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COMPARATIVE REFLECTIONS ON READING THE AMENDED YUGOSLAV CODE: INTERROGATION OF DEFENDANTS IN YUGOSLAV CRIMINAL PROCEDURE

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In America the problem of interrogation as an aid to law enforcement has been the continuing focus of intense interest and debate.¹ Recently, the same problem was discussed in Yugoslavia in connection with the 1967 amendments to that nation's Code of Criminal Procedure. While these amendments were not limited either to the problem of interrogation of suspects and defendants, or to pre-trial procedure, some of the most important changes concerned the techniques and circumstances surrounding interrogations. Certain of these amendments provide the possibility of a substantial lessening of the extensive reliance on interrogations of defendants and suspects which has been a traditional means of discovery in non-adversary systems.² These legislative innovations, if extended to the limits of their potential, could render the traditional *affaire à deux* of custodial interrogation practically impossible and could lead to answers about the necessity of interrogation as a tool of law enforcement.³

A rare opportunity thus has arisen for the comparatist in America to observe how essentially identical issues are approached in the divergent

settings of adversary and non-adversary systems of criminal proceedings which settings also are vastly different in their prevalent political and cultural conditions. Since there are a great number of variables involved, comparative presentation is difficult and this article will not consider many of these distinctions. Rather it only offers the basic information necessary for a more ambitious comparative study of the interrogation problem.

Instead of discussing the Yugoslav legislative changes on the abstract level of "black-letter law," here particular emphasis will be placed on the amendments' potential practical impact. Also, for a characteristically American approach to procedure, the opportunities of bypassing the statutory law by the agencies of criminal procedure⁴ will be considered. A number of Yugoslav legal concepts will have to be "domesticated" for the sake of presentation from this unique angle. Space limitations prevent an attempt to place the Yugoslav legislative amendments in a historical and comparative perspective by relating them to the very different developments of pre-trial procedure in other civil law countries.⁵ But, compara-

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¹ *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Wong Sun v. United States*, 371 U.S. 471 (1963); 18 U.S.C.A. §3501 (1968); Cray, *Criminal Interrogations and Confessions: The Ethical Imperative*, 1968 WIS. L. REV. 173; Kamisar, *Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966); Robinson, *Police and Prosecutor Practices and Attitudes Relating to Interrogation as Revealed by Pre- and Post-Miranda Questionnaires: A Construct of Police Capacity to Comply*, 1968 DUKE L.J. 425; Sutherland, *Crime and Confession*, 79 HARV. L. REV. 21 (1965); *Developments in the Law—Confessions*, 79 HARV. L. REV. 935 (1966).

² The non-adversary or inquisitorial system is found in most Continental countries and consists in the judge taking an active part in questioning the defendant both at, before and during the trial.

³ This is not unlike the situation in America, where decisions like *Miranda v. Arizona*, 386 U.S. 436 (1966), if literally and logically followed, may produce the same result. See SCHAEFER, *THE SUSPECT AND SOCIETY* 31 (1967).

⁴ The term "agencies of criminal procedure" is used in the text to encompass judicial as well as non-judicial officials (e.g., police officials) who are in charge of the criminal process at a particular moment, without regard to whether or not lawyers classify the procedural stage in question as criminal proceedings in a technical sense.

⁵ The Yugoslav development is particularly interesting against the backdrop of procedural thinking in other socialist countries. The salient feature of criminal pre-trial proceedings in all socialist countries other than Yugoslavia, due to the influence of the Soviet procedural model, is the absence of pre-trial judicial examinations. Reasons usually advanced for this omission can be found in Waszczyński's contribution to *THE ACCUSED, A COMPARATIVE STUDY* 260-61 (Coutts' ed. 1966). The first Yugoslav post-war Code of 1948 followed the Soviet pattern in this as well as many other respects. Compare, VASILJEVIĆ, *SISTEM KRIVIČNOG PROCESNOG PRAVA SFRJ (A TREATISE OF YUGOSLAV CRIMINAL-PROCEDURAL LAW)* 43 (1964). The second Yugoslav Code of 1953 introduced the pre-trial judicial investigation, but only with respect to more serious offenses. In prosecutions for minor crimes, investigations were carried out by specially authorized police officers. Even in cases involving serious crime the defendant

tive remarks often will be made in footnotes to avoid the danger of mistaking features of Yugoslav law, strange to a common law lawyer but quite normal to a civil law lawyer for peculiar characteristics of the Yugoslav procedural system. Despite all these limitations, hopefully some evidence will emerge supporting the proposition that in the area of procedure there exists a "common core"⁶ of problems among various legal systems, notwithstanding momentous differences in political, cultural and legal outlook.

POLICE INTERROGATION

In Yugoslavia, as throughout the world, the investigative activity of the police⁷ begins when the authorities become aware of the probability that a criminal offense has been committed. In this situation Yugoslav police are compelled to commence a series of investigative acts⁸ including such routine police work as collection of physical evidence. They will also question suspects or other persons likely to possess information about the crime. Police investigations are designed to provide the prosecutor with needed background infor-

could legally be interrogated by non-judicial officers, and records of interrogations could be used as evidence at trial. The Code of 1953 was amended several times. The latest amendments, aspects of which are discussed in this paper, occurred in 1967. (Official Gazette of SFRY no. 23, 1967). They gave the whole pre-trial stage a new look. Under the amended Code, pre-trial investigation is exclusively in the hands of the investigative branch of the judiciary. Many limitations which had been imposed on the right of counsel to effectively participate in pre-trial proceedings were abrogated. The role of the police in interrogations will be dealt with in the text.

⁶ The descriptive label "common core" has been borrowed from participants in the Cornell Comparative Law Project. See, SCHLESINGER (ed.), *FORMATION OF CONTRACTS* (1968).

⁷ The Yugoslav technical term for police is "agencies of internal affairs." However, because these agencies functionally correspond to the police and for the sake of brevity, the term "police" will be used throughout this article. It must be emphasized, however, that the term "police" is not officially used in any socialist country. The origins of this phenomenon probably go back to the first Russian revolutionary decree on the Militia (1917), which attempted even on the semantic level to stress lack of continuity with Tsarist police.

⁸ Compare, art. 140 YUGOSLAV CODE OF CRIMINAL PROCEDURE [hereinafter cited as CCP]. More often than not the police will commence their investigation on their own initiative. Sometimes, however, a report of crime will reach the public prosecutor's office first. In this situation, if the report requires any substantiation, the prosecutor is authorized by law to require the police to supply him with necessary information for the decision to press charges. Art. 142 CCP. The police are duty bound to render the needed assistance to the prosecutor. *Id.*

mation to decide whether to set the formal investigative machinery in motion.⁹ The initial police work precedes the decision of the public prosecutor to request the investigating judge, who cannot act of his own motion, to consider instituting judicial proceedings.¹⁰ The end of the judicial pretrial investigation marks the technical beginning of the criminal proceedings. Consequently, the investigative police activity occurs outside the criminal proceeding and is in principle not governed by the rules enunciated in the Code of Criminal Procedure.¹¹

Experience teaches, however, that there is in many Continental systems a tendency for this police investigation to furnish much more than the prescribed background information. This requires a brief explanation. In the course of the subsequent judicial investigation (which has no counterpart in the United States), investigative acts (e.g., interrogation of persons) will be repeated by the investigative branch of the judiciary. Unlike investigations at the police level, these judicial inquiries will be carried out in compliance with often very demanding technical rules of criminal procedure. Hence a strong temptation arises to derive as much as possible from the interrogation of the suspect at the earliest stage, before the imposition of legal restrictions which, to a police officer's mind, hamper efficient interrogation. Thus appears a common hypocritical arrangement in which procedural codes provide a full panoply of safeguards for the defendant during the pre-trial judicial investigation, while allowing crucial incriminating statements to be obtained from the suspect by the police. Not infrequently these statements are obtained under color of law by creating a false impression in the suspect's mind that an obligation to cooperate with the police exists. To an extent, therefore, the subsequent judicial investigation

⁹ This is the theory even if the police activity has been triggered, as is usually the case, see note 8 *supra*, without any request from the prosecutor. Upon receiving a signal that a crime has been committed, they are supposed to check these signals only to the extent necessary for an enlightened decision to institute a judicial examination of the matter. See text accompanying note 34 *infra*.

