Relation between Costs of Constitutional Rights and Criminal Law

United States vs. Germany

Elena Reznichenko

Supervised by
Professor Wolfgang Weigel
I hereby declare and confirm that this thesis is entirely the result of my own work except where otherwise indicated. I acknowledge the supervision and guidance I have received from prof. Wolfang Weigel. This thesis is not used as part of any other examination and has not yet been published.

(Technicalities: 15,335 Words, including footnotes. Not including: cover, this declaration, table of contents and bibliography. The thesis is printed double side).

Elena Reznichenko, August 4, 2011.
# Table of contents

1. Introduction ................................................................................................................. 4  
   1.1. Background ........................................................................................................... 4  
   1.2. The Model ............................................................................................................ 8  
2. Procedural Rules .......................................................................................................... 14  
   2.1. Economic Background ......................................................................................... 14  
   2.2. United States ....................................................................................................... 17  
      2.2.1. Search and Seizure ....................................................................................... 17  
         2.2.1.1. Background ........................................................................................... 17  
         2.2.1.2. Costs .................................................................................................... 20  
      2.2.2. The Right to Remain Silent and “Miranda Rules” ......................................... 29  
         2.2.2.1. Background ........................................................................................... 29  
         2.2.2.2. Costs .................................................................................................... 30  
      2.2.3. Prosecutorial Discretion and Plea Bargaining .............................................. 32  
         2.2.3.1. Background ........................................................................................... 32  
         2.2.3.2. Costs .................................................................................................... 34  
   2.3. Germany .............................................................................................................. 35  
      2.3.1. Background to the Exclusionary Rule ......................................................... 36  
      2.3.2. Search and seizure ....................................................................................... 38  
      2.3.3. The Right to Remain Silent and Interrogation Methods ................................ 43  
      2.3.4. Costs ........................................................................................................... 45  
      2.3.5. Prosecutorial Discretion and Plea Agreements ............................................. 46  
         2.3.5.1. Background ........................................................................................... 46  
         2.3.5.2. Costs .................................................................................................... 49  
3. Substantive Criminal Law .............................................................................................. 51  
   3.1. United States ........................................................................................................ 51  
   3.2. Germany ............................................................................................................. 54  
4. Concluding remarks ...................................................................................................... 57  
Bibliography ....................................................................................................................... 64
1. Introduction

1.1. Background

Criminal behaviour encompasses the acts which are prohibited by the state, usually condemned by the public, and are punishable. Those acts are mainly intended and cause public harm, alongside with private harm.\(^1\)

Criminal law has two main functions; (1) to control the state when she exercises the coercive power of investigating, prosecuting, convicting and punishing criminals, (2) defining and guiding the citizens which acts are illegal and informing them about the consequences of carrying them out.\(^2\)

One of the reasons for setting criminal law as a public domain is the burden imposed by crimes on the society as a whole. Among other harms, crimes invoke fear in people’s hearts even if they are not the direct victims.\(^3\)

To comprehend how the criminal system works one need to reveal what motivates the actors in this system. According to the intuition criminals are irrational actors who act on the base of impulsiveness and the fulfillment of their desires. Contrary to this, in his seminal paper, Becker (1968) presented an economic model of crime, where all actors act rationally.\(^4\) Prior to deciding, the state takes into consideration the cost of crime, cost and benefits of investigating and convicting, and

---

finally the cost and benefits of punishment. The potential offender, in turn, takes into account the cost of his offence and his benefits from it.5

Prior to further discussion of the economical analysis of criminal law, some methodological remarks should be presented. According to public choice theory,6 prosecutors, or other official authorities, might not act to maximize social welfare, but to maximize their own welfare. The most evident example is corrupted prosecutors who may exploit their power to harm their enemies or to gain future benefits. However, even though this point is significant and influential in theory, it has less impact in practice. Prosecutors (like other governmental actors) are subject to “checks and balances” system. Their decisions are reviewed by judges, the public and other authorities. Moreover, reputational issues may constrain their self-serving behaviour.7 Hence, due to the abovementioned and the limited scope of this paper, I do not discuss further those problems, i.e. I assume prosecutors and police act to maximize social welfare.

