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Do Rules of Evidence Apply (Only) In the Courtroom? Deceptive Interrogations in the United States and Germany

Jacqueline E Ross

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Abstract:

Scholars who compare common law and civil law countries have long argued that civil law legal systems like Germany do not employ formal rules of evidence comparable to those which govern American courtrooms. The complex and restrictive nature of American evidentiary rules is said to be an artifact of the adversarial process and lay juries, which the legal system does not trust to evaluate evidence dispassionately. Civil law systems that commit fact-finding to mixed panels of lay and professional judges are said to have less need for formal rules of evidence that withhold information from decision-makers.

My essay challenges this widely held view. Existing scholarship overlooks a rich source of evidentiary norms in the criminal process of civil law countries like Germany. Scholars have failed to recognize the dual ways in which evidentiary rules can function: they can restrict the presentation of evidence at trial; and they can shape its acquisition during pretrial investigation. German regulation of police interrogation—particularly its treatment of deceptive stratagems—provides a striking example of how investigatory rules can limit and guide the acquisition of evidence. Germany forbids tricks and ruses common in American interrogations of the accused. Interrogation rules that prohibit the police from asking suspects leading questions or from assuming facts not in evidence greatly resemble the evidentiary principles that govern American trials. I will argue that German interrogation norms, like American evidentiary rules, shape the factual record on which the legal system assesses guilt or innocence—though unlike American evidentiary rules, interrogation norms are motivated not by distrust of the fact-finder but by the desire to protect criminal suspects from unfair manipulation. I will also show that American interrogation rules impose no comparable limits on investigative conduct.

My essay examines both the institutional presuppositions and the implications of regulating the flow of evidence during acquisition in pretrial investigation rather than during presentation at trial. Filtering the flow of information at so early a stage in the criminal process benefits all criminal defendants, while American evidentiary rules matter to only that small minority of defendants who exercise their right to a trial (rather than negotiate a guilty plea.) Rules that regulate how police may ask questions shift responsibility for applying evidentiary rules from litigators to investigators. This presupposes a greater degree of investigative transparency along with a different system of pretrial discovery from that which governs the more adversarial pretrial process in common law countries. In the end, judicial skepticism about the possibility of constraining investigative practices may be one reason why the American criminal justice system filters evidence primarily at trial, where legal professionals pose questions publicly and under judicial supervision.

1 Professor of Law, University of Illinois College of Law.
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I. Introduction

Scholars who compare common law and civil law countries have long argued that civil law legal systems like Germany do not employ formal rules of evidence comparable to those which govern American courtrooms.² John Langbein describes the French and German legal systems as unencumbered by “a body of rules designed to exclude probative information for fear of the trier’s inability to evaluate it.”³ While Mirjan Damaska notes that continental systems employ a few exclusionary principles to limit the fact-finder’s reliance on certain types of evidence, such as hearsay or uncharged criminal conduct, he, too, concludes that “there is no gainsaying that a great deal of information, inadmissible under common law evidentiary rules, reaches the continental adjudicators.”⁴ Continental prosecutors do not confront the difficult task of determining, as common law prosecutors must, “whether the logically relevant information he has gathered will successfully undergo the legal metamorphosis into technically competent evidence.”⁵ The complex and restrictive nature of American evidentiary rules is said to be an artifact of the adversarial process and its reliance on lay juries, whom the rules of evidence shield from information that the legal system does not trust them to evaluate accurately or dispassionately.⁶ Civil law systems that commit fact-finding to mixed panels of lay and professional judges trust them to make proper allowances for the infirmity of certain types of evidence.


⁴ Damaska, “Evidentiary Barriers,” Note 2 supra at 519.

⁵ Id at 521.

⁶ According to McCormack, “It is safe to say that without the jury there would be no law of evidence remotely resembling the rules of admissibility which make up its contents in English-speaking countries today,” (“Evidence,” in 5 Encyclopedia of Social Science 639 (1931).
evidence, such as hearsay, without having to be shielded from the facts. Such a system has less need for formal rules of evidence that keep facts from fact-finders. My essay will challenge this widely held view by contrasting the German and American systems of pretrial investigations.

Scholars who downplay the importance of continental rules of evidence implicitly assume that these rules govern courtroom procedure. But evidentiary rules can shape the ways in which evidence is acquired through investigations as well as ways in which it is ultimately presented at trial. By focusing on courtroom procedure, existing scholarship misses the important role that continental evidentiary rules play in sifting information at its source. Constraints on investigations become evidentiary rules when they significantly affect how investigators such as police and undercover agents obtain information about criminals, sort it, and pass it on to prosecutors. In short, investigative rules function as evidentiary rules to the extent they filter and shape the information that reaches the trier of fact. My thesis, in brief, is this: If Germany has scanty rules of evidence for trials, it has well-developed rules of evidence for investigations. Like American rules of evidence, German investigative rules transmute raw data into evidence, determining what information reaches the fact-finder, and the manner in which it is framed. But German investigative norms serve this function at a much earlier stage in the criminal process. Since the American criminal process reserves its most elaborate procedural protections for trial, American rules of evidence do not come into play until then.

This difference in timing reflects the different purposes for which the United States and Germany regulate the transformation of information into evidence. German investigative norms

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7 Mirjan Damaska notes, however, that the use of lay fact-finders is only one of the reasons for the complexity of American rules of evidence. These rules are designed not only “to correct the cognitive shortcomings of lay adjudicators,” but also “to assist them in reaching a unanimous decision, or to compensate for the cryptic character of their verdict.” Mirjan R. Damaska, Evidence Law Adrift, 46 (Yale 1997). Damaska also identifies other variables that contribute to the hypertrophy of American evidentiary regulation, including the procedural concentration of fact-finding in common law systems, the divided nature of the trial tribunal, which permits judges to keep evidence away from the jury, and the degree to which American criminal procedure entrusts parties with responsibility for framing issues to be adjudicated and for presenting the evidence at trial. Id.
are not designed to forestall improper influences on the jury, but to safeguard the rights of
criminal suspects. But many other systemic differences flow from the disparate timing of
evidentiary constraint. Because German evidentiary rules intervene at the point at which the
evidence is gathered and shaped, rather than at the later stage when it elicited as testimony in
court, these rules benefit the full range of criminal suspects, including those who plead guilty. In
this they differ from American courtroom rules, which benefit only the small number of criminal
defendants who go to trial. To obtain the benefit of evidentiary rules, American defendants must
elect to go to trial and forego the option of pleading guilty and receiving a lower sentence. And
because German evidentiary rules affect the conduct of the investigation rather than the trial,
such norms constrain investigators rather than litigators. Accordingly, their application lacks the
public, performative character of courtroom rules—while presupposing a significant degree of
training and professionalism among the police, as well as a greater degree of uniformity and
transparency in the investigative process.

There are a variety of ways in which German evidentiary norms influence the flow of
information to the fact-finder. Investigative rules such as warrant requirements may restrict the
availability of certain investigative tactics, increasing police reliance on alternatives. Instead of
regulating when the police may use certain investigative techniques, investigative norms may
also regulate how the police may use them, for example by regulating how the police may
question criminal suspects, or, whom, indeed, they may question. By comparison to its
American counterpart, German criminal procedure imposes more constraints both on the choice
of investigative techniques and the manner of their application. To be sure, both the United
States and Germany require warrants for electronic surveillance; and compliance with the
warrant procedure virtually ensures that the resulting interceptions will be usable as evidence at
But in Germany, warrant requirements play a much more important role in securing the usability (or admissibility) of evidence for the simple reason that many more investigative acts, including long-term visual surveillance and undercover operations, are subject to warrant requirements. Likewise, Germany imposes more significant constraints on the questioning of witnesses. Though the United States recognizes testimonial privileges for psychiatrists, lawyers, and spouses, these protections only apply to live testimony; thus they come into play fairly late in the criminal process. In Germany, by contrast, privileges not only cover many more familial relationships; they also apply outside the courtroom, to the initial criminal inquiry.

The significance of these investigative rules is invisible to those who focus primarily on courtroom procedure in contrasting American and German evidentiary systems. Thus it is no doubt true that German courtrooms lack the complex and technical rules of evidence that shape American trials; but the greater informality of fact-finding in the German criminal process is made possible by and takes place in the shadow of significant constraints on the acquisition of evidence. These constraints have no counterpart in American regulation of investigative procedure; their true counterpart, in the U.S. legal system, is the complex system of courtroom rules that govern the presentation of evidence at trial (and the uses which jurors may make of the evidence.)

German regulation of police interrogation—particularly its treatment of deceptive stratagems—provides perhaps the clearest and most striking example of the vitally important role

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8 St PO 100a, 100c.
9 See Jacqueline E. Ross “Germany’s Federal Constitutional Court and the Regulation of GPS Surveillance,” 6 German Law Journal No. 12 (online, 2005)
10 Section 52 St PO (Criminal Procedure Code of the Federal Republic of Germany.) “[I]n addition to refusing to answer self-incriminating questions, in many European jurisdictions witnesses can refuse to answer questions potentially capable of incriminating members of their family. Some countries go even further and dispense witnesses from the duty to answer any question likely to dishonor them or expose them to direct financial loss.” Damaska, Evidence Law Adrift, supra, at 13. See also Ronale Allen et al., The German Advantage in civil Procedure: A Plea for More Details ’92 Nw. U. L. Rev. 705, 731-33 (1988).
that constraints on the acquisition of evidence play in shaping what comes before the trier of fact. Rules that govern the types of questions a police officer may ask, and how he may phrase them, greatly resemble the formal limits that American rules of evidence place on the questioning of witnesses. But German constraints are not rules of courtroom procedure; they apply to investigative conduct and to the manner by which evidence first makes its way into the case file.