¹⁰ For an outline of the nature and duties of the investigating judge see discussion at p. 11 *supra*.

¹¹ In the United States before a formal decision to prosecute, the dictates of the Constitution as well as various statutory and court made rules apply to investigative police activity. U.S. CONST. art. IV, V, VI; *Davis v. United States*, 394 U.S. 721 (1969); *Alderman v. United States*, 394 U.S. 165 (1969); *Terry v. Ohio*, 392 U.S. 1 (1968); *Gideon v. Wainwright*, 372 U.S. 335 (1963); see note 1 *supra*.

frequently turns into an empty ritual.¹² Much of the temptation to collect decisive evidence at this early stage would vanish if the police reports of their investigative activities (e.g., reports of confessions obtained) are inadmissible as evidence at trial or if, in addition, these reports are removed from the dossier of pre-trial procedure which is studied by the trial judge in advance of the trial.¹³

The amended Yugoslav law, desiring to avoid this circumvention of procedural safeguards and to limit initial police work to sources of information other than the potential defendant, does prohibit the inclusion of official police reports in the dossier. The only traces left of police interrogations in the official police report of crime are lists of persons who should be interrogated during the judicial investigation, and the information likely to be obtained from them.

Another effort to discourage police interrogation of suspects is made in provisions dealing with emergency situations and "anticipatory proof-taking." In view of the ephemeral nature of some evidence, it must be gathered before the judicial investigation has been instituted or it will be irretrievably lost. Faced with this problem, Yugo-

¹² This tendency for the "informal" police inquiry to assume far greater importance than the "formal" judicial investigation is best exemplified by the developments in France following the enactment of the famous *loi Constant* of 1897. See, 2 STEFANI/LEVASSEUR, *DRIT PÉNAL GÉNÉRAL ET PROCÉDURE PÉNALE* 105, 215 (2 ed. 1966). Under former Yugoslav practice similar tendencies were noticeable.

¹³ The "dossier" of a Continental criminal case has no exact analogue in American criminal procedure, the nearest approximation being the prosecutor's file. The "dossier" is kept by the procedural agency which at that particular stage is conducting the proceedings (e.g., investigating judge, trial judge, etc.). Each step in the proceedings (decisions rendered, proof-taking activities, etc.) has to be reduced to writing and the resulting document included in the "dossier". The same is true of all documents filed or otherwise submitted by the participants in the proceedings. After the investigative phase is completed, the whole "dossier" continues to grow, as it passes from the investigators to the prosecutor, to the trial court, to the appellate court, etc. Thus the whole history of the case is contained in it.

The "dossier" developed from the *acta* of the investigation (*inquisitio*) in the medieval inquisitorial procedure. Its importance was then paramount, for the trial court would base its decision on records of proof-taking contained in it, rather than on evidence produced directly before the court. In contemporary Continental proceedings the importance of the "dossier" is greatly reduced as a result of the so-called principle of directness. See note 61 *infra*. Still the "dossier" is very important, and a proper understanding of how the Continental procedure actually works cannot be gained without some understanding of it.

slav law makes an exception to the general prohibition against proof-taking by the police and authorizes them to undertake these activities—if the investigating judge is not immediately available—but only in full compliance with procedural formalities. Protocols of these activities may then be included in the dossier and, subject to certain restrictions,¹⁴ admitted as evidence at the trial. But even in these emergency situations under the amended Yugoslav law the police are never authorized to formally interrogate any person, be he a potential witness or defendant. The police must wait for the investigating judge to carry out the interrogations.

Although persuaded that most inducements to interrogate suspects are thus reduced, an American lawyer, projecting his views into the Yugoslav situation, will still be greatly interested in what safeguards persons subject to police interviews have against potential police pressure and abuse.¹⁵ And in all fairness it cannot be said that motivation to obtain incriminating statements from the suspect is totally absent. For example, although a confession obtained at the police station is not admissible at trial, an argument can be made that the confession to the police makes it psychologically difficult for the defendant not to confess to the investigating judge since he has already "let the cat out of the bag."¹⁶ Before an attempt is made to pursue this problem, a general and somewhat delicate comparative observation will be offered in full awareness of its impressionistic character. Yet, this observation is needed in order to put this point into proper perspective and to compare meaningfully the socio-psychological pressures and tensions involved in police interrogations.

The label "inquisitorial" is attached in common law countries to European non-adversary procedure, but contrary to what this seems to suggest, it appears that in the typical American criminal case there are a number of built-in pressures on the police to seek confessions that have no counterpart on the Continent. The first one emanating from the nature of modern Anglo-Saxon procedure, is that only at the earliest stage, preceding the initial

¹⁴ See note 63 *infra*.

¹⁵ In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court emphasized that the procedural requirements imposed by its holding were to offset the coercive effect of custodial interrogations by the law enforcement authorities.

¹⁶ *United States v. Bayer*, 331 U.S. 532 (1947).

appearance before the magistrate, can the potential defendant be subject to questioning. Subsequently, the defendant is only available as an evidentiary source if he volunteers to take the stand. In Continental non-adversary proceedings there is ample opportunity to interrogate the defendant throughout the judicial (or prosecutorial) pre-trial investigation, as well as at the trial itself. These multiple opportunities to question the defendant remove much pressure and tension from the crucial first encounter of the suspect with law-enforcement officials.

The second pressure is connected with guilty pleas, which do not exist on the Continent.¹⁷ It is probably true that due to limitations on available time and financial support the adversary model of jury trials can properly work in the United States only if substantial numbers of defendants plead guilty thereby obviating the need to go to trial.¹⁸ Is it not very likely that those who confess to the police will more easily be persuaded to plead guilty? A German observer has a further point in his theory that the numerous American exclusionary rules of evidence, like the hearsay rules, which do not exist in Continental countries, remove so much relevant evidence from the trial that the emphasis on confessions is inherent in the system.¹⁹ Finally, while the jury verdict must, in America, be unanimous, Continental fact-finders usually decide by a majority vote. Is a confession not the kind of evidence most likely to avoid a hung jury? In short, it would seem that where the European investigator is primarily interested in getting *clues* from the statements of a suspect, his American counterpart will be eager to get a signed *confession* that will stand up in court.²⁰ It is obvious that less pressure is needed to obtain clues than to get confessions.

