РОЗДІЛ 2
МІЖНАРОДНЕ ПРАВО ПРАВ ЛЮДИНИ

Stefano Maffei
University of Parma

David Sonenshein
Temple Law School

THE CLOAK OF THE LAW AND FRUITS FALLING FROM THE POISONOUS TREE: A EUROPEAN PERSPECTIVE ON THE EXCLUSIONARY RULE IN THE GÄFGEN CASE

Even so every good tree bringeth forth good fruit; but a corrupt tree bringeth forth evil fruit. A good tree cannot bring forth evil fruit, neither [can] a corrupt tree bring forth good fruit. Every tree that bringeth not forth good fruit is hewn down, and cast into the fire. Wherefore by their fruits ye shall know them.

Matthew 7:17–20.

I. Introduction

On June 1, 2010, the Grand Chamber of the European Court of Human Rights[1] (ECtHR) delivered the final judgment in the case Gäfgen v. Germany.[2] The decision came two years after the ruling of Section V of the ECtHR[3] in the same case and established a landmark precedent in the jurisprudence of criminal evidence and procedure.

[1] The European Court of Human Rights is based in Strasbourg, France and is often referred to simply as the "Strasbourg Court".

[2] Gäfgen v. Germany, 52 Eur. Ct. H.R. 1 (2011) [hereinafter Gäfgen]. See Antoine Buyse, Introductory Note to European Court of Human Rights (Grand Chamber): Gäfgen v. Germany, 49 ILM 1597 (2010) (containing the full text of the opinion). As one may easily expect, the case was closely followed by German academic jurisprudence: see, e.g., Stephan Ast, The Gäfgen Judgment of the European Court of Human Rights on the Consequences of the Threat of Torture for Criminal Proceedings, 11 Ger. LJ 1393 (2010).

[3] The judgment of the Chamber within the V Section of the ECtHR was issued on June 30, 2008. The applicant successfully requested that the case be referred to the Grand Chamber pursuant to Art. 43 ECHR, according to which, in exceptional circumstances, a case may be re-heard "if it raises a serious question affecting the interpretation or application of the Convention, or a serious issue of general importance".

The Gäfgen case addressed, among other things, a question that has troubled criminal procedure jurisprudence all over the world: When is evidence collected through conduct that shocks the court's conscience, as in the case of inhuman treatment or torture, admissible? The key issue in Gäfgen was how to sever the proverbial fruit from the poisonous tree. In the words of Justice Felix Frankfurter, who delivered the opinion of the United States Supreme Court in Rochin v. California, the issue in such cases is whether brutality might be afforded the «cloak of the law,» and, if so, under what circumstances.[1]

Domestic constitutional laws across Europe prohibit torture and inhuman treatment. At a supranational level, the fundamental and non-derogable Article 3 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter ECHR) also prohibit such treatment. Further, Article 6 of the ECHR guarantees the right to a fair criminal trial, which in turn implies a criminal defendant's right to silence.[2]

This is not to say that illegally obtained evidence is routinely inadmissible before courts of law across Europe. On the contrary, in Europe (as well as in the United States and elsewhere around the world) a great deal of controversy surrounds the scope and limits of the exclusionary rule, which prohibits the in-court admission of evidence acquired via unconstitutional means, such as illegal searches and seizures[3] or unlawful and coerced confessions.[4] All constitutional violations of a suspect's

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1 Rochin v. California, 342 U.S. 165, 173 (1952) (concerning the administration of an emetic against the suspect's will, in order to retrieve morphine capsules swallowed in the course of a search). The term "cloak of the law" was then borrowed by the ECtHR in a similar situation (with regard the swallowing of "drug bubbles" by a suspect) in Jalloh v. Germany, 2006-IX Eur. Ct. H.R. 281 for which more discussion is provided below in part V.

2 "Although not specifically mentioned in Article 6 of the [European] Convention, the right to silence and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6." See, e.g., Saunders v. United Kingdom, 1996-VI Eur. Ct. H.R. 2044, 2064.

3 In the United States, with regards to constitutional violations of searches and seizures, which are governed by the Fourth Amendment, the exclusionary rule was first adopted in the federal system in, Weeks v. United States, 232 U.S. 383, 393-94 (1914), and later extended to the states in the landmark case of, Mapp v. Ohio, 367 U.S. 643, 660 (1961). More insights into the current state of the exclusionary rule in the United States are provided below, in Part VII.

4 In the United States, landmark cases include Massiah v. United States, 377 U.S. 201 (1964), which provides for exclusion of confession (and admissions) made by charged defendants after the point that the Sixth Amendment right to counsel attaches and, of course, Miranda v. Arizona, 384 U.S. 436 (1966), which provided for exclusions of

rights–coerced confessions in particular–offend the community's sense of fair play and decency, while also posing a long-term threat to the public's confidence in the justice system.[1] There is no clear consensus among the Member States of the Council of Europe, the courts of other states,[2] the International Criminal Court[3] and other human rights monitoring bodies about the precise scope of an exclusionary rule for such illegally obtained evidence. Criminal litigation involving the offer of tangible evidence obtained in violation of fundamental (in Europe) or constitutional (in the United States) rights presents the unavoidable choice between guaranteeing fairness to the accused or the pursuit of «factual truth»[4] of guilt. The former is the sine qua non of due process

confessions and admissions made during custodial interrogation, where the suspect was not advised of his right to remain silent and right to counsel.

1 Yet, the fascination with both the efficacy and virtue of torture remains strong in some quarters on the assumption that "torture has sometimes produced self-proving, truthful information[.]" Alan M. Dershowitz, Why Terrorism Works: Understanding the Threat, Responding to the Challenge 137 (2002). See also Memorandum from J. Yoo to William J. Haynes IT, General Counsel of United States Department of Defense, (Mar. 14, 2003 (the so called "Torture memo").

2 It is common for the ECtHR to take a cursory glance to foreign law in establishing "international standards" of protection. In Gäfgen, for example, exclusionary rule precedents of the U.S. Supreme Court and the Supreme Court of Appeal of South Africa are quoted. Gäfgen, supra note 2, at 19. At the same time, some United States Supreme Court Justices, notably Justices Breyer and Kennedy, have spoken approvingly of the notion of looking to foreign law principles in the interpretation of American law, while other members of the Court consider such a notion to be repellent. Compare Graham v. Florida, 130 S.Ct 2011, 2034 (2010) (Kennedy, J.), with id., at n. 12 (Thomas, J., dissenting).

3 See K. Vanderpuye, The International Criminal Court and Discretionary Evidentiary Exclusion: Toeing the Mark?, 14 Tul. J. Int'l & Comp. L. 127 (2005). The author argues that the establishment of a discretionary standard of admissibility with respect to the use of illegal evidence by the ICC "is likely to have a profoundly nocuous impact upon the court", given the peculiarity of its jurisdiction and the compelling need for predictable decision-making. Id. at 176.

4 For a philosophical and historical distinction between "an absolute truth" (which is said to characterize the inquisitorial system) and a "more pragmatic, or compromised, truth" (typical of the adversarial system), cf. Matthew T. King, Security, Scale, Form and Function: the Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems, 12 International Legal Perspectives 185, 187 (2002). The doctrine of the fruits of the poisonous tree "in both Common Law and Civil Law jurisdictions has vacillated between a strictly truth-oriented evaluation of the probative value of evidence and a human-rights based concern with important constitutional rights that sometimes trumps the state interest in a particular case to convict a particular criminal." Stephen C. Thaman, "Fruits of the Poisonous Tree" in Comparative Law, 16 Sw. J. Int'l Law 333, 382 (2010). American scholars and observers often distinguish

while the latter is the goal of crime control or the «public interest»[1] as defined by those whose primary objective is the suppression of crime.

This article reviews the Gäfgen opinion and argues for a bright-line rule of exclusion. Without such a rule, the decision whether to admit products of unlawful police activity inevitably becomes a balancing act that, despite taking into account the «totality of the circumstances» surrounding the illegally obtained evidence, nearly always results in admission.[2] This paper also compares the current European perspective on the exclusionary rule with certain features of the corresponding American rule. Although there has been some reference to the «fruits of the poisonous tree» doctrine in past ECtHR rulings related to evidence obtained directly from torture,[3] the Grand Chamber's decision in Gäfgen v. Germany offers the first comprehensive, structured analysis of the doctrine. Nevertheless, the ECtHR's willingness to avoid the issue by resorting to a questionable totality of circumstances analysis has now set a troubling precedent.[4] In essence, the ECtHR's partial upholding of the German courts' holdings suggests that physical evidence, discov-

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between "legal guilt" and "factual guilt." That is a person may be factually guilty in that he actually committed the crime, but at the same time not be legally guilty because the conviction was obtained in violation of the law. "Due Process" types, see discussion infra, demand legal guilt to support a conviction while the "Crime Control" types are satisfied if "we got the right guy." This is not to overlook the fact that illegally obtained evidence, particularly in the area of coerced confessions, may often be factually inaccurate and untrue.

1 Arguments of public interest are the quintessence of the so called "crime control model", conceptualized by Herbert L. Packer, The Limits of the Criminal Sanction 158-163 (1968). In contrast with the due process model, the crime control model assumes that illegally obtained evidence is always reliable, a belief which albeit true with respect to the product of an illegal search and seizure, is very often untrue when it comes to, for example, coerced confessions and unduly suggestive lineups. According to statistics compiled by the Innocence Project, the clearinghouse in the United States for records of the exoneration of convicted, but innocent, criminal defendants, over the last 15 years, 271 convicted Americans (many on Death Row) have been exonerated through DNA alone. Of those 271 exonerations, 75% involved mistaken identifications and 25% involved false confessions. See Annual Reports 2005-2010, The Innocence Project (www.innocenceproject.org).

2 "Because physical evidence speaks for itself and, if relevant to the crime, is always credible, this prong of the balancing test will always be fulfilled." Thaman, supra note 11, at 353.

3 See Jalloh v. Germany, supra note 4; see also Harutyunyan v. Armenia, 49 Eur. H.R. Rep. 9 (2009) at para. 63 (holding that use of statements implicating the accused by his fellow soldiers, elicited after physical beatings, violated accused's right to fair trial).

4 Readers should be reminded that all Sections of the ECtHR "are expected to follow Grand Chamber judgments, regardless of cogent reasons, unless the case may be

ered as a result of confessions that are coerced or obtained under duress, may be admitted before the criminal courts provided that the mistreatment does not amount to actual torture.[1]

By comparison, United States law excludes both physical evidence and confessions that are found to be the product of either an illegal search and seizure or an «involuntary,» coerced confession. A coerced confession is roughly the U. S. equivalent of a confession extracted by «torture or inhuman treatment» under Article 3 ECHR. However, the Supreme Court has recently decided that although a «mere» Miranda violation[2] (a Constitutional rights violation) renders any elicited confession inadmissible, derivative evidence from that confession will be admissible. The only exception is if the defendant can prove that the violation was intentionally perpetrated in order to obtain the second confession.[3] This is so even though the second confession amounts to the «fruit» of the initial Constitutional violation.

II. Facts of the Gäfgen Case and Related Domestic Proceedings

The Gäfgen case presented difficult facts. The state agents (the German police) faced a difficult and highly charged situation, which culminated in the death of an eleven-year-old boy. In September 2002, Magnus Gäfgen allegedly kidnapped and brutally suffocated a boy whom he initially held for ransom. German police, believing the boy could still be alive, obtained a coerced confession through ten minutes of mistreatment the day after Gäfgen's arrest.[4] During questioning, the suspect confessed that he killed the boy, and he later led the police to

distinguished in some other manner," David J. Harris et al., Law of the European Convention on Human Rights 18 (2d ed. 2009).

1 Gäfgen, supra note 2, at 44

2 Dickerson v. United States, 530 U.S. 428, 446 (2000).

3 Missouri v. Seibert, 542 U.S. 600, 617 (2004).

4 As the facts of the case are described by the Grand Chamber, early in the morning of 1 October 2002, detective officer E., acting on the orders of the deputy chief of the Frankfurt police, D., told the applicant that he would suffer considerable pain at the hands of a person specially trained for such purposes if he did not disclose the child's whereabouts. According to the applicant, the officer further threatened to lock him into a cell with two huge black people who would sexually abuse him. The officer also hit him once on the chest with his hand and shook him so that his head hit the wall on one occasion. For fear of being exposed to the measures he was threatened with, the applicant disclosed the precise whereabouts of the child after approximately ten minutes of questioning. The above description of the facts of the Gäfgen case is quoted liberally from Gäfgen, supra note 2, at 6-7.

the place where the victim's body was buried, near a pond in Birstein, Germany.

