THE EXCLUSIONARY RULE IN GERMANY REVISITED

ANDREAS RANSIEK*

In Germany, the rules governing the exclusion of evidence in criminal proceedings have changed considerably over the last decades. The courts follow a balancing approach and exclude evidence if there were arbitrary, serious, or deliberate infringements of the law. Thus, the standard is almost identical to the one applied to Fourth Amendment violations by the U.S. Supreme Court. Regarding electronic surveillance of the home or suspect, however, the focus in Germany is not on the warrant requirement but on the constitutionality of the statutory law allowing surveillance. As to the failure to give Miranda*-type warnings, the German Federal Criminal Court adopted the rule developed by the U.S. Supreme Court. However, this is shaky ground because the Federal Court's subsequent judgments on police interrogation do not follow a consistent understanding of the self-incrimination privilege.*

Unlike in the U.S., deterring further misconduct of law enforcement officers is not the crucial reason for excluding evidence in Germany. Instead, this Article argues that it may be helpful to take a closer look at the nature of the fundamental rights that law enforcement officers have violated. If these rights intend to restrict the government's access to information, the resulting evidence should be excluded – as both German courts and the U.S. Supreme Court have held in some cases.

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* Professor of Law, Dr. iur., LL.M. (Berkeley); Chair for Criminal Law, Law of Criminal Procedure, and White Collar Crime, Bielefeld University, Germany. The author would like to thank Vivien Stefanic, University of Alberta, Edmonton, and Patrick McKinley, former Chief Assistant District Attorney, Santa Barbara, for reviewing this Article. As always, thanks to the team at Bielefeld University: Beatrice Kock, Marc Lehnert, Vanessa Lubitzki, Lisa Menke, and Johanna Möslang. A BIG thank you to Amanda Chavez and her team at Calif. West. Int. Law J. (Julia Anderson, Cody Archer, Meriel Bench, Brendan Gougeon, Dorothy Grafilo, Christy Hsu, Drew Kriete, and Tonya Larson) for their outstanding support.

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INTRODUCTION

In 1983, the Harvard Law Review published an article by Professor Craig Bradley discussing the German exclusionary rule.[1] Contrary to widespread opinion at the time, he elaborated that both the United States and Germany recognize a prohibition against using illegally

1. Craig M. Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032 (1983).

obtained evidence in criminal proceedings.[2] He also noted that the rules governing the exclusion of evidence in Germany differ from their counterparts in the United States.[3] The German rule was less stringent in excluding evidence derived from unlawful searches of the home.[4] Further, the failure to give *Miranda*-type warnings to suspects generally did not result in the exclusion of confessions in Germany.[5] Yet, forty years later, the law in Germany has changed considerably. Thus, it seems time for an update on the exclusionary rules.

Today the rules for excluding evidence in criminal proceedings are not so different from those across the Atlantic. Of course, any attempt to adopt a variant of the German system for use in the United States, or vice versa, raises difficult questions. Constitutional principles relevant to excluding evidence may be different. There may be statutory provisions explicitly banning the use of certain evidence that have to be taken into account and do not exist under foreign law.[6] In Germany, for example, section 136a(3) Code of Criminal Procedure[7] bans the use of a coerced confession even if the defendant consents to its use afterwards. Thus, the admissibility of the confession is out of the question. It is "the plain mandate of the statute" as it was in *Nardone v. United States*.[8]

The focus is instead on what factors render a confession a coerced one. This question is comparable to determining whether a confession was made voluntarily or in violation of the Due Process Clause of the Fourteenth Amendment.[9] Although section 136a(1) lists prohibited interrogation techniques, it does not outlaw all pressure on the defendant but expressly states that the use of compulsion is acceptable if permitted by law. Thus, what constitutes undue pressure on the defendant to confess under German law is not much clearer than it is un-

2. *Id.* at 1033.
3. *Id.* at 1035.
4. *Id.* at 1058.
5. *Id.* at 1064.
6. *Cf. id.* at 1049-1064 (exclusions based on statutory law in Germany).
7. STRAFPROZESSORDNUNG [STPO] [Code of Criminal Procedure], § 136a(3), translation at https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html #p1223 (Ger.).
8. Nardone v. United State*s*, 302 U.S. 379, 382-383 (1937) ("To recite the contents of [a] message in testimony before a court is to divulge the message").
9. *Cf.* Culombe v. Connecticut, 367 U.S. 586, 624 (1961).

der the Fourteenth Amendment's totality of circumstances test.[10] Therefore, the German statutory provisions on interrogation and compulsion do not make a significant difference in determining coerced confessions.[11]

The German exclusionary rule seems extremely strict if the defendants' consent is insufficient to allow an exception. However, the insignificance of the defendants' consent to use the confession quickly turns out to be a lame duck. While defendants may not consent to the use of the coerced confession, they can confess a second time voluntarily. However, the admissibility of the second confession may require awareness of the first confession's inadmissibility and consideration as to how the first confession affected the defendants' ability to make a free and intelligent choice about the second confession. Therefore, a comparable question arises to the one that the U.S. Supreme Court had to answer in *Oregon v. Elstad*[12] and, more recently, in *Missouri v. Seibert*.[13] German law might be helpful for the U.S. discussion on this question and vice versa.

More fundamentally, the basic differences of an adversarial system of criminal proceedings to the inquisitorial process and different

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10. *Id*. at 602, 606 ("The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process … Since judgment as to legal voluntariness *vel non* under the Due Process Clause is drawn from the totality of the relevant circumstances of a particular situation . . . .").

11. There is one notable exception: § 136a StPO explicitly prohibits deception as an interrogation technique. *But see, e.g.,* Spano v. New York, 316 U.S. 315, 323 (1959) ("The use of Bruno … a 'childhood friend' of petitioner's, is another factor which deserves mention in the totality of the situation. … [Police officers] instructed Bruno falsely to state that petitioner's telephone call had gotten him into trouble, that his job was in jeopardy, and that loss of his job would be disastrous to his three children, his wife and his unborn child. And Bruno played this part of a worried father, harried by his superiors, in not one, but four different acts, the final one lasting an hour."); Leyra v. Denno, 347 U.S. 556, 559 (1954) (subtle and suggestive questions by psychiatrist while defendant expected medical advice and treatment); Moran v. Burbine, 475 U.S. 412, 432 (1986) (deception might rise to a level of a due process violation).

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

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

legal traditions cannot be disregarded. On the one hand, acknowledging these differences is essential to making a serious proposal to adopt or learn from foreign rules. On the other hand, it is much too simple to claim that foreign law is so inherently different and therefore irrelevant from the start.

For example, the United States regards the privilege against self-incrimination as "the essential mainstay of our adversary system."[14] While one might expect that the privilege is less relevant for inquisitorial proceedings, this is not the case. According to the Federal Constitutional Court, the privilege is an integral element of the German rule of law (Rechtsstaatsprinzip) based on the principle of respect for human dignity.[15]

In Germany, the fruit of the poisonous tree doctrine is, in general, rejected to argue that derivative evidence may be used even though the original evidence was discovered by illegal means and is excluded. Even in coerced confession cases, most legal scholars are reluctant to exclude evidence derived from an inadmissible confession. For example, when a victim's body was discovered only because of the murderer's compelled statement.[16]

It is understood that in the United States *all* fruits are excluded that would not have been discovered but for the illegality. The Federal Criminal Court of Justice considers it unacceptable under German law that the proceedings might be "paralyzed"[17] by applying such a doctrine. For example, a defendant shall be convicted when she confesses at trial even though the whole investigation started with an illegal wiretap.[18] However, German scholars do not mention that under U.S. law a causal connection "may have become so attenuated as to dissipate the taint."[19] Further, *Wong Sun v. United States*[20] also clearly

14. Miranda v. Arizona, 384 U.S. 436, 460 (1966).

15. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 8, 1974, 38 Entscheidungen des Bundesverfassungsgerichts [BVERFGE] 105, 113 (Ger.); BVerfG Mar. 19, 2013, 133 BVERFGE 168, ¶ 60 (Ger.).

16. *Cf.* CLAUS ROXIN & BERND SCHÜNEMANN, STRAFVERFAHRENSRECHT, § 24, n. 21 (30th ed. 2022); Brewer v. Williams, 430 U.S. 387, 387 (1977).

17. Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 22, 1978, 27 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHST] [Decisions of the Federal Court of Justice in Criminal Matters] 355, 358 (Ger.).

18. *Id.*

19. Nardone v. United States, 308 U.S. 338, 341 (1939).

shows that a causal connection is insufficient to bar derivative evidence. Thus, American law does not stand for the view that criminal proceedings will be "paralyzed" when there is illegal police conduct at the beginning.[21]

The fruit of the poisonous tree doctrine stems from the adversary system; in contrast, German law, so the argument goes, follows the principle that courts and law enforcement agencies are obliged to investigate the truth.[22] Scholars in the United States argue that criticism of American prosecutors for their "win at all costs" mentality is a "useful backdrop" to illuminate why American courts have found it necessary to develop broad exclusionary rules.[23] German prosecutors, in contrast, are bound to objectivity. Section 160(2) StPO and its predecessor have stated since 1879 that the public prosecutor's office "shall ascertain both incriminating and exonerating circumstances."[24] Thus, it is argued that the German criminal justice system is committed to finding the "substantive truth" and not just a "formal truth that has been filtered through rules of evidentiary admissibility."[25]

However, this does not mean that criminal proceedings in the United States and Germany have different objectives. The truth criminal proceedings try to discover is necessarily a formal truth. Under any legal system the rules that apply on *how* to reconstruct the past events are the basis for conviction or acquittal. The reconstruction at trial is a *re*construction of an event, not the actual event. Criminal law is not concerned with all aspects of the past, but only with legally relevant aspects of the past. Thus, procedural truth is not the "whole" truth.

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20. Wong Sun. v. United States, 371 U.S. 471, 491 (1963).

21. *Cf., e.g.,* INS v. Lopez-Mendoza, 468 U.S. 1032, 1039-1040 (1984); Taylor v. Alabama, 457 U.S. 687, 690 (1982); United States v. Bayer, 331 U.S. 532, 540-541 (1947).

22. *Cf., e.g.,* ROXIN & SCHÜNEMANN, *supra* note 16, at n. 60; HEIKO LESCH, STRAFPROZESSRECHT, 161 n.170 (2nd ed. 2001); Christian Fahl, *Beweisverbote im Strafprozeß – Policeman Donavan und die Früchte des vergifteten Baumes*, JURISTISCHE SCHULUNG [JuS] 1013, 1016-1017 (1996) (Ger.).

23. Shawn M. Boyne, *Truth or Justice: A Comparative Look at the Exclusionary Rule in Germany and the United State*s, ROBERT H. MCKINNEY SCH. OF L. LEGAL STUD. RSCH. PAPER NO. 2019 – 1, 11 (2019).

24. STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], § 160(2), https://www.gesetze-im-internet.de/englisch_stpo/ (Ger.).