¹⁷ See FED. R. CRIM. P. 11; *McCarthy v. United States*, 394 U.S. 459 (1969).

¹⁸ In "1968 approximately 86% (22,055 out of 25,674) of all convictions obtained in United States District Courts were pursuant to a plea of guilty or its substantial equivalent. . . ." *Id.* at 463 n.7. But, it is noted, "[A]n extorted confession is often the white flag of surrender which precedes the guilty plea." Note, 53 MINN. L. REV. 559, 560 n.12 (1969).

¹⁹ Kunert, *Some Observations on the Origin and Structure of Evidence Rules Under the Common Law System and the Civil Law System of "Free Proof" in the German Code of Criminal Procedure*, 16 BUFFALO L. REV. 132 (1966).

²⁰ Note 28 *infra*. Throughout this article we assume that the police force in the countries concerned can be trusted (or mistrusted) to an equal degree, and that each is equally vulnerable to pressures stemming from its desire to do a good job of combatting crime. In actuality, differences among police forces may be quite

Yet, the fact remains that in the European setting there still exist pressures, even if reduced, resulting in aggressive and insistent police interrogations. The desire to solve cases puts substantial pressures on the authorities to elicit information from the suspect who does not have countervailing power to resist aggressive police tactics. In this situation it is dangerous to leave the conduct of police interrogations entirely to police discretion even if, as in Yugoslavia, confessions and admissions obtained by the police are not competent evidence.

What then are the restrictions imposed on the police in questioning suspects in Yugoslavia? Needless to say, gross abuse, such as coercion and methods violative of human dignity are prohibited and constitute criminal offenses.²¹ Moreover, police interviews are by law predicated on the voluntary cooperation of citizens. A provision in the amended Code of Criminal Procedure prohibits the police from repeatedly summoning to interviews those persons who have previously refused to furnish information.²² The law is, however, silent on the important issue as to whether the interviewed person would be notified of his legal right to refuse to answer questions. He can easily get the impression that there is a duty to answer questions, if only from the fact that upon failure to appear on police summons he can be brought to the interview by force.²³

Using as a point of departure the fact that the investigating judge, as opposed to the police, is under a duty to warn the defendant of his right to remain silent, some Yugoslav authorities propose theories resembling those of people in the United States who reject the acceptability of having different standards in the "gatehouse" of criminal justice, from those in the "mansion." These Yugoslav authorities assert that the same standards binding the investigating judge also must, at least as a matter of professional ethics, apply to police officials. For the police to conduct interviews in a manner which creates the impression

wide in this respect, even if divergent pressures of criminality and different degrees of restrictiveness of rules regulating police work are left aside. Note, *e.g.*, that the Continental police are (as a comparative matter) highly centralized, that there is a specialized subdivision of the force authorized to participate in crime investigation, and that there are other important institutional differences.

²¹ This seems to be the case in most modern legal systems and need not detain us here.

²² Art. 142 CCP.

²³ *Id.*

that the suspect is under a duty to make statements and to confess if guilty is, in this view, a flagrant violation of the professional police officers' ethic.²⁴ It also must be noted that since interviews are based on the voluntary cooperation of the citizen and are not a means to gather competent evidence, the law does not provide for the suspect's right to counsel's presence and assistance during police interviews.

Even though somewhat peripheral to our theme, it may be useful in evaluating the setting of police interviews to consider the police activity leading up to them. The police interrogation of suspects in an American police station typically follows an arrest. The latter will often be preceded by limited on-the-street questioning which in turn follows a police stop. What is the situation in Yugoslavia? There is has been little actual experience under the amended Yugoslav Code, and to review the procedures under it will require great reliance on guidelines provided by the legislators. It is obvious that interviews were contemplated by the drafters to occur mainly in response to police summons. The summary procedure will be realistic to an American only in cases in which the nature of the crime and surrounding circumstances do not call for an arrest and speedy police action. However, it must be remembered that arrest plays a somewhat different role in Continental criminal procedures. Consequently, in many instances in which there would be an arrest in America, there will be in Yugoslavia and other European countries only a stop, followed by the requirement to present an identity card. The suspect would then be left free with the expectation of receiving a summons for police interrogation in the next few days.²⁵

²⁴ See BAYER, *ZAKONIK O KRIVICHNOM POSTUPKU* (Code of Criminal Procedure) (commentary to art. 140) 1143 (1968) [hereinafter cited as BAYER, *ZAKONIK*]. For a different view in France, see Bouzat, *La loyauté dans la recherche des preuves*, in *PROBLÈMES CONTEMPORAINS DE PROCÉDURE PÉNALE, RECUEIL D'ÉTUDES EN HOMAGE À M.L. HUGUENY* 166 (1964).

²⁵ Differences that exist in the theoretical importance and need for arrest between American and Continental jurisdictions are largely unexplored. All that we can offer here are some tentative suggestions vulnerable to rebuttal by empirical studies.

Consider, for instance, differences in the law of arrest. "Probable cause" that a felony has been committed and that a specific person committed it suffices for a legal arrest in American jurisdictions. However, the arrested person is accorded (except in certain narrow classes of crimes) an absolute and often constitutional right to bail. The Continental legal design is quite different. The functional equivalent of American "probable cause" is only the basis on which the specific arrest (and subsequent detention) grounds are

Frequently, of course, an immediate arrest will have to be made. The amended Code does not contemplate police interrogation in this situation. The arrested person must be brought before the "most easily accessible" investigating judge "without delay."²⁶ Any delay is justified only on account of "insurmountable obstacles." In case the delay, even if justified, extends 24 hours, it must be explained in writing.²⁷ Any unjustifiable

superimposed. There must, in addition, be a danger that, if not arrested and detained, the person will abscond, tamper with evidence, or repeat the offense. But, when one of these additional grounds is found, there is in Continental countries no "right to bail" at all. Release of the arrested person from detention is never permissible as long as the danger of tampering with evidence or recidivism persists. An important difference can also be found in the fact that in America, probably as a carry-over from old jurisdictional thinking, prosecution for grave crimes can traditionally commence only by an arrest. On the Continent there are many alternatives. Also Continental rules on searches and seizures without warrant are not based upon arrest. In other words, the police need not arrest in order to proceed to a search. Nor is an arrest necessary for "custodial interrogations".

These differences in approach may be attributable to cultural differences including a greater mobility of American society, which permits individuals to move freely between jurisdictions without being easily discoverable through the police's use of such devices as identity cards.

²⁶ Art. 181 CCP.

²⁷ As the reader will notice, the law resembles that of American jurisdictions. It must, however, not be forgotten, that the theory advanced here is that American police have substantial reasons to interrogate the suspect before they bring him before the magistrate; for that stage is the only time when they can attempt to obtain incriminating statements. See text preceding note 19 *supra*.