In April 2003, the German trial court ruled that the interrogating detective, acting under the instructions of the deputy chief of the Frankfurt police, had used prohibited methods of interrogation.[1] The detective threatened that the applicant would suffer considerable pain if he did not disclose the child's whereabouts and hit the applicant once in the chest during the course of the interrogation.[2] The self-incriminating statements that the applicant made in the context of that interrogation were excluded from admissible evidence as the product of inhuman treatment. At the same time, in the criminal proceedings, the German trial court allowed the use of evidence that had become known to the investigating authorities only as a result of the inadmissible statements extracted from the accused Gäfgen. This evidence was primarily the child's corpse and the tire tracks matching the suspect's vehicle. In the court's view, the severity of the unlawful conduct of the police officers had not caused an intolerable violation of the rule of law. Due to that finding and the seriousness of the charges, the court opted not to bar the use of the aforementioned evidence.

On the second day of the subsequent trial, the accused confessed a second time. The original self-incriminating confession was admitted into evidence along with the physical evidence found as a result of the earlier confession.[3] Significantly, the defendant later claimed that he only made the second confession when it was clear that the physical evidence would be admitted, in the hope of securing a less severe sentence. Since there is no separate phase for sentencing in criminal proceedings in Germany, evidence intended to mitigate a sentence can only be introduced during the course of the trial. The defendant was eventually sentenced to life in prison. He later appealed to both the Federal Court

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1 It is undisputed that the conduct in question violated German law. The court of first instance specified that the methods employed in the interrogation violated the "human dignity" clause of Article 1 of the Grundgesetz für die Bundesrepublik Deutschland (which is the constitutional law of Germany). The Conduct also violated Article 136a § 1 of the German Criminal Procedure Code and Article 3 of the ECHR; cf. Gäfgen, supra note 2, at 8.

2 Two hematomas on then applicant's left chest were confirmed, together with superficial skin lesions, by a medical certificate issued a few days later by a police doctor: Gäfgen, supra note 2, at 7.

3 The German court found that since the defendant was advised of his right to remain silent and choose to self-incriminate the second confession could be admitted into evidence. Gäfgen, supra note 2, at 19.

of Justice and the Federal Constitutional Court, arguing that it was improper to admit into evidence items that had been illegally obtained. Both courts upheld the conviction. After the domestic judgment became final, Gäfgen lodged an application to the ECtHR, claiming to be the victim of a violation of both Article 3 and Article 6 of the ECHR.

The two police officers implicated in the mistreatment were subject to both criminal and disciplinary proceedings in Germany. On the criminal side, the officers were tried and convicted of coercion and incitement to coercion committed by an official in the course of his duties. Their sentences consisted of daily fines of €60 for 60 days for the police detective and €120 for 90 days for his superior, the deputy chief. Significantly, though, the court opted to suspend the fines, a measure that makes them payable in Germany only if the defendant police officers commit another offence during the probation period.[1] As justifications for leniency, the courts cited the «sole concern [of the police officers] to save the boy's life» and the «extreme pressure»[2] from the public. As disciplinary sanctions, both officers were transferred to posts that did not involve direct association with the investigation of criminal offenses. A few years later, the deputy chief was appointed as chief of the Police Headquarters for Technology, Logistics and Administration.[3] This combination of initial transfer and subsequent promotion demonstrates the lack of rigor in internal police discipline resulting from the violation in the German domestic realm.

III. The Enforcement of Human Rights in Europe

This section examines the enforcement mechanism established through the ECHR and the role of the ECtHR, with regard to its review of domestic criminal procedure and evidence. This discussion is essential in order to understand (a) how the Gäfgen case made its way to Strasbourg, and (b) what the long-term influence of the Gäfgen opinion on the exclusionary rule across Europe may be.

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1 Id. at 13.

2 Id.

3 Id. at 14. As this article was being submitted for publication, on August 6, 2011 the BBC reported that a German Court had finally awarded Gäfgen compensation for the mistreatment suffered at the hands of the German police. The damage award was 3,000 EUR. The authors believe that this paltry sum provides further evidence of the national denigration of human rights that are deemed non-derogable by the ECHR. This recompense, together with the minor discipline meted out to the German officers who coerced the confession, can only reinforce the argument for suppression as the only viable remedy for violations of important human rights while obtaining criminal evidence.

A. The Institutional Framework: Domestic Realms and the Law of the European Convention on Human Rights

The ECHR system may be regarded as the most advanced and effective international regime for formally enforcing human rights in the world today.[1] Since 1953, when the Convention came into force through an international treaty, it has sought to protect a structured set of civil and political rights[2] for all individuals subject to the jurisdiction of its Member States, whether those individuals are citizens, aliens or refugees.

Early on the Convention established a Commission to review applications. The Commission could investigate the case, seek to settle it, or forward it under certain circumstances to a court, the decisions of which governments were legally bound to follow as a matter of international law.[3] An originally optional clause of the Convention, later made mandatory, permits individual applications to the Court. In other words, any private individual or legal entity that claims to be the direct victim of a violation of a provision of the Convention can file an application. The right of individual petition means that «individuals now enjoy at the international level a real right of action to assert the rights and freedoms to which they are directly entitled under the Convention.»[4] The popularity of the ECHR system of human rights protection, and the large increase in individual applications to the Court, made significant reform necessary in 1998.[5] The Commission ceased to exist and the ad-

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1 See Harris et al., supra note 15, at 4: "Compared to most other international human rights treaties, the Convention has very strong enforcement mechanims"

2 The following rights, among others, are protected by the European Convention: the right to life (Art. 2); freedom from torture and inhuman and degrading treatment (Art. 3); the right to a fair hearing in civil and criminal matters (Art. 6); the right to respect for private and family life (Art. 8); freedom of expression (Art. 9); freedom of thought, conscience and religion (Art. 10); the right to the peaceful enjoyment of possessions (Art. 1 Protocol 1); and the right to vote and to stand for election (Art. 3, Protocol 1).

3 The historical developments of the European Court of Human Rights are described at length by Andrew Moravcsik, The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe, 54 International Organization 217 (2000) at 218.

4 Mamatkulov and Askarov v. Turkey, 2005-I Eur. Ct. H.R. 332, 333

5 The first ECtHR judgment was delivered on July 1, 1961. Lawless v. Ireland, 1961 Y.B. Eur. Conv. On H.R. 430 (Eur. Comm'n on H.R.). As explained in the 2011 Annual Report of the European Court of Human Rights (available at http://www.echr.coe.int), "in the early years, the number of applications lodged with the Commission was comparatively small, and the number of cases decided by the Court was much lower again. This changed in the 1980s, when the steady growth in the number of cases brought before Strasbourg institutions was compounded by the rapid increase in the number of

ministration of the Convention was assigned to two separate bodies: the new permanent Court[1] and the Committee of Ministers of the Council of Europe.[2]

As a general rule, applications to the ECtHR may only be filed upon exhaustion of domestic remedies and must be submitted within six months of the date on which a final decision is rendered at the domestic level. In criminal proceedings, the typical case involves a person who was found guilty in a judgment upheld by the Supreme Court of a Member State. Most criminal-related litigation before the ECtHR raises an issue of torture and inhuman and degrading treatment (under Article 3) or challenges the fairness of the proceedings brought against defendants at the national level (under Article 6). In Gäfgen, the applicant jointly filed these two claims.

B. The Impact of the Case Law of the ECtHR on National Systems of Criminal Justice

The European system for the protection of human rights has been the source of profound changes in the protection of rights across Member States in the last forty years.[3]

Member States". The 2011 Annual Report also shows that the number of applications registered annually with the Commission increased from 404 in 1981 to 4,750 in 1997. On a smaller scale, the Court's statistics reflected a similar story, with the number of cases referred annually rising from 7 in 1981, to 119 in 1997. Growth in the workload continued after the 1998 reforms. In 2010, the Court received 61,300 new applications and issued 2,600 judgments (with an 8% increase in comparison to 2009). For a full account of the steady rise in individual applications to the ECtHR, see Steven Greer, The European Convention on Human Rights: Achievements, Problems and Prospects 33-41 (2006).

[1] The ECtHR consists of a number of judges equal to the number of member States of the CoE that have ratified the Convention. Judges sit in their individual capacity and do not represent any State. The vast majority of the court's judgments are issued by "chambers" (i.e. panels of seven judges within a section). Judgments of each section may, under certain circumstances, be referred to the Grand Chamber (i.e. a panel of seventeen judges which also includes the President and the Vice-Presidents of the ECtHR). In case of referrals (such as in Gäfgen v. Germany), the Court does not include any judges who previously sat in the Chamber that first examined the case.

[2] The Committee of Ministers (CoM) is comprised of the foreign affairs ministers of all the member states, or their permanent diplomatic representatives in Strasbourg. In accordance with Art. 46 of the ECHR, the CoM supervises the execution of judgments of the ECtHR in the manner explained later in this paragraph.

[3] Over the last half–century, the legal commitments and enforcement mechanisms entered into under the ECHR have established a truly peculiar supranational adjudication system in Europe. Compliance is so consistent that ECHR judgments are, in the views of some leading international scholars, "as effective as those of any domestic court." See Laurence R. Helfer & Anne-Marie Slaughter, Toward a Theory

First, although the ECHR system does not impose upon States the obligation to make the Convention part of domestic law, almost all States have nevertheless incorporated the Convention into domestic law. They have even made the application of ECHR law mandatory within the domestic realms. In Germany, Italy and France, the ECHR has been granted the status of a federal statute,[1] which has some implication in the development of the Gäfgen case. In the United Kingdom, the ECHR was incorporated by virtue of the Human Rights Act of 1998. Typically, the Convention is granted some kind of infra-constitutional[2] ranking in the domestic realm, and the decisions of the ECtHR share the rank and significance of the text itself. In essence, the Convention and the precedents of the Strasbourg court are a source of domestic law and may be invoked directly by the national courts, as long as they do not conflict with the State's own constitutional law. Further, the ECHR is now regarded by domestic courts and commentators as a «shadow Bill of Rights,» especially where no established domestic jurisprudence had been developed. These developments have prompted the Strasbourg Court to conclude that the European Convention is ''a constitutional document of European public order.''[3]

Second, major constitutional and statutory reforms at the national level have been prompted by the opinions of the Strasbourg Court.[4] This

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of Effective Supranational Adjudication, 107 YALE L. J., 273, 283 (1997). In hundreds of cases in which a finding of violation was made in Strasbourg, Member States have amended legislation, granted administrative remedies, or paid monetary damages to individuals whose treaty rights were violated. In countless additional cases, litigants have successfully pleaded the ECHR before domestic courts. See Andrew Moravcsik, The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe, 54 International Organization 217, 219 (2000).

1 Sasa Beljin, Bundesverfassungsgericht on the Status of the European Convention of Human Rights and ECHR Decisions in the German Legal Order. Decision of 14 October 2004, EUR. CONST. L. R. 553, 556 (2005).

2 Along with Germany, this is also the case in Italy and France. In the United Kingdom, the Human Rights Act 1998 allows a limited measure of judicial review of primary legislation but "does not directly threaten parliamentary sovereignty." See David Feldman, The Human Rights Act 1998 and Constitutional Principles, 19 Legal Studies 165, 186 (2006). However, in some countries such as Austria, the ECHR has direct constitutional standing (see Austrian Constitutional Court collection of cases No. 5100/1965).

3 Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) at 76 (1995).

4 The most updated and comprehensive account and assessment of the reception process across Europe can be found in Helen Keller & Alec Stone Sweet, A Europe of Rights: The Impact of the ECHR on National Legal Systems (2008). The book includes a series of national reports and selected statistics.

is also true in the fields of criminal evidence and procedure, although these remain today a pretext for national parochialism. By way of illustration, the «fair trial» discourse developed over the last three decades in ECHR law led to the 1999 fair trial amendment to the Italian Constitution[1] and the 2000 reform of the French Code de procédure pénale.[2] Further, ECtHR precedents directly led to national reforms to certain especially sensitive areas of criminal procedure such as–among many others–the use of anonymous witnesses in the Netherlands,[3] the practice of unreasoned verdicts by juries in Belgium,[4] and the rules for detention and questioning of suspects in Scotland.[5]

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1 Article 111 of the Italian Constitution is now an almost literal reproduction of Article 6 of the ECHR. For more discussion, see Stefano Maffei & Isabella Merzagora Betsos, Crime and Criminal Policy in Italy: Tradition and Modernity in a Troubled Country, Eur. J. of Criminology 461-482 (2008).