If American evidentiary rules seek to cabin and channel the deliberations of a potentially aberrant fact-finder, German constraints on the acquisition of evidence are designed to control the police. German interrogation norms promote accuracy by inhibiting practices that can provoke false confessions or distort memories of past events. But German interrogation norms also protect suspects from the police. In reaction to the Nazi regime, Germany regulated interrogations through rules designed to protect suspects’ right to counsel and right to silence, and, more generally, their autonomy in deciding whether to cooperate with the police.11 The complex rules governing the acquisition of evidence from the accused are designed to safeguard these rights. A number of features of the German legal system turn these rules into powerful constraints on investigations. Germany has a more robust conception of voluntariness than the United States. It derives from this a number of interrogation rules designed to protect the autonomy of suspects in their interactions with the police. German criminal procedure enforces these norms through exclusionary rules.12 And some courts and commentators have extended

11 St PO 136, 136a The historical origins of these protections are discussed in BGHSt 1, 387; Degener GA 1992, 443 (463); LR-Hanack, 136a Rn 2. The rule is said to serve the aims of protecting autonomy and preserving the suspect’s right to remain silent and passive in the face of accusation. BGHSt17, 364 (367); KK-Boujong 136a Rn 1; Lindner, “Täuschungen in der Vernehmung des Beschuldigten,” Diss. Tuebingen 1988, at 69.
interrogation norms to other contexts, such as the questioning of suspects by jailhouse snitches and undercover agents.\textsuperscript{13}

These claims about German interrogation norms may seem surprising since there is a surface resemblance between them and their American counterparts. Like the United States, Germany protects suspects from outright coercion or lesser compulsions to speak.\textsuperscript{14} Both the United States and Germany use exclusionary rules should the police apply too much pressure.\textsuperscript{15} Germany also echoes the requirements imposed by \textit{Miranda}, since German police officers must advise suspects of their right to silence and their right to counsel before attempting to question them.\textsuperscript{16}

Nonetheless, German interrogation norms differ significantly from their American counterparts in that they eliminate much of the leeway for officers to obtain by stealth and deception what \textit{Miranda} and the Due Process Clause prohibit them from acquiring by coercion. The \textit{Miranda} decision aims only to arm defendants with knowledge of their rights.\textsuperscript{17} It does not regulate what the police may do once they have administered the required warnings and have succeeded in obtaining a waiver. By contrast, German law forbids the use of deceptive interrogation tactics and derives from this ban a variety of additional rules that govern the form of permissible questioning. Germany applies these constraints to custodial and non-custodial interrogations alike.\textsuperscript{18} Thus interrogation norms govern all open questioning of the accused.

And certain rules, like the prohibition of leading questions, apply to conversations with ordinary

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\textsuperscript{13} BGHSt 34, 362 (jailhouse informants); BGHSt 34, 39 (45 et seq) (police listening in on conversation between target and informant)

\textsuperscript{14} St PO 136.

\textsuperscript{15} See note 9, supra.

\textsuperscript{16} St PO 136.

\textsuperscript{17} \textit{Miranda v. Arizona}, 384 U.S. 436 (1966).

\textsuperscript{18} St PO 136; von Stetten, note __ supra.
witnesses as well.\textsuperscript{19} Indeed, some German commentators argue for extending these norms to some, if not all, covert interactions between suspects and undercover agents or informants. In effect, these critics argue for prohibiting those undercover operations which circumvent and therefore undermine interrogation norms.\textsuperscript{20}

In contrasting American and German approaches to deceptive interrogation, I will argue that German regulation of investigations displays a much greater degree of ambivalence about using the suspect as a source of evidence against himself outside the protected setting of the court. But I will also argue that Germany’s aggressive regulation of interrogation tactics also grows out of a commitment to conducting quality control of the evidence at the point of intake. Germany’s exclusion of defendants’ statement at trial serves not to shield fact-finders from information they are ill-equipped to evaluate properly but to enforce rules about the means by which evidence is acquired. I will also suggest that the intensive regulation of investigations has prompted the police to develop a variety of techniques to evade these constraints. But these tactics invite scrutiny and challenge in a legal system that regulates evidence primarily in the investigative stage. America’s tolerance for deceptive techniques of obtaining evidence stems first from our willingness to postpone procedural safeguards for the suspects until they are arrested or charged; and second, from our decision to sift evidence when it is presented, rather than when it is obtained.

In contending that German investigative constraints function as rules of evidence I do not want to claim that the German evidentiary norms have the same content or complexity or that

\textsuperscript{19} St PO 69 III and 72 extend the requirements of St PO 136a to ordinary witnesses. However, the police need not advise ordinary witnesses of their right to counsel and their right to silence. St PO 136, which imposes this requirement, applies only to interrogations of the accused.

\textsuperscript{20} E.g. Fezer, NSiZ 1997, 18 (19)(who would prohibit all undercover operations); Roxin, NSiZ 18 (who would restrict undercover operations to the investigation of organized crime and rein in the use of informants); Dencker StV 1994, 667 (674), 106 (who would prohibit undercover questioning about past crimes.)
they serve identical purposes. Instead, I will argue that courtroom rules are not the only procedural devices by which legal systems regulate the flow of information to the fact-finder. Legal systems can regulate the transmission of knowledge about crime either at the stage of acquisition or at the point of formal presentation at trial. Controls at the investigative stage can substitute for controls at trial, and vice versa. Both modes of regulation attempt to filter out (some) unreliable evidence. And both modes filter out information for reasons unrelated to its reliability, e.g. by excluding evidence that witnesses and defendants are privileged to withhold. In short, these modes of regulation are comparable in that both of them limit the flow of information to the fact finder and that both of them do so only partly from concern for the reliability of the evidence they exclude. I hope to explore the normative commitments behind these divergent approaches to evidentiary regulation along with their institutional presuppositions and their implications for other features of the criminal process, such as plea bargaining, discovery, and the respective roles of police, litigators and judges.

This study will focus on interrogation norms to show how German investigative norms limit and guide the acquisition of evidence at the source. I will argue that German interrogation norms, like American evidentiary rules, shape the factual record on which the legal system assesses guilt or innocence—though unlike American evidentiary rules, interrogation norms are motivated not by distrust of the fact-finder but by the desire to protect criminal suspects from unfair manipulation. I will also show that American interrogation rules impose no comparable limits on investigative conduct. What makes German interrogation rules so powerful is that they limit the ability of the police to substitute deceptive stratagems for the prohibited use of coercion. Section II of this paper will explore what the German legal system treats as “deceptive.” In so doing, it will develop the analogy between German investigative rules and American evidentiary
rules. Section III will demonstrate the extent to which interrogation norms affect the flow of information from the accused to the trier of fact by showing that German interrogation norms constrain the police very early in the investigative process. In the United States, police questioning may elicit incriminating statements from the accused before he obtains the constitutional safeguards that follow from an arrest or indictment. The limitations that Miranda and the Fifth and Sixth Amendments provide may come too late to impose significant constraints on the acquisition of evidence from the accused. By contrast, German police may not evade constraints on questioning suspects by postponing the timing of arrest or the filing of charges. Because the German legal system interposes evidentiary controls at the point in time when incriminating evidence is first obtained from the accused, German interrogation rules play a powerful role in filtering the statements of the accused that will eventually become evidence at trial.

Section IV will argue that when investigative rules regulate evidence obtained through one investigative tactic, such as police interrogation, such norms have a tendency to spread beyond their initial domain of application to other investigative techniques. If there are several avenues for obtaining evidence from a given source, restrictions on one option will encourage the police to resort to less regulated alternatives. Since American interrogation norms address themselves to particular investigative abuses (like the use of coercion), this shift may be acceptable, and even desirable. But in a legal system that prohibits the police from lying to the accused during questioning, courts and commentators are apt to frown on investigative alternatives like undercover policing as circumventions of the norm against deception. For many German judges and scholars, German interrogation norms establish a preferred method for obtaining evidence from the accused; other means of eliciting incriminating admissions appear
suspect when they depart from the model of questioning that governs open interrogations. Because they so comprehensively circumscribe all official questioning of the accused, German interrogation norms can gradually lay claim to regulating all of the means by which the police acquire information from that source. Section IV will explore this tendency of interrogation norms to spill out the original confines of their application. In particular, this Section will examine the extent to which the ban on deceptive interrogations casts doubt on the legitimacy of other investigative interactions between police and suspects, such as undercover investigations and the use of jailhouse snitches. Each of these sections will explore the ways in which investigative practice permits the police to work around the system’s constraints—while suggesting that such circumventions remain unstable and subject to challenge in a system that concentrates its regulation of evidence at the point of acquisition.

My claims about Germany derive from statutory materials; the academic literature about police interrogation and undercover policing; and judicial opinions. My discussion of the ways in which the German police work around the ban on deception rests in part on 89 field interviews which I conducted from 2002 to 2004 with German police officials, prosecutors, and judges from fifteen of the sixteen German states, as well as my perusal of training materials and police manuals. My sources did not, of course, provide unbiased information. I arranged the interviews in order to cross-check statements and perspectives. I compared claims made by sources against information provided by: (a) colleagues in their own agency; (b) counterparts in other states; and (c) personnel in other parts of the legal system (checking variations in accounts by police officers, prosecutors, and judges). My interviews explored undercover operations,

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21 For reasons of security, I have not provided the names of my respondents. I have, however, included footnotes identifying the official position of the speaker and the dates on which the interview took place.
22 Using what social scientists call “open-ended, semi-structured” field interviews, I sought to ascertain how rules, regulations, and a variety of normative constraints influence the design and execution of undercover investigations.
police interrogations, and the use of informants as covert operatives. I sought to identify the
varieties of roles that subterfuge plays in the criminal investigative process and the ways in
which police adapt to or work around the plethora of statutory regulations governing
investigations of persons suspected of serious crimes. All interviews were conducted in German.