25. Boyne, *supra* note 23, at 15.

Criminal law necessarily builds on the idea of punishing the guilty and protecting the innocent. Otherwise, there would be no reason to insist on due process of law and regret wrongful convictions.[26] American courts, of course, realize that excluding reliable evidence places a heavy toll on the criminal justice system, which is founded on the idea of bringing to justice the guilty,[27] just as the German courts do. And of course, the prosecutor is not an ordinary party. The prosecutor's interest is not "that it shall win a case, but that justice shall be done."[28] Thus, there is "a strong public interest in convicting the guilty"[29] and having those accused of a crime "acquitted or convicted on the basis of all evidence which exposes the truth."[30]

The difference is not in the objective of criminal proceedings but in the "path to truth."[31] The adversarial system "assumes that truth will emerge from a battle between parties."[32] In contrast, the inquisitorial system relies on the court, which shall "*ex officio* extend the taking of evidence to all facts and means of proof which are relevant to the decision."[33]

It may well be that prosecutors usually try to win a case, but that does not make winning the legitimate purpose of criminal proceedings. German prosecutors may pride themselves on their objectivity, but this does not change the fact that a person cannot wear two hats at the same time. If the investigations have focused on a suspect as the one who committed the crime, one should not place too much trust in the prosecutor's ongoing duty to look for exonerating circumstances. German law certainly does not. Otherwise, defendants would not have and would not even need the right to the assistance of defense counsel

26. *Id.* at 11.

27. Leon v. United States, 468 U.S. 897, 907-908 (1984) ("unbending application of the exclusionary [rule] … would impede unacceptably the truth finding functions of judge and jury." "… benefit conferred on such guilty defendants offends [the] basic concept of the criminal justice system").

28. Berger v. United States, 295 U.S. 78, 88 (1935).

29. Kaufman v. United States, 394 U.S. 217, 241 (1969) (Black, J., dissenting).

30. Alderman v. United States, 394 U.S. 165, 175 (1969).

31. Boyne, *supra* note 23, at 21.

32. *Id.* at 11.

33. STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], § 244(2), https://www.gesetze-im-internet.de/englisch_stpo/ (Ger.).

at any stage of the proceedings.[34] Thus, the differences between an adversary and an inquisitorial system do not provide sufficient arguments as to why certain evidence is excluded here but not there.

Therefore, a closer look at the reasons given in the respective foreign legal system for excluding or not excluding evidence might prove to be fruitful for the discussion at home. In the best of cases, the arguments foreign law offers may be found convincing. For example, in 1992, the German Federal Criminal Court followed *Miranda v. Arizona,*[35] overruling former judgments and being well aware of the fact that its own ruling even went farther.[36] The court highlighted the special importance of *Miranda*: "The appellate court rightly points out the particular importance of the U.S. Supreme Court decision in *Miranda v. Arizona* … for developing a prohibition on the use of evidence."[37] One might actually admire a foreign legal concept as Justice Scalia did: "Such a system reflects an admirable belief that the law is the law."[38] Even if the foreign concept is found to be incongruous with one's own legal system, or otherwise unconvincing, the arguments become more viable.

Professor Bradley set forth that exclusionary rules are a reflection of shared democratic principles, and that both the American and German system of law enforcement follow the fundamental rule that relevant evidence must occasionally be excluded to safeguard constitutional rights.[39] Fundamental constitutional rights must not be cast overboard in the name of law and order.[40] Nevertheless, criminal law demands the punishment of the truly guilty party. The cornerstones in German and American law are the same: It is necessary to weigh and

34. *Id.* § 137.

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

36. Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 27, 1992, 38 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHST] [Decisions of the Federal Court of Justice in Criminal Matters] 214 (Ger.) (warnings required at the outset of all, not only in custody-interrogations).

37. *Id*. at 230.

38. Lafler v. Cooper, 566 U.S. 156, 185 (2012) (Scalia, J., dissenting) (with reference to the "legality principle" in Germany, requiring prosecutors to investigate all prosecutable offenses).

39. Bradley, *supra* note 1, at 1066.

40. *Id.* at 1065.

balance both aspects to decide whether evidence should be excluded. The common idea is not to catch criminals "at any price."[41]

I. THE EXCLUSION OF EVIDENCE TO PROTECT PERSONAL PRIVACY

In the wake of the atrocities committed by Nazi Germany, Article 1(1) of the German Constitution (Basic Law, Grundgesetz)[42] affirms as a fundamental principle "the dignity of man is inviolable." Article 2(1) Grundgesetz establishes that "everyone has the right to the free development of his personality."[43] On this basis, the Federal Constitutional Court has defined a doctrine of personal privacy that will cause certain private material, such as diaries,[44] photographs, or recordings made without the knowledge of the person in question, to be inadmissible as evidence.[45] Thus, the focus is on the use of evidence in court, not on the collection of evidence or if there was any misconduct by the police. German courts, however, always emphasize that a prohibition against using evidence is an exception that requires justification because it interferes with the finding of a correct decision.[46] The constitution only bars the use of evidence if such use would lead to a dis-

41. Brewer v. Williams, 430 U.S. 387, 407 (1977) (Marshall, J., concurring); *see, e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice] June 14, 1960, 14 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] [Decisions of the Federal Court of Justice in Criminal Matters] 358, 365 (Ger.) (without the consent of the accused a tape recording secretly established by the participant in a private conversation with the accused may not be used); BGH Mar. 17, 1983, 31 BGHSt 304, 309 (Ger.) (where an informant deliberately led a suspect to self-incrimination to create evidence for the prosecution; the content of a telephone conversation recorded on tape between law enforcement, an informant and the suspect was excluded).

42. GRUNDGESETZ [GG] [Basic Law], Art. 1, translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0019.

43. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 25, 1975, 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1, 41 (Ger.).

44. *Cf.* Bradley, *supra* note 1, at 1042-1043.

45. *Cf.* Sabine Gless, *Truth or Due Process? The Use of Illegally Gathered Evidence in the Criminal Trial-Germany-*, *in* GER. NAT'L REP. TO THE 18TH INT'L CONG. OF COMPAR. L., 675, 688-691 (Jürgen Basedow, Uwe Kischel & Ulrich Sieber eds., 2010); Bradley, *supra* note 1, at 1042-1049.

46. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 13, 2015, Beck-Rechtsprechung [BECKRS] 48649 (2015) (Ger.).

proportionate encroachment on the general right to free development of one's personality.[47]

To Professor Bradley, this view illustrates some of the differences between the operation of exclusionary rules in Germany as opposed to the United States. In the United States, he wrote, the information would be admissible if it was obtained without police misconduct.[48] The idea, however, that a person's thoughts and intimate communications should be protected and that the law must provide some remedy against invasions, is certainly not new to American law. As early as 1890, (the later Justice) Louis Brandeis and Samuel Warren wrote "the common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others."[49]

Thus, it is not a huge step to postulate that a realm of privacy is protected not only against infringements by private parties but against the collection *and* use of such information by law enforcement agencies as well, regardless of whether the information was obtained illegally. Even earlier, in 1886, the U.S. Supreme Court held: "The search for and seizure of stolen or forfeited goods. . . are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him."[50]

A. The Right to One's Own Image and to the Spoken Word

The German Constitution, as interpreted by the Federal Constitutional Court, prohibits the use of evidence if such use would dispro-

47. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 7, 2011, 130 Entscheidungen des Bundesverfassungsgerichts [BVERFGE] 1, 28-31 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 2, 2022, Beck-Rechtsprechung [BECKRS] 5306, ¶ 43 (2022) (Ger.); BGH May 3, 2018, Neue Zeitschrift für Strafrecht [NSTZ] 227, ¶¶ 24-25 (2019) (Ger.).

48. Bradley, *supra* note 1, at 1043.

49. Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy,* 4 HARV. L. REV. 193, 198 (Dec. 15, 1890); *cf.* more than 90 years later in Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 15, 1983, 65 Entscheidungen des Bundesverfassungsgerichts [BVERFGE] 1, 43 (Ger.) ("right of every citizen to know what information the government has collected on him and to limit the government's use, storage, and transmission of the data").

50. Boyd v. United States, 116 U.S. 616, 623 (1886).

portionately interfere with the right to privacy, which encompasses legal positions that are necessary for the development of the personality.[51] Similar to the privacy right to one's own image, this right to privacy includes the right to the spoken word.[52] Thus, each person is entitled to decide for herself who is to record her words and in front of whom, or whether, the recorded voice may be played back.[53] The impartiality of human communication would be disturbed if everyone had to live with the concern that each word, including a thoughtless or unrestrained expression, a preliminary statement in a developing conversation, or a formulation understandable only from a special situation, could be brought out on another occasion or in another context.[54] Today, the protection of free development of personality includes, above all, the protection of individuals against unlimited collection, storage, use, and disclosure of their personal data.[55]

The court identifies three levels of constitutional protection for evidence of this character:[56] Even if a person does not know that she is recorded, there is no protection at all if there is no reasonable expectation of privacy. This is the case, for example, if conversations like phone orders are typically recorded. On the second level, however, if personal privacy rights exist that outweigh the societal interest in using all relevant evidence, the evidence will be excluded.[57] On the third level, if there is an intrusion into a person's most intimate sphere, all use of the evidence is banned completely. The Federal Constitutional Court did not consider the public's interest to be overriding for the case in question.[58] It pertained to the secret recording of a private

51. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 31, 1973, 34 Entscheidungen des Bundesverfassungsgerichts [BVERFGE] 238, 245-246 (Ger.).

52. *Id.* at 246.

53. *Id.*

54. *Id.* at 246-247.

55. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 12, 2011, 129 Entscheidungen des Bundesverfassungsgerichts [BVERFGE] 208, 249 (Ger.).

56. 34 BVERFGE 238, 245-247 (Ger.).

57. Bundesverfassungsgericht [BVerfG] May 13, 2015, BECKRS 48649 (2015) (Ger.).

58. 34 BVERFGE 238, 248-251 (Ger.).

business conversation by one of the parties.[59] Illegal wiretapping by law enforcement agencies and the exclusion of evidence, in contrast, are governed by the Code of Criminal Procedure.[60]

Comparable to medical files, client files at a drug counseling center that are seized by the police to prosecute drug crimes are also protected.[61] The files contained the counselor's records of conversations, tests, therapeutic measures, and the counselor's own statements.[62] The court emphasized the general interest in providing effective help for addicts and those at risk of addiction and balanced this factor with the interest in combating drug abuse through criminal law.[63] Of course, if drug addicts know that their statements about taking drugs could be used to prosecute them, they would think twice about whether to seek advice at a counseling center. Today, a drug counselor's notes are explicitly exempt from seizure by statutory law.[64]

B. The Core Area of Privacy

In cases in which the use of evidence would violate the most basic or central rights of an individual or would intrude into her most intimate sphere, the dignity of the person is deemed inviolable and prevails against all governmental power.[65] Such evidence, according to the Federal Constitutional Court, must be excluded, regardless of the seriousness of the charge. The court even prohibits its derivative use.[66]

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59. *Id.*

60. STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], § 100a, § 100c, § 100f, https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0528 (Ger.).

61. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 24, 1977, 44 Entscheidungen des Bundesverfassungsgerichts [BVERFGE] 353, 354 (Ger.).

62. *Id.* at 372-373.

63. *Id.* at 375-376.

64. STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], § 53(1), § 97(1), https://www.gesetze-im-internet.de/englisch_stpo/ (Ger.).

65. *Id*. § 100d, ¶¶ 1-2.

66. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 3, 2004, 109 Entscheidungen des Bundesverfassungsgerichts [BVERFGE] 279, 313 (Ger.).

Thus, a window into a person's most intimate life is to be closed completely.[67]

Meanwhile, the Code of Criminal Procedure codifies the protection of "the core area of the private conduct of life" regarding telecommunication surveillance, covert remote searches of IT systems, and acoustic surveillance of private premises.[68] If such a measure will likely only lead to findings in the core area, it is illegal.[69] Therefore, any such findings that have been made may not be used and their recordings must be deleted without any delay.