The law in federal jurisdictions is stated in *Mallory v. U.S.*, 354 U.S. 449 (1957); *McNabb v. United States*, 318 U.S. 332 (1943). "All the states with two possible exceptions [Michigan and New York] have consistently refused to accept the McNabb case principle." INBAU AND SOWLE, *CASES AND COMMENTS ON CRIMINAL JUSTICE* 833 (2d Ed. 1964). But see 18 U.S.C. §3501 (c) which provides that

In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or

delay is technically a criminal offense of false imprisonment.²⁸ Thus, while, on summons, interrogation may legally proceed (on the safe assumption that the suspect is willing to talk), it can be lawfully conducted following arrest only insofar as it does not interfere with prompt production of the suspect before the investigating judge. An argument also has been made in a Yugoslav commentary to the Code that where there is a lawful arrest, there is no need for interviews.²⁹

Before we leave problems connected with interrogations of suspects by the police, it is important to know whether there are any effective guarantees that the prescribed legislative procedures will be observed in practice by the police. Mandates of a distant legislator may not be an influential force in police behavior amidst the pressures of their daily work in combating crime. Most natural to an American lawyer would be procedural sanction via exclusionary rules of evidence. However, as previously indicated, information gathered by the police through interviews is incompetent evidence anyway and leaves nothing to exclude. True, an analogue of the "fruits of the poisonous tree doctrine," developed in the American search and seizure cases,³⁰ could stretch the exclusionary rule so as to affect police interviews: e.g., all later statements made by the defendant to the investigating judge (even if all Code rules were complied with then) would be inadmissible, whenever a causal link would be found between the statements to the judge and defective police interviews.³¹ This would, of course,

other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

²⁸ Art. 150 CCP.

²⁹ The argument proceeds roughly as follows: Arrest can be legally effected only if—among other grounds—there is the Yugoslav equivalent of "probable cause." At the same time, all that is required from the initial police activity is to provide some background information on whether there is such "probable cause." If there is, the investigative branch of the judiciary will institute an investigation. Thus, before arresting a suspect the police must already possess reasonable grounds to believe that "probable cause" exists. Consequently there is nothing to interview the arrestee about. See BAYER, ZAKONIK 29. There is surely logic in this somewhat charitable interpretation of a number of Code provisions. It is too early to make predictions with regard to the "living law" on the matter.

³⁰ *Wong Sun v. United States*, 371 U.S. 471 (1963); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1919).

³¹ 61 J. CRIM. L., C. & P.S.—(1970).

frequently result in full immunity for the criminal from prosecution and would probably be without precedent in Continental practice.³²

Judicial Interrogation

Other than the described police interviews, interrogation of suspects or defendants does not occur in the United States, unless the defendant consents to examination at a preliminary hearing or at the trial. In Yugoslavia there are additional interrogations. They are carried out by the investigative branch of the judiciary,³³ and can take place either prior to or following the decision to institute the judicial interrogation, which is technically the initial stage of criminal proceeding.

In order to explain this procedural mechanism a digression is necessary. In a typical case the police will receive information that a crime has been committed either from citizens or officers on patrol. If these initial signals are sustained by police investigations, the police will file an official report (*prijava*, *dénonciation*, *Anzeige*, *notitia criminis*) with the public prosecutor's office,³⁴ containing a summary of their investigative activities. A num-

³² As will be shown later, note 68 *infra*, there is in Continental practice and writing comparatively little precedent for the exclusion of illegally obtained evidence, if otherwise relevant and reliable. This applies with special force to evidence in itself properly obtained, but "tainted" by derivation from illegally obtained clues and other information. True, in a very limited number of countries, like France and Belgium, products of illegal police activity must by legislative fiat be declared null and void, and cannot be used in the case in which they were obtained even by derivation. E.g., 2 STEFANI/LEVASSEUR, *supra* note 12, at 414; LE CHEVALIER BRAS, *PRÉCIS DE PROCÉDURE PÉNALE* 312 (3d ed. 1951). However, in these two countries the police are entitled to collect evidence which will later be presented at trial. The Yugoslav police have no such authority. Moreover, French courts sometimes declare an illegal confession null and void, and yet do not deprive it of evidentiary value. Cf. Bouzat, *supra* note 24, at 173.

³³ Yugoslav investigating judges, who sit on the bench of both lower and higher trial courts, are of the "juge d'instruction" type. They have no counterpart in this country. As indicated, *supra* note 5, other socialist countries follow the Russian pattern and do not use investigating judges. The pre-trial investigation is conducted by investigators who are employees of the public prosecutor's office.

³⁴ In order to avoid misunderstandings, "report of crime" has not been labeled, as is usually done, "complaint". Continental reports are not sworn and can, moreover, be anonymous when sent by private persons. Their role in subsequent proceedings differs from that of a complaint. The text considers only the most usual path of the criminal process. If the report of crime, say by a private citizen, reaches the public prosecutor's office first, the proceedings differ. Compare note 8 *supra*.

ber of documents will be included, but notes taken during police interviews will not be among them. If, upon looking into the matter, the public prosecutor decides that a criminal case should be initiated, he will request judicial interrogation. The prosecutor is under a duty not to interrogate the potential defendant, "unless there is a danger in delay."³⁵ This affords the suspect a chance to deny charges contained in the public prosecutor's request, and oppose the contemplated technical institution of criminal proceedings against him. Thus, the investigating judge often interrogates a suspect prior to the commencement of proceedings.³⁶ Of course, just as in other Continental procedural systems, the judge will regularly interrogate the defendant later, in the course of the judicial investigation.

What concerns us here are rules which regulate all these interrogations. With one exception,³⁷ rules governing interrogations are the same, irrespective of whether they take place before or after the institution of proceedings. These rules are, moreover, *mutatis mutandis* applicable to the defendant's interrogation at trial.³⁸ An analysis of this

³⁵ Art. 148, para. 2 CCP.

³⁶ An additional opportunity for the investigating judge to interrogate the defendant prior to the institution of proceedings in a technical sense arises in the case of the so-called "anticipatory proof-taking," previously described in the text; p. *supra*.

³⁷ This exception is contained in a somewhat cryptic provision of Art. 148(3) CCP, providing for additional interrogation of the potential defendant by the investigating judge, when the latter is faced with the problem of deciding whether or not to institute the judicial investigation. Discussion of this point would, however, carry us too far into the technical detail of Yugoslav procedural law. For an in-depth discussion of the question, see BAYER, *ZAKONIK* 163-66. Even in this exceptional situation the judge is under a duty to put the potential defendant on notice of his right to remain silent. Art. 148(4) CCP.

³⁸ Neither on trial nor at any other stage can the defendant be interrogated under oath. Thus if he provides false answers he cannot be prosecuted for perjury or any similar offense. This is generally the Continental view. As previously indicated, the Continental agencies of criminal procedure are not so much seeking confessions as clues or general impressions that can be derived from the defendant's statements. See accompanying text and note 19 *supra*.

In this situation many Continental legal writers, especially in Latin countries, declare that the defendant has a "right to lie." See Nuvoione, *Beweisverbole im Strafverfahren der Länder des romanischen Rechtskreises*, in *VERHANDLUNGEN DES 46. DEUTSCHEN JURISTENTAGES* 70 (1966) [hereinafter cited as *VERHANDLUNGEN*]. For a somewhat different view in West Germany, see 2 SCHMIDT, *LEHRKOMMENTAR ZUR STRAF-PROZESSORDNUNG*, comm. to §136, no. 11, 13, 15 (25th ed.). For Switzerland, see PFENNINGER, *PROBLEME DES SCHWEIZERISCHEN STRAFPROZESSRECHTS* 105 (1966).

will highlight some of the most important changes introduced into the Yugoslav procedural system by the 1967 amendments.

