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'Fruits of the Poisonous Tree' in Comparative Law

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"FRUITS OF THE POISONOUS TREE" IN COMPARATIVE LAW

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I. INTRODUCTION

The modern rule that unconstitutionally gathered evidence should be excluded from the criminal trial has its roots in the jurisprudence of the United States Supreme Court (USSC) during the later years of the Warren court.[1] These were the years when the USSC gradually incorporated the protections for criminal defendants listed in the Fourth, Fifth, Sixth, and Eighth Amendments of the federal constitution into the overarching protections of Fourteenth Amendment due process and made them binding on the states, thus, effectively, converting the highest federal appeals court into a national constitutional court, responsible for justice throughout the realm.

1. Supremecourtus.gov, Members of the Supreme Court of the United States, http://www.supremecourtus.gov/about/members.pdf (last visited Feb. 4, 2010) (Earl Warren was Chief Justice of the USSC from 1953 to 1969).

The landmark decisions in this respect were: (1) *Mapp v. Ohio*,[2] which made the Fourth Amendment exclusionary rule, already functioning since 1914 in the federal courts,[3] binding on the States; (2) *Wong Sun v. United States*,[4] which re-articulated the exclusionary rule in relation to derivative evidence causally linked to preceding constitutional violations;[5] (3) *Massiah v. United States*,[6] which provided for exclusion of confessions or admissions made to government agents by charged defendants in violation of the Sixth Amendment right to counsel; and, of course (4) *Miranda v. Arizona*,[7] which provided for exclusion of confessions and admissions made during custodial interrogation, where the suspect was not advised of the right to silence and the right to counsel or did not effectively waive those rights in violation of the Fifth Amendment privilege against self-incrimination.

These landmark decisions, especially *Mapp* and *Miranda*, have been very influential overseas, as have some of the limitations placed on the exclusionary rule by the Burger court;[8] the foremost of these being the exceptions to the doctrine of the "fruits of the poisonous tree" known as "inevitable discovery,"[9] "independent source,"[10] and the "good faith" exception to violations of the Fourth Amendment.[11]

Earlier decisions by the USSC, which excluded involuntary confessions in the federal courts, either due to their paucity of evidentiary value,[12] or as direct violations of the Fifth Amendment,[13] and later decisions suppressing mainly state court confessions, based in a violation of due process after an assessment of the "totality of the circumstances,"[14] did not amount to ground-breaking jurisprudence. England and Wales, and most continental European countries had al-

2. Mapp v. Ohio, 367 U.S. 643, 654-55 (1961).

3. Since the decision in *Weeks v. United States*, 232 U.S. 383, 391-92 (1914).

4. Wong Sun v. United States, 371 U.S. 471, 484 (1963).

5. The term "fruit of the poisonous tree" was originally coined by Justice Frankfurter in *Nardone v. United States*, 308 U.S. 338, 341 (1939), but the idea that the government could not use derivative evidence was articulated 19 years earlier by Justice Holmes in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391-92 (1920).

6. Massiah v. United States, 377 U.S. 201, 206 (1964).

7. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

8. Supremecourtus.gov, Members of the Supreme Court of the United States, http://www.supremecourtus.gov/about/members.pdf (last visited Feb. 4, 2010) (Warren Burger was Chief Justice of the USSC from 1969 to 1986).

9. Nix v. Williams, 467 U.S. 431, 432 (1984).

10. *Silverthorne*, 251 U.S. at 392, *cited in* Murray v. United States, 487 U.S. 533, 537 (1988).

11. United States v. Leon, 468 U.S. 897, 897 (1984).

12. Hopt v. Utah, 110 U.S. 574, 585 (1884).

13. Bram v. United States, 168 U.S. 532, 542 (1897).

14. *See* Brown v. Mississippi, 297 U.S. 278 (1936) (representing the most notorious of dozens of cases decided in this area prior to the incorporation of the Fifth Amendment in 1964,

ready recognized exclusionary rules for coerced or otherwise involuntary confessions, either based on their lack of probative value or human rights considerations.

It could seem surprising that modern exclusionary rules developed in a country of the Common Law tradition, rather than in the inquisitorial tradition, which was born on the European continent. It is well-known that the evidentiary tradition in Great Britain and in the Common Law in general, including the United States, was originally that courts never questioned how evidence was obtained, but decided admissibility solely on relevance and probative value considerations. On the other hand, continental European codes of criminal procedure prescribed rather strict rules for the gathering of evidence and the performance of other acts during the preliminary criminal investigation, and even provided for the inadmissibility of the fruits of investigative acts that violated these rules.[15] The resulting "nullity" meant that the act and at times the evidentiary fruits thereof were excluded from the investigative file and thus from the trial altogether.[16] The pedantic "legality" notions of early inquisitorial codes mirror the pedantic nature of the formal rules of evidence which informed the judgment on the facts in these procedural arrangements.[17] When lay participation in the criminal trial on the European continent was abolished in favor of professional inquisitorial courts, the lack of popular legitimacy of the new courts was compensated by rigid strictures on the decision-making powers of both investigating and adjudicating magistrates.[18] Information adduced by investigating magistrates during the prelimi-

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which involved the torture of black suspects in a murder case and their hurried sentence to death three days later in a kangaroo jury court).

15. One need only look at any continental European code of criminal procedure. *See, e.g.,* CODICE DI PROCEDURA PENALE [C.P.P.] arts. 177-415 (Gazz. Uff. 1988) (Italy), *available at* http://studiocelentano.it/codici/cpp/index.asp (outlining various aspects of Italy's code of criminal procedure such as: arts. 208-210 examinations of the parties; arts. 211-212 confrontations between witnesses and defendants; arts. 213-217 identifications; arts. 218-219 judicial experiments; arts. 220-233 expert testimony; arts. 234-243 documents; arts. 244-246 inspections; arts. 247-252 searches; arts. 253-265 seizures; and arts. 266-271 wiretapping. Book V has titles dedicated to: accepting complaints or reports of crime (Title II); formalities of the complaint (Title III); preliminary acts of police (Title IV); activities of the prosecutor (Title V); arrest (Title VI); and depositions and preservation of evidence (Title VII). The nullities prescribed for different violations are codified in arts. 177-186.).

16. For a discussion of nullities, *see* Section II.B.7, *infra*. *Cf.* STEPHEN C. THAMAN, COMPARATIVE CRIMINAL PROCEDURE: A CASEBOOK APPROACH 105-09 (2d ed. 2008).

17. *See* JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF 3-5 (1977) (describing the statutory system of proofs derived from the Roman canon law of evidence) [hereinafter LANGBEIN, TORTURE].

18. *See* JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 36 (3d ed.

nary investigation did not become "evidence" unless the precise rules for its gathering were followed.[19] And trial judges could not convict unless the "evidence" included two eyewitnesses of guilt or a confession corroborated by other evidence.[20] Judges also had to give reasons for their judgments because they lacked the popular legitimacy enjoyed by the jury.

Perhaps the best explanation for the early U.S. development of a doctrine of exclusion, which is separate from the inquisitorial doctrine,[21] is attributable to the gradual establishment of the USSC as a constitutional court for the entire realm and the elevation of constitutional law over the pragmatics of convicting criminals. One also cannot deny the role of the Civil Rights Movement of the 1950s and 1960s as being the impulse for the USSC to take on the regional injustices in state criminal justice systems that ignored rudimentary protections, especially for African-American criminal defendants.

If the American "criminal procedure revolution"[22] took place in the 1960's and 1970's during the tenure of the Warren Court, in Europe it was the reaction to the horrors of the Holocaust and Stalinism after the conclusion of World War II that pushed Europeans to protect citizen's rights against government excesses. The immediate results were the promulgation of the International Declaration of Human Rights, the European Convention of Rights and Freedoms, and the International Covenant on Civil and Political Rights.[23] The countries emerging from the darkness of the first half of the Twentieth

2007) (referring to the lack of discretion of civil law judges, who as "expert clerk[s]" were perceived as mechanically operating a "machine designed and built by legislators.").

19. This tradition continues today, even in countries where the public prosecutor has replaced the investigating magistrate as the chief investigating official. Thus, in Germany, for facts to be proved at trial, the court must abide by a "strict evidentiary procedure" (*Strengbeweisverfahren*), by which only evidence provided for in the code is admissible, and only when the procedural formalities are adhered to. ULRICH EISENBERG, BEWEISRECHT DER STPO: SPEZIALKOMMENTAR 70 (3d ed. 1999). On the "legalizing" of facts to make them admissible in the Russian trial, *see* I.L. PETRUKHIN, TEORETICHESKIE OSNOVY REFORMY UGOLOVNOGO PROTSESSA V ROSSII. 166-68 (2004).

20. LANGBEIN, TORTURE, *supra* note 17, at 4-5.

21. For an early German treatise on the exclusionary rule, see ERNST BELING, DIE BEWEISVERBOTE ALS GRENZEN DER WAHRHEITSERFORSCHUNG IM STRAFPROZESS 10-13, 32-37 (1903) (generally balancing the interests of the state in truth-finding and the protection of human dignity and the human personality).

22. For a critique of this "revolution," *see* CRAIG M. BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION (1993).

23. On the various post-war treaties and conventions which enshrine the criminal justice standards, see David Weissbrodt, *International Criminal Justice Standards*, *in* 2 ENCYC. OF CRIME & JUSTICE, DELINQUENT & CRIMINAL SUBCULTURES – JUVENILE JUSTICE: INSTITUTIONS, 835, 835-41 (Joshua Dressler ed., 2d ed. 2002).

Century created new constitutions that reflected the primacy of the protection of the citizens against the violence and arbitrariness of the state. A parallel phenomenon in Europe has been the creation of Constitutional Courts in Germany, Italy, Spain, and nearly all the countries of the former Warsaw Pact, which are separate from the normal court system under the leadership of Supreme Courts.

A similar explosion of new constitutions and criminal procedure reform came about in the 1990's as Latin America emerged from decades of American-sponsored dictatorships that no longer served one of their prime purposes, the elimination of leftist movements, following the end of the Cold War.

The regular courts and the constitutional courts in Europe and Latin America, as well as, if perhaps to a lesser degree, in other new democracies such as Japan, Korea, Taiwan, and South Africa, are very familiar with the exclusionary rule jurisprudence of the USSC. These courts use USSC jurisprudence when interpreting their new constitutional principles relating to privacy, human dignity and the privilege against self-incrimination, and the possibility of exclusion of evidence gathered in violation of these principles.

In this article I will give a brief review of the types of exclusionary rules articulated in modern codes, constitutions, and jurisprudence and then explore how these rules are interpreted when it comes to excluding the derivative "fruits" of constitutional violations of the right to silence and human dignity during police interrogations and the right to privacy in one's home and confidential communications. The conclusion will show that, whether a country begins with a seemingly airtight categorical exclusionary rule for serious constitutional violations, or allows judges great discretion in deciding whether to use fruits of unconstitutional police behavior, the search for truth has largely triumphed over constitutional rights in relation to "fruits of the poisonous tree," largely due to nimble-footed jurisprudence by judges in fashioning flexible balancing tests or by nullifying legislative mandates. As a result, we can expect that law enforcement officials will continue to intentionally short-cut statutory and constitutional procedures either due to administrative convenience or the lack of legal alternatives, and that courts will continue to wink at such conduct in their pursuit of "truth," i.e., criminal convictions.

II. General Exclusionary Rules and Procedures

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

A number of modern constitutions adopted by democratizing countries emerging from the clutches of totalitarian, authoritarian, or dictatorial regimes have given constitutional status to the prohibition of the use of evidence illegally seized by law enforcement officials. Some of the provisions make no distinction between evidence gathered in violation of constitutional (human rights) protections or that gathered in violation of other codified criminal procedure rules that lack constitutional status. For instance, Article 50(2) of the Russian Constitution of 1993 provides: "In the administration of justice the use of evidence gathered in violation of federal law is not permitted."[24] Art. 5(LVI) of the Brazilian Constitution provides that evidence obtained by "illegal means" will be inadmissible in the proceedings.[25] Similarly, Article 38 (para. 8) of the Turkish Constitution provides that "findings obtained through illegal methods shall not be considered as evidence."[26]

Other constitutional provisions limit the mandate of exclusion to evidence gathered in violation of constitutional protections. Thus, Art. 29 of the Colombian Constitution states quite simply: "Evidence obtained in violation of due process is null in the full sense of the law (*nulo en pleno derecho*)."[27] Article 32(8) of the Portuguese Constitution provides that "any evidence obtained by torture, force, violation of the physical or moral integrity of the individual, wrongful interference in private life, the home, correspondence, or telecommunications is of no effect."[28]

These categorical pronouncements are different than the constitutional exclusionary rule in Art. 24(2) of the Canadian Charter of Rights and Freedoms, which necessarily implies a discretionary weighing of factors: "[w]here . . . a court finds that evidence was obtained in

24. Konstitutsiia Rossiiskoi Federatsii [Konst. rf] [Constitution] art. 50(2) (Russ.). For similar language, see Sakartvelos K'onstitutsia [S. Konst.] (Constitution) art. 42(7) (Georgia); Azərbaycan Konstitusiyasi [Az. Konst.] (Constitution), art. 71(2) (Azerbaijan); Constitution of the Republic of Belarus, art. 27(2); Constitution of the Republic of Kazakhstan, art. 77(3)(9).

25. Constituição Federal [C.F.] [Constitution] art. 5(LVI) (Braz.).

26. Türkiye Cumhuritei'nin Anayasasi [Constitution] art. 38 para. 8 (Turkey).

27. Constitución Política de Colombia [Col. Const.] [Constitution] art. 29. para. 4 (translated by author).

28. Constituição da República Portuguesa [C.R.P.] [Constitution] art. 32(8) (translated by author).

a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."[29]

Originally, Canadian courts developed two separate tests to determine whether exclusion was appropriate under Art. 24(2). Under the first test, exclusion would result, regardless of the seriousness of the violation, if as a consequence a suspect-defendant was "conscripted" to produce evidence against himself, such as through a confession or by extracting bodily fluids, etc., and this was, more or less categorically, considered to affect the fairness of the trial.[30] The second test focused exclusively on the seriousness of the violation such that a failure to exclude would bring the administration of justice into disrepute.[31] Important factors here would be the intentionality of the violation and whether police acted in "good faith," but not whether there might have been a hypothetical clean path to the evidence (i.e., inevitable discovery).[32] Apparently the Canadian courts have now moved to a more simple balancing test that weighs three factors: (1) the severity of the violation; (2) whether the admission of the evidence would bring the administration of justice into disrepute from the perspective of society's interest in respect for Charter rights; and (3) the effect of admitting the evidence on the public interest in having the case adjudicated on its merits.[33]

Patterned after the Canadian Charter provision is § 35(5) of the South African Constitution, which provides that evidence "obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."[34]

29. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.), *available at* http://www.efc.ca/pages/law/charter/charter.text.html.

30. Kent Roach, *Canada*, *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY 57, 71-72 (Craig M. Bradley ed., 2d ed. 2007).

31. *Id.*

32. *Id.*

33. *See* R. v. Grant, [2009] 2 S.C.R. 353, 2009 SCC 32 (Can.); R. v. Harrison, [2009] 2 S.C.R. 494, 2009 SCC 34 (Can.).