The German approach does not yet answer the question of how to define the core area of privacy that is inviolable and exempt from all governmental intrusions. When there is an answer, it is rather disillusioning. According to the Federal Constitutional Court, the development of personality in the core area of private life includes the possibility of expressing inner processes, such as feelings and emotions, as well as thoughts, opinions, and experiences of a highly personal nature without fear of monitoring by state authorities. This protection also covers expressions of unconscious experiences and sexuality.[70]

One may assume a connection to the core area if the persons concerned communicate with others with whom they have a special relationship of trust. Closest family members, religious or telephone counselors, criminal defense attorneys and, in rare cases, doctors are cited as examples.[71] Evidence secured through the electronic bugging of a married couple's bedroom might be the type of such material.[72]

Of course, if criminals do not hold intimate conversations in their bedroom but discuss their latest bank robbery instead, there is no good reason to exclude this information. A conversation about future or past crimes is no more part of the intimate sphere than conversations about

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67. *Cf.* Carpenter v. United States, 138 S. Ct. 2206, 2217-19 (2018) (No. 16-402) (holding that it is an invasion of one's reasonable expectation of privacy to allow the government to access a person's CSLI data but noting that other intrusions do not amount to an invasion of such privacy).

68. STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], § 100d, ¶¶ 1-2, https://www.gesetze-im-internet.de/englisch_stpo/ (Ger.).

69. *Id.*

70. 109 BVERFGE 279, 313 (Ger.).

71. *Id*. at 321; *see also* 129 BVERFGE 208, 247 (Ger.).

72. Bradley, *supra* note 1, at 1045.

legal business transactions.[73] The intimacy of a conversation depends on its contents, not the place where it is held or the interlocutors. Thus, under German law, it is legal for police officers to listen in on a conversation in order to be able to decide if the communication is intimate or not.[74] They must stop the surveillance if this is the case. As such, the conversation is *not* considered absolutely[75] "inviolable," because someone listened to a portion of the discussion. If the surveillance is paused to honor the intimate nature of a conversation, it may resume later as the topic of the communication may change.

Diary-like notes, in which the defendant wrote about his tendency to commit violent acts against women, were not even regarded as belonging to the sacrosanct private sphere, although the Federal Constitutional Court was evenly divided on this issue.[76] Four justices argued that when the defendant wrote down his thoughts, he released them from the inner sphere and exposed them to the danger of being accessed by others.[77] The same is true if persons talk aloud to themselves or to someone else, of course.[78] Then, nothing is left of the core area of privacy.

Self-talks, recorded or otherwise listened to, are excluded as evidence by the courts today.[79] In the case at hand, the defendant talked to [and incriminated] himself in a hospital room by uttering several times in a Bavarian dialect: "Very aggressive, very aggressive …

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73. 109 BVERFGE 279, 319 (Ger.). *Cf.* Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 16, 1983, 31 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] [Decisions of the Federal Court of Justice in Criminal Matters] 296, 297 (a conversation between husband and wife, concerning drug deals in their private home, belongs to absolutely protected core area of privacy).

74. 129 BVERFGE 208, 245-246 (Ger.); 109 BVERFGE 279, 383-384 (Jaeger, J., and Hohmann-Dennhardt, J., dissenting) (Ger.).

75. *Cf.* 109 BVERFGE 279, 313, 328 (Ger.).

76. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 14, 1989, 80 Entscheidungen des Bundesverfassungsgerichts [BVERFGE] 367, 373, 380 (Ger.). Four justices argued that the complainant's constitutional rights had been infringed and the other four took a different view. Thus, there was no majority to hold the constitution to be violated.

77. 80 BVERFGE 367, 376-377 (Ger.).

78. 109 BVERFGE 279, 319 (Ger.)

79. Bundesgerichtshof [BGH] [Federal Court of Justice] Aug. 10, 2005, 50 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] [Decisions of the Federal Court of Justice in Criminal Matters] 206 (Ger.).

should have shot him in the head."[80] However, absolute protection of self-talk is not a foregone conclusion. If the defendant's self-talk had exonerated him, it does not seem justifiable to prohibit its exculpatory use in the name of protecting the defendant's private sphere.[81] Likewise, if a suspect's self-talk reveals plans for a future crime that can be prevented by using that information, courts should allow it as evidence.[82]

Beyond that, it is incompatible with human dignity if surveillance is extended over a long period of time, and is so exhaustive that all aspects of that person's life are logged such that they become the basis for a personality profile.[83] Based on these parameters, the scope of protection provided by guaranteeing a personal sphere of privacy, exempt from all invasions, is actually very small.

II. THE EXCLUSION OF EVIDENCE AS A RESPONSE TO ILLEGAL INVESTIGATIONS

A. The Standard: Serious, Deliberate, or Arbitrary Misconduct

In addition to the protection of a personal sphere of privacy irrespective of police misconduct, the Federal Constitutional Court holds that information obtained in violation of constitutional provisions must not be used if this would "favor" illegally obtained evidence.[84] A prohibition on the use of evidence as a matter of constitutional law may be required particularly after serious, deliberate, or objectively arbitrary violations of the law, in which fundamental legal safeguards

80. *Id*. at 209.

81. *Id.* at 215.

82. *Id*. at 214.

83. 130 BVERFGE 1, 28 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan.12, 2020, 156 Entscheidungen des Bundesverfassungsgerichts [BVERFGE] 63, 123 ¶ 210 (Ger.); *cf.* Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018) (No. 16-402) ("Mapping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts. As with GPS information, the times tamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'").

84. 130 BVERFGE 1, 28 (Ger.).

have been disregarded in a planned or systematic manner.[85] Since excluding evidence restricts one of the essential principles of criminal procedure, namely the principle that the court investigates the truth and for this purpose has to use all reliable evidence, the exclusion is again considered as an exception, which is to be recognized only if there is express legal regulation or for overriding reasons.

The Federal Criminal Court follows a balancing approach to excluding evidence in the same manner as the Constitutional Court.[86] The Criminal Court assumes that arbitrary, serious, or deliberate violations of legal provisions by police officers, prosecutors, or judges[87] lead to the exclusion of evidence. Although under the Code of Criminal Procedure, exclusionary rules could theoretically reach further, this standard is largely identical to the constitutional benchmark. Whether evidence is excluded is decided according to the circumstances of each individual case, balancing the state's and the defendant's interests.[88] On one hand, this balancing process is influenced by the extent of the state's interest in solving the crime and punishing the guilty, which is determined, above all, by taking into account the availability of additional evidence, the degree of the suspicion of the crime, and the seriousness of the criminal offense.[89] On the other

85. *Id*.; s*ee also* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 13, 2015, BECKRS 48649 (2015) (Ger.).

86. Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 5, 2022, Beck-Rechtsprechung [BECKRS] 11288, ¶ 21 (2022) (Ger.); BGH Mar. 2, 2022, BECKRS 5306, ¶ 43 (2022) (Ger.); BGH May 3, 2018, Neue Zeitschrift für Strafrecht [NSTZ] 227, ¶¶ 24-25 (2019) (Ger.). The Federal Constitutional Court does not examine this balancing in detail as a matter of constitutional law. Primarily, it is a matter for the criminal courts to decide on the consequences of a violation of the law; *see also* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 13, 2015, BECKRS 48649 (2015) (Ger.).

87. *Cf.* Bundesgerichtshof [BGH] [Federal Court of Justice] Aug. 15, 2018, Neue Juristische Wochenschrift [NJW] 789 (2019) (Ger.) (judge in probationary period compelling defendant to confess at trial); *see also* Lutz Eidam, *Contemporary Problems of the Right to Remain Silent in Germany*, *in* INTERROGATION, CONFESSION, AND TRUTH (Lutz Eidam, Michael Lindemann & Andreas Ransiek eds., 2020), 49, 56-58.

88. Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 5, 2022, Beck-Rechtsprechung [BECKRS] 11288, ¶ 21 (2022) (Ger.); BGH Mar. 2, 2022, BECKRS 5306, ¶ 43 (2022) (Ger.); BGH May 3, 2018, Neue Zeitschrift für Strafrecht [NSTZ] 227, ¶¶ 24-25 (2019) (Ger.).

89. *Id.*

hand, the weight of the state actor's illegal conduct in question is relevant. The unlawful conduct at issue is measured by the gravity of the violated right and whether it was disregarded in good faith, negligently, or intentionally.[90]

B. Why Evidence is Excluded

The last criteria mentioned are broadly similar to those applied in U.S. law to violations of the Fourth Amendment.[91] Unlawfully obtained evidence is excluded if there is a "deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights" by police officers.[92] However, in the United States, the reason for excluding evidence is the deterrence of future infringements.[93] This rationale is mostly rejected in Germany.[94] For example, in Germany, a constitutional complaint, regarding the inadmissibility of evidence, will fail if it is based solely on disciplining the inappropriate actions of investigators.[95]

Nevertheless, the deterrence rationale does occasionally appear in decisions made by the Federal Criminal Court and the European Court of Human Rights. According to the Federal Criminal Court, tolerating gross disregard of the warrant requirement for searches of the home "would even create an incentive to make the investigations easier and possibly more promising without involving the investigating judge."[96] Interpreting the European Convention on Human Rights–binding law in Germany–the European Court of Human Rights explicitly assumed that "by admitting evidence obtained through prohibited conduct, po-

90. *Id.*

91. Davis v. United States, 564 U.S. 229, 249-250 (2011).

92. *Id*. at 238.

93. *Id*. at 236-250; *see generally* United States v. Herring, 555 U.S. 135 (2009).

94. ROXIN & SCHÜNEMANN *supra* note 16, at nn. 21, 60; Bundesgerichtshof [BGH] [Federal Court of Justice] July 23, 1985, Neue Zeitschrift für Strafrecht [NSTZ] 517 (1985) (Ger.); Kammergericht [KG] [Berlin Court of Appeals] Feb. 16, 2005, Beck-Rechtsprechung [BECKRS] 30351224 (2005) (Ger.).

95. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 15, 2019, Beck-Rechtsprechung [BECKRS] 26364 (2019) (Ger.).

96. Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 21, 2016, Beck-Rechtsprechung [BECKRS] 11272, ¶ 16 (2016) (Ger.); BGH Apr. 18, 2007, 51 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHST] [Decisions of the Federal Court of Justice in Criminal Matters] 285, ¶ 29 (Ger.).

lice officers could be induced to resort to such methods."[97] The Federal Constitutional Court may also be pointing in this direction if prohibitions against using evidence are supposed to prevent illegal investigations from being "favored".[98] Consequently, and at no big surprise, the deterrence argument is not wholly rejected in German and European Law. The rationale of deterring further misconduct goes hand in hand with the vindication of defendants' rights. If suspects' rights are affirmed by excluding evidence for misconduct in the past, there is no incentive for law enforcement officers to violate defendants' rights in future cases.

The German courts' rulings do not clarify the specific reason for prohibiting the use of unlawfully obtained evidence. When the principles of a fair trial are referred to in German criminal proceedings,[99] this concept asks more questions than it answers. The same is true if evidence is excluded to preserve the "purity" or "integrity" of the judicial process.[100] Taken stringently, this would require the exclusion of *all* illegally obtained evidence[101] in order to recognize defendants' rights. If courts allowed law enforcement officers to make use of tainted evidence, the courts would be "like purchasers of stolen goods, who deplore the theft but willingly profit from it."[102] Accordingly, when the Federal Criminal Court argues that the state should not benefit from illegality,[103] the question remains as to why the exclusion of evidence should be restricted to gross infringements of the law.