Under the old Code the defendant was to be informed at the beginning of his first judicial interrogation of the charges pressed against him by the prosecutor, as well as of the most salient incriminating evidence.³⁹ He was not bound to answer questions asked of him by the judge.⁴⁰ Like many Continental procedural systems east and west, the old Code did not provide whether or not the defendant had to be informed of his right to remain silent. As can be imagined, this information was only occasionally given in actual practice. Many defendants were thus under the mistaken impression that they had to cooperate with the examiner and answer questions addressed to them. The socio-psychological atmosphere of interrogation by an authoritative official, especially in cases in which the defendant is brought before the examiner by force or from jail almost inevitably breeds such an impression.⁴¹ Those with practical experience in the field will also realize that the omission of warnings makes the job much easier for those examiners who effectively use psychological pressure to obtain an answer from the defendant. The new Code has instituted a significant change in this area. It explicitly provides that at the first examination, before any questions dealing with the matter *sub judice* are addressed to the defendant, he must be informed that he is not

In Yugoslavia views on the matter vary. See DAMASKA, *ISKAZ OKRIVLJENOG KAO DOKAZ U SUVREMENOM KRIVICNOM POSTUPKU* (THE DEFENDANT'S STATEMENTS AS EVIDENTIARY SOURCE IN CONTEMPORARY CRIMINAL PROCEDURE) 76 (1962).

³⁹ In the United States courts arraignment consists of "reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead." FED. R. CRIM. P. 10.

⁴⁰ Art. 212, para. 2, former CCP.

⁴¹ In-custody interrogations take place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms. *Miranda v. Arizona*, 384 U.S. 436, 448 (1966). Although interrogation tactics are allegedly designed to put the suspect in such psychological state that he will reveal what the police already know, an interrogation atmosphere is created for no reason other than to subject the accused to the intimidation of the examined. Compare INBAU AND REID, *CRIMINAL INTERROGATION AND CONFESSIONS* 43-55 (1967) with Sutherland, *Crime and Confession*, 79 HARV. L. REV. 21 (1965). For an examination of the potential hazards of in-custody interrogation see Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. CRIM. L., C. & P.S. 21 (1961).

under any duty to "advance his defense" or answer questions.⁴² As will be seen later, there are strict sanctions provided for failure to give this warning.⁴³

It is submitted that in practice this change alone probably will not substantially decrease the volume of answers that the defendants will furnish. It is a general Continental experience that most defendants, whether or not put on notice of their right to silence, do talk. Innocents cry out in protest against charges, and the guilty defendants will usually do anything to act as if they were innocent.

Innovations with a far greater potential to affect traditional interrogation practices can be found among the amended provisions dealing with powers of defense counsel in relation to the interrogation of his client. Under the new Code, prior to his first interrogation by the investigating judge, the defendant must additionally be informed of his right to assistance of counsel and of the latter's right to be present during the interrogation.⁴⁴ Interrogations may lawfully proceed in the attorney's absence only if the defendant explicitly waives his right to counsel, or—if the first interrogation is involved—if defendant fails to secure a

⁴² Art. 203, para. 2, CCP.

⁴³ Art. 203(3) CCP directs the examiner, faced with the defendant's refusal to answer, to instruct him "if necessary" that his silence may render collection of exculpatory evidence more difficult. In our view this warning can meaningfully be given only if the investigator already knows whether the defendant is guilty or innocent. Consequently it is meaningless. Cf. BAYER, *ZAKONIK* 204.

As in the other Continental systems, in the Yugoslav procedure the law requires that the judge first invite the defendant to give his side of the story in a form of a narrative account before any real interrogation begins. This is in contradistinction to American practice, at least at the trial state (if the defendant chooses to take the stand). The Continental requirement of an initial narrative account, quite sound from the view of forensic psychology, is used by many Continental theorists in the often repeated argument that the interrogation is designed for the sole purpose of providing the defendant with a means of defense. See note 51 *infra*. Actual practice does not substantiate this legal argument. Many a defendant is not able to give any meaningful narrative account without the interposition of questioning. But, even if he is able to do so and advance his side of the story uninterrupted, his narrative account can as easily be used against him as in his favor. The narrative account may, for example, tie a guilty defendant to a particular fabrication which can, in the light of other evidence, easily be exposed. Contradictions in the defendant's story can later be used by the fact-finders to arrive at a conviction of guilt. It is for this reason that in the text we do not refer to narrative accounts and speak simply of interrogations. Deeper comparative analysis must not, however, overlook this peculiar technique.

⁴⁴ Art. 66 CCP.

lawyer within 24 hours from the issuance of the warnings. The interrogation also may begin in the absence of counsel if the duly notified lawyer fails to appear at the time set for the interrogation.⁴⁵

The mere presence of counsel during interrogations is, of course, of great psychological help to the defendant. However, the degree to which the traditional style of interrogations by the investigating judge will be changed depends on what powers the defense counsel has during the interrogation, as well as on the degree of counsel's familiarity with the case. In an attempt to inject as much adversary party presentation as possible into the Continental non-adversary pre-trial setting, the amended Code permits defense counsel (as well as the prosecutor who may also be present during interrogations) to suggest specific questions to be addressed by the judge to the defendant, or, upon leave of court, to put questions to the defendant directly. Also significant are defense counsel's powers to have his comments and suggestions entered into the official records of the interrogation.

Importantly, in a provision rather rare on the Continent,⁴⁶ defense counsel has at all times an unlimited right to inspect the dossier of the case.⁴⁷ Since files on the Continent record each step taken by the judge, an unlimited discovery results through such inspection. Even more unusual is another related provision of the amended Code, authorizing defense counsel to attend (along with the prosecutor and his client) all interrogations of witnesses and all taking of views.⁴⁸

If one leaves the domain of "black-letter law" and explores the actual position of the defendant during the pre-trial interrogations, one encounters a number of rather delicate and thus seldom discussed questions. The most important is whether

⁴⁵ Art. 203, para. 9, CCP.

⁴⁶ Usually the inspection of the "dossier" by defense counsel becomes unlimited only after the investigator has reached the conclusion that he has clarified the matter. It is interesting to note that on this score many Continental systems are not far from the central European variant of the old inquisitorial procedure. See, e.g., the discussion of the 17th century German legal authority CARPZOV, *PRACTICA NOVA RERUM CRIMINALIUM IMPERIALIS SAXONICA*, Pars III, question 115, no. 100 *et seq.* (Leipzig 1635).

⁴⁷ Art. 72 CCP. See Norton, *Discovery in the Criminal Process*, 61 J. CRIM. L., C. & P.S. 11 (1970).

