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THE EMERGING INTERNATIONAL CONSENSUS AS TO CRIMINAL PROCEDURE RULES

Craig M. Bradley*

INTRODUCTION

The United States Supreme Court has developed criminal procedure rules that even the Court's fondest admirers must admit are unclear. Those rules are backed up with a policy of mandatory exclusion of evidence whenever a violation is found. It is hardly surprising that this system causes great consternation among both liberals and conservatives. Liberals criticize the courts, with ample justification, for ignoring the rules (or, in the case of the Supreme Court, watering them down) in order to avoid the suppression of evidence. Conservatives criticize the courts, again with ample justification, for excluding evidence in cases of technical and unimportant violations by the police, or, even worse, in cases where, as one New York prosecutor put it, "if the Chief Justice were riding in the back of the police car"¹ he could not have definitively told the police what to do.

American conservatives, in particular, tend to feel that U.S. lawmakers should give greater consideration to the practices of other countries. This is because they believe that the U.S. rules are much more pro-defendant than those of other countries, and that comparative study supports the view that U.S. rules should be revised to provide greater leeway for the police. Thus, former Chief Justice Burger declared that the exclusionary rule was "unique to American

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I also wish to thank the Alexander von Humboldt Foundation for supporting my research in Germany in 1982 and 1992 and the Fulbright Foundation for supporting my research in Australia in 1989.

1. Harvey B. Levinson, *Judges Can't Agree About Illegal Evidence*, N.Y. TIMES, Feb. 2, 1990, at A30.

jurisprudence,"² and Judge Malcolm Wilkey has argued that "one proof of the irrationality of the exclusionary rule is that no other civilized nation in the world has adopted it."³

The most recent, and comprehensive, conservative attack on U.S. criminal procedure has come from the Justice Department's Office of Legal Policy. In a series of papers prepared between 1985 and 1989,⁴ the Department systematically attacked U.S. criminal procedure law as unduly interfering with the "truth-finding" process. The Department referred on numerous occasions to the laws of other countries, and cited my own work on Germany⁵ several times, in an effort to show that the *Miranda* warning requirement, as well as the exclusionary rules for both interrogation and search violations, are aberrational rules that every other country has had the sense to ignore.

The Justice Department's claims about the laws of specific countries will be discussed below. In general, after studying several "continental and commonwealth countries," it concluded that the "systematic exclusion of evidence" due to improper police conduct of searches is "unique to America."⁶ As to confessions, "the critical question in determining the admissibility of statements [in other countries] is likely to be whether they are voluntary or uncoerced . . . not whether the police observed the required procedures."⁷ Moreover, "[e]ven when the warnings are required, their omission need not result in the exclusion of subsequent statements."⁸

This article will demonstrate that these general claims, as well as certain observations about specific countries, were, with one significant exception, substantially wrong when they were written. More importantly, due to significant developments in several countries in the years

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

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

4. Stephen J. Markman, *Foreword: The "Truth in Criminal Justice" Series*, 22 U. MICH. J.L. REF. 425, 430 (1989).

5. Dept. of Justice Office of Legal Policy, *Report to the Attorney General on the Law of Pre-trial Interrogation: Truth in Criminal Justice Report No. 1* (Feb. 12, 1986), reprinted at 22 U. MICH. J.L. REF. 437, 540 nn.306-08 (1989) [hereinafter *Interrogation Report*] (citing Craig M. Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1002, 1049-52 (1983)); Dept. of Justice Office of Legal Policy, *Report to the Attorney General on the Search and Seizure Exclusionary Rule: Truth in Criminal Justice Report No. 2* (Feb. 26, 1986), reprinted at 22 U. MICH. J.L. REF. 573, 620-21 n.125 (1989) [hereinafter *Search Report*] (citing Bradley, *supra* note 5).

6. *Search Report*, *supra* note 5, at 617.

7. *Interrogation Report*, *supra* note 5, at 541.

8. *Id.* at 542.

since those reports came out, they are even more wrong now. That is, not only have the U.S. concepts of pre-interrogation warnings to suspects, a search warrant requirement, and the use of an exclusionary remedy to deter police misconduct been widely adopted, but in many cases other countries have gone *beyond* the U.S. requirements.

However, in one very important respect, no other country has gone as far as the United States. This is the scope of the mandatory exclusionary rule.⁹ In the United States, with only a few exceptions, violation of the constitutional rules laid down by the Supreme Court *always* leads to evidentiary exclusion, regardless of the seriousness of the violation, the impact on the prosecution's case, reasonable police confusion about the rules, or anything else. While mandatory rules are not unknown in other countries, a rule that leaves the exclusionary decision to the discretion of the trial judge is much more the norm. Such a system avoids the cases that are most galling to American conservatives as well as to the American public in general: dangerous criminals going free because of minor, technical errors by the police.¹⁰ Because all of the U.S. rules are constitutionally based, it has been difficult for the Supreme Court to declare that although the police violated the Constitution in a given case, it was a minor mistake.¹¹ If all mistakes are of a constitutional dimension they are, by definition, not "minor."¹² Hence the mandatory rule.

9. *Search Report*, *supra* note 5, at 617. This is probably what the Justice Department meant when it referred to the lack of a "systematic" rule in other countries.

10. This article is not the first time that a non-mandatory rule has been proposed for the United States. The most notable such proposal appears in the American Law Institute's MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 150.3 (statements), 290.2 (seized evidence) (1975), where exclusion is mandated only if a violation of the rules was "substantial" or "otherwise constitutionally required." See also William A. Schroeder, *Detering Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361, 1385 (1981).

11. Harmless error doctrine does not function the same as a discretionary exclusionary rule. Under current U.S. law, trial judges are *required* to exclude evidence *whenever* a Fourth Amendment or *Miranda* violation is found, subject only to the "good faith" exception in search warrant cases, *United States v. Leon*, 468 U.S. 897 (1984), and the "search made pursuant to an unconstitutional statute" exception of *Illinois v. Krull*, 480 U.S. 340 (1987). In the hopefully relatively rare case where the trial judge fails to follow the law, the appellate court may, nevertheless, affirm the conviction on "harmless error" grounds. The burden is on the government to establish that the error did not affect the outcome of the trial. Obviously if the evidence in question was significant to the government's case, it will not be able to make this showing.

By contrast, under a non-mandatory exclusionary rule, the trial judge is *not required* to exclude evidence obtained in violation of the rules, unless the use of the evidence would "bring the system of justice into disrepute" or some other test. The importance of the evidence to the government's case may cut *in favor* of admission in a discretionary exclusion regime, rather than against it, as in the U.S. "harmless error" calculus.

12. The Supreme Court has tried to get around this problem by declaring that the *Miranda* warnings are not really mandated by the Constitution, *Michigan v. Tucker*, 417 U.S. 433 (1974) (but failure to give them nevertheless leads to evidentiary exclusion, though not to exclusion of the "fruits of the poisonous tree"); and by creating a "good faith exception" to the exclusionary rule in the case of a defective search warrant. *Leon*, 468 U.S. 897. Nevertheless, the prevailing

Even from the point of view of a civil libertarian, the mandatory exclusionary rule causes practical problems. First, because rule violations almost always lead to exclusion, the Court has been reluctant to establish rules in areas such as night searches or length and conduct of interrogations, for fear that such rules would simply provide undeserving defendants more opportunities to "beat the rap." Second, the knowledge that finding a violation by the police will lead to automatic exclusion naturally causes courts to be reluctant to declare a violation at all, even when, to a dispassionate observer, such a violation seems clear.¹³ This reluctance, and the hedging and fudging to which it gives rise, inevitably leads to confusion about the meaning of the rule in question.

Until very recently, my study of the criminal procedure of other countries had led me to the conclusion that a discretionary exclusionary rule was, for all practical purposes, a non-exclusionary rule.¹⁴ In other words, a discretionary rule was worthless for deterring anything but the most outrageous behavior by the police. The courts simply were not excluding evidence often enough in cases involving clear, but not egregious, violations to have any impact on ordinary police behavior. In recent years, however, this has begun to change.

This article examines six countries: Australia, Canada, England, France, Germany, and Italy. Of these, all have a code of criminal procedure,¹⁵ all generally require a warrant to search a residence, all require some warnings to suspects prior to interrogation, and all use an exclusionary remedy to back up the rules. Some countries have

view, even on this extremely conservative Supreme Court, is that rule violations automatically lead to exclusion.

13. In a study published in 1988 of search and seizure decisions from nine states, I found that, in 10.3% of the 223 cases studied, appellate courts ruled for the government when, according to the law, they should have ruled for the defendant. Craig M. Bradley, *Are State Courts Enforcing the Fourth Amendment? A preliminary Study*, 77 GEO. L.J. 251, 258 (1988).

This problem with the mandatory exclusionary rule has been noted in other countries that have rejected it. The Australian Law Reform Commission has observed that the mandatory rule "tempts courts to reduce the protection of the substantive search-seizure rules by holding that no illegality has occurred in order to avoid important evidence being excluded." Craig M. Bradley, *Criminal Procedure in the "Land of Oz": Lessons for America*, 81 J. CRIM. L. & CRIMINOLOGY 99, 122 n.142 (1990) (quoting LAW REFORM COMMISSION, REPORT NO. 2 (INTERIM), CRIMINAL INVESTIGATION 140 (1975)).

See generally Schroeder, *supra* note 10, at 1382 n.172 and sources cited therein.

14. *E.g.*, I concluded that "the discretionary rule currently in force in Australia, which is 'often mentioned but rarely acted on,' can hardly be considered an adequate safeguard for civil liberties." Bradley, *Criminal Procedure in the "Land of Oz," supra* note 13, at 122 (footnote omitted).

15. However, the Australian Code applies only to federal authorities. All other countries studied have a nationally applicable code. As I propose in my forthcoming book, *The Failure of the Criminal Procedure Revolution* (U. of Pa. Press, forthcoming 1993), a nationally applicable code is both constitutionally possible and highly desirable in this country.

rules that are more restrictive of the police than the United States; others, notably France, are less restrictive. But the trend, particularly manifested by decisions in just the last three or four years, is in the direction of setting clear and rather restrictive standards for police behavior, especially with respect to interrogations, and backing up those standards with a discretionary, but regularly employed, exclusionary rule.

In contrast to the U.S. system, neither continental nor commonwealth systems declare rules by first finding a constitutional violation in an individual case. Rather, most other countries of which I am aware have a nationally applicable criminal procedure *code*, written, and kept up to date, by a legislatively appointed commission. Such a commission, naturally, is not forced to declare rules case-by-case, but rather tries to anticipate and account for problems in advance.¹⁶ Since the courts do not have to use individual cases to establish rules, they can use them in the more usual way: to interpret existing rules and determine the appropriate remedies for their violation. With increasing frequency, foreign courts are finding that breaches of the codes by police should lead to evidentiary exclusion, but if such a result would be unjust in a particular case it is not required.¹⁷

While the Supreme Court's cooption of this field has essentially eliminated the role of U.S. states as "laboratories" where new ideas can be tested, we can view foreign countries as playing an analogous role. However, we must remember that no other industrialized country has the high level of crime of the United States, nor the same level of racial, ethnic, and economic diversity. Consequently, criminal procedure rules which are effective in Italy or Australia will not necessarily work in the United States. On the other hand, if a certain approach has been accepted or rejected by *most* of the other industrialized countries, it behooves U.S. lawmakers to take heed.¹⁸

16. That such a code, applicable to state and federal authorities alike, should be enacted by the federal government in the United States (and *could* be enacted under our constitutional structure) is the subject of my forthcoming book, *supra* note 15. See discussion *infra* notes 326-27 and accompanying text.

17. Just what the appropriate standard should be for deciding the admissibility of evidence obtained as a result of a rule violation is not a matter as to which there is international consensus, and is left open in this article.

18. It is obviously necessary to evaluate a significant number of countries in order to determine whether a trend is occurring. Consequently, despite my lack of "on the scene" experience with four of the countries discussed and my inability to even read French and Italian, I have undertaken to discuss six countries in this study. I have obtained advice from experts on the criminal law and procedure of all of the countries except Canada, as well as some research assistance in French and Italian law, in addition to relying on secondary sources.

ENGLAND AND WALES¹⁹

According to Bevan and Lidstone, leading commentators on the Police and Criminal Evidence Act 1984,

Before [the Act], the law governing police powers for the investigation of crime was unclear and antiquated. It had developed piecemeal since the establishment of professional police forces in the nineteenth century. Parliament had added fitfully to the few common law principles. . . . This varied and scant law was supplemented by (a) rules of guidance as to the admissibility of confessions provided by the Lord Chief Justice [in consultation with the judiciary]; (b) national administrative guidance in the form of Home Office circulars . . . and (c) local administrative [rules]. The result was patchy legal obligations and powers for the police and local variations in powers A wide-ranging overhaul of the system had been due for many years. New and heavier pressures on the police and a more critical public opinion demanded that the powers of the police be placed on a modern statutory footing.²⁰

Consequently, a Royal Commission (the Phillips Commission) was formed, and in 1981 it issued a report proposing a comprehensive statutory reform of the law of police practices.²¹ After extensive parliamentary debate, the Police and Criminal Evidence Act [PACE] was passed in 1984. The Act contains eight principal parts: I. Powers to Stop and Search; II. Powers of Entry, Search and Seizure; III. Arrest; IV. Detention; V. Questioning and Treatment of Persons by Police; VII. Documentary Evidence in Criminal Proceedings; VIII. Evidence in Criminal Proceedings; IX. Police Complaints and Discipline; plus three other sections devoted to miscellaneous details. The Act is supplemented by Codes of Practice, issued by the Home Office, covering in greater detail such areas as interrogations, identification procedures and searches and seizures of property.

While, not surprisingly, the Act has attracted criticism from both left and right for the substance of its provisions,²² there seems to be general agreement that the legislation successfully "codif[ies] and con-

19. What will be referred to in this discussion as the "English" rules govern England and Wales. Scotland operates under separate rules, embodied in the Criminal Justice Act (Scotland) 1980. Northern Ireland is governed by rules similar to England's, embodied in the Police and Criminal Evidence Act (Northern Ireland) Order 1989, which came into force in Northern Ireland on January 1, 1990.

20. VAUGHAN BEVAN AND KEN LIDSTONE, *THE INVESTIGATION OF CRIME: A GUIDE TO POLICE POWERS* 1 (1991).

21. *Report of the Royal Commission on Criminal Procedure* (1981).

22. Compare Leslie Curtis, *Policing the Streets*, in *THE POLICE: POWERS, PROCEDURES AND PROPRIETIES* 95 (John Benyon & Colin Bourn eds., 1986) (too restrictive of law enforcement) with David Ashby, *Safeguarding the Suspect*, in *THE POLICE: POWERS, PROCEDURES AND PROPRIETIES* 183 (John Benyon & Colin Bourn eds., 1986).

trol[s] an area which lacked clarity and was becoming an increasing scandal.”²³

Since the English Code may serve as a model, in its comprehensiveness and detail (though not necessarily in its specific provisions or its clarity), for a U.S. codification of criminal procedure law,²⁴ its provisions will be considered in greater depth than the statutory provisions of the other countries studied.²⁵

1. *Stop and Search*

PACE provides that a constable may stop and search any person or vehicle upon reasonable grounds for suspecting²⁶ that stolen or prohibited articles (i.e. weapons or instrumentalities of crime) may be found. This power applies in public places and places “accessible to the public,” but not in dwellings or private buildings.²⁷ “Reasonable grounds for suspicion” is the same standard as is required to justify an arrest.²⁸ The Code of Practice specifies that

Whether reasonable grounds for suspicion exist will depend on the circumstances in each case, but there must be some objective basis for it . . . [examples omitted]. Reasonable suspicion can never be supported on the basis of personal factors alone. For example, a person’s colour, age, hairstyle or manner of dress, or the fact that he is known to have a previous conviction for possession of an unlawful article, cannot be used alone or in combination with each other as the sole basis on which to search that person. Nor may it be founded on the basis of stereotyped images of certain persons or groups as more likely to be committing offences.²⁹

The Code of Practice makes it clear that a search in public must

23. Ashby, *supra* note 22, at 188.

24. As previously noted, this is something for which I argue in detail in my forthcoming book, *supra* note 15.

25. The general enthusiasm expressed in this article for the *structure* of the English system should not be read as endorsing the *practices* of British police, whose delicts have led to the creation of another Royal Commission. M. McKeon, *Lawyers Urge Interim Criminal Procedure Reform*, 8 LAW SOCIETY’S GAZETTE 7, 20 (Mar. 20, 1991).