From the economic perspective, the main function of criminal law is to keep the market efficient, where allocation of rights and goods are negotiated. Meanwhile, people who commit crimes are in fact bypassing “the system of voluntary, compensated

5 According to id BECKER, at 172-176, the cost of crime includes among others, the damage to society, for example, the cost of murder measured by the loss in earnings of the victim. The costs of investigation and conviction measured by the budget spent on police force, arrests, prosecutors, trials, etc. Cost of punishment is for example monetary cost of incarceration. As for the offender, we measure his utility from the crime and from the other side, his opportunity cost and cost involved with the punishment.
exchange”. Most of those acts cannot be deterred by civil law since the criminals do not always have the means to pay the appropriate compensations. Hence, the alternative solution is nonmonetary methods of punishment, e.g. imprisonment.8

The way to reduce crime may be presented in a simplified way. The cost of crime for the potential offender should be higher than the benefit he derives from it.9

\[(CP)(p(c)) > B\]

Where CP is the cost of punishment for the offender, p(c) is the probability of conviction and B is the benefit for the offender.

Based on this equation, first, it is possible to deter criminals by setting higher punishment. The second way is raising the probability of conviction.10 In theory, crimes can be entirely eliminated by imposing extremely severe punishments and raising the probability of conviction to almost one. In practice, however, this solution is problematic for several reasons.11 There are four issues regarding the aggravation of the punishment.

First, severe punishments may deprive the constitutional and moral rights of criminals.12 Second, higher punishment creates higher risk for the whole society and may cause over-deterrence. For instance, innocent risk-averse people might not engage

---

9 BECKER, supra note 4, at 177. See also EASTERBROOK, supra note 7, at 293.
10 See id, BECKER, at 180-181.
11 See GAROUPA, supra note 1, at 4
12 Id.
in desirable activities fearing of conviction.\textsuperscript{13} Risk itself is also a cost and deterrence through risk causes dead weight loss since there are no benefits elsewhere.\textsuperscript{14} Third reason why it is problematic to choose high-punishment-low-probability system is the high cost of mistake. If only few people are punished and the punishment is very high, wrongful conviction will have two negative results. (1) There is no incentive to obey the law since the punishment is imposed on law abiders.\textsuperscript{15} (2) The injustice in this situation is even greater. Fourth reason can be found in behavioural economics. High punishment mainly related to the bias of “Hyperbolic discounting”. According to this bias, people prefer immediate satisfaction and discount later costs and benefits. The meaning is that increasing the punishment from 10 years of imprisonment to 15 years might not really have additional deterrence impact.\textsuperscript{16}

However, increasing the probability of conviction might also not be the optimal solution due to some constrains. Namely, the attempt to increase the probability of conviction might be too costly and excess the available budget.\textsuperscript{17} The obvious way to increase the probability is by strengthening the enforcement. This can be achieved by hiring more policemen, prosecutors, judges, expanding jails, etc. However, each act of

\begin{footnotesize}
\bibliography{references}
\end{footnotesize}
this kind demands further expansion of the state budget and higher costs for the society.

1.2. The Model

As opposed to the classic methods to raise the cost of crime mentioned above, this paper will focus on the novel work of Stuntz (1996, 1997, 2001). This scholar showed there can be alternative ways to raise the probability of conviction without significantly affecting the budget. This can achieved both, by using the substantive law and by applying certain procedural rules to reduce prosecution costs. In the first stage the legislators can expand the substantive criminal law. In the next stage, the prosecution can resort to its broad discretionary power alongside the plea bargaining practices\(^{18}\) and to use this over-criminalization to their advantages. In addition, broad substantive criminal law can contribute to reduction of investigation costs. The abovementioned concepts will be further explained in current section.