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97. Gäfgen v. Germany, Eur. Ct. H.R., Neue Juristische Wochenschrift [NJW] 3145, ¶ 178 (2010).

98. 130 BVERFGE 1, 28 (Ger.).

99. *Id.* at 27.

100. *Cf.* 51 BGHST 285, ¶ 25 (Ger.) (referring to the rule of law and the reputation of the criminal justice system).

101. *See* Christopher Slobogin, *A Comparative Perspective on the Exclusionary Rule in Search and Seizure Cases*, *in* COMPARATIVE CRIMINAL PROCEDURE (Jacqueline E. Ross & Stephen C. Thaman eds., 2016), 280, 295.

102. PHILLIP JOHNSON, CASES AND MATERIALS ON CRIMINAL PROCEDURE, 1, 59 (1988).

103. 51 BGHST 285, ¶ 23 (Ger.). However, *see* Jenia I. Turner & Thomas Weigend, *The Purposes and Functions of Exclusionary Rules: A Comparative Overview*, *in* DO EXCLUSIONARY RULES ENSURE A FAIR TRIAL? (Sabine Gless & Thomas Richter eds., 2019) 255, 256 ("In adversarial systems, exclusion can be based on the logic that a party which obtains a piece of evidence illegally should not be allowed to benefit from the fruits of the violation. In inquisitorial systems, it is more difficult

Thus, protecting the legitimacy of the criminal justice system is a fragile rationale of a balancing approach to excluding tainted evidence. Such an approach, however, accepts that a failure to convict the guilty may also undermine faith in the system, and should be taken into account.[104] This philosophy may explain why only egregious misconduct triggers the exclusion of evidence, especially intentional breaches of the law, or misconduct that "shocks the sensibilities of civilized society."[105] For example, it would be intolerable for the legal community if officers of the law were permitted to undermine, even arbitrarily, the constitutionally guaranteed protection of the home without any consequence.[106]

This, to be sure, raises a more fundamental dilemma: Particularly in the most severe cases of police or prosecutorial misconduct, the law does *not* have to exclude evidence to respond to the illegal behavior. In extreme cases of police culpability, criminal law applies, and the person concerned can seek civil damages.[107] If investigators try to have defendants convicted "at any cost" and "sought this goal … by criminal acts, the provisions of the Penal Code shall be applied against them."[108] In the words of Justice Traynor of the California Supreme Court: "For his crime the defendant should be punished. For his violation of the constitutional provisions the offending officer should be punished."[109] In Germany, a police officer who threatened the defendant with bodily harm–in order to save a kidnapped victim the officer thought to be alive at the time–was actually prosecuted and convicted.[110] In a more recent

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to rely on this rationale of exclusion because evidence is regarded as "belonging" to the court, not to one of the parties."). Yet, the relationship between government and citizen is crucial, but not the court's role. Rights protecting the citizen from the state have been violated; thus, the state must not use the evidence. Therefore, the Federal Court's argument is also valid for an inquisitorial system. *Cf.* Lange v. California, 141 S. Ct. 2011, 2027 (2021) (No. 20-18) (Thomas & Kavanaugh, JJ., concurring).

104. Slobogin, *supra* note 101, at 295, 300.

105. Moran v. Burbine, 475 U.S. 412, 433-34 (1986).

106. 51 BGHST 285, ¶ 25 (Ger.).

107. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 390 (1971).

108. Bundesgerichtshof [BGH] [Federal Court of Justice] Jul. 23, 1985, Neue Zeitschrift für Strafrecht [NSTZ] 517 (1985) (Ger.).

109. People v. Cahan, 44 Cal.2d 434 (1955).

110. Gäfgen v. Germany, Eur. Ct. H.R., Neue Juristische Wochenschrift [NJW] 3145, ¶ 179 (2010). The German court, however, was quite reluctant to con-

case, a judge still in his probationary period, was indicted for extortion of testimony and pervasion of law, specifically sections 343, 339 Criminal Code, because he tried to pressure the accused into a confession at trial.[111]

Although criminal proceedings against police officers are rare, these exclusionary rules would be a dubious concept if they did not also apply when the investigating law enforcement officers commit a crime and convicting the officer could deter future violations. There is no need to deter twice if deterrence of future misconduct is supposed to be the sole reason for excluding evidence.

Furthermore, the Federal Criminal Court's criteria to determine whether evidence should be excluded or not are questionable. If the seriousness of the suspected crime is to be considered in favor of using the evidence, the defendant is afforded more protection for less serious charges.[112] However, if prohibitions on the use of evidence also serve to grant defendants protection and uphold their rights, it should be especially important to offer defendants protection from tainted evidence when the accusation against them is for a serious crime.[113] The concept of a fair trial is distorted if defendants enjoy more protection in cases with less serious accusations than in cases with egregious claims. If this was the standard, the investigation of serious crime would be subject to less significant regulation than the investigation of minor offenses.[114]

Considering whether the evidence is crucial or not to convict, is also troublesome. The exclusion of tainted evidence does not provide much benefit to defendants if it is not crucial to their case. In any event, as Professor Slobogin has noted, this factor "suggests that clean judicial hands are a concern only when they cost the system nothing."[115]

Above all, there is no answer to the question of *how* the criteria are to be balanced. The defendant's interest will always be to have evidence that will lead to conviction excluded. Otherwise, no opposition to the

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vict because the officer intended to save the victim's life. It was never questioned that the resulting confession was inadmissible.

111. Bundesgerichtshof [BGH] [Federal Court of Justice] Aug. 15, 2018, Neue Juristische Wochenschrift [NJW] 789, 790 (2019) (Ger.).

112. Slobogin, *supra* note 101, at 296-297.

113. Brewer v. Williams, 430 U.S. 387, 406 (1977); *see also* Mincey v. Arizona, 437 U.S. 385, 393 (1978).

114. Slobogin, *supra* note 101, at 296-297.

115. *Id.* at 296.

use of such evidence would exist. However, the state's interest will always be to convict the guilty. Which interest should outweigh the other, and why, remains an open question.

C. The Fruits of the Poisonous Tree

An additional troublesome practice is that even if courts exclude evidence because of a grave violation of defendants' rights, this does not mean that they automatically exclude derivative evidence as well. As mentioned earlier, the Federal Criminal Court seems to be even more reluctant to exclude this type of evidence.[116] However, one wonders what could alter the assessment leading to the exclusion of original evidence but admitting derivative evidence. It seems contradictory to admit derivative evidence—without additional circumstances to attenuate the taint—if law enforcement officers intentionally break the law or arbitrarily disregard the defendant's rights. Yet, the fruit of the poisonous tree doctrine is not rejected unanimously in Germany; in some cases, the Federal Constitutional Court argues that it is a mandate of the constitution to virtually bar all uses of evidence, expressly including its indirect use.[117]

The Federal Criminal Court's argument leads to rather confusing results.[118] For example, the recording of an illegal wiretap and two confessions were inadmissible as direct fruits because police may not interrogate a defendant referring to illegally obtained evidence.[119] However, police can use any clues obtained from the same wiretap for further investigations.[120]

Seven years later the picture has become slightly clearer.[121] A suspect's phone had been monitored without the necessary court order; therefore, the findings were unusable.[122] Police officers interrogated the defendant and informed him of the monitoring, which resulted in a con-

116. *Supra* notes 16-18 and accompanying text.

117. 109 BVERFGE 279, 328 (Ger.).

118. *See* Bradley, *supra* note 1, at 1055-56.

119. 27 BGHST 355, 357-58 (Ger.).

120. *Id*. at 358.

121. Bundesgerichtshof [BGH] [Federal Court of Justice] Aug. 6, 1987, 35 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHST] [Decisions of the Federal Court of Justice in Criminal Matters] 32, 32 (Ger.).

122. *Id*.

fession.[123] The confession was read to the defendant the next day at a judicial hearing, and he confirmed it.[124] The Federal Criminal Court held that both statements could not be used.[125] The statement before the judge only referred to the preceding confession to the police.[126] The confession at the police station was inadmissible because the interrogation was conducted with reference to the illegal tap.[127] In contrast, a subsequent confession made to an expert witness was admissible in principle possibly because this statement was no longer influenced by addressing the wiretap in the earlier interrogation.[128]

This argument may indicate that the Federal Criminal Court is also examining whether there was an attenuated causal connection between the violation of the law and the evidence. A "but for" link is not sufficient to exclude evidence if the original illegality had no substantial influence on the derivative evidence. Of course, a defendant that has already confessed twice, rarely has any reason to refuse to answer questions or confess a third time. Thus, the question is not whether the reference to the wiretap in the first confession influenced the last confession. Instead, the question is whether the earlier confession proximately caused the last confession.

III. THE EXCLUSION OF EVIDENCE IN ILLEGAL SEARCH AND SEIZURE CASES

A. The Scope of Constitutional Protection

In addition to the protection of privacy in Articles 2(1) and 1(1) Grundgesetz discussed earlier,[129] the Basic Law has provisions that protect specific areas of privacy. According to Article 13(1) Grundgesetz, the home is inviolable.[130] Article 10 Grundgesetz protects the

123. *Id*. at 33.
124. *Id*. at 32.
125. *Id*.
126. *Id*.
127. 35 BGHST 32, 32 (Ger.).
128. *Id*. at 33.
129. *Supra* notes 42-83 and accompanying text.
130. Grundgesetz [GG] [Basic Law], Art. 13, translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html (Ger.) ("(1) The home is inviolable. (2) Searches may be authorized only by a judge or, when time is of the essence, by other

privacy of correspondence, mail service, and telecommunication.[131] Article 104(1) Grundgesetz protects against unlawful arrests.[132] However, the constitution does not explicitly protect against seizures.[133]

Investigative measures that affect these fundamental rights need to be authorized by parliamentary law. For example, Article 104(1) Grundgesetz expressly provides that the "liberty of the person may be restricted only pursuant to a formal law and only in compliance with the procedures prescribed therein."[134] This law must itself be in accordance with the constitution, and only proportionate restrictions of fundamental rights are permitted. Additionally, the statute must clearly define what types of restrictions are allowed. For example, the monitoring of telephones or the acoustic surveillance of a home is only permissible in the case of severe criminal offenses, which are listed

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authorities designated by the laws and may be carried out only in the manner therein prescribed. (3) If particular facts justify the suspicion that any person has committed an especially serious crime specifically defined by a law, technical means of acoustical surveillance of any home in which the suspect is supposedly staying may be employed pursuant to judicial order for the purpose of prosecuting the offence, provided that alternative methods of investigating the matter would be disproportionately difficult or unproductive. The authorization shall be for a limited time. The order shall be issued by a panel composed of three judges. When time is of the essence, it may also be issued by a single judge.")

131. *Id*. Art. 10 (Ger.) ("(1) The privacy of correspondence, posts and telecommunications shall be inviolable. (2) Restrictions may be ordered only pursuant to a law.").

132. *Id*. Art. 104 (Ger.) ("(1) Liberty of the person may be restricted only pursuant to a formal law and only in compliance with the procedures prescribed therein. Persons in custody may not be subjected to mental or physical mistreatment."). There are no cases that consider the exclusion of evidence following an illegal arrest. There are several reasons that may explain this. First, as has been discussed earlier, the fruit of the poisonous tree doctrine is met with suspicion and caution by the courts; *supra* notes 19, 116-128 and accompanying text. Second, deterrence of further police misconduct is not regarded as the main reason for excluding evidence in German law. A confession resulting from an illegal arrest may be admitted if the required warnings are given at the outset of an interrogation; therefore, the warnings compensate the initial illegality. A third reason may be that the commencement of criminal proceedings usually does not involve the arrest of defendants. Since racial profiling has become an issue in Germany, this may change in the future. *See* Oberverwaltungsgericht [OVG] [Higher Administrative Court] Münster Aug. 7, 2018, Neue Zeitschrift für Verwaltungsrecht [NVwZ] 1497 (2018) (Ger.).