2 Following the 2000 statutory reform, a preliminary section was added to the French Code of criminal procedure. This section enlists the guarantees of criminal defendant, in a fashion that closely resembles the letter and spirit of Art. 6 ECHR. In France, a 2000 statutory reform repealed and amended more than 170 articles of the *Code de procedure pénale* and inserted more than 80 new ones, thus leading commentators to announce the birth of a new French criminal procedure. Mireille Delmas-Marty, *Une nouvelle procédure pénale?,* Revue de Science Criminelle et de droit penal compare 3 (2001).

3 Cf. Doorson v. The Netherlands, 1996-II Eur. Ct. H.R. 447, in which no violation of Art. 6 was found with regard to statements from anonymous witnesses that had been admitted into evidence in accordance with the "stricter requirements" set by the Dutch statute 603/1993. Statutory reform had been prompted by an earlier finding of violation on the same matter in Kostovski v. the Netherlands, 166 Eur. Ct. H.R. (ser. A) (1989).

4 Taxquet v. Belgium, Eur. Ct. H.R., App. No. 926/05 (16 November, 2010).

5 This is a good example of the far-reaching transnational impact of ECtHR rulings across Europe. In the leading case Salduz v. Turkey, 49 Eur. Ct. H.R. 19 (2008), the Grand Chamber held that a lack of access to legal assistance while the suspect was in police detention had disclosed a systemic violation of the ECHR (see Executive summary, SPICe Briefing-Criminal Procedure: Responses to Cadder v HM Advocate, page 3, available at http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S3/SB_11-20.pdf) This case involved a minor who had been subjected to a custodial interrogation without the benefit of counsel. During the course of the interrogation, the defendant made admissions which he retracted at trial, claiming they were induced by coercive tactics by the police. His successful Article 6 claim induced the Lord Advocate of Scotland to promulgate "interim guidelines" and later revised guidelines regarding access to attorneys during interrogation. Later, in October 2010, the UK Supreme Court ruled, in a unanimous opinion, that Scottish law, which permitted the police to interrogate suspects in the absence of counsel, was "incompatible" with Article 6 of the ECHR: Cadder v. HM Advocate [2010] UKSC 43. Amendments to Scottish legislation were then enacted via Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 , bringing Scotland into compliance with Cadder and the European Convention system.

Third, and perhaps most importantly, the ECtHR is increasingly seen as delivering «constitutional justice.»[1] In general terms, the ECtHR should not be confused with a national Supreme Court, or a national Constitutional Court, as the ECtHR does not possess the authority to reverse decisions by national courts or void national laws.[2] Although final and binding on the State Respondent, the ECtHR does not have the authority to review a domestic criminal conviction and set a defendant free. Rather, it is often said that the ECtHR pronounces declaratory judgments–i. e. it only states that there was (or there was not) a violation of a right protected by the ECHR in the domestic realm.[3] Further, ECtHR rulings are not aimed at condemning a given section of the law as «illegal» or «unfair,» as the Court's decisions are always confined to the case brought before its attention. In other words, the Court does not assess whether national law was correctly applied or whether national law might be contrary to the ECHR system. Instead, the Court's task under the Convention is to ascertain whether the applicant was subject to a violation of one of the Convention's rights in the domestic proceeding brought against him or her.[4]

On these assumptions, one could conclude that the ECHR regime is merely geared to delivering thoughtful assessments on the alleged violation (or non-violation) of a given right in a given case. Such conclusion, however, would be inaccurate because further steps are called for at national level when a violation is found. According to the Convention, members of the Council of Europe bear a duty to ensure an effective remedy to any individual who has been a victim of a violation of the ECHR for which the State is responsible.[5] Whenever the Court

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1 Keller & Stone Sweet, supra note 37, at 703. "No longer does [the Convention] express the identity of western European liberal democracy in contrast with the rival communist model of central and eastern Europe: it now provides an "'abstract constitutional identity' for the entire continent" according to Greer, supra note 30, at 170–71.

2 The ECtHR has made it clear on several occasions that it does not constitute a further court of appeal, i.e. a fourth instance from the decisions of national courts applying national law. In the words of the Court, "it is not its function to deal with error of fact or law allegedly committed by a national court". Ruiz v. Spain, 1999-I, Eur. Ct. H.R. 87, 28.

3 For more discussion on the nature of ECtHR judgments, with specific regard to Article 6 claims, see also Harris et Al., supra note 15, at 201–204.

4 To put it differently, the task of the ECtHR in cases concerning criminal evidence is "to ascertain whether the proceeding as a whole, including the way in which the evidence was taken, were fair" to the applicant. Cf. Kostovski, supra note 40, at ¶ 39.

5 Art. 13 ECHR.

concludes that there has been a breach of the Convention, the respondent State is under a legal obligation to put an end to the breach and make reparations for its consequences in such a way as to restore, as far as possible, the situation existing prior to the violation. The Committee of Ministers supervises this, as the Court has no authority to directly enforce the judgment within the domestic realm.[1]

In this regard, a quiet revolution has been occurring within the discourse on human rights across Europe. For decades, the Committee's oversight was limited to ensuring that «just satisfaction,»[2] in the form of a sum of money, was paid to the applicant who was found to be the victim of a violation. More recently, however, the Committee of Ministers took a far more active stance in applying Article 46 of the ECHR, by virtue of which Member States «undertake to abide by the final judgment of the Court in any case to which they are parties.»[3] The

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1 By virtue of Article 46 para. 2 of the Convention, the task of execution and enforcement of judgments falls to the Committee of Ministers of the Council of Europe (see below).

2 Art. 41 ECHR. Typically, the Strasbourg Court makes awards under three headings: costs and expenses, awards for pecuniary damage and awards for non-pecuniary damage. The award of a just satisfaction, however, is not a right when a violation is found and the ECtHR has frequently decided to hold that the finding of a violation is, in itself, sufficient vindication of the applicant's rights. Cf. Harris et Al., supra note 15, at 857.

3 As per Art. 46 of the Convention, the legal obligation to comply with ECHR judgments concerns all the authorities within Member States (courts, regions, government agencies, etc…). When a final judgment finding a violation of the ECHR is issued, the Member State is thus responsible for identifying the relevant domestic authorities that should be informed of the judgment, in particular when these authorities are called to take execution measures. The Government has then to report to the Committee of Ministers (CoM) of the measures envisaged, the domestic authorities involved and the foreseeable timetable for adoption of the remedial measures. The CoM is supposed to supervise the progression of such measures and, in case of difficulties or delays, to seek appropriate solutions in cooperation with the relevant authorities and the State's Delegation. Some violations are thus addressed and possibly resolved by the domestic courts, as these gradually align their precedents with the dicta of ECtHR. If the courts (or any other domestic authorities) fail to take the necessary measures, the Member State's responsibility is at stake and other domestic authorities might have to intervene in order to achieve the expected result: while the State is indeed free, within certain limits, to choose the means of execution, it is legally bound to attain the execution result required. A good example in this respect is the adoption of legislative measures where the expected change of case law did not take place. It should be noted that in States where the ECHR and its case law enjoy direct effect and are therefore directly applied by the Courts, "it has sometimes been possible to invalidate, through judicial procedures, legal provisions that ran contrary to the ECHR" (as reported by the European Court of Human Rights, in its own website: http://www.coe.int/t/dghl/monitoring/execution/presentation/faq_EN.asp).

establishment of an effective remedy by the Member State is crucial in criminal matters. Since the late 1990s, due to political pressure from the Council of Europe[1] and increasing public demands for rights-based reforms of the criminal justice system, most States have introduced statutory reforms[2] of criminal procedure to allow the reopening[3] of national criminal proceedings after a non-favorable judgment from the ECtHR (the only notable exception being Italy).[4] This is truly remarkable if one

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1 See CoM, Recommendation No. R (2000)2 "on the re-examination or reopening of certain cases at domestic level following judgments of the EctHR", in which the CoM encouraged the Contracting Parties "to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention, especially where: (i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and (ii) the judgment of the Court leads to the conclusion that (a) the impugned domestic decision is on the merits contrary to the Convention, or (b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of.

2 For examples, see the 1998 amendment to §359, German Strafprozessordnung (StPO) and the 2000 amendment to Art. 525 of the Greek Criminal Procedural Code. See also Art. 122, 2005 Statute of the Swiss Federal Supreme Court; Art. 413 para 4 No. 2 Russian Criminal Procedural Code; Art. 540 para 3, Polish Criminal Constitutional Code; Art. 443, Criminal Procedural Code of Luxemburg; Article 391 No. 2, Code of Criminal Procedure of Norway, Art. 406, Criminal Procedural Code of Hungary. In France, Statute 516/2000 introduced a specific means of redress termed "Réexamen d'une décision pénale consécutif au prononcé d'un arrêt de la Cour européenne des droits de l'homme, which is governed by Article 626-1 to 626-7 of the Code de procédure pénale; cf. R. De Gouttes, La Procedure de Réexamen des Decisions Pénales après un Arrêt de Condamnation de la Cour Européenne des Droits de l'Homme, in Libertés, Justice, Tolerance. Mélanges en Homage au Doyen Gérard Cohen-Jonathan 563 (2004). Elsewhere, steps were taken by the domestic courts so to allow the reopening of proceedings based upon existing statutory provisions. In Denmark, for instance, following Jersild v. Denmark, 298 Eur. Ct. H.R. (ser. A) (1994) (finding of a fair trial violation), the impugned criminal proceedings were reopened under Art. 441 of the Code of Criminal Procedure, which provides for this possibility in the case of an unlawful decision by a national court.

3 Incidentally, it must be noted that in Gäfgen the applicant did not claim any award for pecuniary or non/pecuniary damage (see discussion supra at note 49), and he stressed that the only objective of his application was to obtain a retrial before the domestic court (cf. ¶ 190).

4 Failure to reopen domestic criminal proceedings following a judgment of violation has on some occasions sparked tension between the CoM and the relevant Member State. In Hulki Güneş v. Turkey, 2003-VII *Eur. Ct.* H.R., the applicant had been sentenced to death (later commuted to life in prison) and the ECtHR found violations of his right to a fair trial on account of the lack of independence and impartiality of the tribunal due to

considers that, de facto, the ruling of a panel of essentially «foreign» justices–who are appointed to the ECtHR following a nomination by foreign governments–may well open the doors to the reversal of a domestic final judgment on matters of law.[1] No other international treaty has ever triggered the same effect.

Given its widely acknowledged quasi-constitutional standing in the post-reform era, the Strasbourg Court functions as an authoritative source of rights jurisprudence for all of Europe. Yet, the Court is also dramatically influenced by the need to maintain its legitimacy. Its legitimacy may be impaired if the Strasbourg Court finds a violation that implies the law in the vast majority of Member States was inconsistent with the terms of the Convention. This is the reason why it has traditionally been much easier for the ECtHR to «name and shame» domestic practices that fall short of a given European standard than to propose progressive measures beyond what is said to be the common practice, if any, of Member States.[2]

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the presence of a military judge on the bench (Art. 6, para 1 ECHR) and the impossibility for the applicant to examine or to have examined the witnesses who testified against him (Art. 6 para 3(d) ECHR). In three separate resolutions (one in 2005 and two in 2007), the CoM deplored the fact that the 2003 Turkish statute that provided for the reopening of proceedings for human rights violations did not cover cases that were held or pending at the ECtHR before 2003. While significant political pressure can be mounted by the CoM, compliance by Member States might still prove an insurmountable task in certain situations: in Italian criminal procedure, for example, one cannot yet find a remedy to reopen a domestic proceeding following a finding of violation in Strasbourg, in spite of the "serious concerns" voiced by the Strasbourg bodies (cf. CoE, Interim Resolution ResDH (2004) 13, Dorigo v. Italy, App. No. 33286/96).

[1] This is not to argue that the national courts are invariably under an obligation to reverse the prior ruling. In broad terms (and subject to domestic specifications), in a reopened proceeding national courts must abide by the ruling of the ECtHR on matters of law, but they might also have to take into consideration a change of factual circumstances, or a different assessment of the evidence, which might be relevant to the case. This does not amount to a violation of the ECHR, as it derives from the rather obvious fact that "reopened proceedings are not necessarily limited to the grounds which required the reopening"; cf. Matthias Hartwig, Much Ado About Human Rights: The Federal Constitutional Court Confronts the European Court of Human Rights, 6 GERMAN L.J. 869, 887 (2005).

[2] In practice, the consequence is that domestic rules may more likely escape condemnation if and when they reflect the practice of a majority of the Member States. An example is the "judgment in public" clause of Article 6, ECHR, which has been read in a relaxed way by the ECtHR, given that most Supreme Courts in civil jurisdictions do not deliver orally in open court. See Pretto v. Italy, 71 Eur. Ct. HR. (ser. A)(1983).