According to Stuntz (1997), American criminal procedural rules, which were created to protect defendants’ constitutional rights, raise the costs of investigation and prosecution.\(^{19}\) For example, the constitutional rules which limit the power of the police to search and arrest suspects. Another example is the rules which exclude evidence obtained through a violation of constitutional rights.

---

\(^{18}\) For the explanation of prosecutorial discretion and plea bargains in the US see infra section 2.2.3.  
\(^{19}\) STUNTZ W.J. “The Uneasy Relationship Between Criminal Procedure and Criminal Justice”, Yale L. J. 107(1), 1997. pp. 1-76, p. 4. I am referring mainly to the Fourth and Fifth Amendments to the United States constitution. Further discussion on this matter will be presented in part two of this paper.
In turn, to reduce those costs, United States legislators over-criminalize. The authority which is in charge of defining criminal acts is the legislator body. This is an elected institute which is motivated by the public’s interest to punish criminals and reduce crime rates. Consequently, in a world where the costs of conviction are high, the legislator will seek to reduce them and increase conviction rates.  

Similarly to many hierarchical systems, also in the criminal system, principal-agent problem emerges. First of all, prosecutors and policemen are paid fixed salaries which are not influenced by the number of cases investigated or prosecuted. Secondly, in a system such as the United States criminal system, special procedural rules are making criminal investigation and prosecution more costly. Namely, demand more time, energy and increasing the risk of defeat. Therefore, there is a high risk of under-investigating and under-prosecuting. To illustrate, consider the rule of search and seizure. Police has the right to conduct a search only in the case where there is a “probable cause”. This is a constitutional right of people to be secured against unreasonable searches and seizures by the state officials. Breach of this rule can consequently lead to exclusion of the evidence seized. Hence, this rule raises the cost of investigation. The police have to gather more information to establish “probable cause” before conducting a search which can lead to incriminating evidence. And if this rule

---

21 Id. at 17.
22 U.S. Const. Amend. IV.
cannot be lax, there are opportunity costs - the extreme effort put in finding this information could have been used to investigate other cases.

For all abovementioned reasons, a tool for bypassing those rules and reducing the costs was needed. Stuntz (2001) argues that the United States criminal law is very "broad" – large portion of human acts are criminalized, and very "deep" – of those acts, large percentage is criminalized many times over. In other words, the legislator defines very broad behaviour as criminal. Thus, this definition can even include acts which are not really condemned by the public.

Possible explanation for this situation is the goal of the legislator to reduce the costs of conviction by transferring more power to prosecution. The outcome of broad criminal law, alongside prosecutorial discretion and plea bargains practice, is that prosecution can use some offences to punish other offences without actually enforcing the former.

Take for example a situation where the prosecution believes a person committed a certain crime. To convict the person for this crime, prosecution has to prove in court the elements ABC. Assume that element C is hard to prove, namely, demands more time and effort, and thus increases the costs of this case for the police and prosecution. In addition, the prosecution believe they can know when this element C exists even though it’s hard to prove. For those situations the legislator can “create” new crime which will demand proving only elements AB. Hence, lowering the costs of convicting

---

any offender the prosecution believes has committed the ABC crime. Or alternatively, the legislator can “create” a new crime with elements DEF which relate to ABC elements but much less costly to prove.25

In addition, using substitute offences makes it possible for prosecution to induce defendants to plead guilty. If many acts are criminalized and there are overlapping crimes, prosecution can charge the defendant with many offences (hence, increasing the expected punishment).26 In the next step, the prosecutor can agree to reduce the charges as an exchange to a guilty plea. With broad criminal law, the conviction is not costly for prosecution. They can always choose to charge with those offenses which are easy to prove. Consequently, the defendants know the probability of being acquitted in court is lower, and hence they have more benefits from pleading guilty and receiving lesser punishment.27