133. *Id*. Art. 14, however, guarantees property and the right of inheritance.

134. *Id*. Art. 104(1).

in sections 100a and 100c StPO.[135] With new technological surveillance methods, these laws have been the focus of legal discussion in recent years.

The Federal Constitutional Court even considered whether a constitutional amendment passed with the required majority could itself violate fundamental and unchangeable values of the constitution.[136] The original version of Article 13 Grundgesetz only provided that homes could be searched if it was authorized by a judge, or by other authorities designated by the law, when time was of the essence. However, acoustically or visually monitoring a home was not considered a "search" within the meaning of Article 13(2) Grundgesetz.[137] The subsequent constitutional amendment of Article 13(3) Grundgesetz now expressly provides for acoustic surveillance of the home. The majority of the Federal Constitutional Court saw no violation of fundamental values of the Constitution; however, two justices dissented and considered the amendment to be invalid.[138]

Thus, unlike the Fourth Amendment, where the focus is whether a warrant is required to invade a suspect's private sphere, in Germany, the focus is whether there is a valid parliamentary act allowing the invasion and if the authorities complied with the statutory requirements.[139] In almost all cases, statutory law requires a warrant; however the warrant alone does not justify an invasion of privacy not regulated by statute law. To be sure, it certainly is not true that German law places a lower value on protecting the security of the home than its American counterpart.[140] Since an act of parliament is required, Germany potentially has a "more robust vehicle to protect individual

135. STRAFPROZESSORDNUNG [StPO] [Code of Criminal Procedure], §§ 100(a), (c), https://www.gesetze-im-internet.de/stpo/index.html#BJNR006290950BJNE016304125 (Ger.).

136. 109 BVERFGE 279, 279 (Ger.).

137. Until Katz v. United States, 389 U.S. 347, 351 (1967), the reasoning in the United States was exactly the opposite. There, according to the Fourth Amendment's wording, protection is only granted against searches and seizures. *See also* Carpenter v. United States, 138 S. Ct. 2206, 2213 (2018) (No. 16-402) ("For much of our history, Fourth Amendment search doctrine was 'tied to common-law trespass' and focused on whether the Government 'obtains information by physically intruding on a constitutionally protected area.'").

138. 130 BVERFGE 1, 13 (Ger.). *Cf. supra* notes 65-83 and accompanying text.

139. *Id.* at 25.

140. Bradley, *supra* note 1, at 1058.

privacy in an era of rapid technological development" compared to the United States.[141]

It may be an advantage that individual spheres of privacy are explicitly protected by the German constitution when compared to the Fourth Amendment's reasonable expectation of privacy standard because the Basic Law is more specific and comprehensive in its listing of basic freedoms. The Basic Law enumerates at least twenty specific individual liberties, compared to the American Constitution's general protection.[142]

As a result, the legislature may have more leeway in Germany. For example, the legislature abandoned the former warrant requirement of section 81a StPO by amending the Code of Criminal Procedure for blood testing in drunk driving cases.[143] The taking of blood samples in Germany is governed by the right to physical integrity in Article 2(2) Grundgesetz, which allows restrictions pursuant to the (statutory) law, and not by a general right to privacy with a constitutionally enshrined warrant requirement.[144]

Admittedly, the specific protection of personal spheres of privacy also creates inconsistencies. For example, due to the Basic Law's special protection of the home, the requirements for acoustic surveillance are particularly high. *Inter alia*, the corresponding warrant must be issued by a panel of three judges,[145] compared to the United States that only requires one judge to issue the warrant. The requirements for acoustic surveillance outside a home are significantly lower, although a judicial order is still necessary.[146] Thus, it is easier to justify the acoustic monitoring of a conversation while driving a car on a lonesome country road than it is to justify the monitoring of a conversation on a patio with neighbors all around. However, the persons in the car

141. *Cf.* Boyne, *supra* note 23, at 22.

142. Edward J. Eberle, *Observations on the Development of Human Dignity and Personality in German Constitutional Law: An Overview,* 33 LIVERPOOL L. REV. 201, 204 (2012); Boyne, *supra* note 23, at 15-16.

143. STRAFPROZESSORDNUNG [StPO] [Code of Criminal Procedure], § 81a(2), https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0391 (Ger.).

144. *Cf.* Missouri v. McNeely, 569 U.S. 141, 158 (2013).

145. STRAFPROZESSORDNUNG [StPO] [Code of Criminal Procedure], § 100e(2), https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0391 (Ger.).

146. *Id.* § 100f.

would likely assume that their conversation is as or even more private than the conversation on the patio.

B. The Warrant Requirement

In several judgments, the Federal Constitutional Court has emphasized the significance of a judicial warrant authorizing a home search.[147] A neutral judge, not police or prosecutor's office, shall decide whether there is sufficient reason to invade the privacy of a suspect's home.[148] The warrant requirement for searching the home is expressly outlined in Article 13(2) Grundgesetz and is expanded in section 105(1) StPO to the search of other objects.[149] To issue a warrant, probable cause is required–facts that give sufficient reason to believe that a person committed a crime.[150] Thus, "some quantum of individualized suspicion"[151] is necessary before a search, and subsequent seizure, may take place. According to both provisions, an exception applies in exigent circumstances only–that is, if obtaining a warrant beforehand would jeopardize the success of the search.[152] To meet the Constitutional Court's demands, the Federal Criminal Court subsequently overruled earlier judgments[153] and now excludes evidence derived from an illegal search if the warrant requirement was disregarded arbitrarily or intentionally.[154]

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147. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 20, 2001, 103 Entscheidungen des Bundesverfassungsgerichts [BVERFGE], 142, 148 (Ger.); BVerfG Apr. 12, 2005, 113 BVERFGE 29, 45 (Ger.).

148. 103 BVerfGE 142, 148 (Ger.).

149. The language of Article 13 Grundgesetz as to the warrant requirement is plain. In contrast, under the Fourth Amendment, the overall standard to decide the legality of a search is an analysis of its reasonableness.

150. STRAFPROZESSORDNUNG [StPO] [Code of Criminal Procedure], § 102, https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0836 (Ger.).

151. Carpenter v. United States, 138 S. Ct. 2206, 2217-19 (2018) (No. 16-402).

152. Grundgesetz [GG] [Basic Law], Art. 13(2), translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html (Ger.); STRAFPROZESSORDNUNG [StPO] [Code of Criminal Procedure], § 102, https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0836 (Ger.).

153. *Cf.* Bradley, *supra* note 1, at 1058.

154. Köhler, in LUTZ MEYER-GOßNER & BERTRAM SCHMITT, STRAFPROZESSORDNUNG, § 94 n. 21 (65th ed. 2022).

Police officers or prosecutors must not wait to apply for a warrant until the risk of loss of evidence has actually materialized,[155] as this would undermine the judge's competence. The court argued that the case is *not* comparable with those in which individual rights are so massively impaired by investigations far removed from any legal justification that the principles of the rule of law would be permanently damaged if the resulting evidence were admitted.[156] However, if serious violations occur that are characterized by a gross misunderstanding of the law, the state should not benefit from such illegality. Otherwise, the principles of a fair trial would be violated.[157]

In the case at bar, it was already obvious by 4:00 p.m. that a search was necessary to seize drugs in an apartment because one of the defendants was previously arrested.[158] The public prosecutor, however, did not order the search until 8:00 p.m., at the request of the police.[159] Thus, there was sufficient time to involve a judge. According to the court, this suggests that the police officers involved had deliberately ignored the warrant requirement and provoked danger through delay.[160] The public prosecutor ignored his leading position in the investigation and was thereby either conscious or was grossly negligent in not applying for a judicial warrant.[161]

The prosecutor, however, claimed that he did not think of the necessity of a search in the afternoon and did not consider the time that elapsed until later.[162] It is therefore not out of the question to interpret the prosecutor's conduct more kindly than the court does: A regrettable error until it was too late. In addition, a panel of judges had authorized acoustic surveillance of the apartment earlier.[163] Thus it seems rather certain that a judge would have authorized the less intrusive search. However, according to the court, the latter should not play a role, otherwise the judge's jurisdiction could always be undermined in

155. 51 BGHST 285, ¶ 25-26 (Ger.).
156. *Id.* at ¶ 21 (Ger.).
157. *Id*. at ¶ 23.
158. *Id.* at ¶¶ 18, 26.
159. *Id.* at ¶¶ 26-28.
160. 51 BGHST 285, ¶¶ 26-28.
161. *Id.*
162. *Id.*
163. *Id.* at 26.

such cases.[164] Unfortunately, in a more recent case, the court considered that a judge probably would have issued a warrant as an argument for not excluding the evidence.[165] Again, the rules of exclusion lack clarity.

Finally, another aspect is not in question under German law: like the United States with regard to the Fourth Amendment, there is a standing requirement to claim a violation of Article 13 Grundgesetz.[166] The defendant's own Article 13 interests must be infringed upon. The complainant must be either the resident or the owner of the object searched. Thus, deterring further police misconduct cannot be the *only* reason to exclude evidence.[167] The idea of upholding the individual rights of those whose private sphere was unlawfully invaded must be relevant as well.

C. The Seizure of Letters between Defendants and Persons who May Refuse to Testify

There is no explicit protection against unreasonable seizures in the German Constitution. However, the Code of Criminal Procedure requires a warrant for the seizure of objects for evidentiary purposes.[168] The seizure, *inter alia*, of correspondence between the defendant and persons who are granted the right to refuse to testify against the defendant is entirely barred.[169] Thus, the privilege not to have to testify

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164. *Cf.* Rodriguez v. Florida, 187 So. 3d 841, 849-850 (Fla. 2015) ("Where the prosecution has made no showing that a search warrant was being actively pursued prior to the occurrence of the illegal conduct, application of the inevitable discovery rule would effectively nullify the requirement of a search warrant under the Fourth Amendment … We cannot apply the inevitable discovery rule in every case where the police had probable cause to obtain a warrant but simply failed to get one.").

165. Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 17, 2016, Neue Zeitschrift für Strafrecht [NSTZ] 551, 552 (2016) (Ger.).

166. Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 24, 2020, Neue Zeitschrift für Strafrecht [NSTZ] 59, ¶ 7 (2021) (Ger.).

167. Köhler, in MEYER-GOßNER & SCHMITT, *supra* note 154, § 94 n. 21; c*f.* from a Canadian point of view Steven Penney, *Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence under Section 24(2) of the Charter*, 49 MCGILL L. J. 105, 108 (2004).

168. Strafprozessordnung [STPO] [Code of Criminal Procedure], § 98(1), https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0494 (Ger.).

169. *Id.* § 97(1).

is amended. A seizure is not banned, however, when there is probable cause to believe that the persons entitled to refusing testimony are involved in the defendant's crime.[170]

For example, section 52(1) StPO[171] provides that fiancés, spouses, and anyone related directly to the accused are entitled to refuse to testify against their spouse or relative. According to section 53 StPO, professionals have the right to refuse testimony as well. This includes clergy, defense counsel, or other lawyers or tax consultants,[172] *inter alia*, concerning information which was confided to them in their respective capacity. Before interrogation they must be instructed of their right to refuse to testify.