After all, this practice is consistent with the scope of the Convention, which is to establish a minimum level of protection of rights and freedoms across Europe. The significance of ECtHR decisions to the Member States is reminiscent of the treatment of United States Supreme Court decisions in criminal procedure matters in the fifty U. S. states. In the United States, it is accepted that a Supreme Court decision that recognizes a procedural right of a criminal defendant in the federal Bill of Rights provides a «constitutional floor» below which state law may not go. When the Supreme Court chooses to cut back on a defendant's constitutional protections, however, a state court is not required to follow such a restriction. Each state has a right to interpret its own state constitution's bill of rights (which usually mimic the language of the federal Bill of Rights).[1] Similarly, a state court can expand the protections it provides its criminal suspects beyond the protections announced by the Supreme Court by interpreting its own state constitution more liberally.

[1] The "New Federalism" emerged during the 1970's when state courts began to interpret their state Bill of Rights provisions in a way that is more protective of Fourth, Fifth and Sixth Amendment rights than the United States Supreme Court's interpretation of those same rights set forth in the U.S. Constitution. Justice Brennan expressed his approval of this "New Federalism" as early as 1977. Writing in the Harvard Law Review at a time when the U.S. Supreme Court was contracting individual rights, Justice Brennan wrote: "state courts cannot rest when they have offered their citizens the full protections of the federal Constitution. State courts, too, are a fount of individual liberties, their protections often extending beyond those required Supreme Court interpretations of federal law," William J. Brennan, State Courts and Protection of Individual Rights, 90 Harv. L. Rev. 489, 491 (1977). The most widespread use of the doctrine has been seen in numerous State Supreme Court decisions which have refused to engraft the U.S. Supreme Court's announcement of a "good faith exception" to the exclusionary rule (see People v. Bigelow, 488 N.E.2d 451 (N.Y. 1985); State v. Novembrino 519 A.2d 820 (N.J. 1987); State v. Carter, 370 S.E.2d 553 (N.C. 1988); Commonwealth v. Edmunds, 586 A.2d 887 (P.A. 1991)). For some of the rich literature on the subject, see, Michael K. Schneider, An Exclusionary Rule Colorado Can Call Its Own, 63 U. Colo. L. Rev. 207 (1992); Katrina Patrick, Autran v. State Fourth Amendment Judicial Independence Et Tu Texas, 20 T. Marshall L. Rev. 385 (1995); Carrie Leonetti, Independent and Adequate Maryland State Exclusionary Rule for Illegally Obtained Evidence, 38 U. Balt. L. Rev. 231 (2009); James W. Diehm, New Federalism and Constitutional Criminal Procedure, 55 Md. L. Rev. 223 (1996); Paul Cassell, The Mysterious Creation of Search and Seizure Rules Under State Constitutions and the Utah Example, 1993 Utah L. Rev. 751 (1993), Sanford E. Pitler, The Origin and Development of Washington's Independent Exclusionary Rule, 61 Wash. L. Rev. 459 (1986); Robert M. Bloom and Hillary Massey, Accounting for Federalism in State Courts: Exclusion of Evidence Obtained Lawfully by Federal Agents, 79 U. Colo. L. Rev. 381 (2008).

IV. Mistreatment in the Course of an Interrogation and «Means of Redress»

A. «Torture» and «Inhuman Treatment» in European Human Rights Law

As mentioned earlier, Gäfgen filed two separate claims before the ECtHR. As is the practice in Strasbourg, the claims were jointly addressed by both Section V in the 2008 opinion and the Grand Chamber in the 2010 final ruling.[1] The 2008 six-to-one decision announced that under Section V of the ECtHR the applicant could no longer claim the status of victim of torture and inhuman treatment under Article 3 and that his right to a fair trial under Article 6 had not been violated.[2] In 2010, the Grand Chamber partially overturned that decision and stated that Gäfgen was indeed still a victim of a violation of Article 3 because the German authorities had not provided adequate redress for the violent conduct of its police officers during interrogation. Nevertheless, at the same time, the Grand Chamber denied the claim under Article 6, albeit by an unusually slim majority (11-6).[3]

Although the core of the ECtHR argument on the scope of the exclusionary rule in criminal procedure is found in its response to the Article 6 claim (trial fairness), the Grand Chamber's reasoning concerning the Article 3 claim (torture and inhuman treatment) is significant for two reasons.

First, the specific characterization of the police misconduct–whether torture or inhuman treatment–is considered under the Article 3 claim, and the ECtHR later attaches major consequences to this distinction. Second, the appropriate means of redress for an Article 3 violation at the national level is analyzed therein, and this analysis also impacts the subsequent holding concerning the scope of the exclusionary rule.

With respect to the qualification of mistreatment, it is undisputed that the manner in which the suspect was questioned in the German

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1 At the outset, each individual application addressed to the ECtHR is assigned to one of its seven "Sections." Typically, a Chamber of seven judges within the Section shall decide on the admissibility and merits of the applications. Chambers may relinquish jurisdiction in favor of the Grand Chamber (under the terms of Art. 30 ECHR) with the parties' consent, which is a rare occurrence. In addition, any party to the case may request that a case already decided by a Chamber be referred to the Grand Chamber, in terms described above (supra, note 2). This was the case in Gäfgen.

2 Gäfgen, App. No. 22978/05, Judgment of the V Section (30 June 2008), at ¶¶ 82, 109.

3 Gäfgen, supra note 2, at ¶ 49. Although no official data are available on this specific matter, the practice of separate opinions (whether concurring or dissenting) is far less developed at the ECtHR than in the appellate courts of the United States.

police station in 2002 breached Article 3 of the ECHR.[1] German courts acknowledged that the first confession was obtained through methods of coercion, overpowering the will of the accused.[2] Significantly, the Grand Chamber characterized the methods employed during the custodial interrogation as «inhuman treatment,» rather than «torture.»[3] This distinction is a crucial aspect of the decision. The related holding on this specific issue reads as follows: «the method of interrogation to which [the defendant] was subjected in the circumstances of this case was sufficiently serious to amount to inhuman treatment…but…it did not reach the level of cruelty required to attain the threshold of torture.»[4] According to the Grand Chamber, the fact that the treatment lasted «for only approximately ten minutes outweighed the deliberate and immediate pain and suffering inflicted on a subject in custody, handcuffed, and in an obvious state of vulnerability.»[5] The Grand Chamber treated the case as an instance of «threat to torture and sexual abuse,» rather than actual torture, and thus characterized it as inhuman treatment.[6] Although this characterization is consistent with ECtHR precedents on the matter,[7] the

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1 As explained above (supra note 20), the issue was raised promptly before the competent German court and the court acknowledged that the treatment in question amounted to an Article 3 violation.

2 Gäfgen, supra note 2, at 29.

3 In ECHR case law, the distinction between torture and inhuman treatment is "frequently one of degree." Robin C.A. White & Clare Ovey, The European Convention on Human Rights 170 (5th ed. 2010). The U.N. General Assembly's definition of torture, often quoted by the ECtHR, states that "torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment." G.A. Res. 3452 (XXX), ¶ 7, U.N. Doc. A/RES/3452(XXX) (Dec. 9, 1975).

4 Gäfgen, supra note 2, at 27.

5 Id. at 26.

6 Gäfgen, supra note 2, at para 108. See also Campbell v. U.K., 48 Eur. Ct. H.R. (ser. A) (1982) at 12 ("To threaten an individual with torture might in some circumstances constitute at least inhuman treatment").

7 In the last decades, ECtHR case law has addressed rather extreme incidents of Article 3 violations caused by misbehaviors of domestic police forces during the custodial interrogations of suspects. Instances of torture include, among others, severe beatings over a prolonged period of time ("several hours" in Menesheva v. Russia, 2006-III Eur. Ct. H.R. 139); foot whipping (Salman v. Turkey, 2000-VII Eur. Ct. H.R. 365.); "Palestinian" hanging (Levinţa v. Moldova, App. No. 17332/03 (2008), and rape during custody (Aydin v. Turkey, 1997-VI Eur. Ct. H.R. 1866. In the leading case Selmouni v. France, 1999-V Eur. Ct. H.R. 149, a "large number of blows" over two days of questioning was regarded as torture. In comparison, in Ribitsch v. Austria, 336 Eur. Ct. H.R. (ser. A) (1995), a combination of multiple blows and insults fell short of torture and was qualified as "inhuman treatment." Similarly, beatings by the police over a short period "of heightened tension and emotions" were qualified as inhuman treatment in

novelty of the Gäfgen opinion lies in the consequences drawn from the characterization.

Gäfgen is the first ECtHR case in which the distinction between the two types of Article 3 conduct–torture and inhuman treatment–had a direct impact on the question of the admissibility of the evidence found as a result of the violation and on the fairness of the subsequent trial. As is explained in more detail in Part V of this Article, it appears that the ECtHR might be willing to recognize a rule of exclusion of derivative evidence in case of torture because its use would shock the conscience of a court. However, the ECtHR took the view that the shock-the-conscience reasoning would not automatically apply to «mere» inhuman treatment even though admitting such derivative evidence would give legitimacy to morally reprehensible behaviour. This is true despite the fact that inhuman mistreatment is encompassed in Article 3, which is generally referred to as fundamental and is considered to enshrine one of the foundational and non-derogable values of democratic societies.[1] Moreover, the European Convention treats the entire provision of Article 3 as non-derogable even in time of emergency and fundamental to the European concept of human rights.[2] «Disturbing» as it might have appeared to some of the dissenters,[3] the distinction between torture and inhuman treatment turns out to be one of the key factors that led the Grand Chamber to approve the German court's use the poisoned fruits of Gäfgen's coerced confession.

In fairness, the temptation to selectively apply an exclusionary rule based on the nature of a constitutional violation is not uncommon. In the United States, for instance, some constitutional rights receive greater protection than others. For example, a coerced (involuntary) confession, or its derivative fruits, cannot be used for any purpose, including wit-

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Egmez v. Cyprus, 2000-XII Eur. Ct. H.R. 315. Admittedly, the pain inflicted upon the defendant in the Gäfgen case was less severe than in the cases of Egmez and Ribitsch.

1 A. Ashworth, The Exclusion of Evidence Obtained by Violating a Fundamental Right: Pragmatism Before Principle in the Strasbourg Jurisprudence, in Criminal Evidence and Human Rights - Reimagining Common Law Procedural Traditions (P. Roberts & J. Hunter eds., 2012) 147.

2 Art. 15 para 2 lists the non-derogable provisions of the ECHR: Article 2 (right to life, except in respect of death resulting from lawful acts of war), Article 3 (prohibition of torture and inhuman or degrading treatment or punishment), Article 4 para 1 (prohibition of slavery) and Article 7 (no punishment without law).Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Nov. 4, 1950, E.T.S. 005.

3 See Gäfgen, supra note 2, at 49 (Joint Partly Dissenting opinion of Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku and Power).

ness impeachment.[1] However, a confession resulting from a «Miranda violation» without threats or abuse may yield admissible fruits and can be used to impeach the defendant's credibility.[2] The prosecution's failure to produce exculpatory evidence is never considered harmless and always leads to an automatic reversal,[3] while the admission of a coerced or Miranda-violating confession can amount to a harmless error in the face of other overwhelming and untainted evidence of guilt.[4]

As outlined infra in Part III, the ECHR system requires all applicants to seek relief primarily in the domestic realm, while resort to the Strasbourg Court is permissible only after all domestic remedies have been «exhausted,» a term that accounts for any effective means of redress at the domestic level. The question was not whether Gäfgen was subjected to a human rights violation during interrogation, but whether he later lost his victim status because such violation might theoretically have been redressed by the German authorities. In fact, when adequate redress is offered at the national level[5] the «victim» requirement under Article 34 of the ECHR is no longer satisfied thereby and the applicant lacks standing before the ECtHR.[6]

Traditionally, the ECtHR's assessment of the adequacy of the redress is performed on a case-by-case basis and applies a totality-of-the-circumstances standard.[7] In Article 3 cases, the Strasbourg Court has repeatedly held that two measures are necessary to provide sufficient redress. First, the Member State authorities must have concluded a thorough and effective investigation leading to the identification and appropriate punishment of those state actors responsible.[8] Secondly, an effective compensation procedure must be made available to the applicant, such that he or she may recover damages for the mistreatment suffered.[9]

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1 Mincey v. Arizona, 437 U.S. 385 (1978).
2 Harris v. New York, 401 U.S. 222 (1971).
3 Kyles v. Whitley, 514 U.S. 419 (1995).
4 Arizona v. Fulminante, 499 U.S. 279 (1991).
5 In practice, this may occur through successful appeals or a subsequent court decision that acknowledges the violation and provides an effective "remedy."
6 For more discussion on the victim requirement in ECHR law see Pieter van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* 46-60 *(3 ed*., 1998).
7 Eckle v. Germany, 51 Eur. Ct. H.R. (ser. A) at 30 (1982).
8 Çamdereli v. Turkey, App. No. 28433/02 (2008), at ¶¶ 28-29.
9 Vladimir Romanov v. Russia, App. No. 41461/02 (2008) at ¶ 79.