Other good example can be found in cases where the police want to conduct a car search for drugs. If they do not have probable cause for the search, they simply follow the car. At certain point, as most of us do, the driver violates some traffic rules. Subsequently the policeman stops the car for the violation and conducts the wanted

---

25 Stuntz (2001), supra note 23, at 17. Over-criminalization is a delegation of power from legislators to prosecutors and police. Prosecutors and police are the ones who in fact define the bounds of criminal liability by choosing what to enforce. If the prosecutors wouldn’t have such broad discretion (have the obligation to enforce everything) the legislators would have to be more careful not to criminalize too much, but on the other hand criminalize enough. (See Stuntz 1996, supra note 20, p. 18).

26 Id. Stuntz (2001) “The reference is to the familiar double jeopardy rule that a defendant may be convicted of two overlapping crimes for a given criminal incident, but may not be convicted of greater- and lesser-included offenses for the same incident. See United States v. Dixon, 509 U.S. 688 (1993)”.

27 Id. at 18.
search. Presumably, in such a scenario the police did not have to put a lot of effort to gather information which will provide probable cause for the drug search. Thus it can be said, broad criminal traffic violations reduce the cost of searches in cars.

Consequently, the costs of conviction and investigation are decreasing significantly. Police and prosecution have to comply less with the procedural rules. They can use fewer resources to solve crimes. Those resources, in turn, can be used for other cases. In addition, guilty pleas are significantly less costly than trials and the probability of conviction is one hundred per cent.

In this paper I attempt to examine the model described above in one of the civil law criminal systems. The best example for this purpose is Germany. Although German criminal system is considered inquisitorial, in recent years it has gone through significant procedural changes. One of those changes was the regulation of the criminal evidence procedure. As part of this movement, the exclusionary rule was introduced in courts and its use had expanded through the years. This naturally limited the scope of evidences which can be submitted in court and serve as the basis of conviction. Consequently, as was explained in this section and will be further elaborated in section 2.3.4., conviction and investigation costs in Germany might have increased.

---

28 STUNTZ (1996), supra note 20, at 11.
29 STUNTZ (2001), supra note 23, at 27-37. Unlike convictions obtained through guilty pleas, the trials are time consuming for all the parties, and demand more effort in preparing the evidence, witness and the arguments.
In this paper I argue that if the broadening of the criminal code and the introduction of certain procedural rules, serve to reduce conviction costs, we should observe this change in Germany. My hypothesis is that following the increased use of the exclusionary rule in Germany we will observe substantive and procedural changes in their criminal system. On the one hand, reforms which broaden the German criminal code. On the other hand, practices such as broader prosecutorial discretion and plea bargains.

The paper is structured as follows. Section 2 reviews the most significant procedural rules, both in Germany and in the United States’ criminal systems. Those rules are further economically analysed and the conviction and investigation costs are explained. Section 3 reviews criminal codes of Germany and United States. Comparison is conducted between the codes with emphasize on the broadening process of the codes. Section 4 concludes the findings. As the reader will later see, there is an imbalance between the American and the German parts. This is due to the fact that currently Germany is far from the discussion about the costs of procedural rules, this contrarily to the American scholars. In addition, the main costs will be analysed in the American part (sections 2.2.1.2. and 2.2.2.2.) but can be related also to the German procedural rules.
2. Procedural Rules

2.1. Economic Background

Procedural rules which are limiting the scope of evidence introduced to the court can be divided into three groups. (1) Rules that are aiming in reducing the costs of the proceedings. For example, irrelevant evidences which cannot contribute to the finding of the truth. (2) Rules which reduce error costs. In the criminal system there are two types of possible errors: error type one, that is to convict the innocents, error type two, that is to acquit the guilty. The procedural rules enable the exclusion of the evidences which can enhance those errors, e.g., hearsay, lie detectors results etc. (3) Rules which serve specific aims outside the proceedings. Main example is exclusion of evidence with the purpose of deterring government officials from malpracticing.\textsuperscript{31} Under this rule direct evidence which were obtained by illegal act are excluded. Moreover, the indirect evidence derived from the primary evidence, which were obtained by illegal act, can be also excluded – “Fruits of the poisonous tree” doctrine.\textsuperscript{32}