II. The Legal Treatment of Deceptive Questioning in the United States and Germany

A. Deception and Autonomy in Comparative Focus

American law offers few protections against deceptive interrogation tactics. American
police and courts treat deceptive questioning as lawful alternatives to the prohibited use of
intimidation or force that compels self-incrimination. Indeed, the Miranda decision itself made
the tacit assumption that it was constitutional to deceive defendants about the state of the
evidence against them or about whether it was in their interests to cooperate with the police. The
court listed a wide variety of manipulative and deceptive interrogation tactics in explaining why
it was necessary for the police to advise defendants of their rights before embarking on custodial
interrogation.23 The court never suggested that it would be unconstitutional for the police to
elicit admission by feigning sympathy or to conduct reverse lineups, in which fictitious witnesses
identify the defendant as the perpetrator of a crime he did not commit, in order to induce the
defendant to “confess to the offense under investigation in order to escape from the false
accusation [concerning the crime he did not commit.]”24 No legal doctrine prohibits the police
from pretending that the defendant’s fingerprints have been found on the murder weapon or that

My interviews focused on the personal experiences of those who participate in, supervise, and evaluate undercover operations. There are a number of options for gathering this kind of data. See Yvonna S. Lincoln & Egon Guba, Naturalistic Inquiry, (1985); Gary King, Robert O. Keohane & Sidney Verba, Designing Social Inquiry, (1994); Michael Quinn Patton, Qualitative Evaluation and Research Methods, 2nd ed. (1980); David Flinders & Geoffrey E. Mills, Theory and Concepts in Qualitative Research, (1993).

23 Id.
24 Id.
the defendant’s accomplice has implicated the defendant in a crime. American constitutional doctrine has little to say about what deceptive stratagems the police may use once the police have administered the required warnings and a valid waiver is in place.

To be sure, American courts do recognize some limits on the use of trickery or deceit. The police may not question a defendant undercover (or through informants) about crimes with which the defendant has already been charged. The police may not pose as priests, psychiatrists, court-appointed counsel to extract confessions. And in Spano, the Supreme Court found that the police had violated the defendant’s due process rights by permitting the defendant’s friend on the force to pretend that his wife was pregnant and that he would be fired (and unable to support his pregnant wife and family) unless the defendant confessed. But the Spano decision involved not only deception but prolonged questioning of an unusually unsophisticated and psychologically vulnerable suspect. And though the police may not question defendants undercover once formal charges have been filed, this constitutional principle protects only the Sixth Amendment right to counsel; such undercover operations do not violate a defendant’s Fourth or Fifth Amendment rights. Moreover, the police can easily work around this prohibition, as the government generally has considerable leeway in deciding when to indict. Even afterwards, a defendant may be covertly questioned about crimes with which he has not yet

25 Oregon v. Mathiason, 429 U.S. 492 (1977)(in which police falsely claimed that suspect fingerprint’s had been found at the crime scene); Frazier v. Cupp, 394 U.S. 731 (in which police falsely claimed that the co-defendant had confessed.)
27 United States ex rel Latham v. Deegan, 450 F.2d 181 (2d Cir. 1971)(in which a police officer claimed to be an army officer to obtain a confession from soldier on furlough); Joseph P. Grano, Confessions, Truth, and the Law, 114 (1993).
28 Spano v. New York, 360 U.S. 315 (1959). Nor may the government use ruses to deprive the Miranda warnings of their impact on the defendant—as the FBI did in telling suspected Atlanta bomber Richard Jewell that his Miranda warnings were being administered (and videotaped) for training purposes only.
been charged. The ban on posing as a priest is remarkable precisely because it is a rare exception to the general judicial tolerance of lies and ruses during questioning.

Like the privilege against compelled self-incrimination, the Due Process Clause protects defendants primarily from coercion, rather than deception. To be sure, one strand of Due Process analysis focuses on the reliability of police tactics as engines for the discovery of truth. Tactics that are likely to induce false confessions may overbear the defendant’s will and violate his rights to due process. But many deceptive stratagems are quite effective in producing true confessions. Moreover, the reliability of an interrogation tactic is only one factor in Due Process analysis. Courts must consider the “totality of the circumstances” in determining whether a defendant confessed voluntarily. Few deceptive stratagems will automatically require suppression of the evidence, since Due Process violations typically flow from a combination of different abuses; decisions finding such violations are usually highly fact-dependent, making it difficult to isolate deceptive tactics that are in and of themselves sufficiently egregious to violate the Fifth Amendment.

Germany seeks to filter the evidence against criminal defendants at the interrogation stage, as a way of bolstering defendants’ rights—particularly the right of the accused to decide whether to make statements to the police that may be used as evidence against him. That autonomy can be undermined by a variety of police tactics, including deceptive questions that mislead a suspect about the state of the evidence against him, about his best interests, or about the government’s intentions. German courts and scholars reason that a person cannot exercise

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31 3 Wigmore on Evidence (3d ed. 1940) Sections 815—867.
32 Id.
33 Lisenba v. California, 314 U.S. 219, 236 (1941).
35 BGHSt 17, 364; Kleinknecht/Meyer-Gossner, Strafprozessordnung S. 136a.
autonomy in deciding whether to invoke his right to silence if the police influence his mental processes through misinformation.\textsuperscript{36} Accordingly, German law prohibits the police from lying to the accused during questioning.\textsuperscript{37} Statements obtained in violation of this rule must be suppressed.\textsuperscript{38} (However, German commentators disagree about the admissibility of derivative evidence, such as fingerprints or other physical evidence.\textsuperscript{39} German appellate courts have announced no general rule concerning derivative evidence but have held that admissibility should be decided on a case-by-case basis.\textsuperscript{40})

Germany’s ban on deception has its origin in Germany’s post-war reaction to the horrors of interrogation tactics during the Nazi regime.\textsuperscript{41} The Federal Republic’s rejection of this past accounts for a number of normative commitments that conflict with the use deceptive interrogation tactics. These include firm protections for a defendant’s freedom to decide


\textsuperscript{37} St PO 136a.

\textsuperscript{38} Kleinknecht/Meyer-Gossner, \textit{Kommentar zum Strafprozessrecht}, Section 136a. However, evidence must be suppressed only if there is a causal link between the deceptive question and the suspect’s admissions, or if the court cannot rule out the possibility that a misleading question prompted the incriminating statement. § 136a III 2 stop; Karlsruher Kommentar StPO, § 136a Rn. 38: Hanack LR RdNr. 62; Schlüchter RdNr. 88, 1); (BGHSt. 5, 290, 291 = NJW 1953, 1114, 1115; 13, 60, 61 = NJW 1959, 1142; BGHSt. 34, 365, 369 = NJW 1987, 2524 f.; Hanack LR RdNr. 62; Meyer-Goßner RdNr. 28; Herdegen NStZ 1990, 513, 518; aA BGHSt. 31, 395, 400 = NJW 1983, 2205).

\textsuperscript{39} Some scholars (\textit{Henkel}, StrafverfahrensR, 2. Aufl., § 65 II 6; \textit{Roxin}, in: Kern-Roxin, StrafverfahrensR, 14. Aufl., § 24 IV; \textit{Spendel}, NJW 1966, 1102 ff.; \textit{Nüse}, JR 1966, 281 ff.; \textit{Knauth}, NJW 1978, 741 ff.; \textit{Dencker}, Verwertungsverbote im Strafprozeß, 1977, S. 80) take the position that the court must exclude not only the admission itself but also other evidence emanating from the violation, however remote the link may be. Other scholars question the practicability of this approach. Schäfer, in: Lüwe-Rosenberg, StPO, 23. Aufl., Einl. Kap. 14, Rdnr. 43; Müller, in: KMR, StPO, 7. Aufl., § 136 a Rdnr. 20; Kleinknecht, StPO, 34. Aufl., Einl. Rdnr. 53 und § 136 a Rdnr. 21; Baumann, GA 1959, 33 ff. question the practicability of this approach. Usually, it would be hard to determine whether there is a link or not.

\textsuperscript{40} BGH NJW 1980, 1700f.

\textsuperscript{41} BGHSt 1., 387; Degener GA 1992, 443 (463); LR-Hanack, 136a Rn 2.
whether to cooperate with the authorities. Deceptive interrogation tactics undermine the intelligent exercise of that right. Lies subvert the defendant’s right to shape his own defense.

Scholars debate a number of other normative sources for the ban on dissimulation. Commentators point out that tricks and ruses interfere with the right of the accused to confront and challenge the evidence against him during the course of questioning. Lies and ruses may inhibit him from exercising his right to demand that the police perform forensic tests or pursue other avenues of inquiry that may exculpate him. The suspect cannot exercise these prerogatives intelligently if interrogators mislead him about the evidence against him, (though they have no obligation to lay bare their evidence when they question him.) A few commentators argue that deceptive interrogation tactics infringe the constitutional protection for human dignity. Others criticize deceptive questioning as intrinsically “unworthy” of a democratic state committed to the rule of law. A number of scholars criticize deceptive questioning as inconsistent with a person’s constitutional right to “informational self-determination”—that is, a person’s right to control the “presentation of self” by limiting the information about himself that he is willing to divulge. Yet others derived the ban on deception from the defendant’s right to counsel, which is supposed to protect him from implicating himself unwittingly.

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42 BGHS17, 364 (367); KK-Boujong 136a Rn 1; Lindner, “Taeuschungen in der Vernehmung des Beschuldigten,” Diss. Tuebingen 1988, at 69.
43 Dencker, StV 1994, 667; St PO 136 II.
44 See Prasch, supra, Note __. St PO 136a I 2 codifies this right.
45 Kleinknecht/Meyer Gossner, Kommentar zum Strafprozessrecht, Section 136a; BGHSt 5, 332.
47 Kleinknecht/Meyer-Gossner, Kommentar zum Strafprozessrecht, Section 136a.
48 Prasch, supra note __ at 63. This informational right—which is often described as a protection for privacy—is buttressed by robust privileges for family members, including aunts and cousins, who may not be compelled to submit to questioning or implicate the accused.
49 Roxin, NSiZ 1997, 18; Prasch, supra note __ at 77.
Germany’s efforts to bolster the defendant’s right to silence are not the sole reason for the complexity and density of German interrogation norms. Germany’s ban on leading and misleading questioning also derives from the organization of fact-finding in German criminal procedure. German fact-finding is not governed by the parties; the prosecution and the defense do not build separate, competing cases for presentation at trial. In theory, at least, the police occupy a more neutral role during the pretrial investigation, since their inquiry is meant to assist the trial judge who bears primary responsibility for examining witnesses at trial (and who has access to the case file containing transcripts of interviews with the accused and other witnesses.)