26. The British distinguish between “reasonable grounds for suspecting” which is like the U.S. “reasonable suspicion” standard, and “reasonable grounds to believe” which is “a high standard approaching certainty of belief,” seemingly somewhat stronger than the U.S. “probable cause” standard but, in practice, probably the same. See Police and Criminal Evidence Act §§ 2.03-2.04, *reprinted in* VAUGHAN BEVAN & KEN LIDSTONE, A GUIDE TO THE POLICE AND CRIMINAL EVIDENCE ACT 1984 263 (1986) [hereinafter PACE], for a discussion of the difference.

27. *Id.* § 1. See Richard Stone, *Police Powers after the Act*, in THE POLICE: POWERS, PROCEDURES AND PROPERTIES 53, 54 (John Benyon & Colin Bourn eds., 1986).

28. CODE OF PRACTICE FOR THE EXERCISE BY POLICE OFFICERS OF STATUTORY POWERS OF STOP AND SEARCH § 1.5, in BEVAN & LIDSTONE, A GUIDE TO THE POLICE AND CRIMINAL EVIDENCE ACT 1984 app. at 559 [hereinafter STOP AND SEARCH CODE].

29. *Id.* §§ 1.6-1.7.

be "restricted to superficial examination of the outer clothing,"³⁰ but a more extensive search may occur in a nearby police van or stationhouse if "reasonable grounds" for further searching exist. The time for which a person or vehicle may be detained is limited to what is reasonable to permit such a search to be carried out.³¹ The search is limited by the nature of the suspicion. Thus, a constable who suspects that X has a gun in his coat pocket may search only that pocket.³² Each such search must be recorded and the suspect informed that such a recording will be made.³³ A separate section provides for the stopping of vehicles at roadblocks,³⁴ but otherwise no special provision is made for auto searches.

English law thus differs strikingly from that of the United States. The English do not draw any distinction between frisks and full searches of the person, though the "in public" search is essentially the same as the U.S. "frisk." It is the *location* of the search, rather than the level of suspicion, that determines its intensity. In addition, the right to search a person is limited to fruits and instrumentalities of crime, and does not extend to "mere evidence." The English "search" is thus broader than the U.S. "frisk," which requires a suspicion that the subject be armed and dangerous, but narrower than the U.S. "search," which requires probable cause but may be for any evidence. Moreover, the English search of the person does not flow automatically from an arrest, as in the United States. Rather, it is limited, both as to its inception and its scope, by "reasonable grounds for suspicion."³⁵ However, once the suspect is actually taken to the police station, the custody officer must undertake a full inventory search, as is the practice in the United States.³⁶

In the section of PACE relating to the law of "stop and search," the English have succeeded in spelling out rules that the U.S. Supreme Court has taken thirty years to develop. Moreover, many issues that are still unclear in U.S. law have been resolved by PACE. For example, PACE makes it clear that a person can only be searched in the curtilage of a house if it appears that he does not live there or is not there with the owner's consent.³⁷ A similar restriction applies to

30. *Id.* § 3.5.

31. PACE, *supra* note 26, §§ 2(8)-2(9); Stone, *supra* note 27, at 57.

32. STOP AND SEARCH CODE, *supra* note 28, § 3.3; Stone, *supra* note 27, at 57.

33. PACE, *supra* note 26, § 3; Stone, *supra* note 27, at 57.

34. PACE, *supra* note 26, § 4.

35. *Id.* § 1(3).

36. *Id.* § 54.

37. *Id.* § 1(4).

searches of vehicles on private property.³⁸

Furthermore, nearly twenty-five years after *Terry v. Ohio*³⁹ first authorized investigative stops, it remains unclear in the United States whether a frisk is justified absent evidence that "criminal activity is afoot." That is, can the police frisk someone suspected of carrying a weapon if carrying a weapon is not illegal, and if no independent evidence of criminality exists?⁴⁰ Also, can they stop and/or frisk someone for a non-serious, non-dangerous crime, such as possession of narcotics?⁴¹ A related question is whether, given the requisite suspicion for a stop and frisk, the frisk may occur immediately, or whether the police must attempt to dispel the suspicion before frisking. *Terry* suggests that the latter course is appropriate, though common sense suggests a contrary conclusion. U.S. courts are split.⁴²

PACE resolves these matters easily (though not necessarily correctly) by allowing a stop and search any time a suspect is reasonably believed to possess "stolen or prohibited articles" (which includes weapons and illegal drugs). The Code of Practice makes it clear that "there is no power to stop or detain a person against his will in order to find grounds for a search,"⁴³ but "[t]his Code does not affect the ability of an officer to speak to or question a person [in the absence of reasonable suspicion] without detaining him or exercising any element of compulsion."⁴⁴

Thus, in England, a suspect may be stopped and frisked any time a weapon or contraband is reasonably suspected; there is no requirement of preliminary investigation before the frisk is performed; frisks may not be performed for mere evidence of crime; and forcible stops for investigatory purposes other than frisks are not allowed.⁴⁵

38. *Id.* § 1(5).

39. 392 U.S. 1 (1968).

40. See WAYNE R. LAFAYE, SEARCH AND SEIZURE § 9.4 (a) (2d ed. 1987) (discussing the basis for initiating a frisk).

41. See *id.* § 9.2(c) (discussing disagreement on this point). The case of *Alabama v. White*, 496 U.S. 325 (1990), involving an auto stop to inquire about narcotics possession (which must be justified by the same "reasonable suspicion" as a frisk), suggests that a frisk for possession of narcotics is appropriate.

42. LAFAYE, *supra* note 40, § 9.2(c).

43. STOP AND SEARCH CODE, *supra* note 28, § 2.1.

44. *Id.* § 1, Notes for Guidance 1A.

45. The astute reader may have noticed that the two sections of the *Code of Practice* quoted in this paragraph do not directly support the statement in this sentence that forcible stops are never permitted for investigatory purposes. This illustrates a further advantage of statutes over court decisions. When the code writer has delineated a limited set of circumstances in which a certain action is allowed, it is reasonable to infer that such action is *inappropriate* in other than the defined circumstances. By contrast, when a court declares a course of action appropriate under the facts of a certain case, it is never entirely clear what the rule is under different facts.

2. Entry, Search, and Seizure

PACE provides that

If on [a written] application made by [the police] a justice of the peace is satisfied that there are reasonable grounds for believing (a) that a serious arrestable offence has been committed; and (b) that there is material on premises specified in the application which is likely to be of substantial value (whether by itself or together with other material) . . . and (c) that the material is likely to be relevant evidence; and (d) that it does not consist of or include items subject to legal privilege . . . and (e) any of the conditions specified . . . below applies, [a magistrate] may issue a warrant authorizing a constable to enter and search the premises. [The warrant must specifically identify the place to be searched and, if possible, the person or things to be seized.⁴⁶] . . . The conditions mentioned . . . above are (a) that it is not practicable to communicate with any person entitled to grant entry to the premises . . . (c) that entry to the premises will not be granted unless a warrant is produced; (d) that the purpose of a search may be frustrated or seriously prejudiced unless a constable arriving at the premises can secure immediate entry to them.⁴⁷

Entry may be made without a search warrant to arrest on an arrest warrant, or to arrest without a warrant for certain specified offenses (generally, those punishable by imprisonment of five years or longer⁴⁸), provided the officer has reasonable grounds to believe that the suspect is within.⁴⁹ Such entry may also be made in hot pursuit or for the purpose of "saving life or limb or preventing serious damage to property," or to prevent a breach of peace.⁵⁰

The police may also enter "any premises occupied or controlled" by the arrestee, after an arrest outside, if they have reasonable grounds for believing that evidence of the instant, or related, offenses may be found inside.⁵¹

Unfortunately for purposes of understanding the English law of searches, the above-quoted sections of PACE are not the only sources of searching authority. Rather, in this area, PACE supplements previous laws, in particular the Theft Act 1968 and the Misuse of Drugs Act 1971, which already authorized search warrants for certain items (generally, fruits and instrumentalities of drug and theft crimes, as opposed to "mere evidence").⁵² PACE extended the searching authority

This is true even if the court has attempted to extend the rule to other, hypothetical cases, for such an extension can always be dismissed as dictum.

46. PACE, *supra* note 26, § 15.

47. *Id.* § 8.

48. *Id.* § 24.

49. *Id.* § 17.

50. *Id.* §§ 17(1)(d)-17(1)(e), 17(6).

51. *Id.* § 18(1).

52. *E.g.*, the Theft Act, 1968 ch. 60, § 26(1) (Eng.) provides that, upon reasonable cause

to "mere evidence" in cases of "serious arrestable offense" (i.e. the most serious felonies, such as murder, rape, kidnapping and other offenses leading to "serious injury to any person" or "serious financial loss")⁵³. Accordingly, searches for some items, in particular narcotics and stolen property, are not subject to the same restrictions as searches under PACE for evidence of "serious arrestable offenses." In any event, as Bevan and Lidstone report, the great majority of searches in England are warrantless, usually through consent (32%), or incident to arrest (55%). Twelve percent of searches are by magistrate's warrant.⁵⁴

Again, this differs from U.S. law in a number of ways. In order to obtain a search warrant under PACE, British police must show, in addition to reasonable grounds, essentially that exigent circumstances require a non-consensual entry. Furthermore, searches of premises are limited to *serious* arrestable offenses (and for drugs and stolen property under other statutes) and cannot be performed to look for privileged material. A warrantless entry apparently may not be made because of a belief that evidence is about to be destroyed.⁵⁵ None of these limitations is present in U.S. law.

The British allow a search of premises incident to arrest, even when the suspect is not arrested on the premises.⁵⁶ Moreover, the search incident to arrest is not limited to the "immediate vicinity" of the arrest when the suspect is arrested inside, as in *Chimel v. California*.⁵⁷ On the other hand, searches of premises incident to arrest may only be performed on "reasonable grounds to believe," rather than automatically as in the United States.

3. Consent Searches

The Code of Practice provides that consent to search *premises* must, if practicable, be obtained in writing after the occupant has been informed of his right to refuse consent and that anything seized may

shown, a justice of the peace may issue a search warrant to search for and seize stolen goods. If the suspect has been convicted of a theft offense within the last 5 years, a police superintendent may issue such a warrant. *Id.* § 26 (2).

53. PACE, *supra* note 26, § 116.

54. See VAUGHAN BEVAN & KEN LIDSTONE, A GUIDE TO THE POLICE AND CRIMINAL EVIDENCE ACT 1984 73 (1986).

55. The reference to "preventing serious damage to property" quite clearly refers to the protective, rather than the evidence gathering, function of the police. For examples of cases in which the police may enter under this section, see BEVAN AND LIDSTONE, *supra* note 26, at 74-75.

56. U.S. law is to the contrary. *Vale v. Louisiana*, 399 U.S. 30 (1970).

57. PACE, *supra* note 26, § 4.16.

be used in evidence.⁵⁸ This offers substantially more protection than does U.S. law, where the lax rules of *Schneekloth v. Bustamonte*⁵⁹ concerning consent searches provide police with a major loophole to avoid the sometimes too stringent, and always confusing, Fourth Amendment requirements. Despite the stricter English provisions, consent searches, as noted above, remain quite common in England.

By contrast, consents to search the person need not be preceded by warnings, and need not be in writing. Moreover, the Code requirements for making a record of the search do not apply. The only restraint is that "the officer should always make it clear that he is seeking the co-operation of the person concerned."⁶⁰

4. Arrest and Detention

Arrests need only be based on "reasonable grounds for suspicion" and need not be by warrant.⁶¹ The arrestee's person may be searched only if "the constable has reasonable grounds for believing that the arrested person may present a danger to himself or others,"⁶² or that he possesses something "which he might use to . . . escape" or "which might be evidence relating to an[y] offence."⁶³ As discussed above, the arrest also conveys the power, but only upon reasonable grounds for belief (i.e. probable cause), "to enter and search any premises in which [the suspect] was when arrested or immediately before he was arrested for evidence relating to the offence for which he [was] arrested."⁶⁴

After arrest, a "custody officer" at each station, of the rank of sergeant or above, who is independent of the investigation, must determine if there is sufficient evidence to charge the suspect⁶⁵ and perform a full inventory search.⁶⁶ If there are not sufficient grounds to hold him, the suspect must be released. An arrestee may not be held longer than 24 hours after arrival at the police station without being

58. CODE OF PRACTICE FOR THE SEARCHING OF PREMISES BY POLICE OFFICERS § 4, in MICHAEL ZANDER, *THE POLICE AND CRIMINAL EVIDENCE ACT 1984* 381 (2d ed. 1990).

59. 412 U.S. 218 (1973).

60. STOP AND SEARCH CODE, *supra* note 28, Notes for Guidance 1D. The U.S. rule is that "[s]o long as a reasonable person would feel free 'to disregard the police and go about his business,' the encounter is consensual and no reasonable suspicion is required." *Florida v. Bostick*, 111 S. Ct. 2382, 2386 (1991). The Court in *Bostick* held that the fact that respondent did not feel free to leave the bus on which the police sought to question him did not render the police conduct coercive. *Id.*

61. PACE, *supra* note 26, § 24(4).

62. *Id.* § 32(1).

63. *Id.* §§ 32(2), 32(5).

64. *Id.* § 32(2)(b).

65. *Id.* § 37(1).

66. *Id.* § 54.

charged.⁶⁷ However, he may be held an additional 12 hours if the superintendant in charge of the station determines that this is necessary "to secure or preserve evidence relating to the offence or to obtain such evidence by questioning him," *and* that the offense is a "serious arrestable offence," *and* that "the investigation is being conducted diligently and expeditiously."⁶⁸ A magistrate's court may, after a hearing where the suspect is represented by counsel, authorize detention for *another* 36 hours where the above criteria are satisfied.⁶⁹ This warrant may be extended by the magistrate's court for a total detention not to exceed 96 hours.⁷⁰ A suspect has a right not to be held incommunicado during this period and to consult with counsel,⁷¹ subject to certain exceptions discussed below.

The Codes of Practice also provide detailed rules for the conditions of detention, medical treatment of suspects, special treatment of juveniles and the mentally ill, and so forth.⁷² This area represents the most glaring omission in the U.S. system. While in 1957, in *Mallory v. United States*,⁷³ the Supreme Court held that an extended interrogation (7 hours) violated the *Federal Rules of Criminal Procedure* (which prohibited "unnecessary delay" in bringing the suspect before a magistrate), this rule has never been extended to the states, and most states have not adopted a similar rule.⁷⁴ For some reason, the U.S. Supreme Court has assumed that, once the suspect has received his *Miranda* warnings, no further concern for what happens to him at the police station is required. In this area, the English system is better not only because it *has* rules, but because of the kind of rules it has.

5. Interrogations

The obligation of the police to inform suspects of their rights is summed up by British authorities:

Suspects must be cautioned before an interview begins. The caution must expressly make it clear that there is no obligation to say anything or answer questions [and that anything said may be used in evidence.⁷⁵]

67. *Id.* § 41(2)(a).

68. *Id.* § 42(1).

69. *Id.* §§ 43(1), 43(12).

70. *Id.* § 44(3)(b).

71. CODE OF PRACTICE FOR THE DETENTION, TREATMENT, AND QUESTIONING OF PERSONS BY THE POLICE para. 5. [hereinafter INTERROGATION CODE].

72. *Id.* paras. 8, 10, & 13.

73. 354 U.S. 449 (1957).

74. YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 429 (7th ed. 1990).

75. INTERROGATION CODE, *supra* note 71, para. 10.4. However, contrary to U.S. practice, see *Doyle v. Ohio*, 426 U.S. 610 (1976), though the prosecution may not "suggest that an accused's silence was suspicious, they could inform the jury that the accused was silent. Nothing

Each new bout of questioning directed to a suspect should be preceded by a further caution, as where a person is questioned at his home, arrested, and then asked further questions in the police car on the way to the station.⁷⁶

The custody officer must tell [the suspect] the reasons for his arrest. . . . [The suspect] must be told of his right to have somebody outside the police station informed of his whereabouts. . . . He must be told about his right to have legal advice [including free legal advice from the "Duty Solicitor"⁷⁷]. He must also be told that he has a right to a copy of the custody record. The information to the suspect must be communicated not only orally . . . but also in writing.⁷⁸

The rights of the suspect to notify someone of his whereabouts and to consult counsel may be delayed up to 36 hours in the case of a "serious arrestable offence," if an officer of the rank of superintendent or above

has reasonable grounds for believing that the exercise of the rights:

i) will lead to interference with or harm to evidence . . . or interference with or physical harm to other persons; or ii) will lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it; or iii) will hinder the recovery of property obtained in consequence of the commission of such an offence. . . . Access to a solicitor may not be delayed on the grounds that he might advise the person not to answer any questions.⁷⁹

There is no right to cut off questioning by an assertion of the right to silence⁸⁰ (but subsequent questioning must not be "oppressive"). However, further questioning may not follow a request for a solicitor,

could prevent the jury from drawing adverse inferences from the fact of silence if they chose to do so." MICHAEL ZANDER, *THE POLICE AND CRIMINAL EVIDENCE ACT 1984* 144 (2d ed. 1990).

76. David Feldman, *Regulating Treatment of Suspects in Police Stations: Judicial Interpretation of Detention Provisions in the Police and Criminal Evidence Act 1984*, 1990 CRIM. L. REV. 452, 463 (citing INTERROGATION CODE, *supra* note 71, paras. 10.4, 11.2).

77. INTERROGATION CODE, *supra* note 71, para. 6: "(Arrestees) shall be informed in writing of these options and of the fact that option (b) [the duty solicitor] will always be free of charge."

78. Michael Zander, *The Act in the Station*, in *THE POLICE: POWERS, PROCEDURES AND PROPRIETIES* 126 (John Benyon & Colin Bourn eds., 1986). Readers familiar with the U.S. experience with *Miranda* will not be surprised to learn that the police are frequently able to avoid the anticipated impact of these tough interrogation rules by "the ploy of exploiting detainees' disoriented state by rushing them through the drill so briskly that they clearly had little opportunity to absorb [the warnings]." Nevertheless, a requirement that the suspect write out a waiver of counsel in his own hand was rejected by Parliament and the current system that he check a box, either requesting or refusing counsel, was retained. David Wolchover & Anthony Heaton-Armstrong, *The Questioning Code Revamped*, 1991 CRIM. L. REV. 232, 236.

The Code of Practice further provides that a poster setting forth these rights, including a foreign language poster where appropriate, "must be prominently displayed in the charging area of every police station." INTERROGATION CODE, *supra* note 71, para. 6.3.

79. INTERROGATION CODE, *supra* note 71, annex B.

80. See Mark Berger, *Legislating Confession Law in Great Britain: A Statutory Approach to Police Interrogations*, 24 U. MICH. J.L. REF. 1, 39 (1990).

subject to an "exigent circumstances" exception and certain others.⁸¹

Any interview in a police station must be contemporaneously recorded, unless it is impracticable to do so, in which case the police must make a record of why it was impracticable.⁸² [The new Code of Practice now requires tape recording.⁸³] It will be regarded as impracticable to make a contemporaneous record where, for example, the suspect refuses to talk if the conversation is being recorded. However, police officers commonly claim that note-taking slows down the interrogation, gives the suspect more time to prepare and leads to a stilted conversation. These problems will be reduced where tape recording is used, but they will continue to arise in relation to untaped interviews. The decisions so far suggest that a desire to maintain the spontaneity of an interview is not a sufficient reason for failing to make a contemporaneous record.⁸⁴

In the course of interviews, stratagems designed to induce a confession by bringing psychological pressure to bear . . . will not normally amount to oppression making a confession inadmissible [but they may have that effect depending on] the medical and psychological state of the suspect [or if] the police actively mislead the suspect and the solicitor who has the responsibility for advising the suspect.⁸⁵

Thus, contrary to the claim of the Justice Department report (which, extraordinarily, does not discuss PACE, despite its passage two years before), England's interrogation rules are *more stringent* than *Miranda*.⁸⁶ An English suspect must be warned of his rights to silence and counsel not only orally but in writing. Moreover, these warnings must be given, prior to interrogation, as soon as there are

81. INTERROGATION CODE, *supra* note 71, para. 6.6. See Wolchover & Heaton-Armstrong, *supra* note 78, at 238 (discussing this issue in greater detail). See also *The Queen v. Oliphant*, 1992 CRIM. L. REV. 40 (the court dismissed an appeal based on the questioning of the defendant after he had, somewhat ambiguously, asserted his right to a solicitor, on the ground that the violation was not "substantial").

In the United States, the Supreme Court has held that once a suspect has invoked his right to counsel he may not be "subject[ed] to further interrogation . . . until counsel has been made available to him, unless [he] himself initiates further communication . . . with the police." *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). However, the Court had earlier held that a suspect's invocation of his right to *silence* does not necessarily prevent the police from questioning him again later, after some time has passed. *Michigan v. Mosley*, 423 U.S. 96 (1975). See also *KAMISAR ET AL.*, *supra* note 74, at 474, 510-11.

82. The 1991 Code of Practice requires a contemporaneous record of *all* interviews, whether within or outside a police station, unless it is impracticable to do so. INTERROGATION CODE, *supra* note 71, para. 11.3.

83. CODE OF PRACTICE ON TAPE RECORDING, in MICHAEL ZANDER, *THE POLICE AND CRIMINAL EVIDENCE ACT 1989* 429 (2d ed. 1990). For a full discussion of British interrogation law under PACE, including the tape recording requirements, see Berger, *supra* note 80, at 56-57.

84. Feldman, *supra* note 76, at 463.

85. *Id.* at 464 and cases cited therein.

86. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court required that prior to any custodial interrogation, a suspect must be warned of his right to silence; that anything he says may be used against him; of his right to counsel; and that if he cannot afford counsel, one will be provided free of charge.

"grounds to suspect of an offense"⁸⁷ rather than when "custody" ensues as in the United States. More importantly, unlike the fictitious "right to counsel" in the *Miranda* warnings (the assertion of which will not necessarily result in counsel being provided), PACE requires that a "Duty Solicitor" be available, and that the suspect be told of this. Finally, as of 1991, the Code of Practice requires that all interrogations be tape recorded where practicable.⁸⁸ The United States has no such general requirement.

6. Remedies

An American reader may respond to the foregoing recitation of the English rules by saying that "these rules are all very well, but everyone knows that England doesn't enforce its rules with an exclusionary remedy." Traditionally, it was the policy of the British courts to ignore violations of the rules by police, a policy that the Justice Department, unaware of PACE in this regard as well, cited in its report.⁸⁹ Only involuntary confessions were subject to exclusion on the ground that they were unreliable. Otherwise, if evidence was relevant, it would be admissible no matter how obtained.⁹⁰

PACE has completely changed both the law and the attitude of the British Courts toward evidentiary exclusion as a means of enforcing the law. David Feldman summarizes the new approach:

The judges in the Crown Courts and the Court of Appeal seem to have moved away from the traditional notion that it is not the judiciary's job to discipline the police. They treat the regulation of police practices as being at least as important an objective as procedural fairness [in the trial itself]. This seems to reflect a growing disillusionment with police pretensions to professionalism and self-regulatory capacity, a determination to make a go of the balance struck by PACE, a renewed judicial commitment to rule of law principles and the ideal of legal accountability for the exercise of police powers, and the failure of other forms of legal control over the police.⁹¹

There are four grounds for evidentiary exclusion under PACE.

87. INTERROGATION CODE, *supra* note 71, para. 10.1. Once a decision to arrest has been made, the suspect should not ordinarily be questioned until he has arrived, and been cautioned, at the police station (*see infra* note 97). A non-arrested suspect must be informed that he is free to go. INTERROGATION CODE, *supra* note 71, para. 10.2.

88. CODE OF PRACTICE ON TAPE RECORDING, *supra* note 83, para. 3.1. In *The Queen v. Bryce*, 1992 CRIM. L. REV. 728, the Court of Appeal excluded statements allegedly made after the tape recorder had been turned off.

89. *Search Report*, *supra* note 5, at 618.

90. *See The Queen v. Leatham*, 121 Eng. Rep. 589 (1861).

91. Feldman, *supra* note 76, at 468 (footnote omitted). Similarly, the editors of the *Criminal Law Review* note that "PACE has had a dramatic effect on the number of cases in which admissible evidence is in fact excluded." 1992 CRIM. L. REV. 732.

§ 76(2) provides for *mandatory* exclusion of confessions (a) obtained “by oppression” or (b) likely to have been rendered “unreliable” by anything said or done (by anyone). “‘Oppression’ includes torture, inhuman or degrading treatment, and the use or threat of violence. . . .”⁹² When oppression is alleged, the burden is on the prosecution to rebut the charge beyond a reasonable doubt.⁹³ In addition to these mandatory bases for exclusion, § 78(1) provides that “the court may refuse to allow evidence . . . if it appears . . . that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.” Finally, § 82(3) “saves pre-existing common law powers . . . to exclude evidence whose prejudicial effect outweighed its probative value.”⁹⁴

On the face of it, these bases for exclusion do not seem greatly different from the old system, though the extension of the “unreliability” grounds to things done by people other than the police is a significant addition.⁹⁵ But, by drawing attention to the “oppressiveness” of police conduct, irrespective of the reliability of the confession, PACE has clearly directed the judiciary to “police the police.” Since PACE was enacted,

the judges . . . see themselves as having a disciplinary and regulatory role in maintaining the balance between the powers of the police and the protection of suspects. This balance was one of the fundamental elements in the deliberations of the Phillips Commission and of parliamentarians debating the various versions of the Police and Criminal Evidence Bill. . . . In view of the time lavished by Parliament on striking the right balance, it is not unreasonable or improper for the courts to take the resulting statute seriously and seek ways of ensuring that the police do so as well.⁹⁶

For example, since not all of the rights specified in PACE attach until after arrest and arrival at the police station,⁹⁷ the police may be

92. PACE, *supra* note 26, § 76(8).

93. ZANDER, *supra* note 75, at 189.

94. Feldman, *supra* note 76, at 453.

95. Di Birch, *The PACE Hots Up: Confessions and Confusion Under the 1984 Act*, 1989 CRIM. L. REV. 95, 99-100: “Subsection 2(b) represents a break with the past. . . . [A] court’s duty to exclude [now] comes into play wherever anything may have been ‘said or done’ to cause the potentially unreliable confession; it does not matter by whom.”

In *The Queen v. Harvey*, 1988 CRIM. L. REV. 241, for example, the experience of hearing her lover confess to murder may have been enough to induce a psychopathically disordered woman of below-normal intelligence to make a false confession in order to protect her lover. Section 76(2)(b) was invoked to exclude her statement.

Accord *The Queen v. Brine*, 1992 CRIM. L. REV. 122, where the defendant’s confession was excluded on reliability grounds, despite no police misconduct, because it may have been induced by a “mild form of paranoid psychosis” which would have led the suspect to make untrue statements.

96. Feldman, *supra* note 76, at 469 (footnotes omitted).

97. An arrestee does not have to be informed of his rights until after his arrival at the police

tempted to delay arrest. However, in *The Queen v. Ismail*, the trial judge excluded statements made by the defendant where a decision to delay arrest was intended to evade the protective rules.⁹⁸ On the other hand, in *The Queen v. Rajakuruna*⁹⁹, where the suspect was not properly cautioned that he was a suspect, but "was well aware of [that fact]" and declined a solicitor, his statements were not excluded.

One area in which the English courts have been particularly protective of suspects' rights (and have used the exclusionary sanction to display that concern) is where the police delay access to counsel or communication with a third party. David Feldman elaborates:

[T]he statutory ground relied on to justify delay must be reasonably supportable by reference to the known facts. Thus the police cannot claim that an accomplice still at large might be alerted and escape in a case where the arrest is already public knowledge, as where a detainee was arrested in public amongst people known to him and his house had already been searched in the presence of his mother,¹⁰⁰ or where the suspect's mother had been told of the arrest by telephone hours before the decision to delay access to a solicitor was taken.¹⁰¹ . . . [T]o delay access to a solicitor, the police must have reasonable grounds for believing that the particular solicitor is likely to be dishonest, or is liable to be manipulated or duped into passing on information to a detainee's criminal confederates.¹⁰²

David Wolchover and Anthony Heaton-Armstrong conclude that "[t]he burden of authority is such that other than in certain categories of offence it is now virtually impossible for the police to justify the prevention of access [to a solicitor] at any stage."¹⁰³

In a similar vein, exclusion has been ordered when the police fail to fully inform the suspect of his rights,¹⁰⁴ mislead him into thinking that it is not normal to have legal advice,¹⁰⁵ mislead him and/or his solici-

station. However, the Code forbids any questioning prior to the advice other than in "very exceptional circumstances." Wolchover & Heaton-Armstrong, *supra* note 78, at 240; INTERROGATION CODE, *supra* note 71, para. 11.1.

98. Feldman, *supra* note 76, at 454 (discussing *The Queen v. Ismail*, 1990 CRIM. L. REV. 109). Similarly, in *The Queen v. Sparks*, 1991 CRIM. L. REV. 128, the Court of Appeal held that a "friendly conversation" about the crime between the suspect and a constable of his acquaintance prior to an arrest was an "interview" at which the suspect was entitled to be cautioned and the police were required to make a record. The court so held despite the fact that the constable was not purposely trying to evade the requirements of PACE.

99. 1991 CRIM. L. REV. 458. *Accord*, *The Queen v. Dunford*, 1991 CRIM. L. REV. 370 and cases cited in Commentary.

100. Feldman, *supra* note 76, at 458 (citing *The Queen v. Alladice*, 87 CRIM. APP. REP. 380 (1988)).

101. *Id.* (citing *The Queen v. Samuel*, 1988 Q.B. 615).

102. *Id.* (citing, *inter alia*, *The Queen v. Davison*, 1988 CRIM. L. REV. 442).

103. Wolchover & Heaton-Armstrong, *supra* note 78, at 234.

104. Feldman, *supra* note 76, at 455 and cases cited therein.

105. *Id.*

tor as to the strength of the evidence in possession of the police,¹⁰⁶ obtain a confession that is a result of an earlier, unwarned confession,¹⁰⁷ or fail to make a contemporaneous record of¹⁰⁸ (or, after 1991, tape record)¹⁰⁹ the interrogation. The attitude of the courts is summed up by Lord Chief Justice Lane: "If, which we find it hard to believe, police officers still do not appreciate the importance of [PACE] and the accompanying Code, then it is time that they did."¹¹⁰

Evidentiary exclusions are not limited to violations of the detention and interrogation rules. In *Matto v. Wolverhampton Crown Court*¹¹¹ the breath specimen of a suspect was suppressed because of his earlier, unlawful, arrest.¹¹² In *The Queen v. Gall*,¹¹³ the Court of Appeal "quashed a conviction because the trial judge had wrongly refused to exclude evidence of an identification parade [lineup] at which a police officer had looked into the room where the parade had been assembled and could have spoken to witnesses before they attempted to identify the suspect."¹¹⁴ Similarly, in *The Queen v. Conway*,¹¹⁵ the Court of Appeal overturned a conviction where no identification parade had been held, as required by the Code of Practice, and no reason was shown why a parade was impracticable.¹¹⁶

In *The Queen v. Taylor*,¹¹⁷ documentary evidence was suppressed

106. *The Queen v. Beales*, 1991 CRIM. L. REV. 118 (suspect alone misled by police); *accord* *The Queen v. Blake*, 1991 CRIM. L. REV. 119; *The Queen v. Mason*, 3 All E.R. 481 (1987) (suspect and solicitor misled by police).

107. *The Queen v. McGovern*, 1991 CRIM. L. REV. 124. *Compare* *Oregon v. Elstad*, 470 U.S. 298 (1985), where, on somewhat similar facts, the United States Supreme Court reached the opposite result. In *McGovern*, the first confession was made, in the absence of a solicitor, by an emotionally upset woman with an IQ of 73. The Court of Appeal held that the absence of the solicitor was likely to render the first confession unreliable. Since the second confession, though made with full warnings and in the presence of the solicitor, was the result of the first, it too must be excluded. The court did not seem to rely on this defendant's peculiar vulnerability, however, noting that "the very fact" that the first interview was "in breach of the rules" is "likely to have an effect on the person during the course of a second interview." *McGovern*, 1991 CRIM. L. REV. at 125.

