remain silent, the fact that it occurs in open court and is conducted with counsel present makes it relatively uncoercive as compared to the usual stationhouse encounter.

Finally, any proposals adopted should be codified in legislation. The disadvantages of relying on courts, which must wait for an appropriate case and may announce only those rules suggested by the facts of that

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189. Slobogin, *supra* note 38, at 440–41.

190. *E.g.*, Paul G. Kauper, *Judicial Examination of the Accused: A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932).

case, are well documented.<sup>191</sup> The European codes of criminal procedure are far superior to the judicially created American rules in terms of comprehensiveness and clarity.

These concluding comments are offered merely as food for thought. One benefit of comparative analysis is that it renders proposals that seem radical from a domestic viewpoint less so because of foreign analogues. More comparative and empirical work must be done, however, before such proposals can be advanced with confidence.

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191. See FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION, *supra* note 19, at 62–87 (1993) (detailing reasons Supreme Court is ill-suited for developing rules of criminal procedure).