In Gäfgen, the Grand Chamber was not persuaded that the German authorities had provided an adequate response in order to remedy the mistreatment of the defendant. More specifically, the ECtHR found shortcomings especially with regard to the first requirement. The Grand Chamber accepted that the investigation and proceedings against the police officers were sufficiently prompt and expeditious and that responsibilities were eventually established. However, the «token» fines imposed against the police officers were regarded as manifestly disproportionate to a breach of one of the core rights of the Convention.[1] The leniency in both criminal and disciplinary sanction was regarded as lacking «the necessary deterrent effect in order to prevent further prohibition of ill-treatment in future difficult situations.»[2]

«Remarkably, the Grand Chamber majority's argument that the loss of victim status under Article 3 depends on the severity of the penalty» against the police officers led to strong dissents from both the «hardliner» champions of the «public interest»[3] and the most progressive supporters of individual rights.[4] Against a backdrop of case law that treats sentencing as a matter to be left to the margin of appreciation of domestic authorities,[5] the hardliners wondered «what degree of punishment the ECtHR should accept in order to find that the applicant is no longer a victim.»[6] By contrast, the Grand Chamber's progressive minority argued for the application of the exclusionary rule to the illegally obtained item as the only adequate means of redress capable of preventing the Convention rights from becoming theoretical and illusory.[7]

In essence, the Grand Chamber of the ECtHR did not rule out the possibility that, based upon a case-by-case assessment, exclusion of the

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1 Gäfgen, supra note 2, at 6.

2 Id. at 33 In addition to the ECtHR's dissatisfaction with the (extremely-bias?) lenient sanctions imposed by the German courts, the ECtHR was also concerned with the fact that Gäfgen's compensation claim and the preliminary action to attain legal aid for that claim had taken more than three years to be addressed in Germany.

3 Id. at 56 (partly dissenting opinion of Casadevall, J., joined by Kovler, Mijović, Jaeger, Jočienė and López Guerra, JJ.)

4 Id. at 49 (joint partly concurring opinion of Tulkens, Ziemele and Bianku, JJ.)

5 On the "margin of appreciation" doctrine see the landmark case, *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at ¶¶ 47–48 (1976). For insights into the doctrine see Harris et al., supra note 15, at 11; Howard Charles Yourow, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence (1996).

6 Gäfgen, supra note 2, at 56 (partly dissenting opinion of Casadevall, J., joined by Kovler, Mijoviæ, Jaeger, Jočienė and López Guerra, JJ.)

7 Id. at 49

evidence might occasionally be a necessary means of redress in cases «in which the deployment of a method of investigation led to disadvantages» for the applicant.[1] Yet, it is hard to imagine a case more suitable than Gäfgen for drawing such a conclusion, since all the items of physical evidence available to the prosecutors in Gäfgen were the derivative product of the earlier confession obtained through coercion.

B. Redress for Illegally Obtained Evidence in the U. S. System

The notion that exclusion of the evidence is the only effective means of redress for a constitutional violation has been developed over five decades of U. S. Supreme Court jurisprudence. The Grand Chamber's progressive group of dissenters appeared to rely on this.

In Mapp v. Ohio, the Supreme Court announced that the exclusionary rule for illegally obtained evidence (in that case, the product of an illegal search and seizure) must be applied by state as well as federal courts.[2] Prior to Mapp, the Court had required only that both state and federal courts exclude coerced confessions.[3] After Mapp, the Court extended the exclusionary rule to Miranda-violating confessions,[4] post-formal charge confessions obtained by police in the absence of counsel and waiver, unduly suggestive or post-indictment interrogations without counsel, line-ups, and show-ups.[5]

In Mapp (and earlier in Elkins v. United States[6]), the Court recognized two distinct rationales to support the exclusion of illegally obtained evidence. [7]

First, the Court stated that exclusion preserves «judicial integrity»–i. e., it avoids the unconscionable and unseemly participation by a court in admitting evidence obtained in violation of the constitutional law it is sworn to uphold. According to the Court in Mapp, «Nothing can

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1 Id. at 33.

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

3 See Brown v. Mississippi, 297 U.S. 278, 287 (1936).

4 Miranda, 384 U.S. 436 (Supreme Court ruled that exclusionary rule forbids admission of statements obtained in custodial interrogation in the absence of warning and waiver of rights).

5 See Massiah v. United States, 377 U.S. 201 (1964) (the Court ruled that the exclusionary rule forbids admission of post-indictment confessions obtained in the absence of counsel and waiver); Stoval v. Denno, 388 U.S. 293 (1967) (excluded evidence of police identification procedures which are unduly and unnecessarily suggestive); United States v. Wade, 388 U.S. 218 (1967) (Court excludes post-indictment line-up obtained in the absence of counsel and waiver).

6 364 U.S. 206, 222 (1960).

7 Mapp, 367 U.S. at 659.

destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.»[1] Second, the Supreme Court identified a «deterrence» rationale, finding the only effective deterrent to police violating the Constitution is both the threat and reality of exclusion from trial.[2] In supporting the deterrence rationale, the Court flatly rejected the notion that (1) a generally illusory civil damage remedy, (2) public outrage at the police behavior, or (3) internal police administrative discipline would have any meaningful deterrent effect.[3] In later cases, namely United States v. Calandra,[4] Stone v. Powell,[5] and United States v. Janis,[6] the Court essentially abandoned the «judicial integrity» argument in favor of Mapp's other stated rationale, i. e., deterrence.

As to the first aspect, common sense and experience dictate that it is nearly impossible to obtain a civil damage award in favor of a convicted criminal against overzealous police officers who successfully uncovered serious wrongdoing in an improper manner.[7] This could perhaps be less of a concern in Europe, where most trials against police officers would be held before professional judges as opposed to juries. In addition, in the United States, most police officers and supervisors are generally hostile to rules of exclusion because these rules are thought to «handcuff the police.»[8] Officers are even promoted based on their «clearance rate» (calculated by deciding if «we got the right guy,» rather than conviction rates).[9]

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1 Id. at 660.

2 Mapp, 367 U.S at 656.

3 In Mapp, the Court, announcing that the Fourth Amendment exclusionary rule is applicable in state prosecutions, took special note of the fact that the experience in various states of using remedies other than exclusion had proved "worthless and futile." Id. at 654.

4 United States v. Calandra, 414 U.S. 338 (1974).

5 Stone v. Powell, 428 U.S. 465 (1976).

6 United States v. Janis, 428 U.S. 433 (1976).

7 The Seventh Amendment to the U.S. Constitution codifies the right to a jury trial in almost all civil cases. Although the civil jury right is not incorporated to the states, most states provide for jury trials in civil proceedings of any significance. Ordinarily, police officers sued for civil damages would demand trial by jury.

8 Samuel Walker & Charles Katz, The Police in America, (7th ed. 2011) McGraw Hill at 478.

9 Charles Wellford & James Cronin, Clearing up Homicide Clearance Rates, National Institute of Justice Journal, Apr. 2000, at 3.

V. The European Approach to the Exclusionary Rule: Affording the Cloak of Law to Coerced Confessions

As opposed to the current United States view of the exclusionary rule, which turns entirely on a deterrence rationale, the question of exclusion in Strasbourg was about fair trial rights; in other words, whether the use of evidence obtained as a direct or indirect result of a violation of Article 3 in the subsequent criminal trial would deprive the defendant of a fair trial under the terms of Article 6. Difficult as the Gäfgen case was, it presented the Grand Chamber with a clear opportunity to rule upon the exclusionary rule with respect to any derivative means of proof obtained by a breach of Article 3. The ECtHR could have definitively answered the question by asserting that «irrespective of the conduct of the accused, fairness presupposes respect for the rule of law and requires, as a self evident proposition, the exclusion of any evidence that has been obtained in violation of Article 3.»[1] This was not how the court ruled, however. The ECtHR's failure to draw a bright-line rule on the fruits of coerced confessions casts serious doubts on the fundamental structure of the Convention system, notably in relation to the ability of the Strasbourg Court to impact Article 6-related matters.

Admittedly, there are only a few general principles of criminal evidence in ECHR law. The ECHR does not lay down a comprehensive set of rules for the admissibility of evidence in criminal proceedings and the Strasbourg Court systematically refers back to national laws for questions of admissibility. An oft-repeated assertion is that the admissibility of evidence «is primarily a matter for regulation under national law» and that it is not the role of the Court to determine in abstracto whether specific items of evidence may be excluded.[2] ECtHR precedents also state that, given the need to assess trial fairness on the basis of all the circumstances of the case, there may well be significance in determining whether the evidence under scrutiny played a decisive or marginal role in securing the conviction of the defendant at the domestic level.[3] That being said, the ECtHR will not generally review the as-

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1 Gäfgen, supra note 2, at 51 (Jointly Partly Dissenting Opinion of Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku and Power).

2 See generally, Schenk v. Switzerland, 140 Eur. Ct. H.R. (ser. A) at 29 (1988), para. 45; *Teixeira de Castro v. Portugal*, 1998-IV Eur. Ct. H.R. 1451, 1462, para. 34; Gäfgen, supra note 2, para. 162.

3 For example, the ECtHR rulings on the right to confrontation (Article 6 para 3(d) ECHR) are heavily influenced by arguments of corroboration. The use in evidence of non-confronted statements from absent, anonymous or vulnerable witnesses is far

sessment of the evidence by a national court, only doing so where the national court has drawn an «arbitrary or grossly unfair conclusion from the facts submitted to it.»[1]

Nonetheless, a number of ECtHR cases suggest that the use of confessions obtained as a direct result of violence, brutality or any other conduct that could be characterized either as torture or inhuman treatment always render the subsequent trial unfair.[2] Notably, this finding applies irrespective of whether such evidence has been decisive in securing the domestic conviction of the applicant. In 2008, for example, the ECtHR specified that self incriminatory statements resulting from torture (in a case involving «Palestinian hanging»)[3] do «fall within the category of statements which should never be admissible in criminal proceedings since use of such evidence would make such proceedings unfair as a whole, regardless of whether the courts also relied on other evidence.»[4]

In 2006, the ECtHR nearly established a per se rule of exclusion in dicta in Jalloh v. Germany. In Jalloh, the German authorities forcibly administered an emetic to obtain drugs the defendant had swallowed.[5] In the Court's view, the extent of the intrusion into the defendant's right to self-determination was sufficient cause for a finding of violation:

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more acceptable when the ECtHR is satisfied that such statements were not the "only or main evidence against the accused": see generally, Unterpertinger v. Austria, 110 Eur. Ct H.R. (ser. A) at 19 (1986) para. 33 (out-of-court statements from absent witnesses); Doorson v. the Netherlands, App. No. 20524/92, 22 Eur. H.R. Rep. 330, 360 (1996), para. 76 (pre-trial statements from multiple anonymous witnesses); *Lucà v. Italy*, 2001-II Eur. Ct. H.R. 167, 179, para. 43 (out-of-court statements of absent codefendant); P.S. v. Germany, App. No. 33900/96, 36 Eur. H.R. Rep. 61 (2003) (hearsay evidence concerning allegations made by a vulnerable witness). For a comprehensive discussion of the confrontation clause in ECHR law see Stefano Maffei, The European Right to Confrontation in Criminal Proceedings 61-94 (2006).

1 Waldberg v. Turkey, App. No. 22909/93, 1995 (Eur. Comm'n on H.R.), para. 2.

2 Jalloh v. Germany, supra note 4, para. 105.

3 It is well-known that "Palestinian hanging" is a form of torture in which the prisoner or victim is lifted off the ground by a rope attached to the wrists, which have been tied behind the back, and then dropped partway to the ground. This could possibly lead to massive pain and suffering, alongside with the dislocation of both shoulders when the muscles can no longer take the strain: Barbra Ramos, Christopher DuPuis, Dennis Galvin, Eiman Zolfaghari, Sean David Cardeno Interrogation and Torture White Paper Team Report for Project 2 (University of Washington, Seattle & University of California, Berkeley) (2005).