108. *The Queen v. Canale*, 1990 CRIM. L. REV. 329. *See also* *The Queen v. Scott*, 1991 CRIM. L. REV. 56 (where an incriminating statement was suppressed by the Court of Appeal because the police failed to have the defendant read and sign the record of the interview as required under para. 12(12)).

109. *See Bryce*, 1992 CRIM. L. REV. at 728.

110. 1990 CRIM. L. REV. at 329.

111. 1987 R.T.R. 337 (D.C.).

112. *See Brown v. Illinois*, 422 U.S. 590 (1975), for the United States Supreme Court's "taint of an illegal arrest" doctrine.

113. *Cited in* *Feldman*, *supra* note 76, at 468.

114. *Id.*

115. 1990 CRIM. L. REV. 402.

116. *Accord* *The Queen v. Britton*, 1989 CRIM. L. REV. 144 and cases cited therein.

117. *Cited in* *Feldman*, *supra* note 76, at 468-69 (citing *THE INDEPENDENT*, Jan. 19, 1990, at 1).

by the trial judge in a case involving financial improprieties, because, when applying for a subpoena, the police had misled the judge into believing that the investigation concerned drug trafficking. The evidence was suppressed because of police misconduct, irrespective of any concerns about reliability.¹¹⁸ In *The Queen v. Fennelley*,¹¹⁹ in a trial for possession of narcotics with intent to distribute, the trial judge suppressed the narcotics because the suspect was not told the reason why he was stopped and about to be searched by the police, as required by PACE § 2(3).¹²⁰ Finally, in *Chapman v. D.P.P.*,¹²¹ a conviction for assaulting a police officer was quashed where the police entered the defendant's apartment in pursuit of a fleeing suspect without reasonable suspicion that the suspect had committed an arrestable offense.

Given the British courts' long history of ignoring violations by the police in the evidence gathering process, the developments in exclusionary law since PACE are truly extraordinary. As David Feldman's analysis and Lord Lane's comments, cited above, suggest, the British courts have performed this about-face on evidentiary exclusion in part because the code gives them new authority and in part for the simple reason that *now that the rules are clearly stated, the police can be expected to obey them.*

It is particularly striking that this British "criminal procedure revolution" is occurring in the context of discretionary, rather than mandatory, exclusionary rules. The English experience strongly suggests that, if the U.S. rules were clearly stated in statutory form, then it would be possible to relax somewhat the mandatory exclusionary rule that has caused so much difficulty in this country. Such a relaxation would, in turn, make it possible to *expand* the coverage of the rules into areas, such as detention and interrogation procedures, where the U.S. Supreme Court has been unwilling to venture because of the Court's commitment that any breach of its constitutionally mandated "rules" must necessarily lead to evidentiary exclusion.

My admiration for PACE is not entirely unqualified. For one thing, the system of having a statute accompanied by separate, but frequently duplicative (and extremely prolix), Codes of Practice is much too complex.¹²² Also, as noted above, PACE is sometimes diffi-

118. *Id.*

119. 1989 CRIM. L. REV. 142.

120. David Feldman points out that *Fennelley* "might be decided differently under the new Code, since *Fennelley* might be held to have consented to the search and so waived his right to be given the reasons for it." Letter from David Feldman, Professor, University of Bristol, to the author (Dec. 17, 1991) (on file with the *Michigan Journal of International Law*).

121. 1988 CRIM. L. REV. 843.

122. For an example of the statutory form I would use, see BRADLEY, *supra* note 15, at ch. 6.

cult to follow because it incorporates other statutory provisions by reference. Finally, of course, I do not always agree with PACE as to the substantive content of individual rules. At the same time, PACE represents a vast improvement, from the point of view of police, defendants, attorneys, and judges alike, from the previous patchwork quilt of rules that existed in England, and that continues to exist in the United States to this day.

AUSTRALIA¹²³

In 1989 I spent eight months in Canberra, the capital of Australia, studying the criminal procedure system. Australia, like the United States, is a vast, English-speaking former British colony, currently populated by people of diverse ethnic and racial origins. Its legal system is drawn from the British common law and it has a federal system of government much like our own. Moreover, Australians typically display an antipathy for police at least as strong as that of Americans. Consequently, a study of Australia's criminal procedure system would seem to be an ideal source for constructive approaches that might be useful in the United States.

Unfortunately, current Australian criminal procedure law does not bear out this expectation. In most respects, it is where U.S. law was in the mid-fifties, though recent developments augur well for the future. Until 1991, the "voluntariness" test as to confessions was the only basis for mandatory evidentiary exclusion; there had been little control by the High Court over state procedures; and police generally "exercise[d] personal power undisturbed by thoughts that there would ever be an accounting for its use."¹²⁴ Moreover, "in a sphere of activity involving issues of fundamental human liberty the governing rules are unclear, uncertain, out of date, difficult to find and understand and thus quite . . . unsuitable for the age in which we live."¹²⁵

As noted, prior to a 1991 statute, discussed below, there was a mandatory exclusionary rule only for "involuntary" confessions, and even they were not automatically excluded in all states.¹²⁶ Moreover,

123. The discussion of Australian law found in this section is drawn from Craig M. Bradley, *Criminal Procedure from the "Land of Oz": Lessons for America*, 81 J. CRIM. L. & CRIMINOLOGY 99 (1990).

124. REPORT OF THE BOARD OF INQUIRY INTO THE ENFORCEMENT OF CRIMINAL LAW IN QUEENSLAND 91 (1977) (hereinafter LUCAS REPORT).

125. PETER SALLMAN & JOHN WILLIS, *CRIMINAL JUSTICE IN AUSTRALIA* 20 (1984).

126. In New South Wales, exclusion is also automatic for confessions secured by deliberately untrue statements. Crimes Act, ch. 410, N.S.W. Stat. 413 (1900) (Austl.). The Australian Capital Territory does not automatically reject all involuntary confessions; Evidence Act, ch. 68, Austl. Cap. Terr. Ord. (1971).

though this mandatory rule has often been mentioned in court opinions, it has rarely been invoked.¹²⁷ Beyond this mandatory rule, there are three possible grounds for discretionary evidentiary exclusion by the trial judge: 1) that the evidence in question will be unduly prejudicial; 2) that a statement given by the accused appears to be unreliable; and 3) that the evidence is the product of unfair or unlawful conduct by the police.¹²⁸ Trial judges sometimes use these discretionary bases of exclusion to exclude confessions deemed unreliable or obtained by police overreaching.¹²⁹

Most Australian states have fairly detailed statutory rules governing searches and arrests. For example, the New South Wales Search Warrant Act of 1985 provides for the issuance of search warrants to search houses for evidence upon a showing of "reasonable grounds" and requires that those warrants be specific.¹³⁰ However, these rules have not been taken seriously by the police because, until recently, evidence had *never* been excluded due to an illegal search in a reported case,¹³¹ though there is ample evidence that illegal, and even brutal, searches have occurred.¹³² This is true despite the fact that, in the 1978 case of *Bunning v. Cross*,¹³³ the High Court expressly broke from the British common law rule that evidence could never be suppressed due to an illegal search.¹³⁴

In *Bunning*, the Court held that, in exercising their discretion to exclude evidence due to police misconduct, trial judges should consider the following factors: 1) whether the "unlawful or improper conduct" on the part of the police was intentional or reckless on the one hand or merely accidental or "unconscious" on the other; 2) "the ease with which the law might have been complied with"; 3) "the nature of the offence charged"; and 4) whether there was evidence that the rule broken was one which reflected a "deliberate intent on the part of the legislature narrowly to restrict the police."¹³⁵ In *Bunning* itself, the Court held that the evidence of a breathalyzer test would be admissible in a drunk driving case despite the fact that it had been taken without

127. Bradley, *supra* note 123, at 107.

128. *Id.* at 107-10.

129. "[T]his 'police misconduct' discretion is actually *used* from time to time, at least in confession cases, though not with any regularity or consistent logic." Bradley, *supra* note 123, at 112 and cases discussed therein.

130. Search Warrant Act, chs. 5-6, N.S.W. Stat. (1985) (Austl.).

131. Bradley, *supra* note 123, at 116.

132. *Id.* at 119-20.

133. 141 C.L.R. 54 (1978) (Austl.).

134. *Id.* at 69 (Stephan & Aickin, JJ.)

135. *Id.* at 80.

reasonable suspicion and without performing a preliminary roadside test as required by the statute.¹³⁶

In the 1990 case of *George v. Rockett*¹³⁷ however, the High Court finally did suppress evidence seized in an unlawful search. In that case, police in Queensland obtained a search warrant based on a conclusory affidavit stating simply that the police had "reasonable grounds for suspicion" without setting forth the basis therefor. The High Court, sitting in its capacity as the highest court of the state of Queensland, ordered that the warrant was invalid and that the evidence must be suppressed. The Court ruled that the Queensland statute requiring "reasonable grounds" meant that such grounds must be set forth in the sworn affidavit so that the magistrate could satisfy himself that such grounds existed.¹³⁸ It seems likely that this holding, and particularly its repeated insistence that the terms of the statute must be followed, will lead trial judges to be substantially more receptive to the possibility of (discretionary) evidentiary exclusion in future cases involving illegal searches.

In the confessions area, in contrast to searches, no Australian state has enacted statutory rules governing interrogations, and the law in this area has been extremely unclear. However, a recently enacted federal statute, the *Crimes (Investigation of Commonwealth Offenses) Act 1991*, will probably provide the basis for improved state procedures as well (if states choose to pass their own statutes using the federal statute as a model). The new statute provides that federal arrestees must be brought before a judicial officer within four hours of arrest, except that in felony cases a judge may extend the detention period to eight hours.¹³⁹ This codifies and makes mandatory the holding of the High Court in the 1986 case of *The Queen v. Williams*,¹⁴⁰ in which the High Court upheld the trial judge's exercise of discretion in excluding the confession of a burglary suspect who had been arrested at 6:00 a.m. on one day and not taken to the magistrate until 10:00 a.m. the following day. *Williams* did not mandate exclusion in such a case; it simply approved the trial judge's discretionary exclusion. The combined effect of *Williams* and the statute will undoubtedly result in more evidentiary exclusions in state courts on this ground than had previously been the case.

136. Bradley, *supra* note 123, at 110-11 and citations therein.

137. 64 A.L.J.R. 384 (1990).

138. *Id.* at 386-87.

139. Parliamentary Research Service, Digest of Crimes (Investigation of Commonwealth Offenses) Amendment Bill 1990 (Now "Act 1991") [hereinafter Digest of Crimes Amendment].

140. 161 C.L.R. 278 (1986) (Austl.).

The statute goes on to require that a suspect be informed of his right to communicate with a friend or relative and a lawyer, that he be allowed reasonable time to do so, and that the police allow the lawyer to be present during questioning.¹⁴¹ (This is in addition to the common law, "Judges' Rules," requirement that the suspect be informed of his right to silence and that anything he says may be used against him).¹⁴² However, unlike the British and Canadian rules, it is not necessary for the police to inform the suspect of the availability of a Public Defender, or that such a person even *be* available. This statute goes beyond the U.S. rules by requiring that a person under arrest must be informed if a friend, relative, or lawyer has sought information about him; and that the police must provide such information to the party seeking it unless the arrestee says not to.¹⁴³ Finally, all interviews by federal authorities must be tape recorded unless it is not reasonably practicable to do so, and, subject to this exception, untaped interviews are *not* admissible.¹⁴⁴

In 1991, the High Court put heavy pressure on the states to adopt the tape recording requirement. In *McKinney v. The Queen*¹⁴⁵ the Court, by a vote of 4-3, held that where the (state) prosecutor seeks to use confessional evidence that is not tape recorded, the trial judge must warn the jury as to the ease with which the police might fabricate a statement that is not "reliably corroborated."¹⁴⁶ In this warning the court should "emphasize the need for careful scrutiny of the evidence and direct attention to the fact that police witnesses are often practised witnesses and it is not an easy matter to determine whether a practised witness is telling the truth."¹⁴⁷ Thus it seems that the Australian High Court, distressed by repeated allegations of police "verballing" (i.e. fabricating confessions), is determined to use whatever means it has at its disposal to cause the practice to cease. Peter Waight of Australian National University reports that this case "has had the effect of putting the pressure on all Police Forces to tape/videotape interviews

141. Digest of Crimes Amendment, *supra* note 139, at 3.

142. Bradley, *supra* note 123, at 103. Prior to the statute, this "requirement" seems to have been honored more in the breach than in the observance. See, e.g., *Van der Meer v. The Queen*, 62 A.L.J.R. 656 (1988), where the accused were questioned for eleven hours prior to receiving the caution and the High Court nevertheless held that an earlier caution was not required.

143. Digest of Crimes Amendment, *supra* note 139, at 4. Compare *Moran v. Burbine*, 475 U.S. 412 (1986).

144. Digest of Crimes Amendment, *supra* note 139, at 4.

145. 65 A.L.J.R. 241 (1991).

146. *Id.* at 243.

147. *Id.*

with suspects, and they seem to be doing this generally throughout Australia."¹⁴⁸

In another important 1991 development, the High Court held that a defendant's silence, either during police interrogation or at trial, could not be used as evidence against him.¹⁴⁹

Recent developments suggest that Australia is moving in the direction of the modern international trend of having statutory rules governing the police, backed up by a mixed system of mandatory and discretionary evidentiary exclusion when the police break the statutory rules. Specifically, Australia is now requiring that the grounds for searches must be set forth, in advance and in writing, before a search warrant issues, that arrestees must be fully informed of their rights before being questioned, that police interrogations must be tape recorded if they are to be admissible in court, and that silence cannot be used as evidence against the accused. Finally, the Australian High Court seems to have only recently recognized the need for a (discretionary) exclusionary remedy to insure that the police follow the rules. The development of criminal procedural rules in Australia is, however, constrained by the fact that the Australian constitutional structure does not permit the federal government to enact a code of procedure governing the actions of state and local police.

CANADA

The fundamental principles of Canadian criminal procedure law are set forth in general terms in the 1982 Constitution's Charter of Rights and Freedoms, which is supplemented by a detailed Code. Pertaining to police procedures, the Charter states that:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.¹⁵⁰

Everyone has the right to be secure against unreasonable search and seizure.¹⁵¹

Everyone has the right not to be arbitrarily detained or imprisoned.¹⁵²

Everyone has the right on arrest or detention

148. Letter from Peter Waight, Professor of Law, The Australian National University, to the author (June 25, 1992) (on file with the *Michigan Journal of International Law*).

149. *Petty v. The Queen*, 65 A.L.J.R. 625 (1991).

In the U.S., a suspect's silence even after he has been arrested (as long as he has not been given the *Miranda* warnings) may be used for impeachment purposes. See *Doyle v. Ohio*, 426 U.S. 610 (1976); *Jenkins v. Anderson*, 447 U.S. 231 (1980); *Fletcher v. Weir*, 455 U.S. 603 (1982).

150. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 7.

151. *Id.* § 8.

152. *Id.* § 9.

- (a) to be informed promptly of the reasons therefor;
- (b) to retain and instruct counsel without delay and to be informed of that right;
- (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.¹⁵³

Finally, the Charter declares an exclusionary rule:

where . . . a court finds that evidence was obtained in a manner that infringed or denied any of the rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.¹⁵⁴

It is certainly interesting to note that in adopting a new Charter of Rights, the Canadians chose not only to copy the U.S. Fourth Amendment virtually verbatim, but also to adopt, as a constitutional requirement, the much maligned exclusionary rule, albeit in a more limited form.

The current Criminal Code (which is a code of both criminal law and procedure) was adopted in 1970, and was amended substantially in 1985.¹⁵⁵ It has also been amended in various ways several times since then.¹⁵⁶ In Canada, all crimes are federal violations, so there is a single federal code governing the entire country.

Regarding searches, the Code provides for the issuance of a search warrant when a justice is satisfied by "information on oath" that there are reasonable grounds to believe that "there [are] in a building, receptacle or place" fruits, instrumentalities, or evidence of a crime.¹⁵⁷ Such prior authorization must be obtained "where feasible"¹⁵⁸ but

153. *Id.* § 10.