Deceptive stratagems conflict with the responsibility of the police for developing both exculpatory and incriminating evidence in an unbiased fashion. Misleading questioning may also interfere with the judge’s ability to elicit reliable evidence. As Mirjan Damaska has noted, “interviews conducted by partisan lawyers in preparation for the adversary trial can potentially pollute informational sources in ways that cannot later be detected.” In particular, “queries can have serious distorting effect on memory images. Gaps in recollections can be filled by interviewees with suggested materials, and this material can then be used by them in the inferential reconstruction of events.” Accordingly, interrogation norms prohibit the police from “putting words” into the suspect’s mouth or from suggesting a characterizations of events. This prohibition has roots in Roman law. Since such tactics risk distorting the truth, the ban on deceptive interrogation practices along with the technical interrogation rules apply to the

50 Mirjan R. Damaska, Evidence Law Adrift 72, 115 (Yale, 1997). Though witnesses previously interviewed by the police must be re-examined at trial, “records of prior fact-finding can be used by the presiding judge to stabilize proof-taking at trial—using them as a script to guide witnesses through their testimony, for example.” Id at 72. Thus, “records of prior proof-taking continue to find their way to the trier of fact. To decide a case solely on the evidence as adduced at the trial is still a rare event in Continental practice.” Id at 71.
51 Id at 97.
52 Id at 96.
53 Kuehne, NStZ 1985, 252 (255); Eisenberg JZ 1984, 912 (915).
54 Damaska, supra, at 97, n. 45 (citing Francois Gorphe, L’Appreciation des preuves en justice, 39 (Paris, 1947); Eugenio Florian, Delle prove penali, 472 (Turin, 1961)).
questioning of ordinary witnesses as well as the accused. But lies and tricks are particularly damaging to the accused, since they may lead the innocent to confess falsely in the belief that the evidence against them is overwhelming. Thus rules that prohibit suggestive or misleading questioning are at least partly designed to promote the accuracy of fact-finding.

Germany’s prohibition of suggestive or misleading questioning is implemented through detailed rules that that regulate the informational interactions between suspects and police. These norms are comparable to American evidentiary rules in that they significantly limit and shape the information that reaches the trier of fact. But the German legal system places less emphasis on regulating the ways in which evidence is used or presented at trial because it scrutinizes the means by which evidence is first acquired.

B. Ambivalence about interrogation: a source of evidentiary complexity

1. Impermissible “Deception” and Permissible “Subterfuge”

American evidentiary rules are complex in part because they represent compromises between the search for truth and competing policy goals (though evidence is also excluded to shield the jury from information that it may not evaluate properly). Otherwise relevant evidence may be excluded to promote settlements or promote remedial measures. German interrogation rules are complex for similar reasons. The impulse to protect the autonomy of the accused conflicts with the search for the truth and, in particular, with the impulse to seek information from its logical source.

55 St PO 69 III and 72.
56 American evidentiary rules prohibit leading questions on direct examination at trial. But as Damaska notes, “[f]rom the psychological viewpoint, the ostracism of leading questions from direct examination comes too late; the proponent of evidence has already asked these questions of his witness long before the latter has been called to the stand.” Damaska, Evidence Law Adrift, at 97 n. 46.
57 E.g. Fed. R. Evid. 407 (Subsequent Remedial Measures) and 408 (Compromises and Offers to Compromise).
In protecting the accused, German law defines deception broadly to encompass not only outright lies but misleading non-verbal conduct. If the police question a murder suspect in a case in which they never found the murder weapon, they may not produce a weapon of the same type and place it wordlessly in front of the suspect, hoping to trick him into believing that they possess the murder weapon.

The ban on deception encompasses not only false statements but even true statements that lead to misimpressions. Thus a German appellate court found a violation of the ban when a judge induced a confession by telling the defendant (correctly) that remorse is a mitigating circumstance. After convicting the defendant, the trial judge had refused to mitigate punishment because the defendant had been motivated by the prospect of an advantage at sentencing. Likewise, it is may be considered deceptive to take fingerprints from a suspect and then tell him that he has the “opportunity” to confess before being told whether they match those found on the murder weapon. (Such a tactic is deceptive if it implies that the fingerprints match when they do not, or when no fingerprints have been retrieved from the weapon.) If the suspect confesses because he assumes from this that his fingerprints must have matched those on the weapon, his statements must be suppressed. The questioner produced a misimpression, even though nothing he stated was false. (Indeed, he is sometimes said to have circumvented the ban on deceptive questioning by using only true statements in misleading the accused.)

58 Puppe GA 1978, 289 (295); Kleinknecht/Meyer-Gossner, Kommentar zum Strafprozessrecht Sectio 136a.
59 Prasch, supra, note __, at 256; Bernd Lindner, :Taeuschungen in der Vernehmung des Beschuldigten: Ein Beitrag zur Auslegung des 136a St PO,” Diss. Tuebingen, 1988..
60 BGH 14, 189.
61 Lindner, supra, at 101; Prasch, supra, at 217.
As the same time, German interrogation norms create some leeway for the police. The police are not required to reveal the evidence that incriminates the suspect. Nor must they clear up any misconceptions that a defendant harbors through no fault of the police, though such confusions may affect the suspect’s ability to make an intelligent choice about whether to cooperate with the authorities. Indeed, the police are free to exploit a defendant’s confusion about the law or the facts, provided that they do not add to it or confirm his mistaken beliefs. What they may not do, however, is induce this confusion themselves—at least not through the use of deception.

Germany creates additional leeway for interrogation by distinguishing between the prohibited use of “deception” and permissible use of “subterfuge,” which is a lawful means of inducing the kind of confusion that leads a suspect to confess. The same statute that prohibits deception has been interpreted as creating a loophole permitting the questioning officer to use stratagems that fall short of outright dishonesty. There is in fact a large literature seeking to clarify this elusive distinction—and an even larger literature advising the police on how to use it to their advantage. It is debated, for example, whether the police may tell the accused that “a real man would admit what he did”; whether they may manipulate the suspect by feigning

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63 Id.
64 Id; Prasch, supra, at __.
65 This is known as the distinction between “erlaubte List” (permitted subterfuge) and “verbotene Tauschung” (prohibited deceit.) Kleinknecht/Meyer-Gossner, Kommentar zum Strafprozessrecht Section 136a; Brusten Malinowski Die Vernehmungsmethoden der Polizei und ihre Funktion, http://bidok.uibk.ac.at/library/brusten-vernehmungsmethoden.html at 13.
66 Id; St PO 136a.
67 See e.g. Franz Meinert, Vernehmungstechnik, 172, 4. Auflage, (Luebeck 1956); Siebert, DRiZ 1953, 98; Puppe GA 78, 289; Dahle Kriminalistik 90, 431; Kleinknecht JZ 53, 534; Degener GA 92, 464.
68 Ullrich Sommer, Tipps zur Strafprozessordnung, Kapitel I, S. 29.
sympathy;\textsuperscript{69} or whether they may play “good cop/bad cop” to coax admissions.\textsuperscript{70}

Commentators disagree about whether it is lawful, as a subterfuge, to ask “trick questions”\textsuperscript{71} designed to elicit provable lies, or to pose ambiguous questions that may mislead, depending on how the suspect interprets them.\textsuperscript{72} Those most skeptical of the distinction would restrict the category of permissible “subterfuge” to the exploitation of pre-existing misimpressions (not produced by the police) or, at most, to the option of posing seemingly innocuous questions that conceal the officer’s purpose of eliciting incriminating admissions.\textsuperscript{73}

In practice, the prosecutors and police officials use a variety of strategies to negotiate the fine line between deception and subterfuge. Some officers recalled telling suspects, “we know from other sources that it was you who committed the crime”\textsuperscript{74} or that “sooner or later one of you guys will talk,”\textsuperscript{75} even if there was reason to believe the accomplice had already fled the country.\textsuperscript{76} Likewise, one police official recalled telling suspects, “We already know about you. We’ve already spoken with your buddy,” in the belief that the statement was sufficiently ambiguous to skirt the prohibition on falsely asserting outright that the suspect’s accomplice had fingered him.\textsuperscript{77}

Because it is permissible to exploit existing misimpressions, police officials indicated that they would not contradict a suspect who tells an officer, “you probably know everything

\textsuperscript{69} BGHSt 5, 290 (291); Prasch, supra, at 212; Lindner, “Taeuschungen in der Vernehmung des Beschuldigten,” Diss. Tuebingen 1988, at 159

\textsuperscript{70} Ulrich Sommer, Tipps zur Strafprozessordnung, 28; Brusten Malinowski Die Vernehmungsmethoden der Polizei und ihre Funktion, http://bidok.uibk.ac.at/library/brusten-vernehmungsmethoden.html at 12.

\textsuperscript{71} “Fangfragen”

\textsuperscript{72} Meyer/Gossner/Kleinknecht St PO Kommentar; Siegert DriZ 1953, 98 (100); LR-Meyer 13a Rn 28 in 23th ed.; Prasch, supra, at 223.

\textsuperscript{73} Puppe GA 1978, 289 (293); Prasch at 243 et seq.

\textsuperscript{74} Interview with German prosecutor, May 11, 2004

\textsuperscript{75} Interview with German prosecutor, May 22, 2003

\textsuperscript{76} Id.