Not surprisingly, rules which are limiting the scope of the evidence presented to the court create barriers to the discovery of the truth. This in turn, raises the cost of conviction for governmental officials. Whereas the first category of the rules is not


\textsuperscript{32} For explanation and origins of the “fruits of the poisonous tree” doctrine see GREWELL J.B. “A Walk in the Constitutional Orchard Distinguishing Fruits of Fifth Amendment Right to Counsel from Sixth Amendment Right to Counsel in Fellers v. United States”, \textit{J. Crim. L. Criminology} 95(3), 2005, pp. 725-762, pp. 731-733, and the accompanied court rulings.
debatable, there is much dispute concerning categories 2 and 3. Irrelevant evidences do not contribute to the goal of finding the truth, and hence, usually their submission will not reduce the costs of conviction. However, there is a controversy whether the rules from category 2 and 3 are efficient.

There is a notion that evidences which are more likely to cause errors in trials should not be totally excluded. According to this opinion, “poor” evidence such as hearsay should be submitted during trial and the court should give it less weight in his decision.\(^{33}\) Indeed, different criminal systems in the world, introduce different procedural rules from this category. Namely, in the common law systems the notion is mostly that evidence which might mislead the court should be excluded.\(^{34}\) Whereas, in the civil law systems those evidence are usually submitted and the courts decide to what extent it is reliable.\(^ {35}\)

Similarly, some scholars argue that exclusion of evidence is not the right instrument to achieve extrinsic goals. For example, Posner (1982) examined the Fourth Amendment to the United States constitution and the exclusionary rule used by the courts. He argued that excluding evidence as a means to deter the police from conducting illegal searches is inefficient.\(^ {36}\)

\(^{33}\) LEWISCH, supra note 31.
First, this rule causes a deadweight loss and violates Pareto-superiority criterion. On the one hand, the social valuable evidence which can prove the culpability of the guilty is excluded from trial. Hence, there is a high cost caused by the exclusion of the evidence. On the other hand, there is no benefit from this exclusion in the sense of finding the truth and differentiating the guilty from the innocent. In Posner’s (1982) opinion, the alternative “punishment” for the police who conducted the illegal search should be a fine. In this way, the evidence is accepted and the police officer is deterred.37

Second, there is over-deterrence since the private and social costs imposed on the government are higher than the social costs of the misconduct. In other words, the exclusion of critical evidence to conviction may lead to an acquittal of a criminal. This result may impose costs on the society. Consequently, the government who wants to avoid those costs might be too strict with collecting evidence and less successful doing so. In Posner’s (1982) words – this will cause “...the government to steer too far clear of the amorphous boundaries of the fourth amendment...”.38 Eventually, the result is the social opportunity costs – the forgone lawful searches which could have led to conviction of the guilty.

37 Id. at 638. The latter argument is derived from the classical economical notion that fines are a better tool of deterrence than imprisonment. Using imprisonment as a punishment instead of fines causes deadweight loss. The reason is that the costs the criminal is “paying” being imprisoned are not transferred to society. His foregone income, the salary of guards, and costs of jail are lost. On the contrary, fines are the criminal’s costs and in the same time, the society’s gain. So the fine is Pareto superior to the imprisonment. Assuming of course, the criminal has the needs to pay the fine. (Posner, 1982, p.636)
38 Id.
The evidences excluded under the second category of rules usually are not very reliable. On the contrary, many of the evidences excluded by the rules from the third category are reliable evidence which can be used for conviction. Thus, in the following section I will focus on the rules from the third category.