⁴⁸ Even the French Code of Criminal Procedure, which resembles the Yugoslav on inspection of the "dossier" by defense counsel, does not provide for the interrogation of witnesses in the presence of the defendant and his counsel. E.g., Art. 102, FRENCH CODE OF CRIM. PROCEDURE.

it is possible for the investigating judge, early in the course of the investigation, to interrogate the defendant while the latter is not fully informed of the precise nature of the incriminating evidence the investigator has already gathered. This problem arises only in the early phase of the investigation, since under all Continental systems—even those most restrictive of the rights of defense—there comes a point in the investigation when the investigating judge has to permit complete discovery of evidence. Even in this early phase the defendant can be only partially unaware of the character of incriminating evidence, because the judge must apprise the defendant at the beginning of the interrogation of the charge and at least some supporting evidence.⁴⁹

Why should this problem be of interest in assessing the actual position of the defendant during pre-trial interrogations? Experienced investigators know that this situation may be used to great advantage in eliciting precious information from a guilty defendant. If the latter is not thoroughly familiar with all the gathered incriminating evidence, he finds himself in a nervous state of mind, trying to guess how much of his activity is actually known to the examiner. This in turn makes the creation of a plausible but false story very difficult. As a result, at least some guilty defendants eventually confess, even in the absence of a decisive case against them. This technique of interrogation, let us call it the “playing one’s cards close to the vest” examination, may be a useful tool to get at the truth, and convict the guilty. But, as in so many other procedural problems, a “zero-sum” game is involved; what is gained on one side is lost on the other. The innocent defendant will also be affected; he will be in a state of anxiety too, and his proper defense at least temporarily rendered more difficult. Moreover the possibility for self-incrimination is increased. How society balances these conflicting interests in arriving at a solution to this problem is, of course, a matter of society’s values.⁵⁰ But as long as this technique of interrogation is possible, it is somewhat hypocritical to claim—other than on a wholly idealistic level—that the only purpose

of the defendant’s interrogation is to provide him with a means of defense.⁵¹ Interrogation is in this context also used to provide the investigator of crime with a tool to facilitate self-incrimination, *i.e.*, approach the defendant as a source of information.

Before we analyze the new Yugoslav law in terms of discovery, let us review ways in which “close to the vest” interrogations can be made impossible in European investigations. Provisions to the effect that the examiner should not use tricks, that he must “address his questions clearly,” or “ask questions only to clarify what the defendant spontaneously volunteered” will not suffice in practice. More radical steps are necessary. A fundamental change in the traditional confidential character of the pre-trial investigation would be to grant to the prosecution and the defense unqualified free access to all proof-taking steps (interrogation of witness, views, etc.). Another

⁴⁹ That the sole purpose of the interrogation is to provide the defendant with a means of defense is the oft repeated view expressed in Continental writing, sometimes even incorporated as a legislative aspiration in code provisions. Compare, *e.g.*, Clerc in VERHANDLUNGEN 71. This proposition is based on the legal analysis of provisions such as those guaranteeing the defendant a right to remain silent, the right to present a narrative account, *supra* note 43, etc. Sometimes semantics are enlisted in support. Interrogations are called “hearings,” thus implying passive listening on the part of the investigator. The “hearing” of the defendant at trial is said to precede the “proof-taking” phase, as if “hearing” did not yield any evidence. In this matter there appears to be a great discrepancy between “black-letter law” and doctrinal proclamations on the one hand and actual practice on the other. Comparative analysis must not lose sight of this difference. It is submitted that Continental interrogations are Janus-faced, rather than one-sided phenomena; inferences drawn from the defendant’s answers are either favorable or detrimental to him. This applies to pre-trial interrogations as much as to those at the trial. The only Continental system known to this author whose legal design of interrogations at trial coincided with the idea that the defendant’s interrogation is solely a means of defense was—*mirabile dictu*—that of the Russian Tzarist Procedural Code. Under this system there was to be no interrogation of the defendant at trial—at least before incriminating evidence adduced at trial raised the need for some kind of defense—if the defendant declared at the very outset of the trial that he felt not guilty. See the forceful exposition of 2 FOINITSKY, KURS UGOLOVNAGO SUDOPROIZVODSTVA 361 (2d ed. 1899). On the legislative history of this arrangement see SHEHEGLOVITOV, USTAV UGOLOVNAGO SUDOPROIZVODSTVA PO PRODOLZHENIU 1902, 528 (8th ed. 1913). This legislative disinterment is by no means advanced as indicative of what the actual Russian court practice was. Whether this arrangement resulted in actually understating the importance of defendant’s statements as a source of evidence at trial, the author has no way of knowing.

⁴⁹ See note 39 *supra*.

⁵⁰ To the best of our knowledge this problem is seldom thoroughly analyzed in Continental writing. See, however, for a frank and probing discussion, BAYER, LA SIGNIFICATION DE L’AVEU DE L’INCLUPÉ DANS LE DROIT DE PROCÉDURE PÉNALE DE CERTAINS ÉTATS OCCIDENTAUX EUROPÉENS, RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE, fasc. III, 724 (1959).

tack would be to accord to the defendant at all times an unlimited right to inspect the complete dossier of the case. As a comparative matter, Continental countries either do not go so far, for fear that effective law enforcement might be endangered, or having gone so far, shift the bulk of actual investigative activity to the preceding "informal" investigative activities of the police, so much so that the latter overshadow in importance the judicial investigation.⁵² Finally, "close to the vest" interrogation can be rendered very difficult in a somewhat indirect way, by allowing defense counsel to freely familiarize himself with all the evidence, by studying the dossier or otherwise, and letting him at all times communicate with his client prior to interrogation. A comparative *tour d'horizon* reveals that Continental systems impose limitations either on inspection or on communication,⁵³ but that the new Yugoslav Code to some degree allows defense counsel to be present at proof taking and to inspect the prosecutions dossier.

Paragraph one, article 156 of the Code of Criminal Procedure provides that the defendant and his counsel, as well as the prosecutor, all may attend the interrogation of witness. At first blush it seems like a *coup de grace* to traditional Continental investigation. This is all the more astonishing since in Yugoslavia, information gathered at the police level is incompetent evidence and the shift of emphasis on the police level does not help law enforcement very much. On reading the debates accompanying the introduction of the amendments to the Yugoslav Code of Criminal Procedure, one can conclude that the drafters' intention was to downplay the importance of techniques which use defendant as a source of information. Close examination of the Code provisions reveals, however, that the extent to which article 156 will actually affect practice depends on the interpretation by investigating judges of some related provisions of the Code. Whether or not a party, prosecutor or defense counsel will attend proof-taking by the investigating judge is contingent on whether the party is put on notice of the time and place of proof-taking. Here the Code provides that the investigating judge is authorized to withhold

notification in case there is "danger in delay."⁵⁴ Like the term "unreasonable delay" in American arrest law, this phrase is not self-explanatory and possesses equally elastic qualities. A reasonable argument can be made that most investigatory steps (especially if the defendant happens to be detained) are urgent and should not be delayed. Or as Blackstone asked, "is justice not the sweetest when the freshest?" If this view is adopted in Yugoslav practice, then article 156, paragraph 1 of the Code of Criminal Procedure will lose most of its potentially momentous practical significance.

It is interesting to note in this connection that a Yugoslav commentary to article 156 quarrels with this interpretation, labeling it as "frivolous" and even "dishonest." In the opinion of its author, there is danger of delay only if notice to parties renders the proof-taking impossible or seriously impairs its quality.⁵⁵ Although which interpretation will be accepted is still unknown, even if the conservative construction prevails, notifications by virtue of article 156 (5) will still have to issue in a significant number of instances. This alone will place the Yugoslav pre-trial judicial investigation among those least restrictive of defense interests in contemporary non-adversary procedures.

What about the defendant's right to inspect at all times the complete dossier of the criminal case? While defense counsel is granted this right under the amended Code, the law is silent as to whether the defendant has the same privilege. A leading Yugoslav doctrinal authority takes the view that the same rights should be extended to the defendant that his counsel possesses, if only to prevent the inequality that would arise between those defendants who have and those who do not have the assistance of counsel.⁵⁶ If a contrary view is adopted in practice, and if the provision on delay

⁵² Art. 156, para. 5, CCP.