\textsuperscript{77} Interview with German prosecutor, May 11, 2004.
anyway” or disabuse a suspect of the belief that his accomplices have implicated him.\(^78\) One manual about permissible interrogation tactics uses the example of a defendant who mistakenly believes that his crimes were captured on videotape. The officer may use this misimpression to his advantage during questioning, but must stop short of explicitly confirming it.\(^79\) A study of German police interrogation tactics describes the following as a “gray zone” tactic: the police put a thick case file on the interrogator’s desk and state “You see, we’ve been busy,” even if the investigators’ efforts have been fruitless.\(^80\)

When all else fails, the police sometimes used their official power of questioning witnesses to trigger incriminating telephone chatter, which they could then overhear. One official remembered bringing in for questioning the girlfriend of a suspect who had invoked his right to silence. The officer knew in advance that the girlfriend would not implicate the suspect. But before meeting with her, he obtained a wiretap order for her cellphone. As soon as the girlfriend left the police station, she called her boyfriend to tell him, “I didn’t give you up.”\(^81\) Thus subterfuge, combined with wiretapping, allows investigators to obtain through covert methods what the police cannot extract directly through questioning.

2. The Ban on Deception as a Source of Additional Interrogation Rules

The distinction between deception and subterfuge grants investigators some latitude. However, other interrogation rules limit the ability of the police to exploit the distinction between permissible and impermissible stealth. These rules supplement the prohibition of deception with more specific constraints on interrogation. This detailed body of law promotes accuracy of fact-finding by limiting the ability of the police to shape the answers to fit the

\(^{78}\) Interview with German prosecutor, May 23, 2003.

\(^{79}\) Sommer, supra, at __.


\(^{81}\) Interview with German police officer, May 12, 2004.
definitions of the crimes they seek to prove. At the same time, these rules protect a suspect’s right to present her version of events without suggestive influences. Backed by sanctions of exclusion, these norms play the role of American evidentiary rules in sifting the evidence that will eventually come before the trier of fact. But these norms intervene to shape the evidence long before it is presented.

Formal constraints on interrogations implement the norm against deception by identifying prohibited circumventions. The police may not ask leading questions when these rest on unspoken assumptions that the police know to be false but that the suspect is invited sub silentio to accept as true. According to Prasch at 225.

82 Bender/Roeder/Nack Tatsachenfestellung vor Gericht, Bd. II Vernehmungslehre, S. 85; Eisenberg JZ 1984, 912 (915); Prasch, supra at 224.
83 Prasch at 225.
84 Prasch at 225.
85 Prasch at 228.

Nor may the officer pose questions in ways that suggest that the officer knows something which has not yet been established, even if it is in fact true. Thus he may not ask a question which, in American parlance, presupposes facts not in evidence. He may not, for example, ask an innkeeper if the suspect left the inn before or after midnight if the officer does not yet know that the innkeeper was there that day. The officer has not yet laid a proper foundation for his question to the innkeeper. Some commentators argue that the police may not confront an accused with a leading question that incorporates a detailed description of the circumstances of his crime—even if their description is true—when this incorrectly conveys the impression that they have sufficient evidence to convict. On this view, the police should be forbidden to bluff.

Other prohibited forms of interrogation – which apply to the questioning of ordinary witnesses as well as suspects -- include the posing of alternative questions, such as “did the
perpetrators flee on foot or by car,” because such questions exclude other possible scenarios (such as the use of bicycles). Such questions are unduly suggestive because they convey the impression that the suspect must choose only between the alternatives proffered by the interrogator. (German commentators find it necessary to specify that it is permissible to ask whether the perpetrator was male or female, because because the proffered alternatives exhaust the realm of possible answers.)

German law also prohibits the police from phrasing questions in ways that mislead the accused into believing that the officer approves of what he did or that the circumstances surrounding the offense would afford him a successful defense. An officer may not ask the accused, “You couldn’t possibly have stood by and let him do that to you,” or “you must have at least defended yourself, isn’t that right?” Nor may he imply that it would have been unmanly not to respond with violence to a provocation in order to trick the accused into making damaging admissions. Such questions (falsely) suggest that the questioner would regard the actions of the accused as justified; they unfairly provoke the answers the interrogator is looking for. In particular, such phrasings may lead the accused to adapt his statements to fit the characterizations offered by the police. Because small differences in wording may be crucial to determining the applicability of a defense (or the mens rea of the accused who performed a prohibited act), suggestive questions of this sort are deemed to be unacceptably manipulative and unfairly misleading. Indeed, the German legal system views such questions as antithetical to the discovery of the truth, because they produce answers that fuse authentic admissions with the

86 Muencheberg [insert exact cite] p. 90; Prasch at 236
87 Prasch at 237.
88 See Malinowski, supra, Sommer, supra, and Prasch at 237-239.
89 Sommer, supra, at __.
90 Prasch at 238.
91 Id.
wording and characterization offered by the police. Courts and commentators worry, in particular, that such tactics may lead to false confessions.92

So-called “test questions” (or trick questions) fall within the disputed gray zone between permissible and impermissible stratagems.93 If a suspect claims he was in the city of Koblenz on the day of the crime, but the police know that the suspect was really in Cologne (where the crime was committed), commentators disagree about whether the officer may prod the suspect into elaborating his false alibi (by asking him what he did while in Koblenz.) Such tactics are designed to entangle suspects in their own lies.94 One commentator argues that test questions of this sort infringe the ban on deception by producing the mistaken impression that the questioner does not already know the suspect’s true whereabouts at the time of the crime (and thus the falsity of his tales.)95 Another commentator defends such tactics as permissible stratagems, primarily on the ground that they produce alibis rather than incriminating admissions. In his view, interrogation norms apply only to those questions that prompt confessions.96

Test questions are particularly problematic, however, when the police do not already know that the exculpatory claims are false. In one such disputed scenario, a woman accused of murdering her boyfriend claims that the perpetrator was a third party assailant from whom the boyfriend had been seeking to protect her. In order to expose the falsity of this claim, the police might show the suspect a corpse of someone who, as the officer knows, could not have committed the crime. The investigator may ask the suspect if she recognizes her assailant. If the suspect claims that she does, the police will know that her story was false.97 The statement

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92 OLG Oldenburg, NJW 1955, 683; OLG Duesseldorf, NJW 1960, 210 (211); Lesch ZStW 1999, 111; Feldmann NJW 1959, 853 (855); Birmanns NJW 1970, 1834 (1835).
93 Prasch at 243-245.
94 Id; but see Muencheberg, who defends such tactics. Muencheberg [insert cite] at 91.
95 Prasch at 245
96 Muencheberg at 91.
97 Prasch at 246.
elicited through this ruse, unlike the previous example, does provide the police with new information about the crime, by discrediting one account of it. Thus the officer may be considered to have tricked the suspect into providing evidence against herself. Though her statement is not a confession, or even an admission, it incriminates the suspect by exposing her story as false. Accordingly, critics argue, this stratagem crosses the line into prohibited deception.

These rules undoubtedly protect the autonomy of the accused in deciding whether to answer questions, going well-beyond the American privilege against compelled self-incrimination in protecting defendants from unwittingly becoming witnesses against themselves. But many of these German interrogation norms also serve functions more closely associated with evidentiary rules, by improving the quality of the evidence ultimately presented at trial. Safeguards against manipulations are likely to prevent distortions of the evidence that may be difficult to uncover later through the imperfect device of cross-examination (though at the cost of forcing the prosecution to forego those truthful confessions which deceptive tactics would have produced.) Thus German interrogation rules likely produce both better and fewer confessions.

Rules that filter the way in which evidence is gathered rather than the way in which it is ultimately presented shift responsibility for applying evidentiary rules from litigators to investigators and presuppose a significant level of training and professionalism among investigators. Such rules also presuppose an investigative record that reveals the means by which evidence is obtained, and a practice of transcribing all questions asked and answers given during questioning of suspects and witnesses. Constraints on questioning only work if there is a

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98 Id.
99 Id.
100 However, rules like those that prohibit test questions probably disserve the accuracy of fact-finding, since they prevent the police from ascertaining the truth of an alibi or other defense.
record of the questions asked and the answers given. It remains to be seen whether those American jurisdictions that have started to videotape confessions will attract greater judicial scrutiny of interrogation tactics and spur the elaboration of new norms. At present, however, the American legal system may tacitly assume that gathering evidence – or at least the questioning of suspects -- is a messy affair in which the methods employed are difficult to know about let alone to supervise, so that only the most egregious mistakes—which “shock the conscience” or overbear the will of the defendant entirely—will result in exclusion of the evidence. Certainly it is easier to enforce the requirement that the police administer warnings to the most vulnerable group of suspects, namely those in custody, than to regulate closely the dynamics of the interrogation process and the form of the questions posed. Judicial skepticism about the possibility of constraining investigative practices may be one reason why the American criminal justice system filters evidence primarily at trial, where where legal professionals pose questions publicly and under judicial supervision.

**III. How the Timing of Interrogation Norms Shapes Their Evidentiary Function**

German interrogation rules are able to filter the acquisition of evidence from the accused because these norms come into play from the first moment the police question the suspect. These norms therefore govern all official interactions with the suspect. By contrast, American interrogation norms frequently apply only long after a suspect has made incriminating statements to the police, depending on the timing of arrests and indictments. As a result, American safeguards on police interrogation can serve no comparable function as evidentiary filters, since interrogation norms do not affect police interactions with suspects during the investigative phase that precedes arrest or indictment. I will argue that these differences in timing are grounded not only in constitutional doctrine but in the different management and evidentiary role of
investigative case files and in the different ways in which the American and German legal systems distinguish “information” from “evidence.”