154. *Id.* § 24(2). I consider this to be a "discretionary" exclusionary rule in the sense that exclusion does not follow automatically from the finding of a constitutional violation, as in the United States. The Canadian Supreme Court, however, insists that § 24(2) "does not confer a discretion on the [trial] judge but a duty to admit or exclude as a result of his finding [of disrepute]." *The Queen v. Collins*, 33 C.C.C.(3d) 1, 12 (1987). The burden of establishing "disrepute," even after a finding of a Charter violation, is on the defendant. *Id.* at 16. See Yves-Marie Morissette, *The Exclusion of Evidence under the Canadian Charter of Rights and Freedoms: What to Do and What Not to Do*, 29 MCGILL L.J. 521, 538 (1984) (cited with approval in *Collins*, 33 C.C.C.(3d) at 17-18).

The decision whether to exclude depends on "all the circumstances," including the nature of the evidence, what Charter right was violated, whether the violation was serious or technical, willful or inadvertent, whether it occurred in circumstances of urgency, whether the evidence would have been obtained in any event, whether the offense was serious, and whether the evidence was essential to substantiate the charge. *Collins*, 33 C.C.C.(3d) at 18-19.

In *Collins*, the Supreme Court chose the "lower threshold" French version of the constitutional text "could bring the administration of justice into disrepute," rather than the English "would bring . . ." *Id.* at 21-22.

155. R.S.C., ch. C-34 (1970); R.S.C., ch. C-46 (1985).

156. R.S.C., ch. 11 (1st Supp. 1985). See MARTIN'S ANNUAL CRIMINAL CODE CC-1 (1991).

157. MARTIN'S ANNUAL CRIMINAL CODE, *supra* note 156, § 487, at CC-539.

158. *Id.* § 487 ann., at CC-540.

may be done by radio or telephone.¹⁵⁹ The warrant must be executed by day unless the justice authorizes night execution.¹⁶⁰ The police do not need a warrant to search "a person[,] vehicle, or place . . . other than a dwelling house," where they have reasonable grounds to believe that an offense involving a weapon has been committed.¹⁶¹

Police do not need a warrant to arrest a suspect for "an indictable offense" (except for certain theft and gambling offenses, for which a warrant must be used).¹⁶² A warrant is not required to enter private premises to make an arrest,¹⁶³ or to search a vehicle if there are "reasonable grounds for suspicion that the vehicle contains contraband."¹⁶⁴ The police may search the person and "immediate surroundings" of an accused incident to arrest, without any showing of cause beyond the arrest itself.¹⁶⁵ Immediately following a search incident, and prior to execution of a warrant or a consent search, the suspect must be informed of his rights to withhold consent and to have counsel.¹⁶⁶

Canadian law thus adopts a somewhat more police-oriented approach to searches than does U.S. law, allowing warrantless searches for offenses involving weapons, and warrantless entries to arrest (though, as noted, the Canadian consent search rules are stricter).¹⁶⁷ By contrast, Canadian law imposes, in some ways, stricter limitations on police interrogation than does U.S. law.

Upon "arrest or detention," the suspect must be informed of his right to counsel. "The police must refrain from attempting to elicit

159. *Id.* § 487.1(1), at CC-550.

160. *Id.* § 488, at CC-553.

161. *Id.* § 101(1), at CC-108.

162. *Id.* § 495, at CC-565.

163. *Id.* § 495 ann., at CC-568.

164. *Id.* ann., at CH-15 to CH-16 and cases cited therein. This limitation of vehicle searches to "contraband" rather than all evidence of a crime, appears only in the Annotation, not the Code itself, and apparently simply reflects the holding of a particular case. There is no reason to suppose that, if confronted with the case, the Canadian courts would not extend vehicle searches to other evidence as well.

165. *Id.* § 495 ann., at CC-568.

166. *Id.* § 495 ann., at CC-568 to CC-569. Failure to inform the accused of his right to counsel prior to a consent search is likely to render the search unreasonable under § 8 of the Charter. *Id.* at CH-16. Violation of the right to counsel in other search contexts is not. *Id.* Accord S. HUTCHINSON AND J. MORTON, SEARCH AND SEIZURE LAW IN CANADA 7-2 (1991).

In the United States, by contrast, a suspect need not be informed of his right to withhold consent. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 249 (1973).

167. Although the United States Supreme Court has recognized over twenty exceptions to the warrant requirement, searches in cases involving weapons are not among them. See Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1474 (1985). In *Payton v. New York*, 445 U.S. 573 (1980), the Court held that an arrest warrant was required to arrest someone in his home.

evidence from the detainee until he has a reasonable opportunity to retain and instruct counsel."¹⁶⁸ "[D]etainees must be informed . . . of the existence and availability of the applicable systems of duty counsel and legal aid in the jurisdiction. . . ."¹⁶⁹ "Detention" occurs when the person "submits or acquiesces in the deprivation of liberty and reasonably believes the choice to do otherwise does not exist."¹⁷⁰ Once again, the U.S. Justice Department's claim that "there is no required offer of appointed counsel for suspects who cannot retain counsel and no right to refuse to be questioned"¹⁷¹ is incorrect on both counts, though the issue was not clearly settled in 1986 when the Justice Department report was issued.

In one case "detention" occurred, and the warnings were required, when an accused was "ushered into an interview room by customs officers who suspected he was carrying narcotics."¹⁷² However, unlike the *Edwards* rule in the United States, the Canadian rules do *not* give the defendant any right to have counsel present *during* questioning (after consultation has been allowed). The Canadian Supreme Court has specifically invited police to attempt to "persuade" a counseled suspect to confess, "short of denying the suspect the right to choose or depriving him of an operating mind."¹⁷³

Canadian police normally give the British Judges' Rules cautions as to the right to silence and "whatever you say may be given in evidence," which appear on the standard form issued to police.¹⁷⁴ In the 1990 case of *The Queen v. Hebert*,¹⁷⁵ the Supreme Court of Canada assumed that the right to silence included a warning as to that right, holding that "the most important function of legal advice upon detention is to ensure that the accused understands his rights, chief among which is his right to silence."¹⁷⁶ The Court went on to hold that, after a suspect had asserted his right to silence, an incriminating statement coaxed from the suspect by a policeman posing as a fellow prisoner must be excluded. (The Court further observed that statements made

168. MARTIN'S ANNUAL CRIMINAL CODE, *supra* note 156, at CH-21 and cases cited therein.

169. *Id.*

170. *Id.* at CH-19. Thus, traffic stops constitute "detention," but the warnings are still not required if provincial legislation authorizing such stops allows them without warnings. Such legislation has been held to be a "reasonable limit prescribed by law under § 1 of the Charter." *Id.*

171. *Interrogation Report*, *supra* note 5, at 537.

172. MARTIN'S ANNUAL CRIMINAL CODE, *supra* note 156, at CH-20 and cases cited therein.

173. *The Queen v. Hebert*, 77 C.R.(3d) 145, 147, 57 C.C.C.(3d) 1 (1990).

174. *See, e.g., The Queen v. Manninen*, 58 C.R.(3d) 97, 100 (1987).

175. 77 C.R.(3d) 145.

176. *Id.* at 146.

to passive undercover agents, to real prisoners who are not police agents, or overheard by a listening device would still be admissible.¹⁷⁷)

Thus Canada, like England, exceeds U.S. standards by requiring that the police inform detainees as to the availability of free counsel; and tries to ensure that detainees *actually receive counsel* when they ask for it, rather than simply mandating that questioning must cease.¹⁷⁸ Moreover, Canada requires the warnings at the onset of any arrest or detention (subject to the traffic stop exception discussed above), rather than prior to custodial interrogations only.¹⁷⁹ However, neither Canada nor England has the equivalent of our rule forbidding questioning of a suspect after he has counsel.¹⁸⁰

As noted above, the Charter sets forth a discretionary exclusionary rule, to be exercised when admission of the evidence would bring the administration of justice into disrepute. The Supreme Court of Canada, in *Collins v. The Queen*,¹⁸¹ held that this exclusionary authority should "rarely" be applied to real (i.e., physical as opposed to testimonial) evidence, but did order exclusion in that case where the police had applied a chokehold on the subject of a search for narcotics. The Court emphasized that the purpose of the rule was not to discipline the police, but to avoid "disrepute" as the Charter requires. In *The Queen v. Dymont*,¹⁸² the Supreme Court reversed a conviction, on the grounds of unreasonable search, where a doctor at the hospital at which the suspect was being treated after an automobile accident collected a sample of free-flowing blood from the suspect, without a warrant or consent. The blood was used to prove drunk driving. The Court noted that "a violation of the sanctity of a person's body is much more serious than that of his office or even of his home."¹⁸³

The 1989 case of *Genest v. The Queen*¹⁸⁴ is of particular interest.

177. *Id.* at 147. In *Illinois v. Perkins*, 496 U.S. 292 (1990), the U.S. Supreme Court held that statements voluntarily made to "jail plants" by incarcerated suspects are admissible, even though suspects are not given *Miranda* warnings. Where the suspect does not know he is speaking to a law enforcement officer, he is not undergoing "custodial interrogation" within the meaning of *Miranda*.

178. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

179. Compare *United States v. Gouveia*, 467 U.S. 180 (1984), where the Court held that prisoners, held in administrative detention for up to 19 months during the investigation of the murder of fellow inmates, were not entitled to counsel.

180. See discussion, *supra* note 81.

181. 33 C.C.C.(3d) 1 (1987).

182. 66 C.R.(3d) 348 (1988).

183. *Id.* at 367 (quoting *Pohoretsky v. The Queen*, 58 C.R.(3d) 113, 116 (1987), a case where the same result was reached on similar facts). Cf. *Schmerber v. California*, 384 U.S. 757 (1966), allowing the warrantless extraction of blood from a drunk driving suspect under an "exigent circumstance" rationale.

184. 67 C.R.(3d) 224 (1989).

In that case the police, acting pursuant to a warrant that was defective in that, *inter alia*, it did not specify the objects to be searched for, made an illegal no-knock entry into the suspect's house. The Court ruled the search unreasonable and suppressed the evidence. Though admission of the evidence did not render the trial unfair, the non-technical defects in the warrant and its execution were such that use of the evidence would bring the administration of justice into disrepute.¹⁸⁵ Despite the claims of the Canadian Supreme Court that the purpose of exclusion is not to discipline the police, this case seems to have that impact. Similarly, in *Kokesch v. The Queen*,¹⁸⁶ the Supreme Court suppressed marijuana, by a 4-3 vote, because of a trespass onto the curtilage of the suspect's property which provided grounds (*inter alia*, the odor of marijuana) for a search warrant.¹⁸⁷ Because the conduct of the police constituted a violation of clear statutory rules, the majority deemed it "egregious" despite the lack of any bad faith or physical force by the police.

The Canadian courts are much stricter when it comes to breaches of the interrogation requirements. The reasoning is that

where, after a violation of the Charter, the accused is conscripted against himself through a confession or other evidence emanating from him[, t]he use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination.¹⁸⁸

This distinction seems strange unless it is really based on reliability concerns. Why admit evidence obtained by an unreasonable search but exclude evidence obtained by a no more unreasonable interrogation technique?¹⁸⁹ This would seem to be justified only if the latter evidence is suspected of being unreliable. However, the Supreme Court of Canada has not adopted this reason for the distinction. Nor is it obvious that the right to silence is a more important right than that of the sanctity of the home. Whatever the reason, this distinction

185. *Id.* at 225 (English digest of case which is reported in French).

186. 1 C.R.(4th) 62 (1990).

187. *But see* *The Queen v. DeBot*, 73 C.R.(3d) 129 (1989), for a recent case in which evidence found during a frisk was not suppressed by the Supreme Court, despite the police's failure to advise the accused of his right to counsel prior to the frisk. As Justice Sopinka pointed out, concurring in the result, it would be an empty gesture to inform the accused of his right to counsel, since the majority concluded that it was not necessary for the police to suspend the search if the accused invoked that right. *Id.* at 158.

188. *Collins*, 56 C.R.(3d) 193, 211 (1987). *See also* R. E. SALHANY, *CANADIAN CRIMINAL PROCEDURE* 69-70 (5th ed. 1989).

189. *See, e.g., The Queen v. Meddoui* 2 C.R.(4th) 316 (1990), where the Alberta Court of Appeal excluded evidence found as a result of an illegal search. "[A]ny attempt to draw a line around Charter protection based upon personal involvement of the accused is bound to produce curious, even absurd, results." *Id.* at 336.

is the stated basis for a tough-minded attitude by the Supreme Court toward police violations in the confessions area.

For example, in *The Queen v. Manninen*,¹⁹⁰ the Supreme Court upheld a lower court's reversal of a conviction of a suspect who, after being informed of his rights to silence and to counsel, stated: "I ain't saying anything until I see my lawyer."¹⁹¹ The police then questioned him further, inducing an incriminating response. The Court held that § 10(b) of the Charter of Rights imposes a duty on police to afford suspects a reasonable opportunity to contact counsel, and "to cease questioning or otherwise attempting to elicit evidence from the detainee until he has had a reasonable opportunity to retain and instruct counsel."¹⁹² Violation of this principle should lead to evidentiary exclusion.

In *The Queen v. Black*,¹⁹³ the suspect, arrested for attempted murder, asked for a lawyer when originally questioned and talked to her lawyer on the telephone. Later, when the victim of the suspect's knife attack died and the case became a murder investigation, the suspect was again informed of her right to counsel and again asked to speak with her lawyer. The police tried several times to contact her lawyer but were unsuccessful; the suspect refused to try to contact another lawyer. When the police then questioned her about the crime, she confessed and led them to the knife. The Supreme Court excluded the confession, and the circumstances under which the knife was found, but not the knife itself, for the same reason as in *Manninen*.¹⁹⁴

In *Amyot v. The Queen*,¹⁹⁵ the suspect was given the appropriate warnings and was asked to submit to a polygraph exam. Without consulting his lawyer, he agreed to do so. After the test, he was informed that he had failed and, after further discussion, he made an incriminating declaration. The Quebec Court of Appeal reversed the conviction and ordered the statement suppressed, holding that the questioning of

190. 58 C.R.(3d) 97 (1987).

191. *Id.* at 100.

192. *Id.* at 104. *Cf.* *Edwards v. Arizona*, 451 U.S. 477 (1981), to the same effect. *See also* *The Queen v. Duguay*, 67 C.R.(3d) 252 (1987), where the Canadian Supreme Court suppressed physical evidence that was the fruit of a statement given when the accused had been interrogated without having been informed of his right to counsel.

193. 70 C.R.(3d) 97 (1989).

194. *Id.* at 117. The Court also observed that "the knife would undoubtedly have been uncovered by the police in the absence of the Charter breach . . ." *Id.* The fact that the Court felt it necessary to invoke this "inevitable discovery" rationale casts further doubt on the firmness of the Court's resolve to admit real evidence absent unusual circumstances. *Cf.* *Oregon v. Elstad*, 470 U.S. 298 (1985), similarly refusing to apply the "fruit of the poisonous tree" doctrine to *Miranda* violations.

195. 78 C.R.(3d) 129 (1990).

the suspect by the polygraphist after the suspect was told that he had failed was a "breach of trust . . . an example of intimidation, coercion, and undue pressure."¹⁹⁶ In addition, this was a breach of the suspect's right to counsel because he was not rewarned after he became a suspect.

Finally, in *The Queen v. Leclair*,¹⁹⁷ a lineup identification was suppressed by the Supreme Court when the accused was forced to participate without having been informed of his opportunity to consult with counsel (who could have told him that he had no legal obligation to appear in the lineup). The Court held that this was evidence "emanating from" the accused, as discussed in *Collins*.¹⁹⁸

The Canadian system is, in a sense, the mirror image of the American. Whereas in the United States, the rules are muddled but the exclusionary formula is clear (i.e., if the rules have been broken the evidence is *always* excluded¹⁹⁹), in Canada, the rules are relatively clear (at least in those areas of the law where there *are* codified rules), but the exclusionary requirement is, intentionally, unclear. The decision whether or not to exclude is left to the trial court. Unlike in France and Australia, however, the discretionary exclusionary rule is regularly invoked; and although its purpose may not be to deter police misconduct, it nevertheless surely has that effect.