4 Levinţa v. Moldova, App. No. 17332/03 (see above note 67), para. 104 (emphasis added).

5 Jalloh v. Germany, supra note 4, para. 11.

«[I] ncriminating evidence–whether in the form of a confession or real evidence–obtained as a result of acts of violence or brutality or other forms of treatment which can be characterized as torture should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or…to «afford brutality the cloak of law.»[1]

In the Court's view, the use at trial of the illegally obtained evidence, specifically the drug, amounted to a per se violation of the fairness clause of Article 6 of the ECHR, thus Germany was found in breach of the European Convention. The Jalloh opinion appeared to use a pure judicial integrity rationale, which would imply a per se rule of exclusion for illegally obtained evidence.

On closer inspection, however, Jalloh does not implicate the «poisonous fruit» doctrine at all. Although this case is often quoted as a «fruits case» in ECtHR precedents,[2] this is misleading. The drugs recovered were the direct product of the brutality and not the derivative evidence resulting from its exploitation. Jalloh was simply a case where the domestic court admitted evidence that was the direct object of the mistreatment. Had the emetic also produced a document with an address of a secret stash of drugs that the police would not have otherwise discovered, the stash would be considered the «fruit» of the poisonous tree, but this was not the case in Jalloh. The fact that Jalloh involved a physical search of the defendant as opposed to an interrogation is a distinction without a difference for «fruits of poisonous tree» analysis purposes.

Despite the lack of a real distinction between the product of an illegal interrogation and the product of an illegal search, the reasoning in Jalloh introduced a European doctrine in which a flawed distinction was drawn between «confessions» and «real (physical) evidence», as if the latter were always to be regarded as «fruits.» In the opinion of the ECtHR, evidence of confessions or admissions obtained through a breach of Article 3 (whether in case of torture or inhuman treatment) are inadmissible while real evidence obtained only through torture would automatically be excluded as unfair. This leaves totally unanswered the

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1 Id. at para. 105.

2 See, e.g., Gäfgen, supra note 2, at 42

question of the use in evidence of the derivative «fruits», which eventually became relevant in Gäfgen.

As explained above, the majority of ECtHR judges in the 2008 ruling used Gäfgen to draw a major distinction in terms of evidence admissibility depending upon whether the police illegality amounted to «torture» or «inhuman treatment.» By characterizing the conduct of the police during the interrogation as «inhuman treatment,» Section V aligned itself with the dicta in Jalloh, which left the door open to the admission of physical evidence found as a consequence of inhuman treatment. That view is now endorsed by the Grand Chamber's opinion, which explicitly confines the automatic exclusion of physical evidence only to cases in which the underlying acts of violence are characterized as «torture.»[1]

According to the Grand Chamber, in cases of inhuman treatment such as Gäfgen, courts should make a case-by-case assessment of the relationship of the impugned evidence and the finding of guilt against the accused.[2] One could expect that where, as in Gäfgen, the evidence obtained illegally was so critical to the finding of guilt there would be little room for the Court to rule that the relationship between the illegal evidence and the finding of guilt was insignificant.

In similar cases, the ECtHR would look at the direct or circumstantial evidence along with the tainted items to determine if the essence of the «right to a fair trial» was violated as well as to assess if the applicant had an opportunity to challenge the evidence against him.[3] In Gäfgen, there was actually no separately obtained evidence linking the applicant to the death of the kidnapped child. In listing the allegedly un-

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1 Id.; see also Gäfgen, Judgment of the V Section, supra note 59, at para. 99. The ECtHR mischaracterization of "real evidence" as "fruits", however, leaves the reader puzzled as to whether the ECtHR will be prepared to exclude the "derivative" evidence in torture cases. No such occurrence has yet been brought to the Strasbourg Court.

2 In Gäfgen, the issue of the weight (or "quality") of the evidence appears crucial in the eyes of the ECtHR. In this respect, the Grand Chamber opinion slightly moved away from the reasoning of the V Section of the ECtHR in the 2008 ruling. Therein, four distinct parameters had been laid down as concurring criteria in determine trial fairness. They were:"… a) the manner in which the real evidence was found; b) the circumstances established by untainted evidence; c) the weight attached to the impugned items of evidence and d) whether the applicant's defence rights were respected, notably the opportunity for him to challenge the admission and use of such evidence at his trial." (see Gäfgen, Judgment of the V Section, supra note 59, para 105).

3 Khan v. the United Kingdom, App. No 47486/06, 31 Eur. H.R. Rep. 1016, 1026 (2010), paras. 35-37 (a case concerning the admissibility in evidence obtained by means of a listening device in breach of Article 8 ECHR).

tainted evidence in the case the Grand Chamber mentions the blackmail letter, a note found in the applicant's flat concerning the planning of the kidnapping, and the ransom money.[1] All of the physical evidence related to the offence of murder was obtained by means of the first coerced confession. That «even without [the applicant's] confession on the day of the trial, there had been ample evidence to prove the applicant guilty at least of kidnapping with extortion»[2] is the German court's implicit acknowledgement that a finding of guilt on the specific count of murder could not be secured on the basis of the untainted evidence.[3]

The second full confession Gäfgen rendered at trial must be placed in the practical context of a criminal proceeding for a serious crime. The facts of the case make clear that Gäfgen made his second confession only after the court had dismissed his request to exclude the evidence obtained in violation of Article 3.[4] Having already admitted the damning physical evidence derived from Gäfgen's first stationhouse confession, it is striking that the Court completely overlooked the obvious reason for Gäfgen's admission of guilt at trial. After Gäfgen was faced with the physical evidence, he reasonably would have believed that the «cat was out of the bag,»[5] that he had nothing to lose by confessing again, and that he could potentially secure a reduced sentence by taking responsibility for the crime.[6]

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1 Gäfgen, supra note 2, at 44.

2 Id. at 34.

3 Id. at 26. There is in fact a major difference between the punishment prescribed in German criminal law for kidnapping for extortion and murder aggravated by premeditation, in respect of which the applicant was first charged and then sentenced.

4 Id. at 10.

5 The "cat out of the bag" metaphor was first employed judicially in the United States Supreme Court in Oregon v. Elstad, 470 U.S. 298, 314-315 (1985) and more recently in Missouri v. Seibert, 542 U.S. 600, 615 (2004). The metaphor captures the situation where a suspect confesses in a custodial interrogation setting without Miranda warnings and then after being warned, confesses again. Because the suspect does not know that the first confession is inadmissible at trial, he believes the later warnings are meaningless since the "cat is already out of the bag" and believing he has already incriminated himself, sees no point in later remaining silent. In Seibert, where the Supreme Court found that this "question first, warn later" interrogation process was intentional, the second confession was held inadmissible.

6 In Germany, as in most European jurisdictions, courts of criminal law deliberate at once on fact, law and sentence. Since no separate phase for sentencing exists, evidence of mitigating (and aggravating) factors is thus introduced in the course of the trial of first instance

Since all of the Gäfgen evidence was tainted, this would have been the perfect case in which to announce a fruit of the poisonous tree doctrine for Europe. The Grand Chamber's failure to do so on these facts would appear to be an implicit rejection of the doctrine. In the United States, where the courts have dealt with consecutive confessions, it has been argued under the deterrence rationale that once the suspect confesses under illegal means but is not aware that such confession is inadmissible, the «cat is out of the bag,» and the second confession is the fruit of the first. If the second confession is not excluded then police have an incentive to violate the defendant's rights in the first instance (knowing the first confession cannot be used in court) and then to take advantage of the existence of the first confession to obtain the second. The United States Supreme Court ruled accordingly in Missouri v. Seibert, where it found the police action in violating Miranda was deliberately taken to obtain the second confession.[1]

If the Grand Chamber had adopted a fruit of the poisonous tree analysis in Gäfgen, it would have made sense to add to the doctrine the exception for «inevitable discovery» by the police. In the case of Nix v. Williams, the United States Supreme Court announced its acceptance of the «inevitable discovery» exception to the exclusionary rule. The exception provides that if the government can show that the police would have inevitably discovered by lawful means the evidence it recovered illegally, the evidence would be admissible despite the Constitutional violation.[2] In Gäfgen, though, nothing in the opinion suggests that the corpse of the victim or the tire track would have been inevitably discovered in another way. Nothing indicates that the German police investigators were on their way to the place of burial or that any other act of investigation–made at the time or at a later stage in the proceeding–could have linked the missing boy, or the alleged defendant, with the

[1] 542 U.S. 600, 616 (2004).

[2] Nix v. Williams, 467 U.S. 431, 446 (1984). In this case, the prosecution obtained the body of the murder victim in a rural area of Iowa by means of illegally eliciting a statement from Williams in violation of his right to counsel. Because, however, a joint police-citizen search party was underway at the time of the discovery of the body and because according to the searchers protocol, they would have found the body anyway within a short time in freezing temperatures, the U.S. Supreme Court ruled that the evidence would have been discovered inevitably by legal means in the same condition, for forensic purposes, irrespective of the violation of the constitutional right to counsel. Thus, according to the Supreme Court, the admission of the evidence despite the violation put the prosecution in no better position than it would have been absent the violation.

pond in Birstein. The pond is in fact located 100 kilometers away from the city of Frankfurt, in which the defendant was arrested and had his place of residence.[1]

Regardless, the Grand Chamber found that the domestic trial against Gäfgen as a whole had been fair because the breach of Article 3 of the Convention did not have a bearing on the conviction and sentence.[2] This is one of the most perplexing and unconvincing holdings in the recent history of the Strasbourg Court. In the majority's view, there was a break in the causal chain leading from the prohibited method of investigation to the applicant's conviction, and such break was caused by the second confession. Instead, the «impugned real evidence was not necessary, and was not used to prove…guilt or determine…sentence.»[3] Specifically, the ECtHR accepted the domestic court's argument that the physical evidence in question was not presented as proof of fact but merely to test the veracity of the second confession.[4] This is a very odd rationale for admitting the physical evidence at Gäfgen's trial. After all, the physical evidence was obtained only through the first inadmissible confession. If the second, in-court confession was not, as the Grand Chamber ruled, the poisoned fruit of the first illegal confession, then it was «legally» obtained. Thus, the defendant's in-court confession stood unchallenged and there was absolutely no need to corroborate or verify it. Furthermore, corroborative evidence is offered to prove its substantive truth. There is no evidentiary concept of offering additional evidence of an unchallenged key fact for any other purpose. Indeed, notions of «limited admissibility» are foreign to the civil law, at least where professional judges, rather than lay jurors, find the facts.[5]

Furthermore, it is not the practice of the ECtHR to accept at face value the domestic authorities' arguments on whether certain items of evidence were used, or not. In the 2007 Harutyunyan case, the applicant,

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1 No notice was paid either by the V Section or the Grand Chamber in Gäfgen to the attempt made by the German Government to invoke the "inevitable discovery" exception to the exclusionary rule, through the unsubstantiated (and blunt) assertion that "… it was more than likely that [the child]'s corpse and further items of evidence would have been found at a later stage anyway"; cf. Gäfgen, Judgment of the V Section, supra note 59, para. 92.

2 Gäfgen, supra note 2, at 47.

3 Id. at 46.

4 Id.

5 For a comprehensive introduction on the different arrangements in the laws of criminal evidence in civil and common law Countries, see Albin Eser, Collection and Evaluation of Evidence in a Comparative Perspective, 31 Isr. L. Rev. 429 (1997).

a member of the Armenian army on the Azerbaijan border, was accused of killing a fellow serviceman with whom he had argued.[1] During interrogation, the applicant was punched, kicked, and hit with rubber clubs, in addition to having his fingernails squeezed by pliers.[2] Although the Armenian government attempted to argue that the confession was not used in evidence, the Strasbourg Court found that the trial was unfair even though the domestic court records merely mentioned the illegally obtained evidence in their opinions.[3] In comparison, in Gäfgen there were countless references to the impugned items in the opinions of the German courts,[4] leaving one to wonder how a corpse in a murder case could be regarded as bearing no impact on the related findings of fact.