34. S. AFR. CONST. 1996 § 35(5).

B. *Modern Statutory Rules for Exclusion of Illegally Seized Evidence*

1. Absolute Exclusionary Rules

In this section I will discuss "modern" statutory exclusionary rules, meaning that I will deal with the old inquisitorial concept of "nullities" in Section II.B. 4. The language of Art. 75(1) of the 2001 Russian Code of Criminal Procedure (CCP-Russia),[35] is, like that of Art. 50(2) of the Const. RF, absolute in nature.[36] Similarly, Art. 191 CCP-Italy, enacted in 1988, provides for a sanction of "non-usability" in relation to "evidence acquired in violation of the prohibitions established by the law," and suppression motions may be raised *ex oficio* and at any stage of the proceedings.[37] Additionally, Art. 206(a)(2) of the 2004 CCP-Turkey provides that no "illegally obtained" evidence may be admitted at trial."[38]

The 2006 CCP-Serbia Art. 15 is even more extensive in its use-prohibition: "Court decisions may not be based on evidence which per se, or by method of collection are contrary to the provisions of the present Code, any other law, or have been collected or presented by virtue of violating human rights and fundamental freedoms envisaged by the Constitution or ratified international treaties."[39]

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35. UGOLOVNO-PROTSESSUAL'NYI KODEKS [UPK] [Criminal Procedural Code] art. 75(1) (Russ.), *available at* http://www.legislationline.org/documents/section/criminal-codes (follow "Criminal Procedure Code of the Russian Federation (English version)" hyperlink under "Russian Federation"). I will henceforth refer to all criminal procedure codes in the following manner: CCP-Russia.

36. KONST. RF art. 50(2) (Russ.). UPK art. 75(1) (Russ.) states that "evidence, obtained in violation of requirements of this code is inadmissible. Inadmissible evidence has no legal force and may not be used as a basis for criminal charges, nor used to prove any of the circumstances provided in section 73 of this code [relating to proof of elements of crime, aggravating circumstances, etc.]" (translated by author). For similar blanket provisions in other criminal codes of procedure that relate to violations of constitutional and statutory rights, *see* UGOLOVNO-PROTSESSUAL'NYY KODEKS RESPUBLIKI BELARUS [UPK] § 105(4)-(5) (Belarus); UGOLOVNO-PROTSESSUAL'NYY ZAKON RESPUBLIKA KAZAKHSTAN [UPZ] § 116(4) (Kazahkhstan); UGOLOVNO-PROTSESSUAL'NYY KODEKS KYRGYZSKOY RESPUBLIKI [UPK] § 6(3) (Kyrgyzstan); and UGOLOVNO-PROTSESSUAL'NYY KODEKS TURKMENISTANA [UPK] § 125(4) (Turkmenistan). According to BAUDZIAMOJO PROCESO KODEKSO PALVIRTINIMO IR IGVENDIMINO [BPK] § 19(4) (Lithuania), all evidence must be "obtained by lawful means."

37. C.P.P. art. 191 (Italy) (translated by author).

38. CEZA MUHAKEMESI KANUNU [CMK] [Code of Criminal Procedure] art. 206(a)(2) (Turk.).

39. Serbian Code of Criminal Procedure art. 15, *available at* http://www.osce.org/documents/srb/2007/04/24175_en.pdf, *translated by* OSCE Mission to Serbia & U.S. Embassy in Belgrade.

2. Absolute Exclusionary Rules Extending to Derivative Evidence

In 2008, the CCP-Brazil was amended to introduce an absolute exclusionary rule which explicitly extends to fruits of the poisonous tree, but also explicitly recognizes the doctrines of inevitable discovery and independent source developed by the USSC.[40] Article 157 CCP-Brazil provides:

> Illicit evidence, understood to be that obtained in violation of constitutional and legal norms, is inadmissible and should be removed from the trial: (1) The evidence derived from the illicit evidence is also inadmissible except where there is no obvious or causal nexus between the one and the other or where the derived evidence could be obtained from a source independent of the former; (2) An independent source is considered to be such, that when following the normal procedures used in practice which are proper in criminal investigation it would be capable of leading to the facts which are the objects to be proved.[41]

A similar provision was introduced into the CCP-Slovenia in 1994, which provides that a court may not base a decision on evidence acquired in violation of constitutional rights and liberties, nor of other explicit norms of criminal procedure, nor on evidence derived from such violations.[42]

3. Exclusionary Rules Restricted to Evidence That Lacks Credibility

A number of post-Soviet codes have exclusionary rules that are formulated in a deceptive way, by appearing to focus on constitutional rights, but that then limit exclusion to situations where the violation affects the credibility of the evidence. For instance, § 105 CCP-Armenia, limits exclusion to situations where there is a "substantial violation in collecting evidence," which are those that reflect "a violation of constitutional rights and freedoms of the person and citizen or any other requirement of this code in the form of limitation or restriction of rights guaranteed by law to the participants of the trial that influenced or could have influenced the reliability of the facts."[43]

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40. CÓDIGO DE PROCESSO PENAL [C.P.P.] art. 157 (Braz.).

41. *Id.*

42. Zvonko Fišer et al, *La Legislazione Processuale Penale della Repubblica di Slovenia*, *in* 1 LE ALTRE PROCEDURE PENALI: TRANSIZIONI DEI SISTEMI PROCESSUALI PENALI 365, 385 (Berislav Pavišiæ & Davide Bertaccini eds., 2002).

43. UGOLOVNO-PROTSESSUAL'NYY KODEKS [UPK] art. 105 (Armenia). Similar language is used in UGOLOVNO-PROTSESSUAL'NYY KODEKS [UPK] art. 125(2)(1) (Azerbaijan); UGOLOVNO-

This approach to exclusion is similar to a normal rule of evidence, requiring that evidence be credible, relevant and material and clearly would relate primarily to confessions induced by coercion or deception. Yet these weak exclusionary rules are precisely the type adopted by the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda and for the International Criminal Court (ICC).

Rule 95 of the ICTY Rules of Procedure and Evidence provides: "No evidence shall be admissible if obtained by methods that cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings."[44] Identical language was incorporated into Art. 69(7) of the Rome Statute for the International Criminal Court.[45]

4. Exclusionary Rules for Constitutional Violations

By and large, the exclusionary rules in U.S. law are limited to violations of the Fourth, Fifth and Sixth Amendments of the Constitution. The limitation of modern exclusionary rules to "significant" violations or "fundamental" violations reflects the position that mere technical violations of rules unrelated to human rights do not merit exclusion of otherwise credible evidence. Such a rule can be found in § 130(2)(4) CCP-Latvia, which provides for exclusion in the case of violation of "basic principles of criminal procedure," which we can presume to mean those based in constitutional principles.[46]

5. Exclusionary Rules for Constitutional Violations Extending to Derivative Evidence

Spain's Law on the Judicial Power Art. 11.1 restricts the types of violations that will lead to exclusion or non-use of evidence in providing: "Evidence obtained, directly or indirectly in violation of funda-

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PROTSESSUAL'NYY KODEKS [UPK] art. 94(2) (Moldova); and UGOLOVNO-PROTSESSUAL'NYY KODEKS [UPK] § 125 (Turkmenistan). This language appears to be taken from § 143(2) of the Model Code of Criminal Procedure for the Commonwealth of Independent States, which greatly influenced the code-writing in many post-Soviet republics.

44. International Criminal Tribunal for the Former Yugoslavia (ICTY), *Rules of Procedure and Evidence*, Rule 95, U.N. Doc. IT/32/Rev.40 (July 12, 2007), *available at* http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/it032_rev40_en.pdf.

45. Rome Statute of the International Criminal Court art. 69(7), July 17, 1998, 2187 U.N.T.S. 90.

46. KRIMINĀL PROCESA LIKUMS [KPL] § 130(2)(4) (Latvia), *available at* http://www.knab.gov.lv/uploads/free/criminal_procedure.pdf.

mental rights and liberties is without effect."[47] Similarly, Art. 23 of the CCP-Colombia provides: "All evidence obtained in violation of fundamental guarantees is null within the full meaning of the law and should thus be excluded from the procedure. Evidence that is the consequence of the excluded evidence, or can only be explained by reason of its existence, receive the same treatment."[48] In CCP-Colombia Art. 455, which is entitled "nullity derived from illicit evidence," exceptions are explicitly provided for "attenuated connection, independent source, inevitable discovery, and others provided by law."[49]

6. Exclusionary Rules Allowing the Court Discretion

Where the court is given discretion, the decision whether to exclude derivative evidence is just one of the factors taken into consideration and never will flow inexorably from the finding of a constitutional violation. The only exception in most jurisdictions is when dealing with the "fruits" of a statement obtained through torture.

In England and Wales, § 78(1) PACE 1984 provides: "(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."[50] The discretion given the judge by § 78 PACE has been described in the literature as "broad and unstructured" due to the plethora of factors including: "a review of the legality of the police actions; the seriousness of the offence; the bad faith of the investigators; the type of evidence and its potential reliability; the existence of other evidence; the opportunity to challenge the evidence at trial; the type of impropriety involved; and the type of right or protection infringed."[51] In 2003, Taiwan also amended its CCP to include

47. LEY ORGÁNICA DEL PODER JUDICIAL [L.O.P.J.], art. 11.1, (Spain) *available at* http://noticias.juridicas.com/base_datos/Admin/lo6-1985.html (follow "TÍTULO PRELIMINAR" hyperlink) (translated by author).

48. CÓDIGO DE PROCEDIMIENTO PENAL [CÓD. PROC. PEN.] art. 23 (Col.) *available at* http://domiarmo.iespana.es/ (follow "CÓDIGO PROCESAL PENAL COLOMBIANO 2004 SISTEMA ACUSATORIO" hyperlink) (translated by author).

49. CÓD. PROC. PEN. art. 455 (Col.) (translated by author).

50. For a discussion of § 78 as applied in case law, see THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 16, at 114-15.

51. David Ormerod, *ECHR and the Exclusion of Evidence: Trial Remedies for Article 8 Breaches?*, [2003] CRIM. L. REV. 61, 64.

a provision that gives the judge discretion in deciding whether to admit evidence gathered in violation of the statutory provisions: "The admissibility of the evidence, obtained in violation of the procedure prescribed by the law by an official in execution of criminal procedure, shall be determined by balancing the protection of human rights and the preservation of public interests, unless otherwise provided by law."[52]

7. "Nullities" in Modern Criminal Procedure Codes

The elaborate preliminary criminal investigation that developed out of the inquisitorial system on the European continent, and which continued in "mixed form" with the introduction of the oral and public trial (originally with a jury, now often with a "mixed court") following the French Revolution, often provided for the sanction of a "nullity" when the procedural rules for investigating and prosecuting a case were violated. Many countries in Europe and Latin America still provide for "nullities" when there is a violation of procedural norms. In some countries, such as France, procedural "nullities" are still the only statutory grounds for excluding evidence. In others, such as Italy, Brazil, or Colombia, the code has maintained the doctrine of "nullities" and yet added modern statutory prohibitions on the use of illegally gathered evidence in the form of exclusionary rules or rules of "non-usability."

It is sometimes difficult to understand the relationship between the modern rules of exclusion or "non-usability," which certainly had their inspiration in the American jurisprudence of the last 50 years, and the more venerable "nullities," which originally related to procedural acts and not necessarily to the evidence these acts might have produced. In fact, one category of nullities, called "nullities of general order," relates to defects in the procedure that do not necessarily touch on the collection of evidence, yet are treated as grave violations that could even lead to termination of the prosecution.[53] In general, the codes differentiate between serious violations, which affect substantial interests of the defendant and lead to a nullification of the procedural act and the evidence it produced, and sometimes even to a

52. Taiwanese Code of Criminal Procedure art. 158-4 (as amended on Feb. 6, 2003), *translation available at* http://db.lawbank.com.tw/Eng/FLAW/FLAWDAT01.asp?lsid=FL001445 (follow "Article Content" hyperlink).

53. On nullities of "general order" in Italy, see C.P.P. art. 178. On "general order" nullities in France, see Richard S. Frase, *France*, *in* CRIMINAL PROCEDURE, *supra* note 30, at 201, 213. In the CÓDIGO PROCESAL PENAL DE LA NACION [CÓD. PROC. PEN.] art. 167(3) (Arg.), nullities of "general order" include those related to a violation of the defendant's right to counsel.

bar on prosecution, and minor or formal violations, which may be "sanitized" or corrected and do not have the Draconian consequences. In relation to "nullities," one finds provisions that appear to clearly extend "nullification" to the fruits of the unlawful act, whereas another strand of the doctrine has distinguished "nullities" from evidentiary exclusion by the fact that the doctrine of nullities does not recognize the doctrine of "fruits of the poisonous tree."

Article 170 CCP-France provides for the "annulment of an act or a document of the procedure."[54] However, Article 171 CCP-France limits the nullity doctrine to errors that appear similar to what today would be called "constitutional" violations: "There is a nullity when a failure to recognize a substantial formality contained in a provision of the present Code or any other provision of criminal procedure has infringed on the interests of the party to which it applies."[55] In Brazil, nullities are limited to violations that infringe on the interests of the prosecution or the defense and impact the ascertainment of the truth or the outcome of the trial.[56] Like Brazil, Colombia has a modern exclusionary rule, yet also uses the old rubric: "nullity."[57] Yet the only specific nullities recognized are those related to constitutional violations, denial of one's rightful judge, and violations of the "right to defense and due process."[58] Article 23 CCP-Colombia provides for an "exclusionary rule" for "evidence" that is the result of a violation of fundamental rights, yet such a violation, according to Art. 457 CCP-Colombia, could possibly lead to nullity of the entire procedure, regardless of whether evidence was produced thereby.[59] Finally, Art. 174 (para.3) CCP-France dictates the consequences of the declaration of a nullity: the "annulled acts or documents are withdrawn from the investigative dossier and filed with the clerk of the Court of Appeal" and it is "prohibited to derive any information against the parties from the annulled acts or documents or parts of the acts or documents, upon the pain of disciplinary proceedings against the lawyers or judges."[60]

54. CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 170 (Fr.), *translated in* THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 16, at 105.

55. C. PR. PÉN. art. 171 (Fr.), *translated in* THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 16, at 105.

56. C.P.P. arts. 563, 566 (Braz.).

57. CÓD. PROC. PEN. art. 455 (Col.).

58. *Id.* art. 457.

59. *Id.* arts. 23, 457.

60. C. PR. PÉN. art. 174, ¶ 3 (Fr.) (translated by author). From its wording, it appears that the French rule extends the nullity to derivative evidence as well. C. PR. PÉN. art. 206 (Fr.) permits the three-judge investigative chamber to decide whether the nullity extends to all or parts of

In inquisitorial systems, the withdrawal of the document memorializing an investigative measure meant that no use could be made of it because the investigative dossier was traditionally the exclusive repository of admissible evidence at the trial.[61] In France, motions to declare nullities arising out of the criminal investigation must be made to the investigating magistrate, and a successful motion results in removal of any evidence of the illegal act from the file. The trial judge will thus be as insulated from the tainted evidence as would be a jury following a successful pretrial motion to exclude evidence in the U.S.