2.2. United States

United States is a federal system containing 52 states. Most criminal acts are defined by the states, with exception for crimes with federal interest.39

2.2.1. Search and Seizure

2.2.1.1. Background

Amendment 4 - Search and Seizure:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized”.40

Evidence which were seized through a breach of this amendment – namely, the fruits of the poisonous tree - can be suppresses in court. If those evidences were crucial for

40 U.S. Const. Amend. IV.
conviction, the defendant will consequently, be acquitted. This is the exclusionary rule, and it serves to punish and deter the government official from misconducts.\textsuperscript{41}

This rule is court-made doctrine which was established in the case \textit{Weeks v. United States}\textsuperscript{42} concerning the fourth amendment, and was applied in federal courts. After some years, in the case \textit{Mapp v. Ohio}\textsuperscript{43} the court made this rule applicable also in state courts. This rule was further extended in later years to fruits of the illegal conduct (such as verbal evidence derived from unlawful search or arrest).\textsuperscript{44}

According to courts, the basis for reasonable search and seizure is probable cause and warrant. The strength of protection given by the fourth amendment depends on the target place for the search. Thus, the less the intrusive is the search, the less justification it needs. For example, a person’s home is the most protected place, hence, requires much more grounds to justify it.\textsuperscript{45}

As can be expected the consequences of the exclusionary rule protecting the defendant’s constitutional rights under the Fourth Amendment can be extreme. One good example is the case \textit{Coolidge v. New Hampshire}.\textsuperscript{46} The defendant was convicted for

\textsuperscript{41} POSNER (1981-1982), \textit{supra} note 36, at 635.
\textsuperscript{42} Weeks v. United States, 232 U.S. 383 (1914), p. 392
\textsuperscript{43} Mapp v. Ohio, 367 U.S. 643 (1961)
the brutal murder of fourteen years old girl. There were several incriminating evidences against him. In the first stage, the police received from the defendant’s wife his guns, and one of them matched the gun firing in the crime. Based on that and according to his statutory authority, the attorney general issued a search and arrest warrant against the defendant. After the police arrested the defendant and found incriminating evidence against him (the victim’s clothes) in his car, the defendant was charges and convicted for murder. However, the Supreme Court reversed the conviction. The decision was based on the notion that the warrant was defective, the search illegal and the evidence found in the car – inadmissible. Those conclusions were derived from the assertion that the attorney general was not “neutral and detached magistrate”.47

Another interesting example involves less severe crime. In the case U.S. v. Montgomery48 police officers stopped a driver which they suspected was “checking” the area due to the way he was driving. After they received his personal details, they had discovered there is an arrest warrant against him. Following that the policemen conducted a bodily search for weapons. And indeed found several unregistered loaded weapons. The defendant was later on convicted for illegal possession of weapons. However, the appellate court reversed the conviction. They asserted that initially there was no probable cause to stop the defendant, thus, all the evidence seized as a result of the search were excluded.49

48 U.S. v. Montgomery, 561 F. 2d 875 (D.C. Cir. 1977)
49 Wilkey, supra note 47, at 218.
As have been illustrated by the abovementioned cases, the exclusionary rule leads sometimes to the acquittal of the guilty. In both cases the courts excluded objective and reliable evidence which otherwise would lead (and in effect led) to the conviction of the defendants.

2.2.1.2. Costs

The exclusionary rule related to the breach of the Fourth Amendment’s rights is very controversial. For four decades this rule had been praised or criticized heavily. However, no consensus has yet been achieved.\(^{50}\)

Nevertheless, the area of search and seizure is distinct from other constitutional matters. Unlike under the breach of other rights, evidences obtained while violating the Fourth Amendment are always reliable. This is to the same extent as evidences obtained by legal means. This might not be true, for example, regarding evidence obtained using misappropriate means of interrogation.\(^ {51}\) Hence, intuitively speaking, the costs of this rule for the prosecution and investigation authorities, as for the society, can be very high.