Finally, as the dissent puts it, the construct of the break in the causal nexus leading from the prohibited method of interrogation to the applicant's conviction is simply «unrealistic» given the circumstances.[5] From the moment of the arrest to the handing down of the sentence, a European criminal proceeding is an interconnected whole that cannot be compartmentalized. An event that occurs at one stage is often crucial at another. This approach has previously been confirmed and endorsed by the Grand Chamber, especially in consideration of the importance of a correct investigatory process to the fairness of the subsequent trial. In Salduz v. Turkey (which involved restrictions on the applicant's lawyer while the applicant was in custody), the ECtHR found that neither the legal assistance provided at a later stage nor the adversarial nature of the proceeding could cure the defect that had occurred during the time spent in police custody.[6] Indeed, the dissenters in Gäfgen referenced Salduz, writing, «If that is so when considering a breach of the right to consult a lawyer, then surely the same reasoning must apply with even greater force when confronted with a breach,» of a non-derogable right such as Article 3.[7]

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1 Harutyunyan, 49 Eur. H.R. Rep. 9, 204 (2009), 7.
2 Id. 6-11.
3 Id. 41.
4 See, e.g., Gäfgen, supra note 2, at 42-43, 45.
5 Id. at 53 (Jointly Partly Dissenting Opinion of Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku and Power).
6 See supra note 42.
7 Gäfgen, supra note 2, at 52 (Jointly Partly Dissenting Opinion of Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku and Power).

VI. The Rationale of the Grand Chamber: «Unspoken Concerns» in Public Interest Cases before the ECtHR

No bright-line rule is established in Gäfgen to govern the use in evidence of the fruits of coerced confessions. The ECtHR did not make a finding of trial unfairness in the case, based upon its assessment of the totality of the circumstances. Unfortunately, that ruling clashes with the overwhelming probative value of the fruits obtained as a result of the applicant's first coerced confession. As an immediate consequence, Gäfgen may no longer invoke a retrial at domestic level, in spite of the acknowledged breach of Article 3 of the Convention. Given the weakness of the Court's «compartmentalized» reasoning in determining whether to exclude real evidence against Gäfgen, one is led to look for alternative–if unspoken–explanations for the Court's opinion.

This article argues that the Grand Chamber was guided in Gäfgen by major «unspoken concerns» over a) the maintenance of legitimacy of the European Human Rights mechanism and b) the perceived injustice of excluding reliable evidence in the context of a serious criminal proceeding that would instead require a «balancing» of the allegedly «competing» interests at stake.

A. Maintaining Legitimacy in the Face of the Absence of «Fruits of the Poisonous Tree Rule» in Domestic European Criminal Procedures

On the issue of legitimacy, readers must be reminded that an interpretation of the ECHR that deviates substantially from general European practice is bound to undermine the loyalty of States to the Convention system and thereby threaten its continued success or acceptance by the States.[1] As an indirect corollary, in the absence of a European consensus the ECtHR has often tended to reflect national law by applying a lowest common denominator approach.[2] Furthermore, where a Member State's law or conduct is consistent with the practice or law in numerous other Member States, or where the law or practices among the Member States vary widely, the ECHR often avoids finding a violation.[3] This is not to deny that the ECtHR has, on some occasions, acted positively in the interests of protecting human rights.[4] In the area of criminal procedure,

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1 Stephanos Stavros, The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights, 346 (1993).

2 Harris et Al., supra note 15, at 9.

3 Harris et Al., supra note 15, at 10.

4 This was the case, for instance, with regard to the protection of the rights of transsexuals. Compare Sheffield and Horsham v. U.K, 27 Eur. H.R. Rep. 163 (1998) (in which the

however, diversity among states is greater than in other fields, and the ECtHR has often aligned its precedents to the practice of most Member States. For example, the ECtHR has held consistent with the law in a vast majority of Member States that it is not in breach of Article 6 for the criminal court to be informed of the prior record of the defendant[1] or for a conviction to be founded solely on circumstantial evidence.[2]

It is not within the scope of this Article to investigate the current state of the domestic procedural law in the European countries, but nearly all of them do not operate exclusionary rules for derivative fruits of constitutional illegalities.[3] As a result, if the European Court of Human Rights had applied a more stringent fruits standard in Gäfgen, this would have implied that the trials in most European Countries were unfair with respect to this matter.

The civil law has evolved a number of statutory principles regarding exclusion of evidence, but the principle of material truth has traditionally minimized their importance in the practice of criminal trials, especially with regard to items of physical evidence.[4] The reason is that most statutory grounds for exclusions were introduced to ensure the quality of the evidence. As a result, they do not operate when the breach has no impact on the probative value of the item that is found as a result of the violation. For example, most systems do not establish an absolute link between an illegal search and the seizure of the object at which it was aimed. This is because domestic criminal courts are reluctant to reject an item of solid evidence (such as an incriminating physical evidence found at the defendant's home) for the sole reason that it was illegally obtained.[5] The courts' views are that such items existed «in

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Court's judgment laid emphasis on the lack of a common European approach) with Goodwin v. U.K., 35 Eur. H.R. Rep. 18 (2002) (in which the Court, despite the lack of a common European approach, made a finding of violation against the Respondent State based upon a "continuing international trend in favour of . . . [the] legal recognition of the new sexual identity of post-operative transsexuals").

1 X. v. Austria, App. No. 1706/62, 1966 Y.B. Eur. Conv. on H.R. 112 (Eur. Comm'n on H.R.): "it is clear that in a number of [Member States] information as to previous convictions is regularly given during the trial before the court has reached a decision as to the guilt of an accused .....[and the Strasbourg organs are] not prepared to consider such a procedure as violating any provision of Art. 6 ECHR, not even in cases where a jury is to decide on the guilt of an accused" (p. 34).

2 Alberti v. Italy, 10 March 1989, App. No. 12013/86, 59 DR 100 (1989).

3 For a full comparative account on this matter, see Thaman, supra note 11, at 333-53.

4 Id.

5 The expression "solid evidence" is employed in J. R. Spencer, Evidence, in European Criminal Procedures 594, 605 (Mireille Delmas-Marty & J. R. Spencer eds., 2002).

nature» before the violation was committed and were not «generated» by the violation, as opposed to an incriminating conversation obtained by means of an illegal listening device.

Even in the bastion of the adversarial tradition, England and Wales, no general rule of exclusion applies to the fruits of illegalities, as courts are given «broad and unstructured» discretion on this matter.[1] More specifically, [i] n any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.[2]

The current statutory provision aligns with the traditional common law rule according to which «[i] t matters not how you get it; if you steal it even, it would be admissible in evidence.»[3]

It comes as no surprise that, in this context, the European Court of Human Rights was reluctant to affirm a bright-line rule of exclusion as this would have likely engendered the hostility of continental legislators. The more the Strasbourg Court strays from principles generally accepted among the member states, the more those states will question the legitimacy of the Court.

B. «Proportionality» and Arguments of Public Interest in European Court of Human Rights Jurisprudence

As for the European Court of Human Rights' attitude toward «balancing competing interests,» Gäfgen may be regarded as another step toward the progressive erosion of the structure of the Convention system. As constitutional scholars have recently pointed out, proportionality analysis is becoming commonplace around the world in rights

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1 David Ormerod, ECHR and the Exclusion of Evidence: Trial Remedies for Article 8 Breaches, 2003 Crim. L. Rev. 61, 64 (U.K).

2 Police and Criminal Evidence Act, 1984, c. 60, § 78(1) (Eng. & Wales) (emphasis added).

3 Regina v. Leatham, (1861) 8 Cox C.C. 498, 501 (Q.B.). Earlier authorities point in the very same direction. In the 1783 case Ceglinski v. Orr, the English courts took the decision not to suppress evidence obtained by means of illegal coercion. In King v. Warickshall, (1783) 168 Eng. Rep. 234, 235 (K.B.), the court, though excluding the coerced confession, rejected a call for the exclusion of real evidence collected in the course of the illegal interrogation. The concept of the "exclusionary rule", as a matter of fundamental Human Rights or Constitutional law, thus originated in the United States, despite other legal inheritances from Britain.

adjudication,[1] and European Court of Human Rights law is no exception. Although the word proportionality does not appear in the European Convention of Human Rights or its Protocols, some commentators nevertheless consider it to be a dominant theme in the case law as the European Court of Human Rights has held that proportionality is «inherent in the whole of the Convention.»[2]

This claim is extravagant and not at all persuasive. For a start, the principle of proportionality does not apply to the absolute rights mentioned in Article 15, for which not even a state of emergency can justify derogation.[3] Other articles, such as Articles 8 through 11 (privacy, religion, expression, and assembly), incorporate proportionality into the text of the ECHR. How, then, could a proportionality discourse be applied to Articles 5 and 6, for which the letter of the ECHR provides no qualification at all? In this respect, the Court's argument in Gäfgen develops in a sadly common fashion, where rights are first solemnly announced, then narrowly qualified, and finally surrendered on the basis of «proportionality» and the «totality of circumstances» standard.

In the dissenting opinion to the 2008 ruling of Section V, strong criticism was voiced against the use of balancing tests stemming from Article 3 violations.[4] Balancing tests, it was argued, may end up «affording brutality the cloak of the law,» since those disposed to rule against human rights will often simply put sufficient weight on the other

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1 See Alec Stone Sweet & Jud Mathews, Proportionality Balancing and Global Constitutionalism, 47 Colum. J. Transnat'l L. 73, 74 (2008).

2 *Sporrong v. Sweden*, 52 Eur. Ct. H.R. (ser. A) at 26 (1982). There, the Strasbourg Court made the widelycited statement that "the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights[.]" On proportionality, see Van Dijk & Van Hoof, *supra* note 76, at 80-82; Frédéric Sudre, Droit Européen et International des Droits de l'Homme 167-169 (2008). See also S. Van Drooghenbroeck, *La Proportionnalité dans le Droit de la Convention Européenne des Droits de l'Homme: Prendre l'Idée Simple au Sérieux* (2001).

3 Article 15 refers to Article 2 (right to life), Article 3 (prohibition of torture), Article 4 (prohibition of slavery and forced labor) and Article 7 (*nulla poena sine lege*).

4 In the 2008 Judgment of the V Section (supra note 59), Justice Kalydjieva dissented by extensively quoting the Grand Chamber's decision in Saadi v. Italy, 28 February 2008, App. No. 37201/2006, at 20. The Saadi case tested the rights of an individual against national security and Justice Kalydjieva argued that balancing was an ineffective remedy for coerced self-incrimination and openly called for a retrial in which the defendant's rights would be fully respected. Mr. Kalaydjeva further asserted that, in his opinion, the precedents of the European Court of Human Rights allowed no distinction in the treatment of "statements" and "real evidence" obtained through coercion.

side of the balance to tip the scale in favor of the «public interest.» In Gäfgen, a «balancing» type of reasoning first emerged in the German trial court's interpretation of domestic law. The court employed a balancing test where the severity of the interference with the defendant's fundamental rights (in this case the threat of physical violence) was measured against the seriousness of the offense, the murder of a child. The evidence was admitted because «the exclusion of evidence which has become known as a result of the defendant's statement–in particular the discovery of the dead child and the results of the autopsy–appears disproportionate.»[1] The Grand Chamber, when it reviewed the German court's opinion, seemed to reject this argument when it held that the right not to incriminate oneself «presupposes that prosecution seek to prove their case without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.»[2] Further, the Grand Chamber also stated that in cases concerning Article 3, «there can be no weighing of other interests against it, such as the seriousness of the offense under investigation or the public interest in effective criminal prosecution.»[3]

Yet, in the very same portion of the opinion, the Grand Chamber could not resist the temptation of observing that «different competing rights and interests are at stake» in this case.[4] The balancing test is clearly outlined in the opinion, as the Court states,

On the one hand, the exclusion of–often reliable and compelling–real evidence at a criminal trial will hamper the effective prosecution of crime. There is no doubt that the victims of crime and their families as well as the public have an interest in the prosecution and punishment of criminals, and in the present case that interest was of high importance. Moreover, the instant case is particular also in that the impugned real evidence was derived from an illegal method of interrogation which was not in itself aimed at furthering a criminal investigation, but was applied for preventive purposes, namely in order to save a child's life, and thus in order to safeguard another core right guaranteed by the Convention, namely Article 2. On the other hand, a defendant in criminal proceedings has the right to a fair trial, which may be called into question if domestic courts use evidence obtained as a result of a violation of the prohibition

1 Gäfgen, supra note 2, at 27.
2 Id. at 42.
3 "[F]or to do so would undermine its absolute nature." Id.at 44.
4 Id.

of inhuman treatment under Article 3, one of the core and absolute rights guaranteed by the Convention. Indeed, there is also a vital public interest in preserving the integrity of the judicial process and thus the values of civilized societies founded upon the rule of law.