Under **Miranda**, the police need not advise a suspect of his rights unless they have taken him into custody.\(^{101}\) The **Miranda** court addressed itself specifically to those pressures that inhere in custodial questioning. Since the police are free to decide when they wish to place a suspect under arrest, the police may avoid their obligations under **Miranda** by postponing the arrest until after they have concluded their questioning. The Sixth Amendment right to counsel, too, comes into play only late in the investigative process, i.e. when the accused has been formally charged.\(^{102}\) By contrast, German constraints on questioning – and the defendant’s right to counsel-- accrue as soon as the police question him -- whether or not he is in custody, and whether or not formal charges have been brought.\(^{103}\)

It is therefore much harder for the German police to avoid interrogation norms and the constraints they impose on the acquisition of evidence, since the Germans have less leeway than their American counterparts to manipulate the circumstances and timing of interrogations. On the surface, this may not be apparent. Constraints on questioning (and the right to counsel) accrue once the suspect becomes “the accused.” But in Germany, a suspect becomes an “accused” (“der Beschuldigte”) well before he is officially charged or taken into custody (at which point he becomes a criminal defendant, or “Angeklagter,” enjoying additional rights.) It is the commencement of an adversarial process against him and not the deprivation of liberty that triggers procedural safeguards for the defendant’s right to silence and right to counsel. In

\(^{101}\) **Miranda v. Arizona**, supra, note __.  
\(^{102}\) See **Massiah**, supra note __.  
\(^{103}\) St PO 136, 136a.
Germany, the suspect becomes a protected adversary (or target) once the investigation yields evidence that implicates the suspect in wrongdoing.\textsuperscript{104}

There is, to be sure, a debate about when exactly a suspect becomes an “accused.” Some courts and commentators take the position that the status depends on the subjective attitudes of the police, that is, on the strength of their suspicions.\textsuperscript{105} Others worry that such a test gives the police incentives to mask their true suspicions—perhaps even from the case file and in the wording of their reports—in order to postpone as far as possible the time when they must give the suspect the status and protections of the accused.\textsuperscript{106} These critics favor a more objective approach, which bestows or withholds the status of the “accused” once the assembled statements, reports, and forensic examinations tend to implicate the suspect in a crime. Yet other critics contend that a suspect becomes an accused as soon as the state takes any action aimed at pursuing criminal charges against him.\textsuperscript{107} But under either of the first two approaches, the police must warn the accused and respect constraints on coercion and deception, as soon as the evidentiary record assembled in the case file makes it likely that any statements to officials will be evaluated as evidence against the speaker.\textsuperscript{108} (Even on the subjective approach, the existence of suspicion will be gleaned in large part from the case file.\textsuperscript{109})

By contrast, when determining a defendant’s rights and protections during questioning, the U.S. legal system focuses not on the state of the evidentiary record but on the formal stage of the proceedings against the defendant—that is, whether he has been arrested or officially

\textsuperscript{104} Id.
\textsuperscript{105} BGHSt 10,8; BGHSt 37, 48 (51);
\textsuperscript{106} SK-Rogall, Vor Section 133, RN 30; Lesch JA 1995, 157 (158); Karl Peter, Strafprozessrecht (4. Auflage)(Heidelberg, 1985).
\textsuperscript{107} LR-Hanack 136 Rn. 4; Bringewat JZ 1981, 289 (292); Werner Beulke, Strafprozessrecht (4. Auflage)(Heidelberg, 2000).
\textsuperscript{108} Von Gerlach NJW 1969, 779.
\textsuperscript{109} Id.
charged.\textsuperscript{110} Of course, the state of the evidence against a suspect is far easier to determine in a system, like Germany’s, in which the case file is accessible to judge and defense counsel alike, and in which formal record-keeping requirements determine the content of the case-file.\textsuperscript{111} In the United States, information becomes evidence through testimony or exhibits admitted into the record of courtroom or grand jury proceedings. But in Germany, information in the case file has evidentiary significance from the time it is gathered, insofar as it will determine the lawfulness of an arrest or the justification for according (or not according) a suspect the status of an accused. The routine practice of transcribing all questions and answers during police interrogation makes it possible to determine whether the police respected interrogation norms during questioning. The possibility of pinpointing what the government knew at any given stage of a criminal investigation – and of identifying a bounded (and complete) evidentiary record at the investigative stage--made it possible for Germany to recognize an adversarial relationship between the suspect and the state at a much earlier point in the criminal process and to enforce interrogation norms from the beginning of any investigation that focuses on the suspect.

\textbf{IV. The Import of Interrogation Norms for Investigative Alternatives.}

Thus the German ban on deception is a source of complex investigative constraints shaping the evidence that reaches the trier of fact at trial. Because it generates norms that serve as the preferred paradigm for obtaining evidence from the accused, the prohibition affects not

\textsuperscript{110} Of course, the United States legal system generally permits suspects to be arrested at earlier stages of the investigative process. In Germany, the requirement that people register with the authorities in their place of residence (the “Meldepflicht”) makes it unnecessary to arrest them simply for the purpose of obliging them to remain reachable by the authorities.

\textsuperscript{111} In the United States, the prosecutor’s and investigators’ files will only come under scrutiny if there are allegations exculpatory information or other reports or statements that the prosecutor must turn over to the defense were improperly withheld. American disclosure requirements, requiring the government to turn over exculpatory evidence and prior statements of government witnesses are necessary precisely because the case file is not itself regulated (or accessible to the parties or the judge.) Yet disclosure requirements mandate the transmission of information to defense counsel, not to the fact-finder; whether such information reaches the fact-finder will depend on the parties and the rules of evidence that regulate the flow of data to the jury.
only police interrogation but other investigative techniques that are functional alternatives, out of concern that the police may circumvent constraints on one technique by substituting others that seek evidence from the same source—particularly undercover investigations and the use of jailhouse informants. Interrogation norms create threshold concerns about the legality of these investigative alternatives. And they also generate additional investigative rules that determine how evidence may be obtained undercover. Thus investigative constraints in one domain tend to propagate in another, once these investigative norms come to define the preferred method for obtaining particular types of evidence, such as incriminating statements, from a given source (like the accused.)

In the United States, the use of deception poses no special problems for undercover operations since the police are generally permitted to lie during open questioning. Those limits that do apply to police interrogations do not apply to most undercover investigations. Defendants have no Fifth or Sixth Amendment protections against undercover investigations that precede custody and indictment. Thus interrogation norms do not purport to regulate comprehensively all acquisition of evidence from the accused. Since the constraints of Miranda and the Sixth Amendment only come into play once a suspect is arrested or indicted, undercover interactions with suspects circumvent no norms that would apply to open questioning, so long as the undercover investigation is completed before charges are formally brought. While the entrapment defense protects defendants from unfair inducements to commit crimes, no analogous doctrine shields them from inducements to speak and give evidence against themselves.

By contrast, Germany’s commitment to filtering evidence during acquisition rather than presentation in court has important consequences for the regulation of investigative activities other than police interrogation. Constraints on official questioning invite the police to explore

112 See note __, supra.
alternative means of acquiring evidence from the accused. The police may conduct visual or 
electronic surveillance or investigate suspects through undercover agents or informants. But 
because the German legal system regulates what comes before the fact-finder by controlling the 
means by which evidence is obtained, these investigative alternatives to interrogation are also 
highly circumscribed. The police must obtain judicial warrants covert tactics for long-term 
surveillance, undercover investigations, as well as electronic surveillance.\textsuperscript{113} These investigative 
constraints determine what comes before the fact-finder, since compliance with the warrant 
procedure ensures that the results will be admissible at trial; by the same token, a failure to abide 
by these investigative constraints ensures exclusion of the evidence.\textsuperscript{114}

Interrogation norms cast doubt on the legitimacy of covert investigations. Once the police 
have gathered sufficient evidence of criminal activity to obtain authorization for undercover 
operations against identified targets, those targets would be sufficiently implicated in 
wrongdoing to quality for the protected status of the accused. Because the interrogation norms 
protect a suspect as soon as he acquires the protected status of an accused, covert contacts with 
the accused invite challenge as circumventions of the interrogation norms that would govern 
open questioning. While the existence of legislation authorizing undercover investigations makes 
wholesale challenges to such tactics unlikely to succeed, critics of covert tactics question the 
lawfulness of some undercover operations that bear particular resemblance to interrogation.\textsuperscript{115}

The analogy between undercover policing and official questioning is relatively weak 
when undercover agents investigate ongoing crimes or facilitate future offenses. These 
operations are designed to catch defendants in the act and to arrest them before they succeed in

\textsuperscript{113} St PO 100a, 100c.
\textsuperscript{114} Kleinknecht/Meyer-Gossner, \textit{Kommentar zum Strafprozessrecht}, Sectin 100a, 100c; von Stetten, see note __ supra.
\textsuperscript{115} Roxin NSiZ 1997, 18; Annette von Stetten, \textit{Beweisverwertung beim Einsatz Verdeckter Ermittler}, (2000); Patric 
Makrutzki, \textit{Verdeckte Ermittlungen im Strafprozess}, (1999); Prasch, supra, at 277 \textit{et seq}.
their criminal endeavors. But covert practices play the same investigative role as open interrogation when undercover agents provoke discussions of the past. A subset of undercover operations are designed to gather evidence of crimes that have already been completed. In unsolved murder investigations which have yielded a suspect but no evidence, the police often deploy deep cover agents to befriend the suspect and his friends, in the hope of eliciting incriminating admissions. Undercover agents make contact with suspects through shared hobbies or healthclubs and seek, over time, to become friends.\textsuperscript{116} Working closely with psychologists, the police identify vulnerabilities that undercover agents can exploit in steering conversation and in eliciting incriminating admissions from the suspect.\textsuperscript{117} In one elaborate operation, the police held a lottery rigged so that a murder suspect won the prize. In order to claim the prize, the suspect would have had to take a long road trip in the company of another “winner,” an undercover agent.\textsuperscript{118}

Undercover investigations that target past offenses are of course designed to obtain admissions by stealth that the police could not obtain through open questioning. Presumably, suspects who confide in undercover agents would not have made incriminating admissions had they known they were speaking with a police officer. Accordingly, critics of such investigations characterize them as unlawful interrogations.\textsuperscript{119}

Treating conversations between undercover agents and targets as the functional equivalent of an interrogation turns such encounters into violations of interrogation rules requiring police to advise targets of their right to silence and their right to counsel. In addition,

\begin{itemize}
  \item \textsuperscript{116} Interview with German police officer, May 12, 2004.
  \item \textsuperscript{117} Id.
  \item \textsuperscript{118} Interviews with German police officers, May 13, 14, and 19, 2004. The plan fell through, in the end, because the suspect refused to purchase the lottery ticket from the undercover train conductor who offered it for sale.
  \item \textsuperscript{119} Eschelbach, StV2000, 390, 396 (collecting German Supreme Court opinions that mandate suppression of manipulated admissions if the tactics used turned defendants as “mere objects” of a criminal inquiry, that is, interfered with their autonomy in crafting a defense.)
\end{itemize}
such conversations would violate the ban on using deceptive practices during questioning. But this sweeping claim lost force in 1992, when Germany enacted a statute that explicitly authorized undercover investigations. If undercover policing was legal, then conversations with targets could not be considered interrogations. Like American courts, German courts justified this result by pointing out that conversations with undercover operatives lacked the element of intimidation that was present when suspects knew they were speaking to the police. Conceding this difference, critics nonetheless continue to single out as unlawful those undercover contacts that are designed to elicit admissions about past offenses, not to gather evidence of ongoing or future crimes.