Indeed, not long after the *Mapp v. Ohio* decision, scholars were questioning the exclusionary rule and its effects. Oaks (1970) conducted comprehensive study on this


\(^{51}\) Id. OAKS, at 737-738.
matter in attempt to examine the costs and effectiveness of the Fourth Amendment’s exclusionary rule. Among other things, Oaks interviewed police officials and presented the costs of the exclusionary rule from their perspective:

“Some police officers have complained to the author that the arrest and search and seizure rules are so inhibiting that they cannot make a valid arrest or search and get a conviction even where they know that a particular person possesses stolen goods and where those goods are located. They claim that their reliable policeman’s intuition cannot be translated into the necessary probable cause for a warrant. Consequently, the choice is often between an elaborate stakeout involving hundreds of hours of police time that is badly needed elsewhere or a breaking of the rules that recovers the stolen property but forgoes the conviction. In other instances police claim that the time and trouble of obtaining a warrant is prohibitive in view of the practical exigencies of law enforcement...”

Furthermore, the motions to suppress evidences filed by the defendants are time consuming and shifting the attentions to technical accounts instead of the guilt question.

Prosecution have scarce time resources which they out to divide between different cases. The more time is spent on technical pre-trial claims, the higher the opportunity costs. Namely, the time spent on motion hearings could be spent on substantive hearings in other cases.

For example, research conducted in Circuit Court in Chicago in 1969 (after the Mapp v. Ohio decision) showed astonishing results: Motions to suppress evidences were

---

52 Id. at 717.
filed in 52 per cent of gambling cases and 86 per cent were granted. Also motions were filed in 34 per cent of narcotic cases and 97 per cent were granted. Consequently, charges were dismissed.\textsuperscript{53} Furthermore, research regarding the above courtroom time revealed that 20-34 per cent of the time is spent on motions to suppress evidence.\textsuperscript{54}

The abovementioned results illustrate the high costs the exclusionary rule imposes on prosecution and can account for their incentives to find a way to bypass those costs.

Similarly, scholars following Oaks continued to examine the costs and effects of the exclusionary rule. For example, Posner (1981) argued that the exclusionary rule of the Fourth Amendment is not without costs. In his paper, Posner asserts that when courts suppress evidence they raise the costs of investigation. Namely, either the police needs to expand their resources to obtain equally good evidence, or they stop investigate cases with high probability of evidence exclusion – opportunity cost. The later of course, would lead to decrease of probability of convicting guilty criminals. In economic terms, this will cause deadweight loss.\textsuperscript{55}

Posner (1981) examines the Fourth Amendment from economics of tort law perspective. According to this analysis, the exclusionary rule is a tool for deterring the

\textsuperscript{53} Id. at 684-685.
\textsuperscript{54} Id. at 744. This extensive study criticizes judges who justified the exclusionary rule without an empirical data proving that it is actually working. Furthermore the author presented number of empirical attempts to examine the deterrence power of the rule, and offered ways to improve the research in this field. The question whether the exclusionary rule is good or bad is beyond the scope of this paper, hence, the discussion about this study won’t be expanded.
\textsuperscript{55} POSNER (1981), supra note 50, at 57-58.
police from misconduct. Hence, the chosen rule should achieve optimal activity. However, in reality this rule can cause over-deterrence.56

The exclusionary rule often imposes penalties which exceed the social costs of Fourth Amendment’s violations. In other words, the harm brought about by illegal search can be negligible, whereas the “punishment” for the illegality is exclusion of evidence and in turn, release of criminals. For example, the cost of the violation for the criminal is $100 (the scope of the search is broader than it would be with a warrant, thus, more disturbing for the searched person). While the cost for society from the criminal’s release is $1000 57 (weaker deterrence effect for criminals, which might result in higher crime rates).