⁵³ BAYER, *ZAKONIK* at 49.

⁵⁴ *Id.* at 58. In a similar situation in West German law, a contrary view has been taken. See Schmidt, *supra* note 38, comment to §147, no. 3. *Accord*, the judgment of the former German Supreme Court in 72 RGST 268, 275. *Contra*, SCHWARTZ-KLEINKNECHT *STRAFPROZESSORDNUNG*, commentary to §147, no. 2 (25th ed. 1965). In this connection it is interesting to note that in the discussion of the contemplated amendments to the Yugoslav CCP, objections were raised that the extension of defense counsel's powers may result in increased inequality between defendants of various financial means. See MARKOVIC, KOME, ISTRAGA: POLICIJI ILI SUDU (TO WHOM SHOULD INVESTIGATION BE ENTRUSTED: THE POLICE OR THE COURT), *Izbor* no. 4, p. 5 (1967).

⁵² This was the problem with the French "enquet officieuse". See note 12, *supra*.

⁵³ As a representative provision on limitation of inspection, see §147 (2) of the WEST GERMAN CODE OF CRIMINAL PROCEDURE. For limitations on communication, see, as representative, art. 73, former Yugoslav CCP.

as justification for omitting to notify counsel about proof taking is conservatively interpreted, then "close to the vest" interrogations will remain possible in actual practice. But the possibility of such examinations will be limited to the earliest stages of the investigation in view of the fact that the restrictions on the defendant's right to communicate with counsel (and hence get access to the information in the dossier) are permissible only prior to the first interrogation.⁵⁷ No matter how the resulting procedural situation would deviate from that contemplated by *Miranda v. Arizona*,⁵⁸ and a number of United States Supreme Court decisions preceding it,⁵⁹ the comparatist will realize that, even in the event of a conservative interpretation, the amended Code among Continental systems least restricts defense interests.

The next issue which concerns us is the extent to which evidence acquired by the interrogation of the defendant during the judicial investigation may be instrumental in reaching a decision on the question of guilt at the trial stage. As is typical of Continental procedural systems, the Yugoslav investigating judge will draw up in digest form a record of each interrogation. In doing so he will have to act in compliance with a great number of provisions designed to assure the reliability of information contained in the protocol.⁶⁰ The records of interrogations, included in the dossier, may then be introduced as evidence at trial, subject to the standard Continental limitations emanating from the procedural principle of "directness."⁶¹ Even when records are not introduced into evidence, their content will as a practical matter still affect the ultimate decision. This occurs in a round-about way. As is usual on the Continent, the Yugoslav judge will always study the dossier of the case in preparation for the trial. Later, as a towering figure, flanked by lay assessors, he will have to decide both the questions of law and fact.⁶²

⁵⁷ Art. 73, para. 1, CCP.

⁵⁸ 384 U.S. 436 (1966).

⁵⁹ See *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁶⁰ Arts. 77-82 CCP.

⁶¹ The principle of directness requires, among other things, that witnesses and defendants heard in the preliminary investigation be questioned again at trial. However, if statements at trial differ from those given earlier, prior interrogations may be read in court. Damaška, *Fundamental Principles of Non-Adversary Procedure*, in *COMPARATIVE CRIMINAL LAW AND PROCEDURE* 61-63 (1968) (unpublished mimeo, copies available in Biddle Law Library, University of Pennsylvania Law School, Philadelphia, Pa.).

⁶² This happens even in some of those Continental countries which retained the "jury" in prosecutions for certain classes of criminal offenses (e.g., France.)

Consequently, the pre-trial records will, in a normal case, influence the decision rendered by the court, irrespective of whether this is reflected in the trial court's opinion.

In view of the use made of pre-trial records, the question of sanctions for violations of rules regulating interrogations by the investigating judge assumes great practical importance. The exclusion from evidence of statements obtained during defective interrogations suggests itself as a possible sanction. The old Code contained no such provisions. In this situation some argued that statements, if reliable and relevant, should be admissible at trial notwithstanding procedural irregularities in their procurement.⁶³ It would seem that this view was followed in court practice. Without exception appellate decisions reversing judgments based on illegally obtained confessions dealt with statements whose trustworthiness was doubtful. Inadmissibility, therefore, was predicated on the truth test, rather than on an objective exclusionary rule.

In contradistinction to the old Code the amended Code has effective sanctions for violations of the rules regulating interrogation. If the judge fails to issue the required warnings of the right to counsel and the right to remain silent, or if he fails to enter into the record the fact that he issued these warnings, the court is not permitted in arriving at its decision on the merits to use as evidence statements obtained from the defendant during such defective interrogations.⁶⁴ It is irrelevant whether or not the statements are otherwise completely voluntary and trustworthy. The same consequence attaches if the defendant was interrogated in the absence of counsel, save under circumstances in which this is in conformity with the Code. Also of great practical importance is another new provision, article 81, inserted among those dealing with documents and records. It provides that whenever the Code stipulates that the criminal judgment cannot be "based on specific statements," the investigating judge is bound to extract from the official dossier of the case any records containing these "tainted" statements. After being removed from the files, the records have to be placed in a separate folder and must not be inspected or

⁶³ This was the view of the present author. See Damaška, *Procesne posljedice upotrebe dokaza pribavljenih na nedozvoljeni način* (*Procedural Consequences of Use of Illegally Obtained Evidence*) in *NAŠA ZAKONITOST* 220 (1960). Cf. VASILJEVIC, *supra* note 5, at 299.

⁶⁴ Art. 203(10) CCP.

utilized in any manner in the subsequent proceedings. If the judge fails to act pursuant to this provision, and fails to extract the records either on the motion of defense counsel or as part of his official duties, defense counsel will at a later stage have additional opportunity to request their exclusion before the case comes up for trial.⁶⁵ Since under the Yugoslav system, the trial court rules on both the admissibility and the weight of evidence, this procedural device greatly reduces the likelihood that tainted evidence will affect the fact-finders' minds.

The amended Code does not decide the issue of the admissibility of derivative evidence, *i.e.*, evidence obtained from clues and leads contained in illegally procured statements. This is of great practical significance since the investigating judge, just as the police, will question the defendant more than anything else to elicit information on the basis of which physical and other evidence to be presented in court can be discovered. As previously indicated, the Code of Criminal Procedure explicitly refers only to the exclusion of the defendants "statements."⁶⁶ Yugoslav courts are thus at liberty to decide the question of whether to construe the Code restrictively, or adopt some kind of a "fruit of the poisonous tree" doctrine. Persuasive legal arguments can be advanced in support of both interpretations. But these arguments will not detain us here because they would carry us too far afield into technical detail and because, more importantly, it is quite unlikely that the persuasiveness of mere legal arguments, one way or another, will be the controlling consideration in shaping practice under the new Code. What will be decisive is the extent to which the complete immunity which may result from rigorous exclusion seems acceptable to the court. Isolated voices notwithstanding,⁶⁷ there seems to be little evidence

that such a liberal position prevails in the Yugoslav or any other Continental court practice.⁶⁸ In contrast to American practice where, even in cases of serious violent crimes, the strict implementation of

Peters, *Beweisverbote im deutschen Strafverfahren*, in VERHANDLUNGEN 160. Symmetry would, of course, require exclusion of illegally obtained evidence even if it favors the defendant. For a more cautious view see Walder *Rechtswidrig erlangte Beweismittel im Strafprozess*, 82 SCHWEIZERISCHE ZEITSCHRIFT FÜR STRAFRECHT 47 (1966).