The Canadian Code itself tends to be written in more technical language than the British PACE. Consequently, it is a less useful model for emulation by the United States. More troublesome yet, it is not comprehensive. Instead, the Canadian system is a cross between the U.S. and British systems; the Canadian Code spells out some things, such as search warrant requirements,²⁰⁰ while leaving other matters, such as searches incident to arrest, to be governed by judicial interpretation of the Charter.²⁰¹ Thus Canada is of interest not because of its particular code, but because it accepts, at least in part, the principles that a code is the proper way to make rules; that rules can be developed in advance, rather than case-by-case; and that a discre-

196. *Id.* at 129-30 (English digest of opinion in French).

197. 67 C.R.(3d) 209 (1989). Compare *Kirby v. Illinois*, 406 U.S. 682, 690-91 (1972), finding no right to counsel at pre-indictment lineups. For an excellent comparative analysis of Canadian and U.S. criminal procedure, see Robert Harvie & Hamar Foster, *Ties that Bind? The Supreme Court of Canada, American Jurisprudence and the Revision of Canadian Criminal Law Under the Charter*, 28 OSGOODE HALL L.J. 729 (1990).

198. *Leclair*, 67 C.R.(3d), annex at 211.

199. Well, almost always. See *United States v. Leon*, 468 U.S. 897 (1984) (good faith exception to the exclusionary rule in search warrant cases); *Illinois v. Krull*, 480 U.S. 340 (1987) (reliance on statute later declared unconstitutional held not to mandate exclusion).

200. MARTIN'S ANNUAL CRIMINAL CODE, *supra* note 156, § 487 at CC-539-40.

201. See *id.* § 495, Search Incident to Arrest at CC-568.

tionary, but frequently applied, exclusionary rule is the appropriate check on police misbehavior.

FRANCE

French law recognizes three levels of crime: felonies, punishable by five or more years imprisonment; delicts, punishable by two months to five years imprisonment; and contraventions, punishable by no more than two months imprisonment.²⁰² A "flagrant" felony or delict is one that is in the process of being committed or has recently been committed.²⁰³ In such "flagrant" cases, the Code permits the authorities to: (1) search the scene of the offense and seize any evidence found there;²⁰⁴ (2) search the domicile of all persons who appear to have participated in the offense or to be in possession of evidence, and seize any evidence "useful to the manifestation of the truth";²⁰⁵ (3) designate experts to conduct scientific or technical examinations;²⁰⁶ (4) detain persons on the scene until completion of the investigation;²⁰⁷ (5) summon (by force, if necessary) and interrogate (not under oath) any persons capable of furnishing evidence;²⁰⁸ and (6) place witnesses and suspects in investigatory detention for up to twenty-four hours (which can be extended to forty-eight hours with the approval of the prosecuting attorney).²⁰⁹

These search and detention powers are subject to a number of procedural safeguards. For example, house searches must respect professional secrets and the "rights of the defense" and must be witnessed by persons independent of the searching authorities.²¹⁰ Investigatory detention reports must include the dates and times of interrogation, rest, and release, and document that the detainee was advised of his right to a medical examination.²¹¹ On the other hand, there is apparently no particular legal standard (analogous to common law probable cause) governing where an officer may look for evidence of the offense.²¹²

202. Richard S. Frase, *Introduction to THE FRENCH CODE OF CRIMINAL PROCEDURE* 1 (rev. ed. 1988) [hereinafter *Introduction*].

203. CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 53 (Fr.).

204. *Id.* art. 54.

205. *Id.* art. 56.

206. *Id.* art. 60.

207. *Id.* art. 61.

208. *Id.* art. 62.

209. *Id.* art. 63.

210. *Id.* art. 57.

211. *Id.* art. 64.

212. But, as discussed below, searches of domiciles may not be undertaken on mere suspicion.

Nor is there any right to counsel (or even a right to silence warning) during investigatory detentions or at pre-trial lineups.²¹³ Moreover, violation of the durational or other limitations on such detentions has not been found to require exclusion of the resulting confession²¹⁴ (but violations of the rights of defense in other contexts may lead to exclusion²¹⁵).

In the absence of a "flagrant" offense, the investigation is, in theory, conducted by an independent magistrate (*juge d'instruction*); with the police relegated to conducting only a preliminary, noncoercive, investigation in which searches for and seizures of evidence may only be performed upon written consent of the party affected, and detention for interrogation is not allowed.²¹⁶ However, Professor Weigend reports that in one year, only 14% of eligible cases were referred to the magistrate. In the other cases, the police were able to obtain "voluntary" cooperation from the suspect, because people were unaware of their rights or "hesitant to refuse to answer questions or otherwise obstruct police investigations, lest they create or augment suspicion against themselves."²¹⁷ Magistrates have broad discretion in investigations to order arrests and detentions and to carry out "all acts of investigation [including electronic surveillance] that they deem useful to the manifestation of the truth."²¹⁸ Furthermore, magistrates may, and frequently do, delegate their investigatory authority back to the police²¹⁹ (not including their power to issue arrest warrants or to interrogate suspects²²⁰).

213. 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, 585 (1990).

214. Frase, *supra* note 202, at 10.

215. *Id.* at 16 n.105. In particular, "violations of the provisions of Articles 63 and 64, governing investigatory detention, might lead to exclusion if it were shown that 'the search for truth was fundamentally tainted.'" *Id.*

216. C. PR. PÉN. art. 77. However, if the suspect appears "voluntarily" at the police station, or is already there for some other reason, he can be placed in investigatory detention for twenty-four or forty-eight hours as with "flagrant" offenses. Frase, *supra* note 202, at 11. "Discreet allusion to the possibility of [such detention] appears often to induce garrulity in suspects and witnesses." Thomas Weigend, *Continental Cures for American Ailments*, in 2 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 381, 391 (Norval Morris & Michael Tonry eds., 1980).

217. Weigend, *supra* note 216, at 391. See also ROGER MERLE & ANDRÉ VITU, *TRAITÉ DE DROIT CRIMINEL* 263-64 (2d ed. 1973).

218. C. PR. PÉN. arts. 81(1), 82(1). Electronic surveillance is now regulated more closely by a law which limits the duration of, and places other restrictions on, electronic surveillance. Act of July 10, 1991, Law No. 91-646, 162 J.O. 9167, 9 A.L.D. 308.

219. C. PR. PÉN. art. 151.

220. Frase, *supra* note 202, at 15.

At interrogations conducted by an independent examining magistrate, the accused must be informed of his rights to counsel and to silence.²²¹ Failure to warn in these cases will generally result in exclusion of any statement, but not necessarily of its fruits.²²²

Finally, French law provides for identity checks, at which people are required to produce their identification papers. These checks need not be based on individualized suspicion, need not require any suspicion of danger for a weapons frisk, and can last up to four hours.²²³

Even these lenient rules are often ignored because, as Walter Pakter reports, they are not generally backed up with an exclusionary sanction:

French police frequently disregard Code provisions concerning the preconditions and duration of the *garde à vue* [detention for interrogation]. Most scholars have urged that courts use exclusion for Code violations; however, the Court of Cassation has consistently limited relief to individual criminal and civil actions against the police. This relief is illusory because penal sanctions for police violence have been restrictively interpreted by the courts. Furthermore, actions against the police are time consuming, expensive, and difficult to prosecute. . . . Administrative controls within the police department, such as promotion incentives, may prevent gross abuses of detainees. Nevertheless, the primary concern of the police is to solve crimes, and they are unlikely to pay more attention to civil liberties than the courts. . . . [D]etainees in France are generally treated far worse than suspects held by United States or German police interrogators.²²⁴

The Code's very limited restrictions on searches, such as the provisions that searches of attorneys' offices may only be carried out by a magistrate²²⁵ and that searches may not generally be carried out at night,²²⁶ are enforced by mandatory exclusion.²²⁷ Other violations lead to exclusion only if they violate substantial provisions of the Code, in particular the rights of the defense.²²⁸

221. C. PR. PÉN. art. 114.

222. *Id.* arts. 170(1), 172(2).

223. C. PR. PÉN. arts. 78-2, 78-3.

224. Walter Pakter, *Exclusionary Rules in France, Germany and Italy*, 9 HASTINGS INT'L & COMP. L. REV. 1, 13-15 (1985). See also Frase, *supra* note 213, at 586: "[A]lthough some American observers have suggested that French rights are effectively enforced by means of administrative discipline, the French themselves are skeptical of such remedies: 'experience proves that the sole ordinary sanction is exclusion.'" (citations omitted).

225. C. PR. PÉN. art. 56-1.

226. *Id.* art. 59(1).

227. *Id.* art. 59(3), which provides that "The formalities mentioned in Articles 56, 57 and the present article are proscribed upon pain of nullity." See also *id.* art. 78-3(11), providing for mandatory exclusion as to the limitations on detention for the purpose of identity checks.

228. *Id.* art. 172(1). This article relates to violations concerning judicial investigation. For violations in other areas, see Judgment of Mar. 17, 1960 (Kissari), 1960 Bull. Crim., No. 156

In 1980, the Court of Cassation ordered the exclusion of a confession which had been obtained following a warrantless search based on mere suspicion. This indicated that searches and seizures could not be conducted, absent consent, on the basis of mere suspicion or post-search evidence.²²⁹ The Court of Cassation has reaffirmed the exclusion of evidence obtained in illegal searches and seizures, and lower courts have excluded such evidence despite the fact that violations of the Code were made in good faith.²³⁰ The Court has also implied that evidence obtained by way of unauthorized wiretaps would be excluded.²³¹

France has a much more homogeneous population than the United States, and a nationally organized police force.²³² Consequently, it seems to manage with a loosely structured criminal procedure system. The French Code of Criminal Procedure dates back to 1958, though it has been amended since. Whether French procedures are acceptable for France is difficult to say, although many French authorities think they are not.²³³ These procedures are clearly not in keeping with the modern international trend of a detailed code of police procedure backed up by a discretionary, but frequently invoked, exclusionary rule to ensure that the police follow the rules. However, France is addressing reforms of criminal procedure, and a semi-official commission recommended major reforms in a 1991 report.²³⁴

GERMANY

The German Code of Criminal Procedure (*Strafprozessordnung*) was introduced in 1877, and most recently repromulgated in 1975.²³⁵

(Fr.). See generally Edward A. Tomlinson, *Non-Adversarial Justice: The French Experience*, 42 MD. L. REV. 131, 166-71 (1983) (also discussing the concept of "the rights of the defense").

229. Judgment of May 30, 1980 (Gomez-Garzon), Cass. crim., 1980 Bull. Crim., No. 5, at 412 (The police search was conducted because of a suspicion of the presence of drugs. The search had uncovered stolen watches and the defendant had later confessed to cocaine use.).

230. See Pakter, *supra* note 224, at 37 n.266.

231. Judgment of Oct. 9, 1980 (Tournet), Cass. crim., 1980 Bull. Crim., No. 8, at 662 (holding proper the use of an authorized wiretap as long as it was executed under the control of the magistrate, without trickery or stratagem, and without compromising the defendant's rights).

232. Frase, *supra* note 213, at 554-57. "The French police are organized in two nationwide hierarchies: the National Police under the Minister of the Interior, and the Gendarmes, under the Minister of Defense." *Id.* at 554.

233. See ROGER MERLE & ANDRÉ VITU, *TRAITÉ DE DROIT CRIMINEL: PROCEDURE PÉNALE* § 1272, at 541 n.2 (3d ed. 1979); J.C. SOYER, *MANUEL DE DROIT PÉNAL ET PROCEDURE PÉNALE* 285 (6th ed. 1984); J. PRADEL, *PROCEDURE PÉNALE* 464 (3d ed. 1985).

234. Commission Justice Pénale et Droits de l'Homme, *La Mise en Etat des Affaires Pénales, Rapports* (1991).

235. Letter from Thomas Weigend, Professor, University of Cologne, to the author (Jan. 8, 1992) (on file with the *Michigan Journal of International Law*).

It is more detailed, and places more restrictions on the police, than the French code, but it is relatively undemanding by modern standards.²³⁶

For example, the dwelling and person of anyone "suspected" of a crime may be searched by the police "for the purpose of apprehending such person or if it may be presumed that such search will lead to the discovery of evidence."²³⁷ Although Article 13 of the German Constitution (*Grundgesetz*) provides that searches may be ordered only by a judge, that article and the Code permit searches to be ordered "by the prosecution and its auxiliary officials [the police]" if there is "danger in delay."²³⁸ Under the Code, search warrants need not be in any particular form, need not be grounded on probable cause or any particular evidentiary showing (merely some "suspicion"),²³⁹ and may be given orally, or simply dispensed with, if there is danger in delay.

However, in a dramatic (by German standards) new development, the Constitutional (highest) Court has interpreted the Constitution to require more. To search the home of a suspect, the Code, as noted, requires only mere suspicion (*verdächtig*).²⁴⁰ This is in contrast to searches of the homes of third persons, in which case a higher standard (which sounds like our probable cause), "facts upon which it may be concluded" that evidence may be found, must be set forth.²⁴¹ In the *Decision of September 3, 1991*,²⁴² however, the Constitutional Court rejected a warrant that simply declared that the police wanted to search the suspect's home "on suspicion of murder"²⁴³ without setting forth the grounds for the suspicion, and ordered the evidence to be excluded. (This was a typical warrant application prior to this time.²⁴⁴) The Court declared that this warrant violated the constitutional protection of the "free development of the personality,"²⁴⁵ as

236. See generally Bradley, *supra* note 5 (from which much of the discussion in this section is drawn).

237. *Id.* at 1038 (quoting Strafprozessordnung [StPO] § 102 (F.R.G.)).

238. StPO § 105. Grundgesetz [GG] art. 13(2) (F.R.G.). In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the U.S. Supreme Court held that permitting a State Attorney General to issue search warrants even in cases where he later served as chief prosecutor violated the requirement that the magistrate issuing the warrant be "neutral and detached" as required by the Constitution.

239. The translator of the German Code of Criminal Procedure specifically notes that "unqualified suspicion suffices for a search, the word 'reasonable' is not added by the legislature." 10 THE AMERICAN SERIES OF FOREIGN PENAL CODES, THE GERMAN CODE OF CIVIL PROCEDURE § 102 & n.1 (Horst Niebler trans. 1965).

240. StPO § 102.

241. StPO § 103.

242. 1992 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 60 (F.R.G.).

243. *Id.*

244. Conversation with Professor Wagner, University of Kiel (June 16, 1992).

245. GG art 2:

well as Article 13, discussed above. Specifically, the warrant was defective in that it did not set forth details of the offense suspected (in particular that the police were also investigating immigration violations),²⁴⁶ and did not specify the nature of the evidence to be sought or define the areas to be searched narrowly enough.²⁴⁷ This level of detail is necessary so that the magistrate can make an *independent* judgment as to whether the intrusion into the suspect's "private sphere" occasioned by the search and seizure is proportional to the crime suspected.²⁴⁸

While the decision stops short of requiring more than mere suspicion to justify a search, it implies that something more akin to the factual showing required to search non-suspects is now required. Anything less would, in the usual case, make it difficult for the magistrate to make an "independent" judgment declaring the search consistent with the constitutional principle of proportionality. Moreover, since the Constitutional Court excluded the evidence in this case, it demonstrated its willingness to back up its pronouncements with meaningful remedies. This is in contrast to the frequent past practice of declaring a search illegal but then admitting the evidence anyway.²⁴⁹

In addition to this recent development, the German Constitution imposes other restrictions on the criminal justice system:

"[It] affords a fair trial before a legally appointed and independent judge in which constitutional guarantees are observed; specifically the dignity of the person, the right to free development of the personality, the freedom of the person, equality before the law . . . as well as the prohibition against inhumane treatment."²⁵⁰

The *Rechtsstaatsprinzip* (principle of a just state — similar to the U.S. due process requirement) forbids police brutality and deceit both

(1) Everyone shall have the right to the free development of his personality. . . .

(2) Everyone shall have the right to life and to inviolability of his person

246. This is particularly important under German law. If the magistrate were to determine that the only substantiated basis for the search was evidence concerning immigration violations rather than murder, then he might decide not to issue the warrant under the constitutional Principle of Proportionality, even though he would have issued it for a murder investigation. See Bradley, *supra* note 5, at 1041.

247. Decision of Sept. 3, 1991, 1992 BVerfGE at 61.

248. *Id.*

249. See Bradley, *supra* note 5, at 1040-41, 1046, describing the German law as of 1983. At that time, searches could be performed on mere "suspicion," rather than probable cause, and a written search warrant was frequently not used at all. Most significantly, violation of a search order requirement or failure to provide the required information often did not lead to the exclusion of evidence derived from the search.