If they decide to testify, the testimony will be used even when giving such testimony without the defendant's consent is a criminal offense.[173] Neither section 52 StPO nor section 97 StPO provide for the exclusion of relevant testimony in cases where the warnings were not given,[174] or the prohibition of section 97 StPO was not adhered. If section 97 was infringed, the unlawfully seized correspondence or notes are naturally excluded without even mentioning that the needs of the criminal justice system and defendants' interests must be balanced before evidence is excluded.[175] Here, the law itself clearly balances both aspects.

As early as 1889, in imperial Germany, the Reichsgericht[176] decided that a letter between the defendant and his parents seized at the parents' home was not admissible at trial.[177] The letter served only as

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170. *Cf.* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 30, 2021, Deutsches Steuerrecht [DSTR] 799, 800 (2022) (Ger.).

171. Bradley, *supra* note 1, at 1059-1060, for details.

172. *Cf.* 113 BVERFGE 29, 30 (2005) (Ger.).

173. Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 12, 1956, 9 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHST] [Decisions of the Federal Court of Justice in Criminal Matters] 59, 61 (Ger.).

174. Strafprozessordnung [STPO] [Code of Criminal Procedure], § 252, https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1794 (Ger.) (stating that the minutes of the original testimony must not be read at trial if the witness then declines to testify).

175. Reichsgericht [RG] [Supreme Court of the Empire] Nov. 7, 1889, 20 Entscheidungen des Reichsgerichts in Strafsachen [RGST] 91, 92 (Ger.).

176. The Reichsgericht was the predecessor of the Federal Court of Justice.

177. 20 RGST 91, 92 (Ger.).

a handwriting sample to prove that the defendant wrote another letter,[178] and its content was of no relevance to the case. If one shares the court's view that a letter must not be seized even then, there is no other way than to exclude the evidence.[179] The law explicitly proscribes the seizure of the items listed in section 97 StPO, even if they contain information significant for the proceedings.[180] There is only one way to explain the prohibition: These items must not be seized, as the information therein may not be used by law enforcement agencies if the privileged person does not so wish.[181] The law itself denies access to this information; otherwise, there would be no prohibition of seizure. Thus, it is the prohibition to seize certain items that includes exclusion of evidence without any balancing required.

Therefore, it should not come as a surprise that the Reichsgericht confirmed the exclusion of correspondence in later cases[182] and the Federal Criminal Court[183] never even doubted the soundness of these rulings. To be sure, the idea that the infringed law strikes the balance between defendants' rights and the truth-finding process that calls for the exclusion of illegally obtained evidence in *all* cases the law is not adhered to, is rejected by German courts and the U.S. Supreme Court. However, if law enforcement officers have no right to obtain certain information against the will of others or without adhering to rules governing access to such information, this information is off limits and excluded. Justice Day argued quite similarly, "[i]f letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment … is of no value, and … might as well be stricken from the Constitution."[184]

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178. *Id.* at 91-92.

179. If the letter must not be seized as a matter of law, a search to find the letter cannot be justified either.

180. Strafprozessordnung [STPO] [Code of Criminal Procedure], § 95(1), https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0480 (Ger.).

181. Reichsgericht [RG] [Supreme Court of the Empire] June 3, 1913, 47 Entscheidungen des Reichsgerichts in Strafsachen [RGST] 195, 196.

182. 20 *RGSt* 91, 92; 47 RGST 195, 196.

183. Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 23, 1963, 18 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHST] [Decisions of the Federal Court of Justice in Criminal Matters] 227 (Ger.).

184. Weeks v. United States, 232 U.S. 383, 393 (1914).

Thus, the principal function of the exclusionary rules concerning witness privileges, as Professor Bradley correctly stated,[185] is not to deter police misconduct but to secure these privileges. But certainly the police have no reason to disregard the privileged person's rights when they are aware that illegally seized items are not admissible.

This argument is not a one-way street, either. If legal requirements to collect evidence do *not* intend to prohibit or to restrict the government's access to information but serve other purposes, a sound argument can be made that a violation of these requirements does not justify the exclusion of evidence. According to the German Code of Criminal Procedure, for example, a physical examination of a suspect may be ordered to establish facts relevant for the proceedings.[186] Thus, especially in drunk driving cases, taking blood samples is permissible if executed by a physician in accordance with the rules of medical science.[187] If in violation of this requirement, not a medical doctor but a nurse takes the blood sample, there is no good reason to exclude the sample as evidence.[188] The legal requirement intends to protect the suspect's health and physical integrity only but is not meant to restrict or prevent the government's access to this information.

The same argument has been made for violations of the knock-and-announce rule in the United States. The argument goes as follows:

> Until a valid warrant has issued, citizens are entitled to shield 'their persons, houses, papers, and effects,' … from the government's scrutiny. Exclusion of the evidence obtained by a warrantless search vindicates that entitlement. The interests protected by the knock-and-announce requirement are quite different—and do not include the shielding of potential evidence from the government's eyes.[189]

185. Bradley, *supra* note 1, at 1062.

186. Strafprozessordnung [STPO] [Code of Criminal Procedure], § 81(a), https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0442 (Ger.).

187. *Id.*

188. Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 17, 1971, 24 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHST] [Decisions of the Federal Court of Justice in Criminal Matters] 125, 128 (Ger.).

189. Hudson v. Michigan, 547 U.S. 586, 593 (2006).

IV. THE EXCLUSION OF EVIDENCE IN ILLEGAL WIRETAP AND OTHER TECHNICAL SURVEILLANCE CASES

Wiretapping and other electronic or technical surveillance measures are provided for in sections 100a to 101b StPO. They include, *inter alia*, telecommunications surveillance,[190] covert remote search of computers,[191] acoustic surveillance inside and outside of private premises,[192] traffic data capture, especially cell-site location information,[193] or GPS-monitoring of a vehicle[194]

Only rather severe crimes justify the surreptitious surveillance of a person's communications and whereabouts pursuant to the statutory law just cited. Surveillance is thus mostly limited to offenses listed in catalogs of the respective sections of the Code of Criminal Procedure. With the exception of GPS-monitoring,[195] a warrant is required. As mentioned earlier, especially in the case of home surveillance, a panel of judges must issue the warrant.[196] If there is a danger of delay, the prosecutor may issue the order in some cases but not the police.[197] A suspicion that a catalog crime was committed has to be supported by sufficient facts so that probable cause is established.[198]

Since Article 13(3) Grundgesetz only allows acoustic surveillance of the home, optical monitoring with the help of technical devices is prohibited.[199] The term "dwelling" includes not only the actual house

190. Strafprozessordnung [STPO] [Code of Criminal Procedure], § 100a, https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0528 (Ger.).

191. *Id.* § 100b.

192. *Id.* § 100c.

193. *Id.* § 100g; *cf.* Carpenter v. United States, 138 S. Ct. 2206, 2211 (2018) (No. 16-402).

194. *Id.* § 100h; *cf.* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 4 2005, 112 Entscheidungen des Bundesverfassungsgerichts [BVERFGE] 304 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 24, 2001, 46 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHST] [Decisions of the Federal Court of Justice in Criminal Matters] 266 (Ger.).

195. *Cf.* United States v. Jones, 565 U.S. 400, 404 (2012).

196. Strafprozessordnung [STPO] [Code of Criminal Procedure], § 100e(2), https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0528 (Ger.).

197. *Id.* § 100e(1).

198. *Id.* §§ 100a(1), 100b(1), 100c(1), 100f(1), 100g(1), 100i(1).

199. Grundgesetz [GG] [Basic Law], Art. 13, translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html (Ger.).

or apartment, but also its close surroundings within the "curtilage" of the home.[200] Using drone surveillance over a person's property, for example, is therefore not permissible under German law at all.[201] The same might be true for the use of a thermal-imaging device as a "sense enhancing" technology to determine if the amount of heat emanating from a house hints at the use of high-intensity lamps for indoor marijuana growing.[202]

Today, if the statutory requirements are not met, the rules of exclusion of evidence will probably follow those discussed above.[203] The Federal Criminal Court, however, previously excluded evidence if a warrant was not issued or because the judge's order was illegal without balancing the defendants' and the government's interests. A gross, intentional, or serious violation of the law was neither mentioned nor discussed.[204]

Yet, there is one notable exception to the general rule. Even if the surveillance had been in accordance with the law, the evidence can be used only to prosecute one of the listed catalog offenses.[205] Thus, even if police, prosecutor, or judge conform to the precise terms of the statute in implementing a wiretap, any evidence obtained will be automatically excluded if it does not relate to a listed offense. This rule was originally developed by case law[206] but has been codified in section 161(3) StPO. The reason is that not only the gathering of private information but its use also concerns privacy interests. If the gathering of evidence is justifiable only to investigate the listed offenses, but not

200. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 13, 1971, 32 Entscheidungen des Bundesverfassungsgerichts [BVERFGE] 54, 69-72; Jarass, in JARASS & PIEROTH, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND, Article 13 n. 4 (17th ed. 2022).

201. *Cf.* California v. Ciraolo, 476 U.S. 207, 215 (1986); Florida v. Riley, 488 U.S. 445, 450-451 (1989).

202. Kyllo v. United States, 533 U.S. 27, 40 (2001).

203. *See supra* notes 84-90 and accompanying text.

204. 35 BGHST 32, 34 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Aug. 24, 1983, 32 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHST] [Decisions of the Federal Court of Justice in Criminal Matters] 68, 71 (Ger.).

205. Strafprozessordnung [STPO] [Code of Criminal Procedure], § 161(3), https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0528 (Ger.).

206. *Cf.* Bradley, *supra* note 1, at 1055-56.

all crimes, the same rule applies for its use.[207] As Professor Bradley observed, these decisions demonstrate that although the German courts previously took a more lenient approach to search and seizure rules, the leniency was abruptly discarded when wiretaps were involved.[208]

V. THE EXCLUSION OF EVIDENCE IN ILLEGALLY OBTAINED CONFESSION CASES

A. The Failure to Give Miranda*-type Warnings*

Section 136 StPO, which according to section 163a(4) StPO, has been applicable to police interrogations since 1964, provides for *Miranda*-type warnings.[209] Defendants shall be informed, *inter alia*, of the offense they are charged with and the applicable criminal law provisions.[210] Further, they shall be advised that the law grants them the right not to make any statement on the charges, and the right, at any stage, even prior to interrogation, to consult with the defense counsel of their choice.[211] The original version of section 136 StPO, which became effective in 1879, already provided that the defendant must be asked if "he wished to respond to the accusation" when interrogated by a judge.[212]

Thus, the fact that warnings are required at the outset of interrogation is certainly not new to German law. This is true not only for in custody-interrogations (as *Miranda* proscribes)[213] but for all interrogations of the defendant. However, until 1992, there were no legal consequences at all if sections 136 and 163a(4) StPO were not complied

207. *Cf. supra* notes 42-50 and accompanying text.

208. Bradley, *supra* note 1, at 1057.

209. Strafprozessordnung [STPO] [Code of Criminal Procedure], § 136(1), https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0528 (Ger.).

210. *Id.*

211. *Id.*

212. Strafprozessordnung des Reiches [RSTPO] [Code of Criminal Procedure of the Empire], § 136(1), https://de.wikisource.org/wiki/Strafproze%C3%9Fordnung#%C2%A7._136 (Ger.).

213. Miranda v. Arizona, 384 U.S. 436, 468 (1966).

with,[214] even though most scholars urged the Federal Criminal Court to hold confessions inadmissible if the police did not warn defendants of their rights. Here again, there appears no alternative to the exclusion of a confession given without warnings.