Article 177 CCP-Italy provides that "[f]ailure to observe the provisions established in the procedural acts is cause for a nullity only in the cases provided by law," thus limiting the doctrine to what the French would call "textual" nullities.[62] The Italian code distinguishes between "relative nullities," which must be raised by the parties and, if recognized, may be "sanitized" or cured by waiver by the affected party or by the official who violated the law,[63] and "absolute nullities," which may be raised at any stage of the proceedings, including by the judge *ex oficio* and may not be "sanitized,"[64] and as in France, there appears to be a recognition of the "fruits of the poisonous tree": "The nullity of an act renders the subsequent acts invalid which depend on that declared to be annulled."[65] In Brazil as well, "the nullity of an act, once declared, will cause the nullity of the acts that directly

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subsequent procedural acts. French courts have based exclusion of "fruits" on these sections. JEAN PRADEL, PROCÉDURE PÉNALE 604-05 (39th ed. 1997).

61. In systems where the written trial still dominates, such as in the Netherlands or the French trial in the correctional courts, documents could historically be read at the trial if they were prepared according to the rules laid out in the code of criminal procedure. This is now changing as a result of case law of the European Court of Human Rights (ECtHR) which has held that the use of written statements, for instance, may violate Art. 6(3)(d) of the E.C.H.R, which guarantees the right to confrontation. *See* Delta v. France, App. No. 11444/85, 16 Eur. H.R. Rep. 574 (1990) and discussion in THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 16, at 125-35.

62. C.P.P. art. 177 (Italy). Besides the "textual nullities" provided for explicitly in the code, the French criminal procedure code also recognizes "substantial" nullities. C. PR. PÉN., art. 171 (Fr.), *translated in* THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 16, at 105. *See also* Frase, *supra* note 53, at 212.

63. C.P.P. arts. 183-84 (Italy). *See* CÓD. PROC. PEN. art. 171 (Arg.) for a similar provision on sanitization. In a similar manner, CÓDIGO ORGÁNICO PROCESAL PENAL [CÓD. ORG. PRO. PEN.] art. 191. (Venez.) provides for "absolute nullities," with art. 193 (Venez.) providing for sanitizing "relative" nullities. Article 195 (Venez.) limits the declaration of relative nullities to those incapable of sanitization, which are not "insubstantial" and which prejudice the rights of the parties.

64. C.P.P. art. 179 (Italy). For the purposes of this study, the most important "absolute nullity" mentioned is the "absence of defense counsel in the cases in which his presence is obligatory." (translated by author).

65. C.P.P. art. 185(1) (Italy) (translated by author).

depend on, or are the result of such act."[66] Very similar language is found in the Venezuelan and Argentine federal codes of criminal procedure.[67] We will discuss the confusion between the application of "nullities" and "non-usability" in Italian jurisprudence in relation to derivative evidence, *infra*.

Spain's Law on the Judicial Power (LOPJ) contains not only the generic exclusionary rule in Art. 11.1, but also a chapter on the "nullity of judicial acts."[68] The most important section for our purposes is Art. 238 LOPJ-Spain, which provides:

> Procedural acts will be fully void in the following cases: (1) When the court lacks subject-matter jurisdiction; (2) When performed under violence or compulsion; (3) When the essential rules of procedure are not respected and this may have caused an actual restriction of defense rights; (4) When the act is done without the assistance of a lawyer, in the cases where the law prescribes it as mandatory; (5) When a hearing is conducted without the mandatory presence of the court clerk; (6) In all other cases established by procedural law.[69]

The interaction between "prohibited evidence" (*prueba prohibida*) and "nullities," i.e., between articles 11.1 and 238 LOPJ-Spain will be discussed *infra* in relation to derivative evidence.

The Latvian code provides for an exclusionary rule in cases of violations of "basic principles of criminal procedure" as well as a collateral rule dealing with lesser violations which smacks of a classic continental European "nullity:" "Information or facts, gathered while allowing other procedural violations, are admissible in a limited manner and may be used as evidence only in cases, where the procedural violation allowed is not substantial or may be eliminated."[70]

Finally, Art. 359a(1)-(2) CCP-Netherlands, while not talking of "nullities," provides for remedies for procedural violations that follow the nullity-model. It provides:

> (1) If procedural rules prove to have been breached during the preliminary investigation, which breach can no longer be remedied, and the legal consequences of the breach are not apparent from statutory law, the court may rule that: (a) the severity of the punishment will be decreased in proportion to the gravity of the breach if the

66. C.P.P. art. 573(1) (Braz.) (translated by author).

67. CÓD. PROC. PEN. art. 172 (Arg.); CÓD. ORG. PRO. PEN. art. 196 ¶ 1 (Venez.).

68. *See* L.O.P.J., arts. 238-43 (Spain).

69. L.O.P.J. art. 238 (Spain) (translated by author).

70. KPL § 130(2)(4) (Latvia), K.P.L. § 130(3) (Latvia) *available at* http://www.knab.gov.lv/uploads/free/criminal_procedure.pdf (translated by author).

> harm caused by the breach can be compensated in this way; (b) the results of the investigation obtained through the breach may not contribute to the evidence in the prosecution of the offense charged; (c) the Public Prosecution Service will be barred from prosecuting if the breach makes it impossible to hear the case in compliance with the principles of due process.
> (2) In applying the first subsection, the court must take account of the interest that the breached rule serves, the gravity of the breach and the harm it causes.[71]

Here we see the possibility of remedying the breach (sanitization) in subsection one, and then a variety of remedies, including the complete nullity of the proceedings in subsection (1)(c). These, along with the remedy of decrease in punishment are completely uncharacteristic of those accompanying modern exclusionary rules.

8. Court-Made General Exclusionary Rules

While Germany has no general constitutional or statutory exclusionary rule or use-prohibition, the Supreme Court has excluded evidence pursuant to a multi-step balancing process:

> The decision as to whether or not there will be a prohibition on use is made on the basis of a comprehensive balancing . . . . The weight of the procedural violation as well as the importance for the legally protected sphere of the affected party must be considered and placed in the balance, as well as the consideration, that the truth may not be investigated at any price . . . . On the other hand, one must consider that prohibitions on use impede the possibilities of determining the truth . . . and that the state, according to the case law of the Constitutional Court, must constitutionally guarantee an administration of justice which is capable of functioning, without which justice cannot be realized . . . . If the procedural provision which has been violated does not, or not primarily, serve to protect the defendant, then a prohibition on use will be unlikely; . . . . On the other hand, a prohibition on use is appropriate when the violated procedural provision is designed to secure the foundations of the procedural position of the accused or defendant in a criminal prosecution . . . ."[72]

But even if the court finds that the violation is important enough to give rise to a prohibition on use, an example being the use of diary

71. WETBOEK VAN STRAFVORDERING [Sv] arts. 359(a)(1)-(2) (Neth.) (translated by Matthias J. Borgers and Lonneke Stevens).

72. Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 27, 1992, 38 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 214 (218-22) (F.R.G.) *translated in* THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 16, at 111.

entries to prove guilt, which is considered to be a grave violation of the right to develop one's personality, the court must still weigh the seriousness of the crime charged before deciding whether to exclude.

> If the accusation is less weighty, then the personality interest of the author of the writings will often prevail. In cases of probable cause that a serious attack on life, other important legal interests, or the state, or other serious attacks on the legal order have been committed, then the protection of the private life-sphere must give way. The balancing must be undertaken while taking into consideration the interest in criminal prosecution in light of the importance of the constitutional right, whereby the alleged wrongful act, to the extent it can be judged, must also be considered.[73]

Because the trial judge herself, who is always a trier of fact (either alone or in a panel with lay assessors), resolves motions to exclude evidence in Germany, and a decision to suppress does not remove the tainted evidence from the investigative dossier, the illegal evidence could have a psychological impact on the decision made by the judge.[74]

The Australian High Court has also fashioned a general balancing test to determine the excludability of illegally-seized evidence. The trial court should take into consideration whether there was bad faith on the part of the police, the importance of the evidence, the seriousness of the offense, and the ease with which the law might have been complied with.[75] Exclusion is also mandated, according to a later decision of the Australian High Court, when "the public interest in maintaining the integrity of the courts and in ensuring the observance of the law and minimum standards of propriety by those entrusted with powers of law enforcement" requires it.[76]

In 2002, the New Zealand Court of Appeal adopted a multi-factor "fairness" test that gives the trial judge broad discretion based on a list of criteria including the "seriousness of the offense" and the "importance of the evidence" and replaced a stricter prima facie test that had been in place since 1992 according to which it was presumed that illegally seized evidence was inadmissible, but the prosecution could

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73. Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 21, 1964, 19 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 325 (331) (F.R.G.) *translated in* THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 16, at 113.

74. Thomas Weigend, *Germany*, *in* CRIMINAL PROCEDURE, *supra* note 30, at 243, 254.

75. *See* Bunning v. Cross (1978) 141 C.L.R. 54 (Austl.), *cited in* Craig M. Bradley, Mapp *Goes Abroad*, 52 CASE W. RES. L. REV. 375, 380 (2001).

76. Ridgeway v. The Queen, (1995) 184 C.L.R. 19, 38. *See also* Bradley, Mapp *Goes Abroad*, *supra* note 75, at 380.

rebut this presumption.[77] The reason for exclusion, both according to the overruled prima facie test and the new "fairness" test, is the "vindication of the right that has been breached"[78] and not, as with the U.S. Fourth Amendment exclusionary rule, the deterrence of the police.[79]

Clearly, the court-made exclusionary rules in the U.S. were first considered to be mandatory, upon a finding of a violation of the Fourth, Fifth, of Sixth Amendments. Neither *Weeks*, in relation to federal Fourth Amendment violations, nor *Mapp*, in relation to state Fourth Amendment violations, allowed for any exceptions. The same is true for exclusion of confessions for violation of the Sixth Amendment right to counsel under *Massiah*, or the failure to admonish an in-custody prisoner before interrogating under *Miranda*. This is no longer true, however, for the USSC now treats exclusion following any of the aforementioned violations as a "last resort"[80] and withholds its decision until it has engaged in (a rather superficial) "cost-benefit" analysis to see whether the need for exclusion trumps the single remaining reason for exclusion, deterrence of unlawful police conduct.[81] Thus, the U.S. has effectively become a country, at least at the Supreme Court level, where exclusion of unconstitutionally gathered evidence becomes a discretionary act of judges, both at the trial and appellate level.

The most influential court-made exclusionary doctrine today in Europe, of course, is that of the European Court of Human Rights (ECtHR), which has effectively created a balancing test to determine whether a failure to exclude evidence gathered in violation of the European Convention on Human Rights (ECHR) would result in a denial of a "fair trial" under Art. 6 ECHR.[82]

In *Schenk v. Switzerland*, a case involving an unlawful recording of a telephone conversation, the ECtHR stated: "While Article 6 of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is

77. R v. Shaheed [2002] 2 N.Z.L.R. 377 (C.A.) (N.Z.), cited in Richard Mahoney, *Abolition of New Zealand's* Prima Facie *Exclusionary Rule*, 2003 CRIM. L. REV. 607.

78. Mahoney, *supra* note 77, at 610.

79. *See* United States v. Leon, 468 U.S. 897, 916 (1984).

80. Herring v. United States, 129 S.Ct. 695, 700 (2009).

81. *See* United States v. Leon, 468 U.S. 897, 920-21 (1984), where the U.S Supreme Court abandoned "judicial integrity" as a reason for having a strong exclusionary rule.

82. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter Convention for Human Rights] (providing, in pertinent part: "In the determination . . . of any criminal charge against him, everyone is entitled to a fair and public hearing . . . .").

therefore primarily a matter for regulation under national law."[83] This doctrine was followed in a number of English cases dealing mostly with illegal wiretaps. In *Allan v. United Kingdom*, the court cited *Schenk* in holding:

> It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the 'unlawfulness' in question and, where violation of another Convention right is concerned, the nature of the violation found.[84]

The jurisprudence of the ECtHR has influenced, for instance, jurisprudence in Scotland. In 1950, the Scottish High Court developed a test which balanced: "(a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from Courts of law on any merely formal or technical ground."[85] While the Scottish courts have struggled for decades in applying this test, the High Court, in 2006, simply equated the Scottish test with that articulated by the ECtHR in interpreting the Art. 6 fair trial right.[86]

The Irish Supreme Court first engaged in a simple balancing test to determine admissibility of evidence in 1965.[87] However, in 1990, the Court recognized a categorical exclusionary rule in cases where police clearly violate the constitutional rights of citizens, by refusing to adopt the "good faith" doctrine of *United States v. Leon*.[88] According to Judge Finlay: "[t]he detection of crime and the conviction of guilty persons, no matter how important they may be in relation to the ordering of society, cannot, however, in my view, outweigh the unambiguously expressed constitutional obligation as 'far as practicable to defend and vindicate the personal rights of the citizen.'"[89]

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83. Schenck v. Switzerland, App. No. 10862/84, 13 Eur. H.R. Rep. 242, 264 (1988).

84. Allan v. United Kingdom, App. No. 48539/99, 36 Eur. H.R. Rep. 143, 155-56 (2003).

85. Lawrie v. Muir [1950] J.C. 19, at 26 (Scot.).

86. HM Advocate v. Higgins, [2006] HCJ 05, 2006 S.C.C.R. 305.

87. *See* Attorney General v. O'Brien, [1965] I.R. 142 (Ir.).

88. In *United States v. Leon*, 468 U.S. 897, 913 (1984), the U.S. Supreme Court held that the Fourth Amendment exclusionary rule would not apply in cases where a judge issues a search warrant based on an affidavit lacking probable cause, if the police officer affiant in "good faith" believed the evidence was sufficient to justify the search.

89. Director of Public Prosecutions v. Kenny, [1990] 2 I.R. 110, 134 (Ir.).

While the ECtHR has never found that the use of evidence gathered in violation of the right to privacy has resulted in denial of a fair trial under Art. 6 ECHR, it has recently articulated some categorical exclusionary rules relating to statements gathered as a result of torture, or in the absence of counsel. These will be discussed, *infra*.

C. *Balancing Tests and "Fruits"*

When there is no explicit statutory or constitutional exclusionary rule applicable to evidence derived from serious constitutional violations, such as exists in Art. 11.1 LOPJ-Spain, then the fruit admissibility decision will generally follow a balancing of the totality of the circumstances, as occurs under § 78 PACE-England and Wales to see whether there has been a violation of the right to a fair trial or the integrity of the courts would be sullied.[90] When exclusion is the result of such balancing, it is my opinion that the physical fruits of unconstitutional police conduct will nearly always be admissible. Because physical evidence speaks for itself and, if relevant to the crime, is always credible, this prong of a balancing test will always be fulfilled. Trial judges, who invariably do the balancing, are also triers of the fact in all but jury systems, and will invariably place great weight on the truth-finding potential of concrete physical evidence.

Thus, even in a situation where the object of a dwelling search is found in gross violation of a warrant requirement, courts will often let the evidence in just due to its probative value.[91]

One approach we will see, *infra*, when discussing particular violation constellations, is that the admission of physical evidence can never violate the right to a fair trial because it is not really the "fruit" of the violation, nor dependent thereon, having pre-existed the violation.[92]

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90. In a sense, the question on admissibility becomes a rule of evidence, where probative value is balanced against prejudice, much as is done in ruling under FED. R. EVID. 403 or CAL. EVID. CODE § 352. Such weighing in relation to hearsay evidence has been nearly eliminated by the categorical exclusionary rule of *Crawford v. Washington*, 541 U.S. 36, 67, 68 (2004).

91. See the English case of *R. v. Sanghera*, (2001) 1 Crim. App. 20, 299, 305-06 in which the police searched a robbery suspect's home without a warrant or consent and the loot was allowed into evidence due to its unimpeachable probative value and the "good faith" of the officers, who thought the suspect would have consented.