Thus, although the 1992 Act forecloses the argument that undercover policing is intrinsically a form of unlawful interrogation, it does not stave off claims that particular undercover investigations—concerning past offenses—impermissibly circumvent constraints on official questioning. Nor can such challenges be defeated simply by pointing out that the element of intimidation or coercion present in official interrogations is absent during conversations between targets and undercover operatives, since German law forbid trickery as well as coercion during official questioning. If asking a target about past offenses is a form of interrogation, then the absence of intimidation does not foreclose challenges to the use of deception. Questioning a target about past offenses looks even more like a circumvention of interrogation norms when infiltrators befriended suspects who had already invoked their right to silence under official questioning, or if the conversation took place in custody, where the target’s

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120 St PO 110a.
121 Meyer-Gossner, St PO *Kommentar*, 136a n.4; BGH GrS 42, 139; Gusy, StV 95, 450.
122 BGH GSSt StV 1996, 465. See Perkins, supra, note ___.
123 Von Stetten, *supra*, at 116; see also Makrutzki, *supra*.
124 St PO 136a. Whether trickery infringes dignity or is simply “unworthy of a ‘Rechtsstaat,’” is disputed. See Eschelbach, StV 2000, 390, 396 and Meyer-Gossner, *St PO: Kommentar*, 136a n.12. It is, at any rate, unlawful.
autonomy was already curtailed. If such covert contacts were the equivalent of official questioning, then it would be similarly illegal for the police to befriend and question close intimates of the suspect (including parents, siblings and fiancés) to whom German law accorded the privilege of not implicating the suspect.

This critique of undercover policing emerges from the same anxieties that underlie the entrapment doctrine—that undercover agents can influence targets by concealing their official status. What made undercover questioning improper, critics contended, was not that it provoked crimes (since these lie in the past). Rather, it provoked admissions. Like entrapment, questioning by covert agents improperly impinged on targets’ autonomy. But instead of entrapping a target into committing a crime, undercover policing entrapped the accused into giving evidence against himself.

The problem of what I term the “manipulated admission” remains largely unresolved in Germany, though the German legal system has begun to regulate it in a few particular areas. Courts suppress admissions to jail-house informants on the ground that covert tactics in prison unfairly take advantage of a inmate’s psychological need to unburden oneself to cellmates. At least one appellate court has held that the police unlawfully circumvent interrogation norms when they listen in on a telephone conversation between a suspect and a government informant—though the court did not provide a principled basis for distinguishing between

125 Von Stetten, supra, at 116; Meyer-Gossner, St PO: Kommentar, 136a n.4a,b.
127 Sorrells v. United States, 287 U.S. 435, 448 (1932) (defining entrapment as “the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them.”); Sherman v. United States, 356 U.S. 369 (1958)(same).
130 BGH St 34, 362.
permissible and impermissible undercover contacts.\textsuperscript{131} Appellate courts have also suggested that undercover questioning of a suspect’s family violate the relatives’ privilege to withhold testimony that would implicate the suspect—at least when the questioner is an informant, whose authority to participate in covert operations has not yet been regulated by statute.\textsuperscript{132}

While these regulations can curtail unsavory practices, they cannot ultimately resolve the dilemma posed by manipulated admissions. Just as German law hopes for a world where agents do not commit crimes or encourage others to participate in wrongdoing, so it wants questioning of suspects conducted without coercion or trickery. Undercover policing, however, requires deception. Trickery is not an excess or abuse; it is the foundation of covert work. The very purpose of undercover policing is to obtain through stealth the intelligence and admissions that the police cannot reasonably obtain without deception. Covert operations circumvent restrictions on interrogations not because of mismanagement or overzealousness. They do so by design. To the extent that a legal system holds up an ideal of transparent questioning of suspects, where coercion and deception play little role, undercover work will continue to raise problems of legitimacy.

On the surface, German concern with manipulated admissions bears some resemblance to arguments of some American courts and commentators who object to “perjury traps” as a form of entrapment. Following Judge Learned Hand’s dissenting opinion in \textit{United States v. Remington},\textsuperscript{133} some state courts and commentators would dismiss perjury indictments on grounds of entrapment where prosecutors “instigated” perjury by asking grand jury witnesses

\textsuperscript{131} BGH NStZ 1996, 200; NStZ 1995m 410 (411).
\textsuperscript{132} “Sedlmayr case,” BVerfG, JR 2000, 333.
\textsuperscript{133} 208 F.2d 567 (2nd Cir. 1953).
questions designed only to “elicit and preserve” provable falsehoods. Such questions can involve an element of trickery, if the phrasing of the question, or its context, suggest that the prosecutor knows or more less than she actually does, or if the prosecutor misleads the witness about her purpose in asking the question (e.g. by suggesting that she is simply verifying his alibi concerning Crime A, of which she knows he is innocent, while in reality attempting to establish his presence at the scene of Crime B, which the witness does not realize she knows about.) Like German criticisms of undercover policing, American discomfort with perjury traps rest on an analogy between prompting a suspect to speak and prompting him to act. Both American and German critics emphasize the perceived unfairness of giving the suspect enough rope to hang himself. But German concerns come from applying interrogation norms to undercover investigations; by contrast, American critics of perjury traps do not draw on interrogation norms (since the use of deception is not ordinarily prohibited.) Instead, courts and commentators model the concept of the “perjury trap” on the doctrine of entrapment, which they borrow from the regulation of undercover policing. Prosecutors who elicit perjured testimony are compared to undercover agents who induce the commission of a crime. Thus German criticisms derive from viewing police interactions with the accused as the unfair provocation of admissions rather than the permissible triggering of criminal conduct; conversely, American criticism of perjury traps

134 See supra note 119; Bennet Gershman, The “Perjury Trap,” 129 U. Pa. L. Rev. 624 (1981); People v. Tyler, 46 N.Y.2d at 251 (1978); People v. Rao, 73 A.D.2d 88, 425 N.Y.S.2d 122 (1980); People v. Blumenthal, 55 A.D.2d 13, 389 N.Y.S.2d 579 (1976). (Following these New York decisions, Gershman would treat questions as perjury traps when they have no tendency to prove or disprove the crime under investigation and are used only to elicit provably false testimony, for the purpose of prosecuting the witness for perjury. It is worth noting that there are a number of problems with the concept of the “perjury trap,” at least as Gershman would define it. First, a test based on the subjective motivations of prosecutors is inherently problematic, as prosecutors may sometimes expect false testimony and plan to file perjury charges if the witness testifies falsely, even or especially when the testimony bears on the elements of the crime being investigated. But if the prosecutor’s questions bear on material elements of an investigated offense, even Gershman concedes that his underlying hopes and motivations provide the defendant no relief in the form of an excuse or justification for perjury. If the questions do not bear on material elements, then the false statement does not constitute perjury anyway, since perjury is usually defined as a false statement about a fact material to a criminal investigation. In that case, the real criterion of criminal responsibility is materiality: false statements about immaterial matters may not be prosecuted because they do not constitute perjury, not because they were elicited with improper motives.)
depends on regarding the prosecutor’s interaction with grand jury witnesses as the unfair
provocation of crime instead of the permissible prompting of testimony.

Nonetheless, there are some situations in which the U.S. legal system, like Germany,
applies interrogation norms to undercover tactics. Once targets have been charged with a crime
and their Sixth Amendment right to counsel has attached, the government may not use
undercover agents or informants to question them about charged offenses. This prohibition
applies both inside and outside of prison. Until formal charges are filed, however, the
government remains free to make contact with targets through covert operatives. The
government may also postpone arrest and indictment until its undercover investigation is
complete. Indeed, undercover agents and informants may question defendants after indictment,
if the crime they are investigating is not the crime with which the defendant has been charged.
Even when the target is already in custody, such contacts do not violate the right to be free from
compelled self-incrimination, since the United States Supreme Court reasons that “when a
suspect considers himself in the company of cellmates and not officers, the coercive atmosphere
is lacking.” By contrast, Germany worries about admissions provoked undercover out of
concern for defendants’ right to silence, not their right to counsel. Consider jailhouse
admissions. The United States does not treat admissions to jail-house informants as having
been compelled, since the targets would not have known they were speaking to someone from
the government. Germany protects suspects’ subjective compulsion to “unburden” themselves

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136 Id. In addition, many (American) states forbid attorneys from contacting individuals who are represented by
counsel. These ethical rules have sometimes been interpreted to prohibit prosecutors from approving undercover
contacts with targets who have hired an attorney, even when no formal charges have yet been filed. The rule barring
contact with represented defendants treats undercover infiltration in the same fashion as overt discussions or
interrogations between the government and its targets. See, e.g., Model Rule 4.2 of the Model Rules for Professional
Conduct (1992) (prohibiting attorney contact with represented persons.)
137 Id.
138 See von Stetten and Makrutzki, at note , supra.
and prohibits the state from taking advantage of the pressures that result from the inherently coercive atmosphere of incarceration.\textsuperscript{139}

The application of interrogation norms to covert investigations remains exceptional even in Germany. But the logic of interrogation norms remains in tension with undercover policing. Some German scholars challenge the constitutionality of the statute authorizing deep cover investigations on the grounds that it conflicts with protections for the right to silence. If interactions between undercover agents and suspects are characterized as an informational interaction with the accused during an ongoing criminal investigation, then any crimes which the accused commits under auspices of the government are also testimonial acts. Covert tactics turn suspects into witnesses against themselves, while depriving them of the safeguards that would protect them during open questioning.