That the goal of fairness in the criminal process often clashes with other valuable interests protected by the European Convention (mainly the interests of victims and witnesses) is unquestionable. Nevertheless, it is open to debate whether reference to proportionality can help in solving such clashes. Some European Court of Human Rights rulings on Article 6 favor proportionality, in which the «fair balance» between the protection of the individual's procedural rights and the interests of the community can only be achieved if restrictions on these rights are strictly proportionate to the aim they pursue.[1] The very concept of fairness, entrenched in Article 6, implies the need to solve tensions between competing values through a pattern of checks and balances. We prefer the view that a violation of a fundamental right such as the fair trial, precisely because of its «unqualified nature,» ought not be subject to the argument of «proportionality» or «balancing tests.»[2]

C. Alternative Approaches to Illegally Obtained Evidence

A closer look at other Strasbourg precedents suggests that the Strasbourg Court could have followed a more demanding approach than simple proportionality, or balancing, in this case.[3] In Rowe v. United Kingdom, for instance, the Court held that the entitlement to disclosure of evidence is not an absolute right.[4] Any criminal proceeding may involve competing interests (e. g., the efficiency of prosecutions, the protection of society, the personal security of intimidated witnesses,

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1 See *Ashingdane v. U.K.*, 93 Eur. Ct. H.R. (ser. A) at 24 (1985).

2 Cf. Andrew Ashworth, Human Rights, Serious Crime and Criminal Procedure 70 (2002). Support to this view may also be found in some ECtHR cases in which the general requirements of fairness embodied in Article 6 were said to "apply to proceedings concerning all types of criminal offence from the most straightforward to the most complex" and thus that "the public interest cannot justify the use of evidence obtained as a result of police incitement." Teixeira, supra note 104, ¶ 36.

3 The tension between fundamental rights and the public interest in European Court of Human Rights discourse is brilliantly investigated in Ashworth, supra note 157, at 78. The author argues that although "[t]he Court's approach does use the term 'balance' (or at least 'counterbalancing'), . . . it also sets out some distinct parameters for such reasoning." These parameters should be followed "as a template for some of the 'public interest' cases [where there] . . . is not so much a wide public interest but rather the rights of potential victims that are in conflict with the defendant's rights."

4 *Rowe v. U.K.*, 16 February 2000, App. No. 28901/95, at 14.

and the secrecy of investigations), which could be weighed against the rights of the accused. Despite these considerations, the Court came to the conclusion that «only such measures restricting the rights of the defense which are strictly necessary are permissible under Article 6(1).»[1] Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defense by a limitation of its rights must be «sufficiently counterbalanced by the procedures followed by the judicial authorities.» As one of the authors of this article has argued, this reasoning is «convincing insofar as it conveys that there is a difference between allowing certain limited restrictions on a right in case of necessity and holding that all restrictions that can be said to be proportionate to considerations of public interest should be tolerated.»[2] This accords with the unambiguous statement that «[t] he general requirements of fairness embodied in Article 6 apply to proceedings concerning all types of criminal offense, from the most straightforward to the most complex.»[3]

This approach is persuasive as it gives some priority to the fundamental rights of the citizens over the interests of the «majority.» In our view, incursions into fundamental rights are only acceptable if serving specific and compelling reasons but not simply by reference to a generic call for the protection of society. Otherwise, society's interest in repressing crime would always trump the individual's rights and there would be little point in developing a serious human rights discourse.

Jalloh v. Germany[4] is an important case for the development of the ECtHR jurisprudence on the tension between public interest and fundamental rights. In Jalloh, the ECtHR used multiple controversial balancing tests to discover whether Article 3 applies. The public interest balancing test is especially problematic, as it seems to incorporate a factor weighing the seriousness of the crimes against the degree to which one may infringe on fundamental human rights. Essentially, the serious concern in Jalloh is what «instant case» would justify a «grave

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1 *Id.* (*emphasis added*).

2 Stefano Maffei, The European Right to Confrontation in Criminal Proceedings 64 (2006), and see also Ashworth, supra note 157, at 61. The latter author also suggests that "there must be an assessment of the potential threat to rights in each case … it cannot be sufficient to regard a whole category of cases as presenting dangers (*e.g.* organized crime, drug trafficking), in a way that fails to recognize the need for each case to be assessed individually."

3 *Teixeira de Castro v. Portugal, 1998-IV Eur. Ct. H.R. 1451, 1463.*

4 Jalloh v. Germany, supra note 4.

recourse» when dealing with a fundamental human right. In Jalloh, the «weight of the public interest» seems to mean that fundamental human rights can be infringed upon if the «public» has a great interest in securing a conviction. For example, having a handful of drugs in one's possession «to eat» is not severe enough to make a fundamental human right evaporate, but perhaps having a van load of drugs would be?[1] Again, this might well erode the very nature of the fundamental human rights under the Convention system.

The use of the public interest balancing test in the Gäfgen case further muddies the water. The Gäfgen Court's application of this same public interest balancing test led to a finding that there had been a vital public interest, both in saving the victim's life and in convicting the applicant of his murder, which might have justified the use of items of evidence obtained through a measure in breach of Article 3. This argument moves the public interest balancing test to an even more dangerous level and seems to open the door to a treat-inhumanly-and-pay-a-token-penalty policy in cases of serious offenses and public concern.[2]

Indeed, in the aftermath of Gäfgen, one could imagine a rational domestic court ruling that an issue of unfairness (under Article 6) relating to illegally obtained evidence (under Article 3) only applies where the fundamental human rights violation occurs in the context of a minor crime or to an offence which does not involve death or serious bodily harm. Might it have made more sense for the Grand Chamber to announce a clear-cut rule that applies Article 6 to all such violations and their fruit but makes an exception, as do the United States courts, for Miranda violations, when required, to prevent imminent harm to the public or an individual?[3]

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1 The question is raised by Ashworth, supra note 68, at 152; in the author's view the language of Jalloh seems to suggest that "in cases where the offence is very serious (unlike small-time drug dealing), official compulsion might be permissible without violating the privilege against self-incrimination".

2 In the U.S., the very same issue has been addressed by Justice Frankfurter in Rochin, 342 U.S. at 173 ("to attempt in this case to distinguish what lawyers call 'real evidence' from verbal evidence is to ignore the reasons for excluding coerced confessions. Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law.").

3 Quarles v. New York, 467 U.S. 649 (1984).

Finally, it is also remarkable that the majority opinion in Gäfgen failed to address the «judicial integrity» argument, which the dissenters used extensively. In their view, the Gäfgen case generates another critical public interest, that is the interest in «ensuring and maintaining the integrity of the judicial process, and the admission into a trial of evidence obtained in violation of an absolute human right would undermine and jeopardize the integrity of that process.»[1] Though the situation is critical, it is precisely in times of crisis that a society must hold on to its foundational values, which must remain uncompromised.

VII. Legal Criteria and Case-by-Case Balancing Tests in the Present and Future of the Exclusionary Rule

As suggested earlier, balancing tests inevitably lead to the derogation of human rights. The long-term implications and possible defects of the case-by-case approach developed in Gäfgen may be better understood by looking comparatively at the state of the exclusionary rule in the United States.

In Weeks v. United States[2] and later in Mapp v. Ohio,[3] the United States Supreme Court announced that both federal and state courts were forbidden under the Fourth and Fourteenth Amendments from admitting real evidence obtained through the means of an illegal search and seizure.[4] In addition, in Wong Sun v. United States[5] and Silverthorne Lumber v. United States,[6] the Court extended the exclusionary rule to the indirect product of the above constitutional violations, recognizing the «fruits of the poisonous tree» doctrine that forbids courts from admitting evidence derived from the exploitation of the initial constitutional violation. «Poisoned fruits» include both real evidence and statements by the accused. Thus, the U. S. Supreme Court has not determined that

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1 Gäfgen, supra note 2, at 49 (Jointly Partly Dissenting Opinion of Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku and Power).

2 Weeks, 232 U.S. 383, 398.

3 Mapp, 367 US 643, 655.

4 Thereafter, in Massiah, 377 U.S. at 201 and Miranda 384 U.S. at 436, the exclusionary rule was extended to inculpatory and exculpatory statements of suspects when obtained in violation of the Fifth, Sixth and Fourteenth Amendments or where such statements are obtained during custodial interrogation without warnings and a waiver of the right to counsel. Earlier, in Brown v. Mississippi, 297 U.S. at 278, the Court has announced that state and federal courts are required by both the Fifth and Fourteenth Amendments to exclude statements obtained by coercive interrogation tactics.

5 Wong Sun v. United States, 371 U.S. 471 488-491 (1963), rule re-articulated in relation to derivative evidence causally linked to preceding violations.

6 Silverthorne Lumber v. United States, 251 U.S. 385, 392 (1920).

exclusion of the direct or indirect product of the constitutional violation should turn on a case-by-case balancing test. The Court does not weigh the constitutional violation against other factors such as the gravity of the offense or generalized public safety or public interest arguments. In general, in the United States, the tainted product of a constitutional violation is excluded per se from the criminal trial. This is similar to the ECtHR's view that a coerced confession per se amounts to a violation of Article 6.

This is not to say that the temptation of balancing has not pervaded the U. S. discourse on the matter, albeit in a rather different way than in Strasbourg. More recently, in fact, the U. S. Supreme Court has embarked on another kind of balancing. As mentioned earlier, the U. S. Supreme Court originally identified two rationales for the exclusionary rule: «judicial integrity» and «police deterrence.»[1] In the last thirty-five years, the Supreme Court has jettisoned the judicial integrity rationale,[2] thus freeing itself to balance exclusion solely against the effectiveness of deterrence for particular classes of cases.

For example, the U. S. Supreme Court has ruled that the deterrence value of exclusion is weak for the following reasons: (1) where the illegally obtained evidence is later used in a grand jury investigation,[3] (2) where the evidence could eliminate an immediate, on-going risk to the public safety,[4] (3) where the evidence is based on a good faith reliance on a magistrate's decision to issue a warrant,[5] (4) where the evidence is used for impeachment,[6] (5) where police fail to knock and announce their presence before forcibly entering a dwelling to search,[7] and (6) where the illegality resulted from police negligence rather than deliberate misconduct.[8] Though dramatically reducing the reach of the exclusionary rule and the protection of basic constitutional rights, the Supreme Court has at least done so in a way that provides lower courts and police guidance for future behavior

The Supreme Court applies the rule in a large variety of generic situations, rather than balancing in each case the significance of the

1 See discussion supra in part IV at pp. 19-21.
2 Stone v. Powell, 428 U.S. 465 (1976).
3 United States v. Calandra, 371, U.S. 471 (1963).
4 New York v. Quarles, 467 U.S. 649 (1984).
5 U.S. v. Leon, 468 U.S. 897 (1984).
6 Harris v. New York, 401 U.S. 22 (1971); United States v. Havens, 446 U.S. 620 (1980).
7 Hudson v Michigan, 547 U.S. 586 (2006).
8 Herring v United States, 555 U.S. 135 (2009).

violation against the potential deterrence likely to accrue in the future by exclusion. As a result, the Supreme Court has done its balancing a priori. Thus, unlike European and non-U. S. courts, the U. S. Supreme Court has operated under per se rules of either automatic exclusion or automatic admission of illegally obtained evidence.[1] Though we may disagree with a number of choices made by the Court regarding what to categorically admit or exclude, at least there is clarity.

The per se or «bright-line» approach to exclusion has the advantage of providing clear guidance to police officers and lower court prosecutors, lawyers and judges. Of course, the problem with a per se approach is that it sweeps broadly. For example, it may seem awkward to exclude a confession when the suspect is an experienced criminal lawyer or judge simply because of a failure to give complete Miranda warnings. But the balancing approach taken on a case-by case basis in Europe provides police officers and lower court judges with little guidance as to the propriety of their behavior. In theory, the per se approach is more protective of human rights, particularly in cases with serious charges. After all, in the United States, the gravity of the offense is not considered in the exclusion decision, and, thus, significant human rights cannot be «balanced away» in favor of a particular public interest. In Europe, if an amorphous «public interest» is always in play for some Article 3 violations, national judges will have essentially unbridled discretion to abrogate or derogate significant human rights.

VIII. Conclusion

While Article 3 is revered as enshrining one of the most fundamental values of democratic European societies, Gäfgen reveals three troubling developments that call into question the non-derogable nature of Article 3 rights. First, the ECtHR has divided Article 3 into two distinct aspects, the prohibition of «torture» as opposed to the prohibition on «inhuman treatment.» The Grand Chamber has clearly privileged the former over the latter. Second, the conclusion reached in Gäfgen implies that there might be circumstances (as in the case of the murder of a child) where the application of Article 3 turns on the nature of the crime charged, thereby lessening the protection of human rights in

[1] For example, the direct product of an illegally obtained confession or a search deliberately conducted without probable cause (absent an ongoing public safety danger) is always excluded. At the same time, a Miranda-violated confession or an illegal search and seizure can always be used to impeach the criminal defendant victimized by the illegality.