As mentioned earlier, the court finally changed its jurisprudence in 1992.[215] The court reiterated the general principle that if infringements of the law lead to the exclusion of evidence, the cases will be decided individually.[216] A comprehensive balancing of interests is required.[217] There is reason to presume, the court argued, that the use of evidence is prohibited if the law intends to secure the basic procedural position of the accused in criminal proceedings.[218] In the case of a violation of the warning requirements, this basic position is affected. According to the court, the principle that no one is required to testify against himself is one of the recognized basic principles of criminal procedure.[219] In a subsequent decision, this rule was extended to the warning of the right to the assistance of counsel.[220]

The importance of the self-incrimination privilege[221] as a basic principle of criminal proceedings, not the severity of the violation of such privilege, is decisive in excluding the confession. Yet, this principle lies on shaky ground. Of course, anybody who does not know about a right to remain silent or to the assistance of counsel needs to be informed accordingly. Otherwise, the person cannot decide whether to execute the right or not. This is the reason why, according to the court, the exclusion of the resulting confession is not mandatory if de-

214. Bundesgerichtshof [BGH] [Federal Court of Justice] June 7, 1983, 31 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHST] [Decisions of the Federal Court of Justice in Criminal Matters] 395, 398 (Ger.).

215. 38 BGHST 214, 227 (Ger.).

216. *See supra* notes 84-90 and accompanying text.

217. *See supra* note 86 and accompanying text.

218. 38 BGHST 214, 220 (Ger.).

219. *Id.*

220. Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 12, 1996, 42 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHST] [Decisions of the Federal Court of Justice in Criminal Matters] 15, 21 (Ger.); BGH Nov. 22, 2001, 47 BGHST 172, 172 (Ger.).

221. The privilege is derived from the constitution's protection of human dignity in Articles 1(1) and 2(1) Grundgesetz and the rule of law. *See supra* notes 42-43.

fendants actually know of their rights.[222] However, this is meant as a rather rare exception.

However, if defendants unknowingly talk to the police, this does not automatically mean that they are *compelled* to incriminate themselves. According to the Federal Criminal Court, the police are not obliged to correct defendants' error before accepting a confession that was made by defendants who erroneously believe there is enough evidence against them and that a confession may lead to a lighter sentence.[223] Thus, it seems doubtful why defendants assuming to be obliged to answer the police officer's questions should be protected.

Defendants may feel compelled to answer questions to appear less suspicious in the eyes of the interrogator.[224] They assume only guilty people will decline to communicate with and help the police. However, this pressure results from general communication rules and certainly does not constitute police misconduct. According to the Federal Criminal Court, this is why only police officers questioning the defendant in their official capacity as officers of the law are required to give warnings, but not undercover agents or private persons questioning defendants on behalf of the police.[225] Nonetheless, this form of pressure to not refuse answers is certainly a far cry from cases in which statements of the defendant are coerced by brutal beatings[226] or by threats of physical pain.[227]

The current version of section 136 StPO provides that the defendant "shall, further, be advised that he may … under the conditions of

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222. 38 BGHST 214, 224 (Ger.).

223. Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 21, 1986, Strafverteidiger [STV] 419, 421 (1988) (Ger.).

224. C*f.* Illinois v. Perkins, 496 U.S. 292, 296-297 (1990).

225. Bundesgerichtshof [BGH] [Federal Court of Justice] May 13, 1996, 42 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHST] [Decisions of the Federal Court of Justice in Criminal Matters] 139, 145-146 (Ger.); BGH Mar. 31, 2011, Neue Zeitschrift für Strafrecht [NSTZ] 596, 597 (2011); *cf.* Illinois v. Perkins, 496 U.S. 292 (1990). In exceptional cases, it is regarded as a violation of the self-incrimination privilege if a defendant, who had refused to testify earlier, is questioned undercover, especially if there is pressure exerted to confess. *See* BGH July 26, 2007, 52 BGHST 11 (Ger.); Eur. Ct. H.R., Nov. 5, 2002, Strafverteidiger [STV] 257 (2003) (Ger.).

226. Brown v. Mississippi, 297 U.S. 278 (1936).

227. Gäfgen v. Germany, Eur. Ct. H.R., Neue Juristische Wochenschrift [NJW] 3145, ¶ 108 (2010).

section 140(1) and (2), request the appointment of defense counsel in accordance with section 141(1) and (3); in the latter case, reference shall be made to the resulting costs referred to in section 465."[228] Section 140 StPO stipulates that defense counsel must be appointed to assist defendants if they are charged with serious crimes like robbery or murder.[229] This can be done already during the preliminary proceedings and especially before the first interrogation commences but is not mandatory for all cases.[230] Appointed defense counsel is initially free of charge for the accused, but section 465 StPO provides that the accused must bear the costs in the event of a conviction.[231]

Thus, the answer to the question of whether and when defense counsel must be appointed requires precise legal knowledge. Nevertheless, because the facts may be uncertain, it is questionable whether a police officer is able to inform defendants accordingly. It is even more doubtful whether a defendant will understand these instructions. While most defendants are aware of their right to remain silent, at least if they ever watched an American police drama on TV,[232] it is fair to assume that most defendants are not aware of the regulations concerning appointed counsel. Moreover, for a defendant who is not able to pay for a defense attorney, the information about access to counsel at no charge is important. The Federal Criminal Court, however, does not exclude a confession if the required warning was not given–not even in a case where the defendant expressly emphasized he had no money to hire defense counsel at the outset of interrogation.[233]

Today, there is a vivid discussion of whether "qualified" warnings must be given. In these cases, a defendant is not warned of her rights before confessing the first time, but then receives the required warn-

228. Strafprozessordnung [STPO] [Code of Criminal Procedure], § 136(1), https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0528 (Ger.).

229. *Id.* § 140.

230. *Id.* § 141.

231. *Id.* § 465.

232. *Cf.* Charles D. Weisselberg, *Exporting and Importing* Miranda, 97 B. U. L. REV. 1235, 1282 (2017).

233. Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 6, 2018, Neue Zeitschrift für Strafrecht [NSTZ] 671 (2018) (Ger.).

ings prior to confessing the second time.[234] However, the defendant is not told about the first confession's inadmissibility. The same is true if the first confession was obtained by employing illegal interrogation methods prohibited by section 136a StPO.[235]

The Federal Criminal Court assumes that a qualified instruction is required if the original infringement still has an effect and influences the second confession.[236] The defendant, the court argues, will usually believe that the first confession cannot be undone.[237] Surprisingly, this does not mean that the second confession is also inadmissible, rather the conflicting interests are balanced against each other. According to the court, the failure to give a qualified warning should not be given the same weight as the preceding failure to give warnings–at least defendants now know that they may remain silent.[238] If defendants know, however, that the "cat is out of the bag,"[239] they will usually have no reason to refuse to confess a second time.

At least, in accordance with the U.S. Supreme Court,[240] the Federal Criminal Court seems to disapprove of deliberate violations of the warning requirement before the first interrogation starts in order to obtain a second, admissible confession after unqualified warnings were given.[241] To be sure, a different view would be a "crippling blow"[242] to the warning requirement.

234. Bundesgerichtshof [BGH] [Federal Court of Justice] May 3, 2018, Neue Zeitschrift für Strafrecht [NSTZ] 227, ¶ 28 (2019) (Ger.).

235. Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 13, 2021, Strafverteidiger [STV] 410 (2021) (Ger.).

236. *Id.*

237. *Id.*

238. Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 18, 2008, 53 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHST] [Decisions of the Federal Court of Justice in Criminal Matters] 112, 115 (Ger.); BGH May 3, 2018, Neue Zeitschrift für Strafrecht [NSTZ] 227, ¶¶ 28-29 (2019) (Ger.).

239. U.S. v. Bayer, 331 U.S. 532, 540 (1947).

240. Missouri v. Seibert, 542 U.S. 600, 620 (2004) (Kennedy, J. concurring).

241. 53 BGHST. 112, 116 (Ger.).

242. Oregon v. Elstad, 470 U.S. 298, 319 (1985) (Brennan, Marshall, JJ., dissenting).

B. The Failure to Respect Defendants' Wish to Remain Silent or to Consult Counsel

Section 136(1) StPO further provides that "if the accused wishes to consult defense counsel prior to his examination, he shall be provided with information which makes it easier for him to be able to contact such defense counsel."[243] However, the failure to do so does not necessarily result in the exclusion of a subsequent confession. Even in cases where the assistance of defense counsel is mandatory at trial and her absence constitutes reversible error,[244] a confession is not excluded *per se* if the defense attorney is not present during police interrogation in pre-trial proceedings. Section 141 StPO expressly provides that the presence of defense counsel is not mandatory for police interrogation in all cases.[245] To be sure, even if it is, the Federal Criminal Court does not automatically exclude a confession made without the assistance of counsel.[246] In Germany, rights granted to the defendant in the "mansion" of the courthouse are not in the "gatehouse" of police interrogation.[247] The reason is obvious: "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances."[248]

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243. STRAFPROZESSORDNUNG [STPO] [Code of Criminal Procedure], § 136, https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1279 (Ger.).

244. In Germany, defendants cannot waive the assistance of counsel and act *pro se* in such cases. *Cf.* Farretta v. California, 422 U.S. 806, 849 (1975) (Blackmun, J., dissenting) ("For my part, I do not believe that any amount of *pro se* pleading can cure the injury to society of an unjust result, but I do believe that a just result should prove to be an effective balm for almost any frustrated *pro se* defendant.").

245. STRAFPROZESSORDNUNG [STPO] [Code of Criminal Procedure], § 141, https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1279 (Ger.).

246. Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 5, 2022, BECKRS 11288, ¶ 20 (2022) (Ger.).

247. *Cf.* Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in* POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 31 (1980) [reprint from 1965].

248. Watts v. Indiana, 338 U.S. 49, 59 (1949). In Germany's inquisitorial system, defense counsel also "owes no duty whatever to help society solve its crime problem."

If the police deny the defendant's wish to consult with defense counsel and interrogate her, the confession will be excluded.[249] However, this does not mean that the interrogation will be terminated at once if the defendant exercises the right to remain silent or requests the presence of defense counsel.[250] The interrogator does not have to accept an initial refusal to testify. She may hint at disadvantages defendants could suffer if they remain silent and do not defend themselves. Therefore, the interrogation may continue after a refusal to testify as long as the freedom of will of the person to be interrogated is not interfered with by prohibited means.[251]

In 1992, the Federal Criminal Court did not have any concerns that the police "persuaded" the defendant to make further statements before defense counsel arrived[252] and did not find it offensive that an interrogation continued after the suspect expressed the wish to remain silent and to talk to a lawyer.[253] Nevertheless, the Federal Criminal Court occasionally clearly expresses its unease about the fact that a defendant is simply questioned further despite an initial refusal to testify.[254] There is, unfortunately, no distinct rule to prevent "officers from badgering a suspect into waiving his previously asserted *Miranda* rights."[255]

C. Involuntary Confessions

Warnings given at the outset of interrogation will not compensate for interrogation techniques such as promises, threats, or trickery employed by the interrogator after defendants waive their right to remain

249. Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 29, 1992, 38 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] [Decisions of the Federal Court of Justice in Criminal Matters] 372, 373 (Ger.).

250. Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 6, 2018, Neue Juristische Wochenschrift [NJW] 1986, ¶¶ 12-15 (2018) (Ger.); *cf.* Edwards v. Arizona, 451 U.S. 477, 477 (1981); Maryland v. Shatzer, 559 U.S. 98, 98 (2010).