92. *See, e.g.*, PJ Schwikkard & SE van der Merwe, *South Africa*, *in* CRIMINAL PROCEDURE, *supra* note 30, at 471, 488 (noting that this approach is used in South Africa).

III. Excluding the "Fruits" of Unlawful Confessions

A. *Involuntary Confessions*

To coerce confessions through torture, cruel, inhuman, or degrading treatment, or other tactics—such as threats, promises, deception, or psychological or physical pressures—is a violation of international human rights treaties and of the constitutions and codes of criminal procedure of most countries.[93] As a result, confessions or statements obtained by the police through means that render them "involuntary" are usually not admissible in the criminal courts.

In this section I will attempt to distinguish between involuntary confessions obtained through the use of a cascading level of coercion, from the worst, torture, to the closely-related but less grave "cruel and inhuman treatment," and finally to the use of lesser categories of psychological inducement, threats, deception, promises, etc. In relation to confessions or admissions by the defendant, I will deal with, as "fruits," the discovery of witnesses, the discovery of physical evidence, and the otherwise legal obtainment of a subsequent confession, which may or may not have been the "fruit" of the preceding involuntary confession-admission.

1. Fruits of Confessions Induced by Torture

Even in the heyday of legalized torture on the European continent, the confession directly produced by torture was not admissible as evidence. To constitute evidence it had to be repeated "freely" in court, or before the investigating magistrate, after the physical effects of the torture had abated, according to one source, "a day and a night" later.[94] If the accused refused to repeat the content of the confession, he was again tortured.[95] To think of the second "confession" as not being a "fruit" of the first confession, especially with the threat of renewed torment lingering, would be unthinkable today. Yet, dis-

93. *See* Constitución [C.E.] art. 15 (Spain); Costituzione [Cost.] art. 13 para. 4, art. 27 para. 2 (Italy); Konst. rf [Constitution] art. 21(2) (Russ.). *See also* Universal Declaration of Human Rights, G.A. Res. 217A, art. 5, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 7, Dec. 10, 1984, S. Treaty Doc. No.100-20 (1988), 1465 U.N.T.S. 85 [hereinafter Convention Against Torture]; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221.

94. Langbein, Torture, *supra* note 17, at 15.

95. *Id.* at 15-16.

cussion of the upcoming trial of Khalid Sheikh Mohammed and other alleged September 11th conspirators, may raise this very question.[96]

In early common law England, confessions obtained by torture were admissible.[97] This changed in the Eighteenth Century, but the prohibition did not extend to the fruits of such confessions.[98] In early U.S. law, coerced statements were originally excluded in the federal courts not only on humanitarian grounds, but also based on their inherent unreliability as evidence.[99] When the USSC began excluding "involuntary" admissions and confessions as a violation of "due process" in the first half of the Twentieth Century, regardless of whether the content of the statement was deemed to be unreliable, they still did not carry the prohibition over to the other, otherwise credible evidence, that was a "fruit" of the involuntary confession.[100]

As mentioned *supra*, nearly all countries have for a long time excluded confessions that are the result of torture and this is required by Art. 15 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[101] But the Convention Against Torture does not mention "fruits." Coerced confessions would likely be inadmissible under the weak exclusionary rules of the International Tribunals, which were probably aimed at just such evidence.[102] But this still does not answer the question relating to credible physical evidence derived from torture-induced statements.

An important new case recently decided by the ECtHR that will be revisited by the full court in the near future, is crucial to the debate about the fruits of torture-induced confessions in Europe, and beyond. In *Gäfgen v. Germany,*[103] the German police threatened to torture a Frankfurt law student and subject him to sexual assault by jail inmates if he did not reveal the whereabouts of a young kidnap victim, who

96. While the government has acknowledged "waterboarding" Khalid Sheikh Mohammed on numerous occasions, the government plans to try him before a jury in New York where the effect of this torture on other evidence, including a conceivable boasting at trial of his role as organizer of the September 11th attacks, must be litigated. Charlie Savage, *U.S. To Try Avowed 9/11 Mastermind Before Civilian Court in New York*, N.Y. TIMES, Nov. 13, 2009, at A1.

97. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 343 (5th ed. 2009).

98. There has been a prohibition on the use of "involuntary" confessions, whether acquired through torture, threats or promises, since the early eighteenth century. *See* R v. Warickshall, (1783) 1 Leach 263, 264, 168 Eng. Rep. 234, 235 (K.B.); JOHN H. LANGBEIN, ORIGINS OF ADVERSARY CRIMINAL TRIAL 218-29 (2003).

99. This was the original approach taken by the U.S. Supreme Court. *See* Hopt v. Utah, 110 U.S. 574, 585 (1884).

100. LAFAVE ET AL., *supra* note 97, at 543.

101. Convention Against Torture, *supra* note 93, art. 1.

102. *See* Section II.B.3., *supra*.

103. Gäfgen v. Germany, App. No. 22978/05, 48 Eur. H.R. Rep. 253 (2008).

the police believed was still alive. The student then directed the police to a lake where he had disposed of the boy's body, and the police also discovered tire tracks which they later matched to his automobile.[104] At his trial in Frankfurt, the court excluded the confession under the terms of § 136a CCP-Germany, which explicitly provides that "the suspect's freedom to determine and exercise his will shall not be impaired through maltreatment, fatigue, physical intervention, the administration of substances, through torture, deception or hypnosis" and mandates exclusion of any statements gathered by the use of such methods.[105] German courts had given Gäfgen the equivalent of *Miranda* warnings,[106] and then taken subsequent statements, but the trial court held that *Miranda* warnings were not sufficient to attenuate the taint of the initial coerced statement because the defendant had not been advised that his initial statement was inadmissible.[107] Therefore, all subsequent statements made to the police were also suppressed as being under the "continuing effect" of the original torture threats.[108]

But the Frankfurt trial court refused to dismiss the proceedings or, which is most important for this discussion, to suppress the child's body or the tire track evidence, holding that a violation of § 136a CCP-Germany has no "long-range effect," or *Fernwirkung*, meaning, it does not extend to derivative evidence or "fruits."[109] The court then engaged in a general balancing of factors to determine whether the physical fruits should be excluded. After balancing the seriousness of the violation against the seriousness of the crime, the court decided to admit the fruits.[110] At trial, the defendant was admonished of his right to remain silent, but decided to confess to the crime to try to encourage mitigation at sentencing.[111] The court, in its judgment-reasons, held that this confession was not a fruit of the coerced initial confession, because he was in court, with the aid of counsel, thus attenuating the taint.[112] But it even made a fall-back argument, that

104. *Id.* at 258-59.

105. *Id.* at 272; 267-68, citing STRAFPROZEßORDNUNG [StPO] [Code of Criminal Procedure] § 136a (F.R.G.). C.P.P. art. 64(2) (Italy) contains a similar statutory prohibition of "usability" of such statements.

106. *See* THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 16, at 85-93 (on German *Miranda* warnings).

107. *Gäfgen*, 48 Eur. H.R. Rep. at 260-61.

108. *Id.*

109. *Id.* at 261-62.

110. *Id.* On the general lack of a doctrine of "fruits of the poisonous tree" in relation even to coerced confessions in Germany, *see* Weigend, *supra* note 74, at 251-54.

111. *Gäfgen*, 48 Eur. H.R. Rep. at 262.

112. *Id.* at 282-83.

there was sufficient evidence to convict without the confession, because the police had been observing the defendant since the kidnapping and could have connected him to the child's body through the tire tracks.[113]

The ECtHR determined that Gäfgen was definitely the victim of inhuman and degrading treatment in violation of Art. 3 ECHR, but that the threat did not amount to "torture":

> The Court has considered treatment to be "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance, or when it was such as to drive the victim to act against his will or conscience. Treatment has been held to be "inhuman" because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering. It was the intention that the Convention should, by means of the distinction between torture and inhuman treatment, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering. Moreover, a mere threat of conduct prohibited by art. 3, provided it is sufficiently real and immediate, may be in conflict with that provision. Thus, to threaten an individual with torture may constitute at least inhuman treatment.[114]

The ECtHR agreed that exclusion of the confessions was an appropriate sanction for the violation of Art. 3:

> The Court considers that this exclusion of statements made under threat or in view of incriminating statements extracted previously is an effective method of redressing disadvantages the defendant suffered on that account in the criminal proceedings against him. By restoring him to the status quo ante in this respect, it serves to discourage the extraction of statements by methods prohibited by art.3.[115]

As was mentioned *supra*, the ECtHR usually deals with illegally obtained evidence in the context of whether its admission at trial would violate the defendant's right to a fair trial under Art. 6 ECHR. While this normally requires balancing of the gravity of the violation, the probative value of evidence, the seriousness of the crime, etc., with *Gäfgen* and some earlier cases it has now come to the clear position that statements gained through violations of Art. 3 ECHR conclusively make the trial unfair and may not be used, whether they were

113. *Id.* at 262-63.

114. *Id.* at 269-70.

115. *Id.* at 274. Both German police officers were also tried and convicted of criminal offenses related to their conduct, which also weighed heavily in the court's opinion. *Id.*

the products of torture or inhuman or degrading treatment. As to the fruits of statements gathered in violation of Art. 3, the ECtHR, however, is only willing to categorically exclude physical evidence if the violation amounts to "torture."[116] In the case of physical evidence found as a result of an Art. 3 violation that constitutes at most "inhuman and degrading treatment," as found in *Gäfgen*, then there is a strong, though rebuttable presumption that their use at trial will constitute a violation of the fair trial right in Art. 6.[117] The court then found that Gäfgen's right to a fair trial was not violated, under the totality of circumstances, because the trial court only used the physical evidence to corroborate the in-court confession and not as the main evidentiary basis for the judgment of guilt.[118]

Thus, in summary, *Gäfgen* stands for three approaches to "fruits" evidence in the context of involuntary confessions: (1) all fruits of confessions resulting from torture must be excluded; (2) there is a rebuttable presumption that the use of fruits resulting from confessions induced by inhuman and degrading confessions will violate the right to a fair trial; and (3) a voluntary in-court confession when represented by counsel will not be treated as a "fruit" of a prior involuntary confession.

2. Fruits of Confessions Induced by Cruel, Inhuman, or, Degrading Treatment

Article 3 of the ECHR prohibits "torture" or "inhuman or degrading" treatment.[119] Article 7 of the U.N. International Covenant on Civil and Political Rights (ICCPR) prohibits "torture" or . . . "cruel, inhuman or degrading" treatment or punishment."[120] Article 16(1) of the CAT requires signatory states to prevent "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture."[121] This language clearly indicates that "cruel, inhuman or degrading treatment" is something less than "torture," though the border is fluid. In 1978 the ECtHR originally set a high bar to reach before conduct became "torture," but has been lowering that bar recently.[122] But, oddly enough, the CAT does not provide an

116. *Id.* at 280.
117. *Id.* at 281.
118. *Id.* at 281-83.
119. Convention for Human Rights, *supra* note 82, art. 3.
120. ICCPR, *supra* note 93, art. 7.
121. Convention Against Torture, *supra* note 93, art. 16(1).
122. In *Ireland v. United Kingdom*, the European Court of Human Rights found that wall standing, hooding, subjection to noise, deprivation of sleep and reduced diet constituted inhu-

explicit exclusionary rule for statements gathered through use of "cruel, inhuman, [or] degrading treatment."[123] Under paragraph 16 of the U.N.'s "Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment," however, prosecutors must "refuse to use as evidence statements obtained by torture or other ill treatment except in proceedings against those who are accused of using such means."[124]

Although U.S. law originally did not expressly distinguish between torture and other cruel and inhuman treatment, or mere deception, promises, or threats that might render a confession "involuntary," when the scandals surrounding the alleged use of torture at Guantánamo and Abu Ghraib prisons erupted, the government began to characterize waterboarding, and some of the more egregious techniques as something less than torture, obviously aware of the exclusionary rule in the CAT.[125]

While U.S. law now prohibits torture or cruel, inhuman or degrading treatment and provides for exclusion of statements obtained thereby in trials by military commission, it would allow otherwise "involuntary" statements before military commissions if "the interests of justice would best be served by admission of the statement into evidence" and the statement was taken at the time of capture.[126] In normal criminal courts, however, it is clear that statements that are the product of "cruel, inhuman or degrading treatment" would be inadmissible under the due process voluntariness test.[127]

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man and degrading treatment, but not torture under Art. 3 ECHR, but in later cases involving Turkey has lowered the bar. Ireland v. United Kingdom, 25 Eur. Ct. HR (ser. A) at 162 (1978). *See also* Michael P. Scharf, *Tainted Provenance: When, If Ever, Should Torture Evidence be Admissible?*, 65 WASH. & LEE L. REV. 129, 141-42 (2008).

123. Scharf, *supra* note 122, at 140.

124. *Id.* at 145, citing Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27-Sept. 7, 1990, *Guidelines on the Role of Prosecutors*, ¶ 16, U.N. Doc. A/CONF.144/28/Rev.1 (1991), *available at* http://www.asc41.com/8th%20UN%20Congress%20on%20the%20Prevention%20of%20Crime/026%20ACONF.144.28.Rev.1%20Eighth%20United%20Nations%20Congress%20on%20the%20Prevention%20of%20Crime%20and%20the%20Treatment%20of%20Offenders.pdf.

125. *See* Memorandum from Department of Justice Office of Legal Counsel to Alberto R. Gonzales, Counsel to the President ("Bybee memorandum") (Aug. 1, 2002), *in* NORMAN ABRAMS, ANTI-TERRORISM AND CRIMINAL ENFORCEMENT 460-61 (3d ed. 2008).

126. 10 U.S.C. § 948r(a), 948(c)(2) (2006).

127. See LAFAVE ET AL., *supra* note 97, at 343-49 for a summary of the numerous "voluntariness" cases (including cases of physical coercion, threats, long periods of incarceration, degrading acts, etc.) decided between the 1936 case of *Brown v. Mississippi*, 297 U.S. 278, 285-86 (1936) and 1964, when the Fifth Amendment was made binding on the states.

3. Fruits of Involuntary Confessions Which Are Not Cruel, Inhuman, or Degrading

Many confessions found to be "involuntary" by the U.S. Supreme Court would likely not rise to the level of cruel, inhuman, or degrading treatment,[128] yet they are all subject to exclusion. It is unclear, however, to what extent the "fruits" of such confessions must be excluded. The USSC has implied that a confession that otherwise comports with *Miranda* would be subject to exclusion if it follows on the heels of a confession deemed to be involuntary under the due process analysis.[129] Because the USSC based its reluctance to apply the fruits-of-the-poisonous-tree doctrine to violations of *Miranda* on the then popular (and still breathing) doctrine that the required warnings as to the right to silence and counsel were merely "prophylactic," and not required by the Fifth Amendment, the consequence would be, of course, that a clear constitutional violation of due process involving an involuntary confession would necessarily require exclusion of the "fruits," whether they be subsequent confessions or physical evidence.[130]

In England and Wales, § 76(2) PACE provides for exclusion of what U.S. courts would call "involuntary" statements.[131] Evidence "may" be rendered inadmissible under subsection (a) "where it has been obtained by "oppression" or in subsection (b) where it has been made "in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by [the defendant] in consequence thereof."[132] If an otherwise legal confession follows one taken in violation of § 76(2)(a), for instance, the court must decide whether there is any suggestion of oppression, inducement, stress or pressures in the

128. See Ashcraft v. Tennessee, 322 U.S. 143, 153-54 (1944) (confession after 36 hours of questioning); Watts v. Indiana, 338 U.S. 49, 53 (1949) (confession after sustained pressure by police); Haynes v. Washington, 373 U.S. 503, 513-14 (1963) (not allowing defendant to call wife or anyone else until he talked); Ward v. Texas, 316 U.S. 547, 555 (1942) (isolating prisoner from friends to prevent him being bailed); Lynum v. Illinois, 372 U.S. 528, 534 (1963) (informing prisoner that financial aid for her infant children would be cut off and they would be taken from her); Rogers v. Richmond, 365 U.S. 534, 535-36 (1961) (threatening to bring defendant's arthritic wife in for questioning). *See also* Fikes v. Alabama, 352 U.S. 191, 196-97 (1957) (taking advantage of the defendant's "mental retardation"); Culombe v. Connecticut, 367 U.S. 568, 630-35 (1961) (taking advantage of defendant's "mental retardation"); Blackburn v. Alabama, 361 U.S. 199, 205-07 (1960) (taking advantage of insanity).