250. THEODOR KLEINKNECHT & KARLHEINZ MEYER, STRAFPROZESSORDNUNG Einleitung para. 19 (40th ed. 1991) (citations omitted).

in the seizure of evidence²⁵¹ and in interrogations.²⁵² Although evidence must be excluded if the seizure itself was in violation of the *Rechtsstaatsprinzip*,²⁵³ regardless of its probative value or the seriousness of the crime under investigation,²⁵⁴ the practical effect of this broad exclusion has been limited by the fact that the German courts have analyzed searches and seizures separately. Thus, in a case in which a search order violated the *Rechtsstaatsprinzip* because it failed to specify the crime being investigated and the evidence sought, this constitutional defect alone did not lead to suppression of the evidence seized pursuant to the order.²⁵⁵ Instead, the seizure was evaluated independently of the illegal search to determine whether it had been accomplished through brutality or deceit.²⁵⁶ The court reasoned that the question of the validity of the search itself was not properly presented,²⁵⁷ because the seizure was the actual source of the evidence.²⁵⁸ As a result, unconstitutional seizures (i.e. seizures achieved through brutality or deceit) will lead directly to suppression,²⁵⁹

251. Judgment of Mar. 17, 1971, 24 Entscheidungen des Bundesgerichtshof in Strafsachen [BGHSt] 125, 131 (F.R.G.) (decisions of the federal appeals court panel for criminal cases).

252. The rules forbidding brutality and deceit in interrogation are statutory, see StPO § 136a, but the statute in turn rests on constitutional principles. Bradley, *supra* note 5, at 1049-50.

253. KLEINKNECHT & MEYER, *supra* note 250, Einleitung para. 54.

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

255. See Judgment of May 24, 1977, 44 BVerfGE 353.

256. *Id.* at 371-72; see also Bradley, *supra* note 5, at 1406. In this case, the seizure was held unconstitutional for essentially the same reason for which the search was held unconstitutional: the police were not investigating a specific crime, and a "fishing expedition" could not justify an action as intrusive as the seizure of the private medical records of a drug rehabilitation clinic. If, however, the police had found illegal narcotics rather than merely medical records, it is likely that the evidence would not have been suppressed, despite the defects in the search; in deciding in favor of exclusion, the court placed great emphasis on the private nature of the evidence seized.

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

258. See Judgment of May 24, 1977, 44 BVerfGE 353, 383-84. In view of the fact that the German Constitution guarantees the inviolability of the home — GG art. 13; see Judgment of May 26, 1976, 42 BVerfGE at 219 — this distinction makes little sense. Breaking down the door of a house to find evidence is certainly as serious an intrusion as snatching the evidence from the defendant's hand. Because the German system provides alternate grounds to exclude evidence, however, this distinction does not create as much mischief in Germany as it might in the United States. This point is illustrated by the Supreme Court's decision in *Irvine v. California*, 347 U.S. 128 (1954). When police broke into the defendant's home and installed a microphone, the Court condemned the police behavior as a flagrant violation of the Fourth Amendment, *id.* at 132, but declined to exclude the evidence (the conversations of the occupants), because the Court had not yet held the exclusionary rule applicable to the states. *Id.* at 132-34; see *Wolf v. Colorado*, 228 U.S. 25 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643, 665 (1961). In Germany, the courts would have no difficulty excluding such evidence, not because of illegal police behavior, but because private conversations in the home generally are not admissible, however obtained. See generally Bradley, *supra* note 5, at 1044-46 (discussing the tape recording case).

259. Judgment of May 24, 1977, 44 BVerfGE at 383-84.

whereas unconstitutional searches and merely illegal seizures (those that violate the rules of criminal procedure) will not necessarily have that effect.²⁶⁰

However, as noted above, the *Decision of September 3, 1991* seems to be changing the German approach and mandating exclusion as a remedy for police misconduct for *either* search or seizure violations, though the Court did not directly address this issue in the opinion. In that case, exclusion was ordered even though the seizure was not accomplished by brutality or deceit, but rather, involved a defective search warrant.

The second relevant constitutional principle is that of *Verhältnismässigkeit* (principle of proportionality).²⁶¹ Under this doctrine, the methods used in fighting crime must be proportional to the "seriousness of the offense and the strength of the suspicion"²⁶² as well as to the constitutional interests at stake. Thus, what would be appropriate in some cases may not be justifiable in others. The courts also employ a form of "least drastic means" analysis when assessing police actions under the principle of proportionality: if less intrusive measures will suffice, a greater intrusion will not be permitted.²⁶³ This approach is illustrated by the Federal Constitutional Court's *Judgment of June 10, 1963*,²⁶⁴ in which the taking of spinal fluid from a suspect to determine his possible insanity, though generally authorized by the Code of Criminal Procedure,²⁶⁵ was held to be out of proportion to the misdemeanor charge against the suspect.²⁶⁶ The warrant application in the

260. Thus a night search that is prohibited by StPO § 104, for example, can nevertheless yield admissible evidence unless use of that evidence would violate the principle of proportionality. See Bradley, *supra* note 5, at 1041.

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

262. KLEINKNECHT & MEYER, *supra* note 250, Einleitung para. 20.

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

264. 16 BVerfGE 194.

265. "A physical examination of the accused may be ordered for the ascertainment of facts which are important for the proceeding. For this purpose the taking of blood samples and other penetrations of the body, made by a physician pursuant to the rules of medical science . . . are permissible without the consent of the accused, provided no resulting detriment to his health is to be feared." StPO § 81a.

266. Judgment of June 10, 1963, 16 BVerfGE at 202. Because this case arose on appeal from the order authorizing examination, the evidence was never obtained, and the question of suppression was not directly addressed. See also Judgment of Aug. 5, 1966, 20 BVerfGE 162, 187 (holding that search of a press room requires a higher standard of cause than do other searches; such a search "must promise success in producing appropriate evidence," rather than be grounded on mere suspicion).

1991 case was also held to violate the Principle of Proportionality because it did not give the magistrate sufficient information to determine whether the search was a proportional measure in that case.²⁶⁷

German courts therefore engage in a two-step analysis when addressing constitutionally-based challenges to the use of evidence. First, the court determines whether the evidence at issue was seized or obtained in violation of the *Rechtsstaatsprinzip*. In cases in which there is a violation, the judiciary must exclude the evidence to preserve the purity of the judicial process (*Reinheit des Verfahrens*).²⁶⁸ If the evidence is not excluded in the first step, the court then considers the principle of *Verhältnismässigkeit* (proportionality). Weighing the appropriate factors, the court decides whether to use the evidence in question. If the court determines that the individual privacy rights of the accused outweigh the societal interest in the presentation of all relevant evidence,²⁶⁹ the evidence will be excluded, even if the police have followed all the rules.

The mechanics of the German system are demonstrated by three cases in which the courts excluded a diary,²⁷⁰ a tape recording of a private conversation,²⁷¹ and the files of a drug rehabilitation clinic²⁷² on the ground that use of the evidence in court would violate the privacy rights of the defendant. The courts reached these results even though the legality of the seizures was conceded in the first two cases. In the *Diary Case*,²⁷³ the federal court of appeals considered whether the defendant's diary was properly admissible in a perjury trial. The police had been given the diary by the wife of the defendant's paramour, in whose home it had been concealed. Applying the balancing test required by the principle of proportionality, the court reversed the defendant's conviction on the ground that using the defendant's private diary against her in court violated her privacy rights under arti-

267. Decision of Sept. 3, 1991, 1992 BVerfGE at 61.

268. *But see* Claus Rogall, *Gegenwärtiger Stand und Entwicklungstendenzen der Lehre von den Strafprozessualen Beweis Verboten*, 91 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZSTW] 1, 12 (1979) (discussing and criticizing the focus on the purity-of-the-process doctrine).

269. *See generally*, 1 LÖWE-ROSENBERG, DIE STRAFPROZESSORDNUNG UND DES GERICHTSVERFASSUNGSGESETZ, Einleitung ch. 14, para. 1 (23d ed. 1976) (observing that the search for truth in criminal investigations is limited by the commands of justice, which forbid investigatory means that "are unreasonable, grossly violate the proportionality principle, offend human dignity, or are not related to the development of the truth," and claiming that "[t]he exclusionary rules serve the purpose of enforcing these interests") (author's translation).

270. Judgment of Feb. 21, 1964, 19 BGHSt 325.

271. Judgment of Jan. 31, 1973, 34 BVerfGE 238.

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

273. Judgment of Feb. 21, 1964, 19 BGHSt 325.

cles 1 and 2 of the constitution.²⁷⁴ The court emphasized, however, that the mere fact that the defendant's privacy rights were implicated did not automatically require exclusion, and stressed that exclusion was appropriate in this instance because the gravity of the intrusion outweighed the minor nature of the criminal charge. The court suggested that a criminal's diary entries concerning his felonies, or a foreign agent's entries concerning his spying activities, would not be protected, because the interests of the state in prosecuting the offense would outweigh the privacy interests of the defendant.²⁷⁵ Similarly, business papers that did not expose the personality of the author would not be excluded, because there would not be a privacy interest to weigh against the state's interest in securing the admissibility of all relevant evidence.²⁷⁶

This case illustrates some of the differences between the operation of exclusionary rules in Germany and in the United States. In the United States, the diary would have been admissible because it was obtained without police misconduct,²⁷⁷ whereas a gun obtained pursuant to a defective search warrant would have been excluded.²⁷⁸ In contrast, the diary was excluded in Germany, whereas an illegally seized gun might be admissible because its use would not interfere with the free development of the defendant's personality. Only a brutal or deceitful seizure that violated the defendant's most fundamental constitutional rights under the *Rechtsstaatsprinzip* would automatically result in exclusion of a gun. A diary is subject to different treatment,

274. *Id.* at 326-27; GG art. 2, para. 2. The *Diary Case* was the first to hold explicitly that exclusion could be based on a violation of constitutional rights. The court reached this result even though the exclusionary provisions of the Code of Criminal Procedure — for example, StPO § 136a, which excludes coerced confessions — were not applicable, and thereby prepared the way for the subsequent expansion of the exclusionary rule based on the broad constitutional principles discussed above. The basic concept of exclusion, however, is not a new one in Germany; it was first set forth in 1903. 46 E. BELING, *DIE BEWEISVERBOTE ALS GRENZEN DER WAHRHEITSERFORSCHUNG IM STRAFPROZESS IN STRAFRECHTLICHEN ABHANDLUNGEN* (THE EXCLUSIONARY RULES AS THE BORDERS OF THE SEARCH FOR TRUTH IN CRIMINAL PROCEDURE) 37 (1903).

275. Judgment of Feb. 21, 1964, 19 BGHSt at 331. Indeed, in 1989, the Constitutional Court affirmed, by an equally divided court, the conviction of a murderer whose legally obtained, diary-like notes were used against him. Judgment of Sept. 14, 1989, 80 BVerfGE 367.

276. Judgment of Sept. 14, 1989, 80 BVerfGE 367.

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

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

however, because its use in court constitutes a harsh incursion on an individual's personal privacy, whether or not it was legally obtained.²⁷⁹

By excluding a legally seized diary but holding that diaries or other private personal papers may be used as evidence in prosecutions of more serious crimes, the court in the *Diary Case* gave the police little guidance in deciding when such documents should be seized. As the case indicated, the admissibility of all evidence — unless seized in violation of the *Rechtsstaatsprinzip* or a statute requiring exclusion — is open to consideration by the court, which decides on an ad hoc basis whether to admit or exclude. Thus, the purpose of the German exclusionary rule has traditionally not been to deter police misconduct.²⁸⁰ Instead, through balancing, the rule operates to maximize privacy interests consistently with society's interest in prosecuting serious crimes.²⁸¹ The statement of the Justice Department that "evidence is suppressed only when deviation from prescribed standards is thought to jeopardize its reliability"²⁸² completely misstates the bases for evidentiary exclusion in Germany.

Similarly, in the *Judgment of January 31, 1973*²⁸³ the Constitutional Court excluded a tape recording of the planning of a fraud that had been made by one of the parties to the transaction and turned over voluntarily to the police. The Court held that use of taped conversations in court intruded upon the "private sphere" of the individual and that such recordings would only be admissible in the event of an overriding public interest, which was not present in that case. While the court held that the tape recording was not admissible in this fraud

279. A recent reaffirmation of the diary case may be found in the Decision of January 4, 1988 by the supreme court of Saarbrücken, 9 NEUE ZEITSCHRIFT FÜR STRAFRECHT [NSTZ] 424 (1989). In a narcotics case, the police, acting pursuant to a search warrant, seized the diaries of the defendant's "girlfriend" who, unbeknownst to the police, had become his wife, at the apartment where they both lived. The court held that the diary would not be admissible against either of them because the seizure violated the constitutional principle of "free development of the personality." *But see* Decision of Sept. 14, 1989, as discussed in Bradley, *supra* note 5, at 1040-41, 1046, in which the Constitutional Court affirmed, by an equally divided vote, the use of a diary in which the defendant had commented on the tensions within him that, the prosecution argued, had led him to commit the charged murder.

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

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

282. *Search Report, supra* note 5, at 620.

283. 34 BVerfGE 238.

prosecution, it noted that the result might have been different had the tape been evidence of a crime of violence.²⁸⁴

Finally, in the *Judgment of May 24, 1977*,²⁸⁵ the Constitutional Court held that the records of a narcotics treatment center could not be used when they were obtained during an unwarranted "fishing expedition" by the police. However, the court again cautioned that in an investigation of serious crime, or a properly limited search for specific narcotics violations, seizure and use of such records might be appropriate.²⁸⁶

In a 1985 article reviewing German exclusionary law, especially the *Judgment of March 17, 1983*²⁸⁷ in which the federal appeals court excluded evidence when an unlawful wiretap was used in combination with deception, Walter Pakter concluded that "[r]ecent decisions indicate that the BGH [federal appeals court] now recognizes that illegal searches by the police occur, and the current trend is to expand the use of exclusion to deter misconduct by police or other state officials."²⁸⁸ But while this may be the "trend" in Germany, such exclusionary decisions are still too rare to have a consistent impact on police behavior, and the disciplining of police is explicitly *not* the basis for evidentiary exclusion.²⁸⁹ This is especially true because a decision by the trial court "excluding" evidence does not mean that the fact finders (a mixed panel of judges and private citizens) do not find out about the excluded evidence. Rather, knowing of it, they are enjoined to disregard it, and the evidence cannot be used to support the statement of reasons that must accompany each judgment to the appellate court. This arrangement obviously tends to dilute the impact of any exclusionary rules.²⁹⁰ Nevertheless, the *Decision of September 3, 1991* does seem to reinforce Pakter's view.

In the confessions area, § 136 of the Code of Criminal Procedure provides that, prior to any questioning in court,

the accused shall be informed of the act with which he is charged and of the applicable penal provisions. It shall be pointed out to him that the law grants him the right to respond to the accusation, or not to answer

284. *Id.* at 248. In a recent case, the Supreme Civil and Criminal Court did admit an illicit tape-recording to prove arson. Judgment of Apr. 12, 1989, reprinted in 42 NJW 2760 (1989).

285. 44 BVerfGE 353.

286. *Id.* at 379. Similarly, in the Judgment of May 8, 1972, the federal constitutional court held that information from a doctor's files concerning his treatment of the defendant, though seized pursuant to a valid warrant, must be excluded from the defendant's extortion trial. 32 BVerfGE 373, 379.

287. 31 BGHSt 304 (1983).

288. Pakter, *supra* note 224, at 48.

289. Bradley, *supra* note 5, at 1044 and authorities cited therein.

290. This problem is discussed in more detail, *id.* at 1063-64.

regarding the charge, and at all times, even before his examination, to consult with defense counsel of his choice.