251. *Cf.* Schmitt, in MEYER-GOßNER & SCHMITT, *supra* note 154, § 136 n. 8.

252. Bundesgerichtshof [BGH] [Federal Court of Justice] May 15, 1992, Neue Juristische Wochenschrift [NJW] 2903, 2904 (1992).

253. Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 7, 1997, Neue Zeitschrift für Strafrecht [NStZ] 251, 252 (1997) (Ger.).

254. Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 10, 2006, Neue Zeitschrift für Strafrecht [NStZ] 286, ¶¶ 2-3 (2006) (Ger.).

255. Davis v. United States, 512 U.S. 452, 458 (1994).

silent and talk to the police. Thus, section 136a StPO provides the following:

> [The defendant's] will must not be impaired by ill-treatment, induced fatigue, physical intervention on the body, the administration of drugs, torture, by means of deception or hypnosis. Compulsion may be used only insofar as this is permitted by law. Threats with measures not permitted under the provisions of criminal procedure law and holding out the prospect of an advantage not envisaged by statute shall be prohibited.[256]

In addition, section 136a(2) StPO explicitly prohibits interrogation techniques that infringe upon the defendant's understanding and capacity to decide rationally.[257]

There are judgments of the Federal Criminal Court restricting section 136a StPO to severe impairments of a defendant's will.[258] Under these judgments, only fundamental violations of due process of law result in the exclusion of a subsequent confession.[259] The illegal interrogation methods enumerated in section 136a StPO are characterized as grave violations, at least in part, subject to severe criminal sanctions, or as brute infringements of the rule of law.[260] For example, if a defendant has not slept for at least 38 hours, is under extreme physical and psychic duress because she just gave birth without medical aid, and has been interrogated several times with "increasing vigorousness," her confession is excluded.[261] Here, contrary to the wording of

256. STRAFPROZESSORDNUNG [STPO] [Code of Criminal Procedure], § 136a(1), https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1223 (Ger.).

257. *Id.* § 136a(2).

258. 31 BGHST 395, 399-400 (Ger.).

259. Diemer, in KARLSRUHER KOMMENTAR ZUR STRAFPROZESSORDNUNG (Rolf Hannich ed.), § 136a n. 8 (8th ed. 2019).

260. 31 BGHST 395, 399-400 (Ger.); *cf.* Andreas Ransiek, *Self-Incrimination Privilege and Interrogation. A German and Comparative View*, *in* INTERROGATION, CONFESSION, AND TRUTH: COMPARATIVE STUDIES IN CRIMINAL PROCEDURE, *supra* note 87, at 151, 166-168.

261. Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 21, 2014, 60 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHST] [Decisions of the Federal Court of Justice in Criminal Matters] 50, ¶¶ 3-4 (Ger.).

section 136a StPO,[262] it is of no significance whether the police induced the defendant's fatigue or duress.

The result is different, however, when it comes to the question of whether there was an unlawful deception. Since the Federal Criminal Court argues that only severe violations of defendants' rights are covered by section 136a StPO, the prohibition of deception is interpreted narrowly. Thus, some forms of trickery used to obtain a confession are permissible, and only explicit, deliberate deceptions are not.[263] Section 136a StPO bans only outright lies.[264]

A confession is inadmissible, for example, if a defendant is told without any factual basis that there is so much evidence against him that he could not be released under any circumstances if he maintains his previous statement.[265] He would have no chance at all and everything would boil down to murder with life imprisonment; he could improve his situation only by confessing to examine whether not the offense could be lowered from murder to perhaps manslaughter or bodily harm resulting in death.[266] The prosecutor's office had regarded this as an "incorrect prognosis about the future outcome of the court proceedings."[267]

In the particular case referred to above, it seems rather astonishing that the Federal Criminal Court had to decide on the admissibility of the confession at all. The defendant became progressively more confused over the course of his interrogation, to the extent that the interrogators sometimes had the impression he was no longer aware of the implications of what he was saying.[268] The defendant had no record, was unemployed without a profession, and had skidded into the milieu

262. STRAFPROZESSORDNUNG [STPO] [Code of Criminal Procedure], § 136a(1), https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1223 (Ger.).

263. 31 BGHST 395, 399-400 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 10, 2021, Neue Zeitschrift für Strafrecht – Rechtsprechungsreport [NSTZ-RR] 142, 143 (2021) (Ger.).

264. 31 BGHST 395, 399-400 (Ger.).

265. Bundesgerichtshof [BGH] [Federal Court of Justice] Aug. 24, 1988, 35 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHST] [Decisions of the Federal Court of Justice in Criminal Matters] 328, 329 (Ger.).

266. *Id*. at 331.

267. *Id*. at 330.

268. *Id*. at 331.

of drunkards and homeless.[269] It seems obvious that his confession was wholly unreliable.

More recent cases, however, have lowered the bar for exclusion of a confession under section 136a StPO. In one such case,[270] there were no facts indicating that a deliberate killing could be qualified as murder. Nevertheless, the police officer lied to the defendant that the crime looked like a classic murder.[271] The officer said that he personally did not believe the defendant was a murderer, but that the defendant should make a statement to set the record straight.[272] After the defendant confessed, it became clear that a murder was indeed committed.[273] In an ongoing homicide investigation, there is always the possibility that the aggravating circumstances of the murder rules apply. In everyday German language the word "murder" is used to describe all intentional killings and is not limited to its legal meaning. Thus, it was not certain whether the defendant understood the officer's use of the word in the legal sense as an aggravated intentional killing. The Federal Criminal Court excluded the confession.[274] Thus, it is not only in the most severe cases that confessions are inadmissible today.

In another recent case,[275] a police officer stayed in a hospital room where the suspect, who declared earlier that she did not want to make a statement, was medically treated and listened to her talking to her doctor about the crime. The officer asked if she should leave the room but received no answer.[276] The statements were held inadmissible.[277] According to the court, the defendant's right to remain silent was never honored by the police; she was continually questioned and did not decide rationally whether to incriminate herself or not.[278] It is im-

269. *Id*.

270. Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 25, 2016, Neue Juristische Wochenschrift [NJW] 1253, 1255 (2017) (Ger.).

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id*.

275. Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 6, 2018, Neue Juristische Wochenschrift [NJW] 1986, 1986-1987 (2018) (Ger.).

276. *Id.*

277. *Id.*

278. *Id*. at 1988; *cf*. Ji Seon Song, *Policing the Emergency Room*, 134 HARV. L. REV. 2647, 2661, 2672-2677 (2021).

portant that in this case the defendant needed medical attention and incriminated herself speaking to her doctor.[279] Such communications enjoy special protection.[280] However, the police officer did not ask a single question, nor did she request the doctor to ask questions.[281]

Overall, the picture is blurred as to which interrogations tactics will render a confession inadmissible. It is therefore of particular importance that, according to the current version of section 136(4) StPO, the interrogation of the defendant must be recorded in video and audio if it concerns the accusation of a homicide.[282] However, it remains to be seen whether a violation will result in the exclusion of an unrecorded confession.

CONCLUSION

Over the last 40 years, a great deal has changed in German law with regard to the exclusion of evidence in criminal proceedings. In particular, the exclusion of evidence is now recognized in the case of illegal searches[283] and in violations of the obligation to instruct defendants of their rights to remain silent and to the assistance of counsel.[284] Today, the protection of the home is regarded as a fundamental guarantee safeguarded by exclusionary rules.

The same is true for the self-incrimination privilege. Like the U.S. Supreme Court, German courts rely on this privilege to argue that the failure to give warnings at the outset of interrogation leads to the exclusion of a resulting confession. However, this does not extend to all warnings which are required under statutory law.[285] There is also significant precedent concerning prohibited interrogation methods. Ac-

279. Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 6, 2018, Neue Juristische Wochenschrift [NJW] 1986, 1988 (2018) (Ger.).

280. *Cf. supra* note 71 and accompanying text.

281. Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 6, 2018, Neue Juristische Wochenschrift [NJW] 1986, 1987 (2018) (Ger.).

282. *Cf.* Miranda v. Arizona, 384 U.S. 436, 448 (1966) ("Interrogation still takes place in privacy. Privacy results in secrecy, and this, in turn, results in a gap in our knowledge as to what, in fact, goes on in the interrogation rooms.").

283. 51 BGHST 285 (Ger.).

284. 38 BGHST 214 (Ger.); 42 BGHST 15 (Ger.); 47 BGHST 172 (Ger.).

285. Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 6, 2018, Neue Zeitschrift für Strafrecht [NSTZ] 671, 671 (2018) (Ger.).

cording to the Federal Court, the police should not be handcuffed by legal rules that prevent them from obtaining a confession. Thus, defense counsel does not have to be present during police interrogation, even when this is obligatory at trial.[286]

German courts regard the exclusion of evidence as an exception that must be justified by overriding reasons. In principle, German case law follows a balancing approach. The Federal Criminal Court weighs the state's interest in convicting the truly guilty against the defendant's interest in vindicating her rights in each particular case.[287] However, it remains unclear how the individual criteria included in the balancing process are weighed. Exclusion of evidence is only certain when egregious misconduct is at issue. As a result, the German courts share the U.S. Supreme Court's opinion in the case of violations of the Fourth Amendment: Particularly serious, arbitrary or intentional infringements of defendants' fundamental rights lead to the exclusion of evidence.[288] However, the focus in Germany is not only on misconduct of police officers, but that of prosecutors and judges as well.[289]

Unlike in the United States, the prohibition on the use of evidence in case of such violations is not primarily justified on the grounds of deterring unlawful investigative measures. The exact reasoning behind these exclusions, even when the inadmissibly obtained evidence is reliable, remains unclear. As current cases on the admissibility of confessions indicate, there is a reluctance to declare evidence deemed trustworthy to be unusable. This is especially true when it comes to derivative evidence.

The protection of a core sphere of personal privacy, independent of illegal law enforcement conduct, is still granted. However, its scope of application is small, since it concerns almost exclusively the prohibition of using information obtained by recording or listening to de-

286. Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 5, 2022, Beck-Rechtsprechung [BECKRS] 11288, ¶ 7 (2022) (Ger.).

287. *Id*. at ¶ 21; Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 2, 2022, Beck-Rechtsprechung [BECKRS] 5306, 2022 (Ger.); BGH May 3, 2018, Neue Zeitschrift für Strafrecht [NSTZ] 227, ¶ 23 (2019) (Ger.).

288. 130 BVERFGE 1, 28 (Ger.).

289. Bundesgerichtshof [BGH] [Federal Court of Justice] Aug. 15, 2018, Neue Juristische Wochenschrift [NJW] 789 (2019) (Ger.).

fendants talking to themselves.[290] The prohibition on using recordings from technical surveillance measures as evidence for crimes other than those for which the technical surveillance was permitted by the legislature is today mandated by statutory law.

As the prohibition of seizing defendant's personal letters to close relatives in German law demonstrates, some exceptions to the balancing approach are quite naturally accepted. The courts have been excluding some evidence since 1889 without weighing the interests at stake and without egregious misconduct of police officers.[291] Thus, it might be helpful to consider more closely the nature of the defendant's right violated by law enforcement officers. If the law grants a right which precisely serves the purpose to preclude information that is obtained by law enforcement agencies or intends to restrict their access to information, this right is a decisive argument for excluding evidence. If the infringed rule serves a different objective and protects other values, however, there is no reason to exclude reliable evidence, just as the Federal Criminal Court and the U.S. Supreme Court have argued.

290. 50 BGHST 206 (Ger.).
291. 20 RGST 91 (Ger.).