129. Oregon v. Elstad, 470 U.S. 298, 318 (1985).

130. *See* LAFAVE ET AL., *supra* note 97, at 543.

131. Police and Criminal Evidence Act (PACE), 1984, c. 60, § 76(2) (Eng.).

132. *Id.*

earlier interview that may have continued to exert a 'malign influence' during the later interview.[133] The subsequent confession may be thrown out also in exercise of the discretionary balancing provided by the general exclusionary rule under § 78 PACE.[134] When it comes to physical evidence, however, §§ 76(4)-(6) PACE provide that the exclusion of a confession under § 76(2) shall not have any influence on the admissibility in evidence of "any facts" discovered by utilizing the suppressed confession.[135] The Argentine courts have also allowed use of information from involuntary confessions to further the investigation.[136]

B. *Fruits of Unknowing Confessions or Those Made in the Absence of Counsel*

1. Confessions Made Without Advice as to the Right to Silence and Counsel

Most European and Latin American jurisdictions now require that persons subject to police interrogation be admonished of their right to confer with counsel and their right to remain silent before being interrogated.[137] In 1966, in the landmark case of *Miranda v. Arizona*, the USSC limited the requirement of such admonitions to cases in which the suspect was in "custody," explaining that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."[138] In interpreting the provisions incorporating its *Miranda* rights, German courts have extended this protection to any cases in which the person questioned can be considered to be a suspect in the commission of the crime, regardless of whether he is in custody or not.[139]

133. Y v D.P.P., [1991] CRIM. L. REV. 917.

134. PACE, 1984, c. 60, § 78 (Eng.). *See* Section II.B.6., *supra*.

135. PACE, 1984, c. 60, §§ 76(4)-(6). PACE § 76(5) provides, albeit, that the jury shall not be told that the "facts" were derived from the statements of the defendant.

136. Alejandro D. Carrió & Alejandro M. Garro, *Argentina*, in CRIMINAL PROCEDURE, *supra* note 30, at 3, 32-33.

137. *See* THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 16, at 85-96 (discussing some European countries and case law). *See also* Stephen C. Thaman, *Miranda in Comparative Perspective*, 45 ST. LOUIS U. L.J. 581, 592-97 (2001).

138. Miranda v. Arizona, 384 U.S. 436, 467 (1966). In Spain, admonitions are also only required when the suspect is in custody, *see* LEY DE ENJUICIAMIENTO CRIMINAL [L.E. CRIM.] arts. 520(2)(a)-(c) (Spain).

139. *See* Thaman,Comparative Criminal Procedure, *supra* note 16, at 91-93 (discussing German Supreme Court decisions: Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 27,

Thus it is not only the coercion of police custody which requires such admonitions. The German Supreme Court, like most other countries who have recognized *Miranda* rights, firmly recognizes the constitutionality of the warnings and grounds them not only in the right to silence, but also in the right to human dignity:

> The principle, that no one must testify against himself in a criminal proceeding, that is, that everyone has a right to remain silent, belongs to the recognized principles of criminal procedure . . . . It has found a positive expression in Art. 14(3)(g) of the International Covenant on Civil and Political Rights . . . . The recognition of this right to remain silent reflects the respect given to human dignity . . . . It protects the personality rights of the accused and is a necessary component of a fair trial . . . .[140]

Because *Miranda* rights, as interpreted by the German Supreme Court, are "designed to secure the foundations of the procedural position of the accused" and are meant to protect the dignity and personality rights of the defendant, their violation will lead to the non-usability of the statements acquired in violation thereof.[141]

Although the *Miranda* Court clearly held that the admonitions were required by the Fifth Amendment and the USSC re-established the constitutional status of *Miranda* in 2000,[142] a three-justice plurality of the court in 2004 still relied on the allegedly non-constitutional "prophylactic" nature of the *Miranda* rules, in order to admit into evidence a gun, which was found as a "fruit" of a confession acquired in violation of *Miranda*.[143] The plurality, while allowing "fruits" following *Miranda* violations, appears to affirm the inadmissibility of fruits of coerced confessions:

> [A]lthough the Court requires the exclusion of the physical fruit of actually coerced statements, statements taken without sufficient *Miranda* warnings are presumed to have been coerced only for certain purposes and then only when necessary to protect the privilege

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1992, 38 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 214 (215, 218) (F.R.G.); and DER STRAFVERTEIDIGER (StV) Vol. 8, 337, at 337-39).

140. Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 27, 1992, 38 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 214 (224-25) (F.R.G.) *translated in* THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 16, at 111.

141. *Id.* at 218-22.

142. United States v. Dickerson, 530 U.S. 428, 438 (2000).

143. United States v. Patane, 542 U.S. 630, 631-32 (2004) (stating that "[u]nlike actual violations of the Self-Incrimination Clause, there is, with respect to mere failures to warn, nothing to deter and therefore no reason to apply *Wong Sun's* "fruit of the poisonous tree" doctrine. It is not for this Court to impose its preferred police practices on either federal or state officials."). Chief Justice Rehnquist, the author of *Dickerson*, again flip-flops in this opinion in asserting the non-constitutional status of *Miranda*.

against self-incrimination. This Court declines to extend that presumption further.[144]

The USSC's original position that suppression of "fruits" is only required if a violation is of constitutional stature was undermined by its historically necessary rescuing of *Miranda*.[145] Yet the Court's failure to distance itself from its old decisions, and the plurality's clumsy and forgetful return to pre-*Dickerson* palaver, again has relegated *Miranda* to its previous status as a part of the "pretend constitution."[146] Since the decision in *Hudson v. Michigan*,[147] however, the USSC is now expressly denying suppression even when it recognizes a violation of constitutional norms, bringing it line with certain courts in Europe and thus demoting the "knock and announce" component of the Fourth Amendment,[148] to the "pretend constitution."

However, the USSC is not alone in refusing to recognize the "fruits of the poisonous tree" doctrine in relation to *Miranda* violations. Many European countries have a similar approach. It is interesting, though, that some state courts have ruled that physical evidence found as a result of a *Miranda* violation, whether negligent or intentional, must be suppressed.[149]

The other most typical "fruits" of unlawful statements, whether involuntary or unknowing, would be the discovery of a witness or the procurement of a subsequent "legal" admission or confession that was the product of the unknowing statement taken without the appropriate warnings.

In its pre-*Dickerson* period of deconstitutionalizing *Miranda*, the USSC refused to suppress the testimony of a witness, discovered as a

144. *Id.* at 632.

145. As mentioned, *supra*, *Miranda* has been adopted by the vast majority of democratic countries and is now considered a necessary component of the privilege against self-incrimination and the protection of human dignity. Chief Justice Rehnquist must have been aware of this and the blow it would cause to the institution of the USSC if it were to go back to 1950's approaches to criminal justice. In *Dickerson*, the Court had to admit the obvious: *Miranda* could not have been decided if it were not mandated by the Fifth Amendment.

146. See Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1442-43 (1987), for a discussion of Justice Holmes's hypothetical "bad man of the law's" police training manual created by *Miranda* in the "'pretend Constitution" era prior to *Dickerson*.

147. Hudson v. Michigan, 547 U.S. 586, 593-94 (2006).

148. Recognized in Wilson v. Arkansas, 514 U.S. 927, 930 (1995).

149. *See, e.g.*, Commonwealth v. Martin, 827 N.E.2d 198, 203 (Mass. 2005); State v. Peterson, 923 A.2d 585, 588 (Vt. 2007); State v. Knapp, 700 N.W.2d 899, 917-18 (Wis. 2005). *But see* United States v. Patane, 542 U.S. 630, 641-42 (2004) (where the violation was clearly a negligent, and not an egregious violation).

result of a *Miranda*-defective confession,[150] and refused to accept that a subsequent confession taken with proper admonitions was the "fruit" of a prior defective admission.[151] Because of the jurisprudence permitting use of such "fruits," some police in the U.S. began to intentionally omit *Miranda* warnings when they thought they could benefit thereby in gathering information.[152] Some courts would also engage in a balancing test and suppress "fruits" where the violation was intentional or egregious, and refuse to do so when the violation was inadvertent or negligent.[153]

In the context of "two interrogations" cases, where the first is in violation of *Miranda* and the second following proper admonitions, the USSC in *Missouri v. Seibert*, elaborated on the precedent established in *Elstad*.[154] The USSC did not find the second "proper" confession to be a "fruit" of the first confession obtained by police, even though the police had a policy of intentionally omitting the required warnings to soften up criminal suspects.[155] However, the Court did find that the subsequent waiver of *Miranda* rights was not "knowing and intelligent," coming as it did directly on the heels of an interrogation without warnings and without an accompanying explanation that the first confession would not be admissible in court.[156]

Despite the fact that the German courts have given their version of *Miranda* warnings constitutional status and require exclusion of statements taken in violation thereof, they have not extended this evidentiary prohibition to the "fruits" of the confession, whether in the form of physical evidence or subsequent confessions.[157] In Spain, the failure to advise of the right to silence, required by Art. 520(2)(a)

150. Michigan v. Tucker, 417 U.S. 433, 444-45 (1974).

151. Oregon v. Elstad, 470 U.S. 298, 317-18 (1978).

152. California Attorneys for Criminal Justice v. Butts, 195 F.3d 1039, 1045 (9th Cir. 1999) (allowing civil suit against officers based on this practice).

153. *See* Garvin v. Farmon, 258 F.3d 951, 954 (9th Cir. 2001) (stating that the police were not able to use the fruits that resulted from an improper *Miranda* warning); People v. Neal, 72 P.3d 280, 292-93 (Cal. 2003) (holding that statements gathered in violation of *Miranda* could not be used for any purpose where the police grossly pressured the suspect to talk and ignored both his right to remain silent and to counsel); State v. Sosinski, 750 A.2d 779, 785-86 (N.J. Super. Ct. App. Div. 2000) (holding that the use of statements or fruits was not allowed because of improper *Miranda* warning).

154. Missouri v. Seibert, 542 U.S. 600 (2004).

155. *Id.* at 611-12.

156. *Id. Compare* United States v. Patane, 542 U.S. 630 (2004) *with* Gäfgen v. Germany, App. No. 22978/05, 48 Eur. H.R. Rep. 253 (2008) (where the German trial court intimated that the statements made by the defendant after the coerced confession might have been admissible had the police advised him of the inadmissibility of the first confession).

157. LUTZ MEYER-GOßNER, STRAFPROZESSORDNUNG 550 (50th ed. 2007); Weigend, *supra* note 74, at 261.

CCP-Spain,[158] is considered to be a constitutional violation, which leads inexorably to exclusion of a statement.[159] While exclusion of "fruits" should also be a consequence per Art. 11.1 LOPJ-Spain due to the constitutional nature of the violation, there is some indication that the content of an illegal statement could be used to further the investigation or even as corroborating evidence at trial.[160]

The Italian CCP at first glance provides for the greatest protection of the suspect-accused when confronted by the specter of police interrogation. Even spontaneous admissions made by persons to the judicial police or a judge may not be used even though the person was not being questioned as a suspect.[161] Suspects must be advised of the right to remain silent and that all they say can be used against them and the statute requires exclusion if the admonitions are not given.[162] Yet as we shall see, *infra*, Italian law does not recognize the doctrine of "fruit of the poisonous tree."

2. Confessions Obtained by the Police in the Absence of Counsel

In the U.S. there is no violation of *Miranda* if a defendant knowingly and intelligently waives his right to counsel, without ever having spoken with one, and speaks to the police.[163] The USSC long ago said that the police need not secure counsel for a jailed defendant who wants to consult with counsel, as long as they did not interrogate him before he renounced that right.[164]

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158. L.E. CRIM. art. 520(2)(a) (Spain), *translated in* THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 16, at 259-60.

159. STS, May 19, 1990 (R.J., No. 4195, p.5480), *cited in* EDUARDO DE URBANO CASTRILLO & MIGUEL ÁNGEL TORRES MORATO, LA PRUEBA ILÍCITA PENAL: ESTUDIO JURISPRUDENCIAL 76 (3d ed. 2003).

160. VICENTE GIMENO SENDRA ET AL, DERECHO PROCESAL PENAL 507 (1996).

161. C.P.P. §§ 63, 350(7) (Italy).

162. C.P.P. § 64. Although the failure to advise a suspect of the right to remain silent is considered by some Italian courts not to constitute a nullity, *see* C.Cass. VI, 11.12.91, voices in the literature dispute this, claiming the failure should constitute a nullity of general order leading to exclusion. Marilena Colamussi, *Interrogatorio dell'Imputato ed Omesso Avvertimento della Facoltà di Non Rispondere*, in PERCORSI DI PROCEDURA PENALE: DAL GARANTISMO INQUISITORIO A UN ACCUSATORIO NON GARANTITO 15, 19 (Vincenzo Perchinunno, ed. 1996).

163. Brewer v. Williams, 430 U.S. 387, 403-04 (1977).

164. *See, e.g.*, Duckworth v. Eagan, 442 U.S. 195, 202-03 (1989); California v. Prysock, 453 U.S. 355, 359 (1981). The U.S.S.C. has never required the presence of lawyers in the jails, as is required in England and Wales under the system of "duty solicitors." *See also* Code of Practice for the Detention, Treatment, & Questioning of Persons by Police Officers, Code C, § 6.6(a)-(c) (effective Jan. 31, 2008) (authorized by the Police and Criminal Evidence Act, 1984, c. 60, § 66 (Eng.)) *available at* http://police.homeoffice.gov.uk/publications/operational-policing/2008_PACE_Code_C_(final)2835.pdf?view=Binary.