The American and German legal system thus disagree not only about the content of interrogation norms but about their import for other investigative contacts with suspects. The different roles which the United States and Germany assign to interrogation norms may be attributed to a variety of institutional and doctrinal differences between the American and German criminal justice systems. These include, first, distinct conceptions of when a suspect becomes a formal adversary in the criminal process—which in turn determines when he must be afforded procedural safeguards for constitutional rights. Second, the differing role of interrogation norms in the United States and Germany reflects disparate conceptions of when the right to silence is in peril. The Fifth Amendment privilege against compelled self-incrimination initially served as a safeguard at trial and then subsequently extended to custodial interrogation (and bolstered by the warnings required in the \textit{Miranda} decision) in order to address abuses—particularly the use of violence—that occurred during custodial questioning, when the defendant

\textsuperscript{139} \textit{Id.}
was particularly vulnerable to coercion. This left pre-custodial interrogations largely unregulated. In Germany, statutory constraints on the interrogation of the accused were not reserved for trial or designed to remedy specific abuses. The right to silence operates as a constraint on the full range of official police interactions with the accused. Interrogation norms are simply one of many statutory constraints on investigative conduct; for German criminal procedure regulates and requires warrants for a number of investigative powers, such as long-term visual surveillance in public areas, that remain largely unfettered by American law.

Third, American unwillingness to extend interrogation norms to undercover practices may also be attributed to the circumstance that undercover practices are far more entrenched in the United States than in Germany. Deceptive interrogation tactics, particularly undercover operations, have a long history in the United States—and one that predates Miranda. In post-war Germany, undercover policing is a relatively recent police practice, though it has a longer history as a tactic of domestic intelligence agencies. Undercover investigations came into use as a police tactic against domestic terrorists and later against drug dealers and organized crime in the 1970s and 1980s. The constitutionality of such tactics was heavily disputed until a 1992 statute authorizing deep cover investigations was enacted to rescue such tactics from a twilight of uncertain legality. Thus, interrogation norms—and the ban on deceptive practices—were already in place when Germany first created a legal basis for the long-contested use of undercover tactics. The new statute inevitably raised questions about the compatibility of existing norms with the new investigative tactics that were specially designed to avoid them.

140 St PO 163f.
There is a fourth reason why German interrogation norms, unlike their American counterparts, conflict with undercover practices. In Germany, interrogation norms and the entrapment doctrine serve as alternative means of protecting a suspect’s autonomy. Just as the entrapment doctrine prohibits the police from inducing suspects to commit crimes they would not have attempted if left to their own devices, the ban on deceptive questioning prohibits the police from manipulating suspects into making admissions that they would not have made if the police had not undermined their ability to choose whether to provide evidence against themselves. In the context of undercover investigations, however, the ban on entrapment provides only limited protections, because German criminal law treats entrapment as a mitigating factor at sentencing and not as a complete defense. If undercover tactics could be re-characterized as a different kind of entrapment, that is, as an unfairly deceptive form of questioning, then this investigative tactic would be unlawful whenever it produces incriminating admissions—and perhaps even when it produces incriminating conduct, if crimes can be re-characterized as testimonial acts. Challenging undercover practices as unfair forms of interrogation holds particular appeal for defendants and critics of covert tactics, since the remedy for entrapped confessions, unlike the remedy for entrapped offenses, is the suppression of incriminating statements.

V. Conclusion: The Power of Evidentiary Rules as Investigative Norms

Contrary to many scholars’ assumptions, detailed evidentiary rules exist in Germany as well as in the United States. Where the U.S. reserves them for the courtroom, Germany uses them as constraints on investigations. German interrogation rules, in particular, have the power


144 Id.
to shape the evidence that reaches the fact-finder. These norms compel compliance because they exclude improperly obtained statements from being used as evidence against the accused. Interrogation norms resemble American rules of evidence since they filter the evidence that may be used to convict.

Unlike American evidentiary constraints, however, German interrogation norms are designed to protect the accused from the police—not to keep certain facts from the fact-finder. For that reason, Germany regulates the acquisition rather than the presentation of evidence. This makes evidentiary rules difficult to evade. If the police adapt to interrogation norms by approaching suspects through covert operatives, they may be accused of undermining the protective purposes of the rules that govern official questioning. According to German commentators who view undercover investigations as interrogations, everything a suspect does in his interactions with undercover agents may be seen (and regulated) as testimonial.

If the United States regulates the presentation of evidence at trial, and the use jurors may make of it, this makes sense in a legal system in which the primary locus of fact-finding is the trial. By contrast, as Damaska notes, “Continental trials are far from the climactic events the native folklore proclaims them to be—especially as generators of information for the adjudicator.” While the common law trial “still stands far apart from the rest of procedural activities, overshadowing them in its critical importance as supplier of information to the court,” Continental trials appear to be “a mere stage in a continuing procedural effort.”

Regulating the acquisition of evidence rather than the way it is presented or used makes sense in a legal system in which the trial is only one procedural phase in the handling and sifting of evidence.

The scope of German protections against deceptive interrogations—and the debate about whether to extend such norms to the undercover context—also testifies to the legal system’s

145 Damaska, Evidence Law Adrift, supra, at 60.
ambivalence about using the accused as a source of evidence against himself. Indeed, Germany’s greater reluctance to press for confessions is consistent with Germany’s lesser reliance on guilty pleas as means of resolving criminal cases. Because German criminal trials are less encumbered by evidentiary constraints than their American counterparts, German police, prosecutors, and judges have less need to resort to procedural shortcuts like guilty pleas— and therefore less need to push for confessions. Put differently, a criminal justice system that relies heavily on plea bargaining has reason to press harder for confessions: admissions lead to guilty pleas and make outcomes easier and faster to negotiate.

However, differences between German and American notions of “fair play” in criminal procedure are also linked to differences between the systems’ criminal laws. American criminal law prohibits a variety of efforts to avoid detection or punishment of crime. These second-order concealment offenses include lying to federal officers, perjury, obstruction of justice, structuring of financial transactions, money laundering, and escape. Germany, like many other European legal systems, recognizes far fewer of these crimes. Efforts to conceal a crime are not generally punished as obstruction of evidence. Suspects may lie to the police without incurring criminal sanction. And at trial, criminal defendants may tell provable lies under oath without risking prosecution for perjury. Germany does not prosecute murderers for throwing away the murder weapon or denying guilt.

Second-order offenses depend on the real or potential existence of a criminal investigation. Accordingly, criminal procedure must recognize that the state may legitimately prosecute crimes even when its enforcement activities have played some role in prompting their commission.

147 Killing witnesses would nonetheless be crime. It is worth noting, however, well-known Nineteenth Century opinion recognized a prisoner’s “natural right” to bolt from execution and even to kill his hangman without incurring additional criminal charges. [cite forthcoming.]
Crimes like perjury and obstruction of justice presuppose a symbiotic relationship between investigators and suspects, since investigative tactics prompt and shape the evasive choices of suspects. The same is true even for financial crimes like money laundering and structuring of financial transactions to avoid reporting requirements. These crimes cover up other offenses; and they are designed to evade routine procedures for detecting the underlying criminal conduct. (By contrast to these second order violations, the crime being concealed is less likely to have been committed in the shadow of a concrete investigation or routine enforcement procedure.)

Because investigative activity triggers second order crimes, police and prosecutors have reasons to favor tactics that influence targets and provoke provable lies, obstruction, or other second order misconduct, particularly since second order offenses (like possession offenses and conspiracy) may be easier to prove than the primary crimes. Investigators may question suspects about incriminating conversations they have on tape, in the hopes that suspects will make false denials. Prosecutors may ask a business for documents in the hope that the request will prompt targets to destroy the requested evidence under the watchful eye of informants. Courts may frown on some investigative tactics, like the setting of “perjury traps”; but since second order offenses react to investigative conduct (like the issuance of a subpoena), the criminalization of lies and obstruction means that police and prosecutors will regularly be able to influence targets in ways that yield evidence of some crime, even if it is only a crime of concealment. Put differently, any evidence of a second order crime such as perjury is likely to be at least partly the product of government action, be it only the posing of a question. A system that accepts some government influence on targets as inevitable in the pursuit of second order crimes is likely to be more tolerant of manipulation than one which prosecutes targets primarily for crimes they commit independently of the government. And when a legal system tolerates some
manipulation of targets in the pursuit of evidence, investigative lies may become accepted as only one among a number of possible strategies for “flushing out” out truthful admissions or provable lies. One might say, then, that the United States permits the police to lie precisely because suspects may not.

The disputed compatibility of covert tactics with interrogation norms is also a symptom of the difficulty a legal system encounters in justifying exceptions to investigative norms (such as interrogation rules) that functions as rules of evidence. When evidentiary rules apply not to the presentation of evidence but rather to the ways in which information is acquired from a particular source, like the accused, there is a natural tendency to apply such rules comprehensively to every investigative tactic that elicits information from that source. Otherwise investigators may use one tactic (like undercover policing) to evade constraints on others (like questioning by the police.) Critics of undercover investigations and other “evasive” alternatives would deter investigators from circumventing interrogation norms by regulating all covert and overt investigative tactics that seek evidence from the accused. In order to exempt undercover investigation from the investigative norms that apply to interrogation, the German legal system has therefore had to develop comparable evidentiary constraints on undercover investigations (as alternatives to interrogation rules.) The warrant requirement serves precisely this function.

Evidentiary constraints on investigative conduct thus have a tendency to propagate. In the attempt to reach all “functional alternatives” to regulated investigative conduct, rules for the acquisition of evidence generate ever new forms of investigative constraint.