Although this section does not apply on its face to police interrogations, the federal appeals court has held that the police are required to give these warnings.²⁹¹ However, until 1992, exclusion by the trial judge of a confession obtained after a failure to give the warnings was not required.²⁹² In the important *Decision of February 27, 1992*,²⁹³ the Fifth Senate of the Federal Court of Appeals (BGH), in an opinion subscribed to by other Senates,²⁹⁴ (and thus, apparently, the final word on the subject) changed this. Citing *Miranda v. Arizona*, and noting that Britain, France,²⁹⁵ Denmark, Italy, and the Netherlands also have a mandatory exclusionary rule for such violations, the Court declared that if the interrogation of an accused by the police has not been preceded by the § 136 warnings, "the admissions may not be used."²⁹⁶ Only minor exceptions, such as where the accused already was aware of his rights, were discussed, so the exclusionary rule appears to be mandatory. Moreover, the warning requirement applies "before [the subject] is questioned as an accused."²⁹⁷ Thus, going further than *Miranda*, it applies to all interrogations, without regard to whether or not the suspect is "in custody." However, Germany does not apparently have any requirement of a warning as to *appointment* of counsel if the suspect cannot afford one, much less actually maintain a "duty solicitor" who will be available at all times, as in England.

In addition to the warning requirement, § 136a of the Code provides:

The freedom of the accused to determine and to exercise his will shall not be impaired by ill-treatment, by fatigue, by physical interference, by dispensing medicines, by torture, by deception or by hypnosis. . . . Statements which were obtained in violation of these prohibitions may not be used even if the accused agrees to such use.

Thus, in the *Judgment of May 31, 1990*,²⁹⁸ the BGH excluded a confession from an accused who had been informed that the police were investigating a "missing person" report when, in fact, they had

291. Judgment of June 7, 1983, 31 BGHSt 395.

292. *Id.* at 400.

293. *Reprinted in* 22 NJW 1463 (1992).

294. *Id.* at 1467.

295. The German Court correctly noted, as discussed above, that the warning requirement in France applies only to *judicial*, not police, interrogations.

296. Decision of Feb. 27, 1992, *supra* note 293, at 1463.

297. *Id.* at 1464.

298. 4 StR 112.

already found the body, and were investigating a murder.²⁹⁹ However, subsequent statements, made after the accused had been informed of the true nature of the investigation, were admissible. Similarly, earlier cases had excluded confessions where an accused confessed after being arrested at 5:00 a.m. and deprived of sleep for thirty hours,³⁰⁰ and where the accused had been confronted with the corpse of his three year old son, whom he was accused of murdering.³⁰¹ By the same token, according to Pakter, "arbitrary prolongations of arrest and mistreatment of suspects are no longer considered a problem. . . . [A]ny statement obtained [after the permitted 24 hour time limit on detentions³⁰²] would be excluded under § 136(a).³⁰³

In conclusion, Germany, in common with the growing international trend, has a fairly detailed code of procedure that generally requires meaningful search warrants, and *Miranda*-type warnings prior to interrogation. Moreover, the Germans are increasingly using evidentiary exclusion as a means of enforcing the mandates of the code, despite the claims of the German courts that this is not the purpose of exclusion.

ITALY

In 1989, Italy adopted a new code of criminal procedure to replace the Fascist inspired *Codice Rocco* that, with many alterations and amendments, had been in effect for fifty years.³⁰⁴ The new code contains 746 articles that cover the entire criminal process from investigation to appeals.³⁰⁵ In general, the thrust of the code has been to transform Italy's criminal justice system from an inquisitorial to an accusatorial model, and to codify "many aspects of the American Supreme Court's 'criminal procedure revolution' of the 1960s."³⁰⁶

299. Cf. *Colorado v. Spring*, 479 U.S. 564 (1987), where the Supreme Court held that it was not necessary that the suspect be accurately informed of the subject matter of the investigation.

300. Judgment of Mar. 24, 1959, 13 BGHSt 60.

301. Judgment of Oct. 7, 1960, 15 BGHSt 187.

302. StPO § 128.

303. Pakter, *supra* note 224, at 20.

304. For a discussion of the background of the code reform in Italy, see Jeffrey J. Miller, Note, *Plea Bargaining and its Analogues Under the New Italian Criminal Procedure Code and In the United States: Towards a New Understanding of Comparative Criminal Procedure*, 22 N.Y.U.J. INT'L L. & POL. 215, 221-22 (1990).

305. Codice di procedura penale [C.P.P.], enacted by Pres. Decree, Law No. 447 of Sept. 22, 1988, 250 Gazz. Uff.

306. Lawrence J. Fassler, Note, *The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe*, 29 COLUM. J. TRANSNAT'L L. 245, 246 (1991). According to Miller, *supra* note 304, there are three major aspects to the Italian reform: 1) creating a "more partisan relationship between the public prosecutor and the defense counsel, while the judge retains a more impartial position in the process;" 2) making the trial more than a "brief

Under the new code, police officials may frisk persons caught *in flagrante delicto*, fugitives, or individuals named in a "cautionary" custodial order.³⁰⁷ The code only permits warrantless searches of a crime scene under three circumstances: when a person is caught *in flagrante delicto*, when a fugitive is evading police officers, or when an arrest warrant has been issued for a suspected criminal.³⁰⁸ In addition, the code allows searches of domiciles at any hour of the night when delay could prejudice the case.³⁰⁹ However, one major exception potentially could swallow up much of the rule: police may also perform warrantless searches of places where weapons are thought to be hidden, and this may permit them in practice to search homes for evidence of almost any crime under the pretense of looking for weapons.³¹⁰ This power is limited to "cases of necessity and urgency,"³¹¹ so the Italian courts may, in theory at least, exclude evidence found when the police cannot make such a showing.

In contrast to the flexible restrictions on searches, stringent rules limit interrogations. No statements made by persons under investigation at the scene of the crime can be documented or used if a defense attorney is not present.³¹² Police officers may only employ information given by suspects, in the absence of defense counsel, in order to continue immediate investigations and inquiries.³¹³ Furthermore, an individual not yet officially under investigation who starts to make incriminating declarations in front of judicial authorities or police must be interrupted, warned of the inculpatory potential of such statements, and invited to nominate a defense attorney.³¹⁴

public formality at the end of the investigation" as it was under the old system; and 3) introducing "special procedures to eliminate the majority of cases before the trial stage" such as plea bargaining and summary trials. *Id.* at 224-26. In particular, at trial, the accused now has a right to counsel, C.P.P. arts. 104, 364(2), a right to silence, *id.* art. 64, and a right to confront, and have his counsel cross-examine, witnesses against him, *id.* arts. 195(3), 498).

307. C.P.P. arts. 352(1), 352(2).

308. *Id.*

309. *Id.* arts. 251, 352(3).

310. Fassler, *supra* note 306, at 256. Compare Canada's "weapons exception" to the search warrant requirement, discussed *supra* note 161 and accompanying text, which does not apply to domicile searches. Presumably this also allows frisks for weapons even when the suspect is not caught red-handed.

311. *Id.* at 255.

312. C.P.P. art. 350(6).

313. *Id.* art. 350(5).

314. *Id.* art. 63. When "specific and exceptional cautionary reasons" exist, the preliminary investigation judge may delay the exercise of the suspect's right to confer with an attorney for up to seven days. *Id.* art. 104(3). (But uncounselled statements still may not be used at the trial.) In addition, the prosecutor can suspend the right of an arrested person to confer with counsel until the time the accused first appears in court. *Id.* art. 104(4). The period between arrest and the first court date could conceivably be up to four days. *Id.* arts. 390(1), 390(2).

Statements made without an attorney present *may not even be used to impeach*.³¹⁵ Thus, not only has Italy, in essence, adopted the *Miranda* warnings, it has completely barred confessions from the trial unless the confession is given in the attorney's presence.³¹⁶ This seems extreme, and raises concerns that the courts will find ways to get around strict enforcement of the rules. If Italy is concerned about the police falsifying or forcing confessions, a tape recording requirement similar to Australia's would largely eliminate the first concern and help to alleviate the second.

In addition to being able to demand the presence of defense counsel at any interrogation,³¹⁷ the suspect is also entitled to the assistance of counsel during cross-examinations of witnesses, scientific tests, and searches and seizures.³¹⁸ This right can be avoided by the police only if "justified urgency" requires them to proceed without the presence of defense counsel.³¹⁹

Finally, and most significantly, the code expressly provides that "[e]vidence acquired in violation of prohibitions established by law cannot be used [in court]."³²⁰ Unfortunately, the Italian experience with this new code has not yet been reported in English. Because of the broad "weapons" exception to the warrant requirement discussed above, the code's exclusionary rule may be "best considered as a prohibition against illegally coerced testimonial evidence."³²¹ However, this may prove to be an underestimation of the exclusionary rule's impact, since the requirement of counsel at various stages of the investigation listed above, absent "justified urgency," also seems ripe for police violation, and hence, exclusionary sanction.

There was some tradition of evidentiary exclusion under the old code. The inadmissibility of uncounseled confessions, for example, was established in 1974.³²² After 1978, the police were allowed to seek and use "summary inquiries" made in the absence of the suspect's

315. Decision of the Constitutional Court of May 23, 1991, 259 Gazz. Uff. The Court struck down one clause of C.P.P. art. 350(7) permitting the limited use of spontaneous statements made without a defense attorney to contest testimony at trial.

316. *Id.* Statements made to the *police*, with the defense attorney present may only be used to impeach, not in the prosecution's case-in-chief.

317. C.P.P. art. 364.

318. C.P.P. arts. 498, 360, 305, 356. See also Ennio Amodio & Eugenio Selvaggi, *An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure*, 62 TEMP. L.Q. 1211, 1222 (1989).

319. Fassler, *supra* note 306, at 253 n.50.

320. C.P.P. art. 191(1).

321. Fassler, *supra* note 306, at 256.

322. Pakter, *supra* note 224, at 24. "Exclusion plays a central role in Italian law in controlling police interrogations." *Id.*

counsel for investigatory purposes, but the statements themselves were inadmissible in court and excluded from the dossier.³²³ Statements made without warnings as to silence and counsel are “unusable in any way” in a trial.³²⁴ That is, even evidence *derived* from unwarned, as opposed to uncounseled, statements has been held inadmissible.³²⁵

In contrast to the German courts, which, prior to 1991 at least, had distinguished the illegal search from the seizure and only automatically excluded evidence from inappropriately performed seizures, the Italian Court of Cassation has held that:

Once the nullity of a search has been ascertained according to art. 185 of the [old] code of criminal procedure, the consequences cannot be avoided. Rather, if the act of the search is void, the efficacy of the seizure can no longer be discussed, and thus the evidence gained from the seizure cannot be used.³²⁶

Thus, Italy, with the most recent recodification of the countries studied, stands as an important example of the fact that not only do other countries consider a code to be the way to declare rules, and use an exclusionary rule to deter police violations, but that some nations deem it appropriate to impose limitations on the police as strong as, and in some cases stronger than, those imposed by the Warren Court.

CONCLUSION

Four trends emerge from the comparative analysis in this article. First, every country examined here except the United States agrees that the declaration of criminal procedure rules is, at least primarily, the province of the *legislative*, not the judicial branch. The legislature enacts rules in a code that the police can learn and obey, rather than in a series of court opinions. Second, most countries require *Miranda*-type warnings prior to interrogation. If the requirement of such warnings in the United States was once aberrational, that is no longer the case. Third, exclusionary remedies are finding increasing favor as a means of deterring police breaches of the rules, even though the courts of two countries, Canada and Germany, continue to maintain that deterrence of police misconduct is *not* the purpose of the exclusionary rule. Fourth, these exclusionary remedies tend, except in the case of coerced confessions, to be discretionary, rather than mandatory as in the United States. Nonetheless, they tend to be enforced often enough

323. *Id.* at 24. Compare the German method, discussed above, where “excluded” evidence is not referred to in court, but remains in the dossier.

324. Judgment of Feb. 20, 1974, 127 *Giurisprudenza Italiana* [Giur.Ital.] II 432, 436.

325. *Id.*

326. Judgment of Sept. 26, 1980, 133 *Giur. Ital.* II 113 (The evidence was nevertheless admitted because the issue was first raised on appeal).

to have an impact on the police, at least in Canada and England, increasingly in Germany, and perhaps in Italy and Australia as well.

It seems that these countries, influenced by U.S. developments, may have the right idea: develop, either directly through the legislature or by means of a legislatively appointed body, a comprehensive code of rules, all of which *may* be enforced with the exclusionary remedy so that the police are encouraged to obey them. Then, use that remedy often, but only when, on balance, the use of the evidence would be unfair or would bring the administration of justice into disrepute. The clearer the rules that the police are supposed to follow, the more likely that their failure to follow them will cause the public to lose confidence in the justice system. Thus, on the admittedly frequent (but far *less* frequent than is currently the case) occasions when the statutory rules would not give the police clear guidance, evidentiary exclusion would ordinarily be inappropriate. But, when the rules are clear, evidentiary exclusion would be the norm, at least for violations of non-technical rules. However, other factors, such as the seriousness of the crime, the quantum of evidence possessed by the police, the willfulness of the violation, and the importance of the evidence to the government's case, could also figure into the equation.

My experiences in Germany in 1982 and Australia in 1989 had led me to believe that a "discretionary" exclusionary rule was no exclusionary rule — a remedy that was paid lip service by the courts but was not seriously enforced, and hence had no substantial impact on police behavior. However, my study of the British and Canadian systems, as well as recent developments in Italy, and in Germany and Australia themselves, has convinced me that a discretionary system can function effectively as long as it is based on clear, codified rules and taken seriously by the courts, particularly the nation's highest court. I see no reason to believe that U.S. courts, with a thirty year tradition of evidentiary exclusion to deter police misconduct, could not be trusted to rigorously apply a discretionary rule, just as British and Canadian courts, with *no* such tradition, seem to have done.

A switch by the U.S. to a non-mandatory exclusionary rule would, in most cases, lead to the same result (non-exclusion) as does the current "mandatory" but inconsistently enforced rule. However, such a switch only makes sense if it is accompanied by a comprehensive code of criminal procedure that clearly spells out the rights and duties of both police and citizenry. Our current confusing rules too easily lend themselves to legitimate police misunderstanding, and consequently to unduly erratic exclusionary decisions by trial judges. The English experience in particular demonstrates that, if the rules are clearly spelled

out, and divorced from the exclusionary remedy, a discretionary exclusionary rule, used only when clear rules are clearly broken, can be an apparently effective deterrent to police misconduct, at a lesser cost in terms of the loss of probative evidence.³²⁷

The question of whether the United States could and should have a national code of criminal procedure is discussed in detail in my forthcoming book, *The Failure of the Criminal Procedure Revolution*.³²⁸ In that book, I argue that once the Supreme Court "incorporated" the Fourth, Fifth, and Sixth Amendments into the Fourteenth, it also automatically gave Congress the power to legislate a code of procedure under § 5 of the Fourteenth Amendment which provides that "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." Such a code should be drafted, and kept up to date, by a body created for that purpose, similar to the current federal rules drafting committees. Its product should be subject to an "aye or nay" vote in Congress, but not to congressional amendment. Of course, the Supreme Court would retain authority to determine the constitutionality of particular provisions and, in the unlikely event that the committee did not act first, to resolve conflicts among the States and Circuits as to the meaning of those provisions. A federal criminal procedure code, while not without its administrative difficulties, would solve the most pressing problem of our current system: that a Court deciding issues on a case-by-case basis is simply not suited to declare a comprehensive set of rules.³²⁹

327. I say "apparently effective" because there is no way to say for certain that either the English or the U.S. approach effectively deters police misconduct, much less which one works the best. Nevertheless, it is obvious that the English rules are much clearer and more comprehensive than the U.S. Rules. It would seem to follow that exclusion when the police commit serious breaches of the rules is an easier matter to determine in Britain, and consequently, a more effective, even though less frequently employed, deterrent.

328. *Supra* note 15.

329. I first discussed the particular mechanisms by which Court decisions create unnecessary problems in the law of criminal procedure in Craig M. Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1; and that discussion is reiterated, and, to a limited extent, enlarged upon in my book. An example: when the Court decides, as it did in *Terry v. Ohio*, 392 U.S. 1 (1968), that police may "stop and frisk" a suspect if they have reasonable suspicion that he is armed and dangerous and that "criminal activity is afoot," that decision is based on a particular set of facts. In the next case, where the facts vary, such as that criminal activity is not "afoot," police receive no guidance from *Terry*. (See *United States v. Hensley*, 469 U.S. 221 (1985), finally deciding, seventeen years later, that past criminal activity can provide grounds for a "stop and frisk.") A code could have resolved the *Hensley* issue, as well as the many other questions raised by *Terry*, *Miranda*, and the other Warren Court cases, in advance. It can still answer the myriad unanswered questions present in current criminal procedure law.