After a defendant is charged and has counsel, a much stricter rule applies that prevents interrogation altogether unless the defendant and counsel specifically agree.[165] This strict rule used to also apply to defendants who had been charged, arraigned in court, and advised of the right to counsel,[166] but this latter restriction was overruled in a recent case.[167] Despite the clear constitutional foundation of the Sixth Amendment right to counsel, the USSC also recently changed course and allowed prosecutors to use a statement elicited behind the back of defense counsel in violation of *Massiah* to impeach the defendant when he testified, thus relegating the Sixth Amendment right to counsel to the expanding "pretend constitution," the violation of which has few untoward results for law enforcement.[168]

There is a trend in Europe to reinforce the right to counsel pre-trial and to restrict the use of any statements gathered by the police where the defendant either had not spoken to counsel, or confessed in the absence of counsel. Russia included in its 2001 CCP a rule that prevents any use of a statement made by a suspect-defendant to police or criminal investigators pre-trial in the absence of counsel, if he or she retracts that statement at trial, even if the suspect had waived the right to counsel.[169] A similar rule exists in Spain.[170]

In Italy, the denial of the right to consult with counsel constitutes a nullity of general order and requires suppression of any subsequently obtained confession.[171] The police, however, are permitted to gather "summary information" from suspects, even those arrested *in flagrante*.[172] This must generally be done with obligatory assistance of

165. Massiah v. United States, 377 U.S. 201, 203-04 (1964) (holding that any interrogations of a charged defendant in the absence of counsel violates the Sixth Amendment right to counsel, whether conducted out of custody by an informant); Brewer v. Williams, 430 U.S. 387, 399 (1977) (holding that interrogation of a charged defendant in absence of counsel while in custody by police officers violates Sixth Amendment).

166. *See* Michigan v. Jackson, 475 U.S. 625, 632 (1986).

167. *See* Montejo v. Louisiana, 129 S. Ct. 2079, 2091 (2009) (where police acquired a confession to capital murder after the defendant had been charged and arraigned).

168. *See* Kansas v. Ventris, 129 S. Ct. 1841, 1846-47 (2009).

169. UPK art. 75(2)(1) (Russ.). This provision was introduced due to the prevalent use of coercion by Russian criminal investigators in inducing confessions and waivers of counsel prior to interrogation. On the problems with the implementation of the rule, *see* Stephen C. Thaman, *The Nullification of the Russian Jury: Lessons for Jury-Inspired Reform in Eurasia and Beyond*, 40 CORNELL INT'L L.J. 355, 375-78 (2007).

170. *See* De Urbano Castrillo & Torres Morato, *supra* note 159, at 78.

171. Marilena Colamussi, *In Tema di Deducibilità della Nullità Derivante dalla Violazione del Diritto dell'Imputato in Stato di Custodia Cautelare di Conferire con il Proprio Difensore*, *in* PERCORSI, *supra* note 162, 37, 37.

172. C.P.P. art. 350(2)-(3) (Italy).

counsel,[173] but it may also be done in the absence of defense counsel as long as "no record or use may be made of the information and tips gathered in the absence of defense counsel."[174] However, such "information and tips" gathered by police may, freely be used in ways that do not prejudice the declarant, for instance, against third parties,[175] but it may also be used for the purpose of justifying a search or seizure or an order of pretrial detention. The information gleaned from a non-usable statement may also be used to develop leads in an investigation.[176] A statement, otherwise non-usable, may however, as in the U.S., be used to impeach the defendant if he testifies at trial in a contrary manner.[177] Italy does not recognize the doctrine of fruits of the poisonous tree for physical evidence or witnesses discovered through otherwise unlawful confessions.[178] Despite the weakness of the Italian exclusionary rule in relation to derivative evidence, the Italian code categorizes the interrogation of the suspect-defendant as a tool of the defense, not as a means for law enforcement to use her as a source of evidence against herself.[179]

Although the right to remain silent is not what it used to be in England and Wales, as one's silence may now be used against oneself at trial,[180] the English courts will on occasion suppress confessions, but primarily when the defendant is denied the right to consult with coun-

173. *Id.* Even before the adoption of the 1988 C.P.P., the 1930 C.P.P. was interpreted to also prohibit any use whatsoever of statements taken in the absence of counsel. *See* Craig M. Bradley, *The Emerging International Consensus as to Criminal Procedure Rule*, 14 MICH J. INT'L L. 171, 218-19 (1993).

174. C.P.P. art. 350(5)-(6) (Italy) (translated by author).

175. GIOVANNI CONSO & VITTORIO GREVI, COMMENTARIO BREVE AL NUOVO CODICE DI PROCEDURA PENALE 143, 387 (4th ed. 2002).

176. *Id.* at 390.

177. C.P.P. arts. 350(7), 503(3) (Italy).

178. That violations of C.P.P. art. 64 (Italy) do not result in suppression of the fruits, see Elizabeth M.T. Di Palma, *Riflessioni Sulla Sfera di Operatività della Sanzione di cui all'Art. 191 C.P.P., in* PERCORSI, *supra*, note 162, 113, 115.

179. C.P.P. art. 65(2) (Italy) expressly states: "The person [under investigation] is invited to explain to the extent she deems it useful in her defense and direct questions may be asked of her." *translated in* THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 16, at 103.

180. Suspects are warned in the following fashion: "You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in Court." Code of Practice for the Detention, Treatment, & Questioning of Persons by Police Officers, Code C, § 10.5 (effective Jan. 31, 2008) (authorized by the Police and Criminal Evidence Act, 1984, c. 60, § 66 (Eng.)) *available at* http://police.homeoffice.gov.uk/publications/operational-policing/2008_PACE_Code_C_(final)2835.pdf?view=Binary. The use of one's silence following such warnings has been upheld by the European Court of Human Rights in *Murray v. United Kingdom*, App. No. 18731/91, 22 Eur. H.R. Rep. 29 (1996).

sel before being interrogated.[181] For instance, in one case the English Court of Appeal suppressed a confession properly obtained because it was the fruit of a previous confession obtained in violation of the right to consult with counsel.[182]

In the last few years the ECtHR has also taken steps to strengthen the pretrial right to counsel during interrogations. In *Salduz v. Turkey*, the court held that the right to counsel guaranteed in ECHR Art. 6(3)(c) applies during the first police interrogation and any conviction based on an admission or statement taken in violation of this right constitutes a violation of the general right to a fair trial guaranteed under ECHR Art. 6.[183] The language is tantamount to that of fashioning a court-made exclusionary rule for any such statements; "[t]he rights of the defense will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction."[184]

Violations of the right to a fair trial have been found in a number of cases from Turkey, Ukraine, and other countries based on denial of counsel.[185] This case law will likely bring substantial changes to those European countries, like France, where the right to pre-interrogation counsel is severely limited. Although I have found no cases discussing the suppression of physical fruits of confessions obtained in violation of the right to counsel, the ECtHR discussed the possibility of suppressing a confession to an investigating magistrate, if it followed closely on the heels of a coerced confession in the absence of counsel.[186] The court has also found a violation of the right to a fair trial in an instance where the coerced confession of a witness without counsel was used to convict the defendant, thus indicating that the violation is

181. PACE, 1984, c. 60, § 58 (Eng.) guarantees the suspect a right to consult with counsel before being interrogated.

182. R v. McGovern, (1991) 92 Cr. App. R. 228 (Eng.).

183. Salduz v. Turkey, App. No. 36391/02, 49 Eur. H.R. Rep. 421, 435-39 (2009). All decisions of the European Court of Human Rights are available at http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC†atabase/ (follow "HUDOC icon" hyperlink to get to search page).

184. *Id.* at 435-39. For a similar decision, see Panovits v. Cyprus, App. No. 4268/04 (Mar. 11, 2009) ¶¶ 69-86, in which a 17 year-old defendant was convicted on the basis of a confession taken after the police advised him of the right to silence, but not to counsel, and where the conviction played a central role in the guilty judgment.

185. *See* Ibrahim Öztürk v. Turkey, App. No. 16500/04 (Feb. 17, 2009); Shabelnik v. Ukraine, App. No. 16404/03 (Feb. 19, 2009); Gülecan v. Turkey, App. No. 23904/03 (Apr. 28, 2009); Öngün v. Turkey, App. No. 15737/02 (June 23, 2009); Çimen Işik v. Turkey, App. No. 12550/03 (July 16, 2009); Özcan Çolak v. Turkey, App. No. 30235/03 (Oct. 6, 2009); Güvenilir v. Turkey, App. No. 16486/04 (Oct. 13, 2009); Oleg Kolesnik v. Ukraine, App. No. 17551/02 (Nov. 19, 2009).

186. Kuralić v. Croatia, App. No. 50700/07, ¶¶ 47-50 (Oct. 15, 2009).

so serious that "standing" was not required to litigate its effect on the trial.[187]

In Canada, police are not constitutionally required to advise detained suspects of the right to silence before questioning them, but Art. 10(b) of the Charter does accord arrested persons the right to attempt to contact counsel before being interrogated.[188] If the right to counsel has been violated, however, and derivative evidence is found that could not have been found but for the violation, the Canadian courts consider this to be "conscripted" evidence and have traditionally suppressed it. Thus, if a suspect points out incriminating evidence in his own house, which would have been searched anyway, this would be admissible, but if the accused, while being denied the right to counsel, informs police that the murder weapon is at the bottom of a frozen river, this must be suppressed.[189] It appears, however, that the Canadian Supreme Court may take a different approach to this issue since it has adopted a new approach to exclusion in two 2009 cases.[190]

3. Can a Valid, Knowing Confession Break the Causal Nexus of an Unconstitutional Privacy Violation?

Several years ago, the USSC ruled that the giving of *Miranda* warnings would not necessarily attenuate the taint caused by an unconstitutional arrest.[191] Ireland's Court of Criminal Appeal also held that a voluntary confession on the heels of an unlawful arrest or search does not necessarily break the causal nexus and ensure its admissibility.[192] The Argentine courts have also suppressed statements given by a defendant on the heels of an unconstitutional dwelling search as well as following an unlawful arrest.[193]

However, recent cases decided by the Spanish Constitutional Court have held that a knowing confession, preceded by proper *Mi-*

187. Lutsenko v. Ukraine, App. No. 30663/04 (Dec. 18, 2008); Shabelnik v. Ukraine, App. No. 16404/03 (Feb. 19, 2009).

188. Roach, *supra* note 30, at 75-78.

189. *Id.* at 71.

190. *See* R. v. Grant, [2009] 2 S.C.R. 353, 2009 SCC 32 (Can.), R. v. Harrison, [2009] 2 S.C.R. 494, 2009 SCC 34 (Can.). In *Grant*, the Court balanced a non-egregious unlawful detention and questioning, by virtue of which the defendant was "conscripted" to admit possession of a gun, against the admitted importance of the rights impinged on thereby, and the importance of the physical evidence to determine the truth of the charges and admitted the gun.

191. *See* Brown v. Illinois, 422 U.S. 590, 603-04 (1975); Taylor v. Alabama, 457 U.S. 687, 691-92 (1982) (two cases in which the Court put a heavy burden on the prosecution to show that the subsequent confession was independent of the preceding infraction).

192. *See* Director of Public Prosecutions v. Madden, [1976] I.R. 336, 347 (Ir.).

193. Alejandro D. Carrio & Alejandro M. Garro, *Argentina*, *in* CRIMINAL PROCEDURE, *supra* note 30, at 3, 24.

randa-type admonitions will attenuate the taint of an unconstitutional search or wiretap that preceded it and led to the suspect's arrest and prosecution.[194]

American courts, of course, will find that a temporal hiatus between the Fourth Amendment violation and an ensuing admission, and especially the defendant's release from custody, will attenuate the taint.[195]

IV. Fruits of Privacy Violations

A. *Introduction*

Under the rubric of "privacy violations" I would like to concentrate on the two most egregious forms of such violations, which, one could say, have obtained the status of international human rights violations: (1) entries of a dwelling without probable cause or judicial authorization in the absence of exigent circumstances; and (2) wiretaps or bugs of private conversations without probable cause or judicial authorization, in the absence of exigent circumstances.[196] The "fruits" issues relating to interceptions of private conversations are similar to those relating to illegal interrogations: both conversations and interrogations reveal vast amounts of information, which can lead to derivative evidence in the form of the identity of witnesses, leads to further the investigation, and physical evidence. The goal of an illegal search, on the other hand, is to find the object of the search, which in the criminal procedure context is usually fruits or instrumentalities of crime, or contraband, i.e., the *corpus delicti* of criminal activity. Thus, a successful search always has a hoped-for "fruit." Occasionally, of course, unexpected "fruits" present themselves "in plain view" where the searchers were expecting the object of their efforts.[197]

I will first discuss a general distinction that applies to both dwelling searches and interception of communication, which makes the ex-

194. *See* STC, June 6, 1995 (R.J., No. 4944, p.6641); STC, Mar. 26, 1996 (R.J., No. 2593, p.3487); STC 136/2006, May 8, 2006, *available at* http://sentencias.juridicas.com/docs/00252917.html; *see also* STS 556/2006, May 31, 2006, *available at* http://sentencias.juridicas.com/docs/00261718.html (the Supreme Court also found that "voluntary statements" of alleged Al Qaeda sympathizers in a prosecution for belonging to a terrorist organization were attenuated and not poisoned by illegal wiretaps).

195. Wong Sun v. United States, 371 U.S. 471, 490 (1963).

196. "Exigent circumstances" normally means when there is, what the Germans call "danger in delay," i.e., that there is peril to life and limb, that evidence will be destroyed, or that a felony suspect will escape.

197. These fruits are admissible in American trials if they are readily recognizable as fruits, instrumentalities or contraband. *See* Horton v. California, 496 U.S. 128, 141-42 (1990).

clusion decision dependent on whether or not the violation was of constitutional stature, or was of a technical or non-constitutional statutory character. I will then discuss the admissibility of fruits of unconstitutional dwelling searches and discuss the approach abroad to exclusion, especially of physical evidence (usually the goal of a search) in light of exceptions recognized in the U.S., such as "good faith," inevitable discovery or independent source, but also theories overseas that have not yet gained credence in this country for using evidence seized in a gross violation of constitutional rights.

It is also important to recognize that the right to privacy overseas is often given express constitutional and statutory protection, and is defined in a much broader manner than in the U.S. The right to privacy is related to the right to human dignity (also never mentioned in the U.S. Constitution) and most importantly to the "right to develop one's personality."[198] This approach has made certain items non-seizable, even where the government has probable cause that these items would be material to prove guilt in a criminal case. In Germany and some other countries this protection extends to personal diaries[199] and a person's right to confidentiality in their spoken words.[200] Thus it is impermissible for a participant in a conversation to secretly tape-record the words of a conversation partner, and such evidence is usually not usable in a criminal prosecution.[201] This doctrine is reminiscent of the old "mere evidence" doctrine of the USSC, which was overruled in 1967.[202] According to this doctrine, the government only had a right to seize the *corpus delicti* of crime, that is, objects to which it had a superior title: such as fruits and instruments of crime, and contraband.[203] Personal papers were protected, unless they were instruments of crime.[204] In fact, to search for and seize a person's words, even where put to paper or uttered under no compulsion, was considered to be tantamount to compelling self-incrimination. As the *Boyd*

198. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [Basic Law] May 23, 1949, Federal Law Gazette 14, as amended, Art. 2(1).

199. *See* Bundesgerichtshof [BGH][Federal Court of Justice] Feb. 21, 1964, 19 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 325 (331-34) (F.R.G.), *translated in* THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 16, at 82.

200. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] June 14, 1960, 14 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 358 (359-60, 364-65) (F.R.G.), *translated in* THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 16, at 72-73.

201. *See id.*

202. Warden v. Hayden, 387 U.S. 294, 310 (1967).

203. *Id.* at 295-96.