Besides such isolated scholarly analyses advocating the rejection of derivative evidence, one can occasionally find in Continental writing broad proclamations to the effect that evidence extracted from the defendant cannot be used, in any form, as a basis for his conviction. It would seem, however, that those who make these broad pronouncements do not always distinguish between trustworthy and untrustworthy illegal evidence or express opinions on suspected trends. For a realistic appraisal of one such broad pronouncement see Nuyolone, *Beweisverbote den Ländern des römischen Rechtskreises*, in VERHANDLUNGEN 89.

⁶⁵ From an American perspective there seems to be in all European countries relatively little discussion of the problem whether reliable evidence, illegally obtained from the defendant, may be used in arriving at a decision of guilt. The tenor of the Continental tradition is, of course, in favor of admissibility, although one can find even in the days of the old inquisitorial procedure writers who would exclude illegal evidence even at the price of acquitting the guilty. See, *e.g.* JULIEN DENTAND, *ESSAI DE JURISPRUDENCE CRIMINELLE*, Tome II, 165-66 (Lausanne 1785), who points to the example of English trials. [The book is available in the rare book section of the Biddle Law Library, University of Pennsylvania Law School, Philadelphia, Pa.] The only exception to the traditional practice of admitting illegal evidence (if truthful) seems to have been sporadic exclusion of incriminating evidence addressed to the defendant's father confessor. see I PITAVALL, *CAUSES CÉLÈBRES AND INTÉRESSANTES AVEC LES JUGEMENTS QUI LES ONT DÉCIDÉES* 377-79, 405 (Richer ed. 1772).

Decisional authority is also rather scarce in Europe. Occasional court decisions usually do not warrant reliable conclusions and their importance on the Continent should not be equated with that of American decisions. Few legislative enactments follow the West German and Yugoslav example and explicitly deal with the issue, even if limited to unlawfully obtained statements only.

The fact that there is very little authority on the exclusionary rule in the context of defective interrogations is in itself significant, if our expectations are not unfounded that defective interrogation must occur in practice. Lack of litigation of the issue seems indicative of the inhospitable attitude towards exclusion.

Scandinavian law seems to favor admissibility of unlawfully obtained evidence, on the condition, of course, that it is reliable. Compare ANDENAES, *STRAFFPROCESSEN* 336 (1962); see also VERHANDLUNGEN 25-26. Italian decisional authority and much scholarly writing seem to take the same view. For a somewhat different view in Italian writing, see CORDERO, *PROVE ILLECITE NEL PROCESSO PENALE*, RIVISTA ITALIANA DIR. E PROC. PEN. 32 (1961). Swiss practice does not permit any conclusions. See Walder, *supra* note 67, at 37. The

⁶⁵ This happens in the framework of the proceedings for "contesting the charging papers," Art. 246 CCP. Somewhat similar provisions pertaining to the extraction of documents from the dossier can be found in French law. Art. 173, FRENCH CODE OF CRIMINAL PROCEDURE.

⁶⁶ Art. 203 (10) CCP.

⁶⁷ These isolated voices are mostly heard in academic circles, where the emphasis on consistency and symmetry is not tempered by considerations of a utilitarian nature and actual responsibility for decisions. An example of a highly respected academic voice in favor of the ban on derivative evidence comes from West Germany. With respect to a provision of the German Code of Criminal Procedure, Art. 136a, resembling the Yugoslav Art. 203(10) CCP. K. Peters argues that no evidence derived from illegally obtained statements of the defendant should be "evaluated" (used in arriving at a decision) as long as the "causation chain" with the unlawful evidence is unbroken. See

the exclusionary rules results in definitive acquittals of notoriously guilty perpetrators,⁶⁹ case histories of people like Escobedo or Mallory have yet to arise in Yugoslavia. What is involved in this con-

present author was not able to find any, authority on the issue under consideration in any socialist country except Yugoslavia, note 63 *supra*. Even in jurisdictions such as Scotland or France in which the exclusionary principle seems to be adopted, a case by case approach often leads to the admission of illegally obtained evidence. For France compare Bouzat, *supra* note 24 at 173; for Scotland see Lawrie v. Muir, 1950 Justiciary Cases 19. In West Germany, as in Yugoslavia, the practical significance of the exclusionary rule depends on whether it stretches to derivative evidence. The only case in point found by the author rejects the extension. See the judgment of OLG Oldenburg, reported in *Neue Juristische Wochenschrift* 683 (1955). Some influential commentaries follow suit. See SCHWARTZ-KLEINKNECHT, *supra* note 56, commentary to §136a; SCHMIDT, *supra* note 38, commentary to §136a. In any of these countries, there are probably no cases of notorious perpetrators of violent crime going free as a result of the operation of the exclusionary rule.

Perhaps a caveat is needed at the close of these remarks on the exclusionary rule in the area of defective interrogation of defendants. The reader must not be misled into thinking that the scarcity of rules excluding reliable but legally defective evidence prevails in all areas of Continental criminal procedure. It is true in the law of searches and seizures, but not in the law dealing with privileges of witnesses. Except for sporadic examples to the contrary (*e.g.*, France, Russia), witnesses are granted the privilege against self-incrimination by explicit statutory provisions. The violation of these privileges results as a rule in the exclusion of the testimony obtained even if otherwise reliable. In some European jurisdictions witnesses' privileges are much broader than in typical American jurisdictions *see, e.g.*, Art. 222 of the Yugoslav CCP.

⁶⁹ But see *Jessie v. State*, 28 Miss. 100, 103-4 (1854): The word 'guilty' universally, in law, implies a

trast is probably a vast cultural difference.⁷⁰ It thus appears to us that the Yugoslav Code, following the amendments, has gone as far in the direction of excluding trustworthy evidence illegally obtained from the defendant as the culture would tolerate. An extension of the exclusion rule to derivative evidence would be surprising indeed.

violation of law—a commission of an act or omission of a duty under circumstances which render the commission or omission unlawful. When it is said that the law is made for the protection of the innocent by a due punishment of the guilty, and that it is better than [sic] ninety-nine guilty persons should escape than that one innocent should be punished, the term 'guilty' is not asserted of persons who do or have done acts which may or may not be unlawful. . . , but all those who actually do or have done such acts attended by such circumstances to render them illegal.

⁷⁰ The fact that a rigorous application of the exclusionary rules with reference to trustworthy evidence is relatively more acceptable in America than in Europe may have something to do with the greater impersonalization emanating from greater size, the increased social mobility and somewhat weaker family ties in the United States. The release of a notorious criminal, particularly in rape or murder cases, into a sedentary, peasant type society seems almost unthinkable. American attitudes toward the exclusionary rule are reflective of the relatively greater cultural tolerance of allowing known criminals to be at large in order to preserve other legal and moral values. The impossibility of appeal by the state and the problem of organized crime with its known leaders freely moving about are other aspects of the essentially same cultural phenomenon so striking to foreign observers.