204. Weeks v. United States, 232 U.S. 383, 390-91 (1914); Boyd v. United States, 116 U.S. 616, 638 (1886).

Court noted: "And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."[205]

We will see a related twist on this doctrine in the Italian jurisprudence, according to which evidence will be suppressed following an unconstitutional search, only if the evidence is not contraband or the *corpus delicti* of the crime.[206] Thus, following *Boyd*, personal papers would be untouchable, but all other fruits, instruments or contraband would be considered "legally" seizable, and therefore not a "fruit" of the unlawful search.[207] In the U.S., it appears, there is no item that may not be seized if it can be used, even as "mere evidence" to circumstantially prove guilt of a crime.[208]

B. Constitutional or Merely Statutory Violations

This distinction, of course, applies only to those jurisdictions that will only exclude evidence if the violation is "substantial," or touches "fundamental" or constitutional rights. Spanish law makes a clear and interesting distinction here. If a dwelling search is based on probable cause and is judicially authorized, then the constitutional underpinnings of the search are guaranteed.[209] If the violation relates to a lesser statutory requirement of the search, this is considered to be a an "irregularity," rather than an "illegality," and is treated like a "nullity," which cancels the evidentiary value of the documentary evidence memorializing the investigative measure, the search, but does not prevent proof of the search using other means.[210] For instance, police conducted a search that was authorized by the investigating magistrate upon probable cause, but neither the investigating magistrate nor his secretary were present during the search, violating Art. 569(4) CCP-Spain.[211] The Spanish Supreme Court held that this did not constitute

205. *Boyd*, 116 U.S. at 633. Note the similarity with the now outdated Canadian exclusionary rule based on constitutional violations that "conscript" the defendant to give evidence against himself.

206. Italian Supreme Court decision of March 27, 1996, *translated in* THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 30, at 122-24.

207. *Boyd*, 116 U.S. at 623.

208. *See* Andresen v. Maryland, 427 U.S. 463, 474 (1976); Fisher v. United States, 425 U.S. 391, 407-09 (1976).

209. *See* STS, July 9, 1993 (R.J., No. 6060, p.7682-83), *translated in* THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 30, at 109.

210. *See id.*, *translated in* THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 30, at 108-09.

211. *Id.*, *translated in* THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 30, at 107.

the violation of a fundamental right, which would have occurred had there not been judicial authorization or probable cause, and therefore the sanction was merely the annulment of the act documenting the search, thereby making it inadmissible at trial.[212] But this did not prevent the police who conducted the search from testifying in court to prove the seizure of the drugs and the *corpus delicti* of the crime.[213] Here is a good example of the use of the old term "nullity" as nullifying a procedural act, but not its fruits. The fruits may be proved independently from the procedural record.[214]

As previously mentioned, Art. 11.1 LOPJ-Spain clearly requires exclusion of evidence and its fruits gathered in violation of "fundamental" rights. This statute was enacted on the heels of a landmark decision by the Spanish Constitutional Court, which required exclusion of both direct and derivative evidence only when the violation touched on the constitutional rights of the citizens.[215] Unlike the USSC in *Leon*, the Spanish Constitutional Court did not mention deterrence, but grounded the prohibition of use on: (1) the violation of a fair trial with all the guarantees established by law (Art. 24 Const.-Spain); (2) a denial of equality of arms, in the sense that the defense may not violate the law in order to produce evidence; and (3) in the presumption of innocence, which Spanish law sees as the right not only to be presumed innocent, but also to be proved guilty based on sufficient legally obtained evidence.[216]

In principle, the USSC has also limited exclusion to constitutional violations and has categorized certain violations of the Title III wiretap law and of statutes authorizing search warrants as being of subconstitutional status, the violation of which does not require suppression. Thus, mistakes in the execution of an otherwise valid search warrant,[217] or Title III wiretap,[218] will not lead to exclusion. By refusing to suppress the fruits of an otherwise constitutionally valid war-

212. *Id., translated in* THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 30, at 108.

213. *See id.*

214. *See* DE URBANO CASTRILLO & TORRES MORATO, *supra* note 159, at 47-52.

215. *Id.* at 41.

216. *Id.* at 41-42.

217. United States v. Schoenheit, 856 F.2d 74, 77 (8th Cir. 1988) (violation of prohibition of night service per FED. R. CRIM. P. 41(c)(1)); United States v. Charles, 833 F.2d 355, 357 (5th Cir. 1989) (FED. R. CRIM. P. 41(d) violation because officer serving warrant did not have warrant in hand).

218. Under 18 U.S.C.A. § 2518(10)(a)(i), evidence will be suppressed when the failure to follow statutory requirements "directly and substantially implements" the congressional intention to restrict the use of electronic surveillance. *See* United States v. Giordano, 416 U.S. 505, 506 (1974); United States v. Chavez, 416 U.S. 562, 571 (1974).

ranted search in *Hudson v. Michigan*[219] despite a violation of the "knock and announce" requirement, the USSC has come to a result similar to that of the Spanish Courts, but had to resort to contorted reasoning because of their previous recognition of the "knock and announce" rule as constitutionally mandated.[220]

C. *Use of Illegally Seized Objects or Information Against Third Parties*

According to USSC jurisprudence, only persons whose rights were violated during the illegal investigative action may move to suppress the evidence gathered as a result thereof.[221] This exception to the exclusionary rule essentially permits intentional violations of the constitutionally protected privacy of citizens whenever more than one person can be found in the area to be searched, or where the target of the investigation is a person who is not present.[222] The evil of this approach was articulated in a long-since overruled decision of the California Supreme Court: "It virtually invites law enforcement officers to violate the rights of third parties and to trade the escape of a criminal whose rights are violated for the conviction of others by the use of the evidence illegally obtained against them."[223] "Standing" limitations are also recognized in Canada.[224]

D. *Fruits of Unlawful Searches*

In this section I will address the approach taken overseas in relation to theories that break the causal connection between the constitutional illegality and the "fruits," i.e., the evidence seized, which is used

219. *See* Hudson v. Michigan, 547 U.S. 586, 594 (2006).

220. The Court based its decision on the fact that the seizure of the evidence was not a "fruit" of the unlawful entry due to inevitable discovery, and that any taint was attenuated. *Id.* at 592-93.

221. Rakas v. Illinois, 439 U.S. 128, 132 (1978) (citing Jones v. United States, 362 U.S. 257, 261). The German *Rechtskreistheorie* reaches a similar conclusion. *See* CLAUS ROXIN, STRAFVERFAHRENSRECHT 166 (24th ed. 1995); *cf.* BELING, *supra* note 21, at 35; Weigend, *supra* note 74, at 253.

222. For instance, the USSC ruled that only the owner of a vehicle has an expectation of privacy therein. Rakas v. Illinois, 439 U.S. 128, 148 (1978). In relation to dwelling searches, only the residents of a dwelling or overnight guests have a reasonable expectation of privacy, and thus "standing" to complain of illegal searches. Minnesota v. Olson, 495 U.S. 91, 96-97 (1990). This may not extend to persons who are only involved in illegal enterprises during short-term visits. Minnesota v. Carter, 525 U.S. 83, 90 (1998).

223. People v. Martin, 290 P.2d 855, 857 (Cal. 1955).

224. Roach, *supra* note 30, at 73 (citing R. v. Edwards, [1996] 1 S.C.R. 135 (Can.), which even denies standing to a person in his girlfriend's house where he has occasionally spent the night).

as the basis for a judgment of guilt. These approaches include the notion, alien to U.S. law, that seizures are conceptually independent of searches, and that if the seizure is "legal" then the nexus of illegality has been attenuated. The other attenuation theories pioneered in the U.S. include: inevitable discovery, independent source, and "good faith," which has recently been treated as an attenuation element in Spain.

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

It may be hard for Americans to understand that there are countries that separate the seizure of physical evidence radically from the investigative search measure that led to the discovery. It is a doctrine firmly in place in Italy and accepted by courts in Germany, for instance, that the seizure, say, of drugs, is deemed not to be a "fruit" of an unconstitutional search of a dwelling (or other building), the express object of which was to find the selfsame drugs.

The Italian courts reason, that because Art. 253(1) CPP-Italy requires the judicial authorities (and the police) to seize the *corpus delicti* of a crime, that is, fruits, instrumentalities, and contraband, then this *legal* seizure cannot be vitiated by an antecedent unconstitutional search, be it without probable cause or judicial authorization.[225] The courts have held that searches and seizures have different juridical presuppositions and functions and cannot be viewed as connected due to their convergence in reality.[226] Although Art. 191 CPP-Italy seems quite straight-forward in prohibiting the use of any evidence collected in violation of prohibitions established by law, the courts hyper-technically construe the language to defeat its very goal by saying that "non-usability" only applies in relation to evidence gathered in violation of an "express or implicit prohibition" and not to evidence "where a mere formality of acquisition has not been observed."[227] Finally, in 2001, the Italian Constitutional Court made it clear that the "fruits of the poisonous tree" apply only to "nullities" because it is expressly provided by statute, whereas Art. 191 CCP-Italy, providing for "non-usability," has no language referring to derivative evi-

225. Italian Supreme Court decision of March 27, 1996, *translated in* THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 52, at 122-24.

226. CONSO & GREVI, *supra* note 175, at 550 (this decision also provides that any illegality during the acquisition of the seizable object (the search) should be punished by disciplinary or penal means).

227. *Id.* at 392.

dence.[228] This doctrine is rather ludicrous, because the Italian literature has also made a distinction similar to that of the Spanish, that "nullities" relate only to non-constitutional violations in the gathering of evidence, whereas "non-usability" applies only to violations of fundamental rights.[229]

German doctrine also does not see an inexorable link between an illegal search and the seizure of the object at which it was aimed.[230] German courts will suppress the item seized if there was an independent prohibition on seizing it, for instance, because it is protected by a privilege.[231] Separating an unlawful search, which is a tool to find evidence in a criminal case, from its object, the evidence sought, is an example of the courts either ignoring the plain meaning of constitutional or statutory law or intentionally subverting it in order to convict a guilty person at any cost, which is no longer the purported goal of criminal procedure. It is clear that the prohibition of the violation of privacy of the dwelling is not only rooted in the protection of privacy, but also constitutes a prohibition of seizures in those spaces, i.e., a prohibition on the state's power to gather information. Search and seizure cannot be logically separated into different actions with different motivations.[232]

2. The Doctrines of Inevitable Discovery, Independent Source, and Good Faith

Whether or not a court will "balance" a serious constitutional violation against the search for truth in the criminal trial, it seems that nearly all courts will entertain an argument that the evidence would

228. La Corte Costituzionale, 3 oct. 2001, n. 38, *available at* http://www.cortecostituzionale.it/giurisprudenza/pronunce/schedaDec.asp?Comando=RIC&bVar=true&TrmD=&TrmDF=&TrmDD=&TrmM=&iPagEl=1&iPag=1; *but cf.* CONSO & GREVI, *supra* note 175, at 339.

229. GIUSEPPE LUIGI FANULI, INUTILIZZABILITÀ E NULLITÁ DELLA PROVA NEL GIUDIZIO ABBREVIATO, NEL "PATTEGGIAMENTO" E NELL'ISTITUTO DELLA ACQUISIZIONE DEGLI ATTI SU ACCORDO DELLE PARTI 5-6 (2004).

230. The German Constitutional Court also made it clear that use-prohibition will not be the regular, "normal" result of an unconstitutional search. BVerfG NJW 1999, 273, 274. BVerfG NStZ 2000, 488, 499; StV 2000, 233, 234. In 1989, the German Supreme Court held that legal errors during a search do not lead to non-use. BGH NStZ 1989, 375, 376. The Court postulated, "when no legal hindrances to the issuance of a search warrant would have existed and the seized objects as such were legally accessible for use as pieces of evidence" there will be no exclusion. Andreas Ransiek, *Durchsuchung, Beschlagnahme und Verwertungsverbot*, 10 DER STRAFVERTEIDIGER 565, 566 (2002); Weigend, *supra* note 74, at 252.

231. BGH 18, 227, cited in KLEINKNECHT/MEYER/MEYER-GOßNER, STRAFPROZEßORDNUNG 287 (47th ed. 1997). *See also* Weigend, *supra* note 74, at 252.

232. Ransiek, *supra* note 230, at 568. At least one section of the Italian Supreme Court has rejected the prevailing absurdity and recognizes a strict functional relationship between the act of searching and the seizure. CONSO & GREVI, *supra* note 175, at 550.

have been found regardless of the violation. In the United States this doctrine has two manifestations. The courts will allow evidence that has been discovered through an illegal "search" if it is actually "seized" by independent legal means.[233] The courts will also admit evidence that is seized illegally, if it would have been inevitably discovered through legal means.[234] Both of these doctrines have been recognized and applied by the Spanish courts despite their absolute statutory exclusionary rule.[235] The Spanish Supreme Court developed this jurisprudence and continued to analyze whether the "fruit" was "causally connected" to the constitutional illegality or actually independent therefrom. In a 1997 case, the Court affirmed that to use evidence derived from unconstitutional violations "would constitute a hollow proclamation of effective content which would include an incitement to utilize unconstitutional procedure, which, indirectly, produces results."[236] The court continued, that the "the expansive effect provided in Art. 11.1 LOPJ only allows evaluating independent evidence, that is, which has no causal connection to that gathered illegally."[237] In the analysis, one should not confuse "different evidence" derived from the illegality from "independent" evidence without causal connection.[238]

The fairly clear approach of the Spanish Constitutional and Supreme Courts began to change in 1998, when the Constitutional Court pronounced a new doctrine, which differentiated between "natural" causation and "juridical" causation.[239] The court here was definitely influenced by the doctrine of the ECtHR[240] and analyzed the extent to which an illegal wiretap tainted the other evidence in the case by

233. The doctrine of "independent source" is applied in cases where there have been two searches, an illegal one and a legal one, independent of the illegality. It is applied, for instance, when police discover the presence of evidence illegally, but actually seize it pursuant to a search warrant based on information they possessed before the illegal search. Segura v. United States, 468 U.S. 796, 805 (1984); Murray v. United States, 487 U.S. 533, 542 (1988).

234. This doctrine of "inevitable discovery" is applied where there is only one search and seizure, but other investigative procedures independent of the illegality *would have* discovered the evidence legally. Nix v. Williams, 467 U.S. 431, 444 (1984). The Germans call this the "hypothetical independent source" or "hypothetical clean path." Weigend, *supra* note 74, at 253.

235. *See* STS, June 5, 1995 (R.J. No. 4538, p. 6060), *translated in* THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 16, at 118-19.

236. DE URBANO CASTRILLO & TORRES MORATO, *supra* note 159, at 49-50 (citing STS, Apr. 18, 1997 (R.J., No. 3611, p. 5404)).

237. *Id.*

238. *Id.*

239. *Id.*

240. Schenk v. Switzerland, App. No. 10862/84, 13 Eur. H.R. Rep. 242 (1988).

referring to the right to a "fair trial."[241] It analyzed whether the violation was of a required "intensity" and then used a balancing test to determine whether there was an "antijuridical" nexus between illegality and the derivative evidence.[242] It determined, that the violation was not so "intense" due to the fact that the police obtained a wiretap order, and the violation was based on a lack of probable cause.[243] The Court also noted that such an "error" was not intentional and not grossly negligent, and that under the totality of the circumstances, the derivative evidence could be used.[244] Thus we see an incorporation of the "good faith" rule articulated in *Leon* in relation to wiretaps, a step that even the USSC has not yet taken.[245]

A good summary of the new Spanish doctrine is presented in a 2004 Spanish Supreme Court decision:

> (1) The general rule is that evidence derived directly or indirectly from a violation of fundamental rights is inadmissible, as long as there is a causal nexus; (2) An exception exists, even when there is a factual causal nexus between the illegality and the evidence, if the causal link is not based in the illegality (is not "anti-juridical"); (3) In order to assess the existence of a legally relevant connection, the following elements should be taken into account: (a) The significance of the constitutional infringement; (b) The importance of the evidence for proving guilt; (c) whether there was a hypothetical clean path to discover the evidence (i.e. inevitable discovery); (d) whether the right violated requires special protection; and (e) whether the violating officers acted intentionally, or erred in good faith, and thus whether exclusion is necessary for deterrent purposes.[246]

Article 455 CPP-Colombia also explicitly provides for exceptions for "attenuated link, independent source[,] and inevitable discovery and others established by law."[247] The doctrine of "inevitable discovery," however, can serve as a gaping loophole in the constitutional protections if interpreted in too broad a manner. Some American courts have recognized this exception if the police were already in the process of getting a search warrant (and the judge would have hypo-

241. STC 81/1998, Feb. 4, 1998, *available at* http://www.boe.es/aeboe/consultas/bases_datos/doc.php?coleccion=tc&id=SENTENCIA-1998-0081.

242. *Id.*

243. *Id.*

244. *Id.*

245. *See* United States v. Rice, 478 F.3d 704, 714 (6th Cir. 2007) (finding that there is no "good faith" exception to the exclusionary rule under Title III).

246. STS 9/2004, Jan. 19, 2004, translated by author, *available at* http://sentencias.juridicas.com/index.php.

247. CÓD. PROC. PEN. art. 455 (Col.) (translated by author).

thetically issued it) when they searched due to, for instance, circumstances later determined not to have been exigent.[248] However, the most dangerous extension of this notion of a "hypothetical independent source" is when the court allows the introduction of evidence because probable cause allegedly existed and a judge would have approved a warrant application had it been submitted.[249] The German Courts have used this latter rationale to justify their refusal to enforce the privacy requirements of Art. 13 Const-Germany with an exclusionary remedy. Clearly such a justification would completely undermine the constitutional requirement of judicial warrant.[250]

Once a court moves, as has Spain and the U.S., from a seemingly categorical exclusionary rule, to one involving balancing, then it is seldom that physical fruits will be suppressed in cases where the violation was not egregious and the crime investigated was serious. Because, at least in balancing schemes in Europe, whether in England and Wales, under the approach of the ECtHR, or now in Spain, the seriousness of the offense, the importance and reliability of the evidence, and the nature of the breach are the most important criteria to be balanced.

E. Fruits of Unconstitutional Wiretaps

1. The Use of Illegally Acquired Information to Further the Investigation

As with *Miranda*-defective confessions, illegally intercepted communications, even though suppressed and unusable as evidence against the person whose rights were violated, are still useful for developing a criminal investigation by gathering further physical or testimonial evidence which could be used against the affected person or others. The murder weapon with the defendant's fingerprints on it will damn the defendant just as easily as his confession of guilt, whether told to an interrogator or overheard on the telephone.

248. United States v. Cabassa, 62 F.3d 470, 471-72 (2d Cir. 1995); United States v. Curtis, 931 F.2d 1011, 1013 (4th Cir. 1991); United States v. Whitehorn, 829 F.2d 1225, 1231 (2d Cir. 1987) (search warrant signed after the search).

249. *See* United States v. Buchanan, 910 F.2d 1571, 1573 (7th Cir. 1990). However, the overwhelming majority of U.S. courts have rejected this argument, for it would make the warrant requirement meaningless. *See* United States v. Brown, 64 F.3d 1083, 1089 (7th Cir. 1995); United States v. Johnson, 22 F.3d 674, 683 (6th Cir. 1994); United States v. Echegoyen, 799 F.2d 1271, 1280 (9th Cir. 1986); State v. Handtmann, 437 N.W.2d 830, 838 (N.D. 1989).

250. *See* Ransiek, *supra* note 230, at 566. *See* BGH NJW 1989, 1741, 15 1744 (holding that the evidence found in an unconstitutional search will be admissible as long as it is otherwise legally seizable (i.e., contraband, fruits, instrumentalities—and not a protected diary) and a judge would have issued a search warrant had the police sought one). Cited in Weigend, *supra* note 74, at 252.

Clearly if the "fruits" of unlawful wiretaps or bugs may be used to convict a person, then there would be no incentive for law enforcement officials to refrain from secretly wiretapping or bugging private places without probable cause or judicial authorization due to the derivative usefulness of this investigative tool. Indeed, criminal investigators in the former Soviet Union secretly overheard millions of telephone conversations, which aided them in prosecuting actual or imagined criminals, as long as they could claim (or invent) a link to the incriminating evidence that would allow them to keep the wiretap secret.[251]

Both Germany and the U.S. have held, for instance, that the use of recordings of illegally intercepted conversations during interrogation will taint any incriminating statements made by the suspect when confronted with the illegally seized evidence.[252] However, German courts have admitted the testimony of witnesses who were discovered through an illegal interception.[253] The Spanish Supreme Court, however, has suppressed the testimony of the only witness of guilt, who was discovered as a result of an unconstitutional wiretap.[254]

Although the CCP-Italy mandates "non-usability" of illegally intercepted conversations, there is no restriction to using the contents of those conversations to further the investigation, discover new crimes, etc.[255] Even new wiretaps may be based on the information gained from illegal wiretaps.[256]

As was mentioned *supra*, the ECtHR found violations of Art. 8 ECHR's right to privacy due to wiretaps in England and Wales, but in no case found that the defendant's right to a fair trial was thereby violated. In a similar manner, in Canada's pre-2009 exclusionary test, which articulated a seemingly ironclad rule for "conscripted" evi-

251. *See* I.L. PETRUKHIN, CHELOVEK I VLAST' 141-42 (1999) (discussing the secret instructions of the KGB permitting warrantless and illegal wiretapping and secret searches of dwellings, which continued until wiretapping was first regulated in 1992).

252. Gelbard v. United States, 408 U.S. 41, 47-49 (1972) (allowing witness before the grand jury to refuse to answer questions related to the illegally intercepted conversations); Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 22, 1978, 27 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 355 (357-58) (F.R.G.), *translated in* THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 30, at 119-21.

253. BGHSt 32, 68 (1983), *see* Weigend, *supra* note 74, at 253. *But cf.* Michigan v. Tucker, 417 U.S. 433, 449-50 (1974) (testimony of a witness found through a *Miranda*-defective confession was not suppressed).

254. Marta Muñoz de Morales Romero, *La Intervención Judicial de las Comunicaciones Telefónicas y Electrónicas*, *in* INVESTIGACIÓN Y PRUEBA EN EL PROCESO PENAL 138, 169 (Nicolás González-Cuéllar Serrano et al. eds., 2006).

255. FRANCO CORDERO, PROCEDURA PENALE 804 (5th ed. 2000).

256. CONSO & GREVI, *supra* note 175, at 399.

dence, the interception and recording resulting from unconstitutional wiretaps was not considered to be "conscripted" evidence that *per se* affects the right to a fair trial, and was thus dealt with under the more discretionary balancing test.[257]

2. Use of Physical Evidence Gathered as a Result of an Unconstitutional Interception of Private Conversations

U.S. law expressly provides for exclusion of all fruits, including physical evidence, which are gained from an unlawful wiretap. Title 18 U.S.C. § 2515 provides for the exclusion of all derivative evidence once the intercepted communication has been deemed to be in violation of the law: "no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof."[258] The broad sweep of the exclusionary rule of § 2515 would certainly prevent use of evidence even against third parties, thus giving more protection than the general Fourth Amendment rule for searches.[259]

Up until the new jurisprudence of the Spanish Constitutional Court in 1998, physical evidence found as a result of an unconstitutional wiretap or bugging was routinely suppressed as per Art. 11.1 LOPJ-Spain as being "fruit of the poisonous tree" and not usable during the trial.[260] In one case, the police determined via an unconstitutional wiretap, when a woman would be delivering drugs, and thereby arrested her and found the drugs.[261] The Court suppressed the drugs.[262] Since the new case law, however, the decision depends on the new balancing test developed by the constitutional court. In the seminal 1998 case in which the Spanish Constitutional Court altered its theretofore strict exclusionary rules, the Court used the doctrine of inevitable discovery to dissociate the arrest of the defendant in posses-

257. Roach, *supra* note 30, at 71.

258. 18 U.S.C.A. § 2515 (West 2010). Identical fruit-of-the-poisonous-tree language is contained in the Foreign Intelligence Surveillance Act, as well. 50 U.S.C.A. § 1805(e)(5) (West 2008).

259. *See* discussion, *supra*, at IV.C.

260. *See* Juan-Luis Gómez Colomer, *La Intervención Judicial de las Comunicaciones Telefónicas a la luz de la Jurisprudencia*, 1 REVISTA JURÍDICA DE CATALUNYA 145, 162-63 (1998).

261. STC 84/1994, Mar. 14, 1994, *available at* http://www.boe.es/aeboe/consultas/bases_datos/doc.php?coleccion=tc&id=SENTENCIA-1994-0084.

262. *Id.*

sion of drugs from an unconstitutional wiretap, by arguing that the defendant was already under heavy police surveillance and the arrest was therefore not sufficiently tainted by the antecedent illegality.[263]

V. CONCLUSION

In this survey of the treatment of the "fruits of the poisonous tree" in comparative law, we have seen how the jurisprudence in both Common Law and Civil Law jurisdictions has vacillated between a strictly truth-oriented evaluation of the probative value of evidence and a human-rights based concern with important constitutional rights that sometimes trumps the state interest in a particular case to convict a particular criminal.

Although the Common Law began with an indifference to how evidence was gathered, as long as it was reliable and probative, one country from this tradition, the United States, with its venerable constitution and Bill of Rights, developed a new doctrine which took the right to privacy, implicit in the Fourth Amendment, seriously, and refused to allow use of physical evidence seized in violation thereof despite its indubitable probative power. It also gave the privilege against self-incrimination proclaimed in the Fifth Amendment teeth, by suppressing confessions and admissions if they were involuntary or even given in ignorance of the right to counsel and silence, even if they were truthful and corroborated by other evidence.

Other Common Law countries hew closer to the old tradition, and treat issues of exclusion as being discretionary, much like the power of a judge to exclude relevant evidence if its probative value is outweighed by its prejudicial quality. In these countries, physical evidence is seldom suppressed and the exclusion of admissions or confessions is by and large limited to statements, which are "involuntary," i.e., induced by force, threats, promises or deception.

Although the Civil Law jurisdictions, with their "nullities," had statutory principles of exclusion before they were developed even in

263. STC 81/1998, Apr. 2, 1998, *available at* http://www.boe.es/aeboe/consultas/bases_datos/doc.php?coleccion=tc&id=SENTENCIA-1998-0081. A year later, the Court came to a similar ruling where it admitted that the unconstitutional wiretap opened up new avenues of investigation, but the arrest of the defendant was primarily based on personal surveillance and not the wiretap. STC 239/1999, Dec. 20, 1999 *available at* http://www.boe.es/aeboe/consultas/bases_datos/doc.php?coleccion=tc&id=SENTENCIA-1999-0239. Similar rationale led to admission of evidence following unconstitutional wiretaps, where the arrest and seizure of drugs was connected to the surveillance of the person. STC 26/2006, Jan. 30, 2006, *available at* http://www.boe.es/aeboe/consultas/bases_datos/doc.php?coleccion=tc&id=SENTENCIA-2006-0026; STC 70/2007, Apr.16, 2007, *available at* http://sentencias.juridicas.com/index.php.

the U.S., the principle of material truth had traditionally minimized their importance in the criminal trial and exclusion of anything but an "involuntary" confession was a rarity. This began to change as a result of a new emphasis on human rights and the promulgation of modern constitutions after the atrocities of World War II. But an examination of the developments in these countries shows that the initiative to develop exclusionary rules has often been by those who drafted the postwar constitutions and criminal procedure codes, and not necessarily by the judiciary, as was the case in the U.S. Yet seemingly ironclad exclusionary rules, as adopted by the legislature in Italy and Spain, have been either ignored by the courts, as in Italy, or gradually undermined, as in Spain, much like the Warren Court categorical rules have been undermined by subsequent constellations of the USSC.

The strong doctrines requiring exclusion of the "fruits of the poisonous tree" enunciated by the Warren court and articulated in, for instance, Art. 11.1 LOPJ-Spain, have gradually been undermined by a balancing of the seriousness of the violation with the connection between the violation and the discovery of the derivative evidence. The countries with weak or non-existent "fruits" jurisprudence, like Italy, Germany, and some of the Common Law countries, still admit reliable and relevant physical evidence, regardless of its provenance. The main exception seems to be in the area of the physical fruits of a confession, which is the result of torture or cruel, inhuman or degrading treatment. Here, the ECtHR in *Gäfgen v. Germany* has begun to treat the exclusionary rule more seriously than it did in cases involving privacy violations.

But, on the whole, the non-constitutional principle of material truth has largely nullified the right to privacy guaranteed by international human rights conventions and national constitutions. Only in the U.S. and Spain, of the countries I am well-acquainted with, is physical evidence garnered in unconstitutional dwelling searches actually suppressed from time to time. The tolerance given to the physical "fruits" of illegal wiretaps and unknowing and sometimes even involuntary confessions in many countries, has also weakened the privilege against self-incrimination, and given police officers an incentive to violate it. It is ironic, that with all of the voluble trumpeting about the need to protect human rights, they are treated as less important than a conviction in a particular criminal case, especially in countries that proclaim the "legality principle" when it comes to prosecuting and convicting criminals. When one sees how the Italian high courts have

made the exclusionary rule enunciated in Art. 191 CCP-Italy nearly irrelevant, one wonders if the legality principle is a one-way street.

Where judges have discretion to exclude evidence, based on the weighing of multiple factors, only one of which is the constitutional violation, I believe that this weighing should not be carried out by the trial judge in non-jury trials, where the trial judge is always a trier of the facts and is often duty bound to ascertain the truth. This mixes adjudicatory with investigative duties and physical evidence, *res ipsa loquitur*, is nearly always credible and relevant circumstantial evidence at trial.

If police and criminal investigators can still achieve convictions when they negligently violate the rights of citizens in investigating crime, or even when they intentionally fail to follow clear and simple constitutional dictates, such as gaining judicial authorization or admonishing suspects of the right to silence and counsel, either due to laziness or a desire to use derivative fruits rather than the immediate evidence obtained, then the security of the entire populace is at risk.

As an American, I do not think it is a terrible "cost" when a criminal conviction is lost due to violations of the constitution by public servants. Many of the convictions lost due to violations of the Fourth Amendment, for instance, are those involving suppression of drugs. This is a victimless crime and in many U.S. jurisdictions, the punishment is worse than the crime itself. This is not Europe and Latin America, where there is no death penalty and not every criminal conviction ends in deprivation of liberty, as is nearly the case in the U.S.[264] Each time an American avoids the Draconian punishment system in the U.S. by winning a suppression motion, especially when charged with non-violent crimes, is actually a plus for humanity and human rights.

264. Eighty percent of Germans convicted of crimes are fined and only three percent do more than one year deprivation of liberty. On the other hand, all convicted in the U.S. federal courts are sentenced to deprivation of liberty. Marcus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 560, 596-97 (1997). The average sentence in Germany is one-third of that in the U.S. for a similar crime. Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 234-35 (2006).