The abovementioned can be compared to over-deterrence of doctors. When costs of punishment are too high, it creates distorted incentives. Hence, if doctors know they are being severely punished for every mistake, they might avoid conducting certain risky procedures which can save lives.58

Similarly, excessive use of the exclusionary rule might incentivize police to investigate fewer cases, and focus on the easy and less costly cases. In other words, the

56 Id. at 54.
57 Id. at 55. The author suggests replacing the exclusionary rule with fines. According to him, whenever there is a violation of constitutional rights by government officials, the evidence should be admitted in court and tort suit should be filed against the violators. Posner emphasizes that the protected interests by the Fourth amendment are “personal property”, interests in “bodily integrity”, “mental tranquility”, and “freedom of movement” which are the domain of tort. The interest of the criminal not to be convicted in trial is not a protected right; hence, exclusion of probative evidence is not the right tool to enforce the Fourth Amendment. Often the harm to the victim of the illegal search (waste of his time, mess in his property, etc) is much lower than the cost of excluding reliable evidence.
58 SHAVELL S. “Economic Analysis of Accident Law”, HARVARD UNIVERSITY PRESS, CAMBRIDGE MASSACHUSETTS, LONDON, ENGLAND, 2007, p. 209. Shavell is discussing the circumstances in which the individual is taking too much care and avoids beneficial activity to society.
police would refrain from desirable activity. Consequently, many criminals who impose high costs on society will walk free.

Later on, Atkins & Rubin (2003) examined the costs of the exclusionary rule in an empirical study. They asserted that the exclusionary rule related to the Fourth Amendment has secondary costs. Namely, when the police know the search products are excluded from trial, they would seek for alternative investigation methods, which might be more costly. Consequently, they might be forced to allocate more resources to those cases where the probability for exclusion is higher. For example, investigation of robbery might be more affected by the exclusionary rule than assault. This is due to the fact that to prove robbery you need the loot as evidence. This loot is a potential evidence to be excluded from trial. 59

The outcome is high opportunity costs. Specifically speaking, the extended resources allocated now to certain crimes could have been distributed among different cases. Consequently, certain crimes will not be investigated since with the exclusionary rule the costs might exceed the benefits.

In addition, the police will be induced by the courts to take alternative measures to conduct searches which in turn might make the investigation less efficient. As a result the expected punishment for potential criminals will decrease (due to the decrease of the probability being detected) and their expected benefits will outweigh

the costs. According to the rational choice model, this situation will lead to higher crime rates.60

The abovementioned opportunity costs impose a burden not solely on the police and prosecution who cannot try criminals, but on the society as a whole. More crimes usually mean more victims.

Mialon & Mialon (2008) furthered the above assumption and build an economic model of “crime and search” to assess the effects of Fourth Amendment’s exclusionary rule on crime and privacy.

The authors introduced complicated set of relationship between the exclusionary rule, the police conduct and criminals’ behaviour. According to their model, the exclusionary rule reduces directly illegal searches, but then, indirectly increases illegal searches by directly increasing crime. However, the assumption is that the direct effect is more dominant and hence the result is decrease in wrongful searches and increase in crime.61

One of the main assumptions of the model is that the exclusionary rule increase $\alpha = P\{Iv|C, -I\varepsilon\}$, where $P$ is probability, $Iv$ is not guilty verdict, $C$ is

---

60 *Id.* The authors of this paper conducted an empirical study examining the crime rates before and after the introduction of search and seizure exclusionary rule. And indeed the results of their study showed an increase in crime rates in the following years after the court’s decision in Mapp v. Ohio. The authors were aware of past studies which concluded that the above decision had no significant impact on the crime rates. However, they explained that previous studies focused on the cases lost in trial due to the exclusionary rule. The results were that the percentage of such cases was low, and thus, the conclusion derived was that the rule didn’t have significant impact on crime rates. On the contrary, Atkins & Rubin (2003) showed that the impact of the exclusionary rule is on much earlier stage of the criminal process.

committed crime and \( I \varepsilon \) is evidence which not suffice probable cause. Meaning, when the Fourth Amendment’s exclusionary rule is stronger, the probability of acquitting guilty defendants which were searched without probable cause, is higher. Hence, though protecting the guilty is not the purpose of the rule, this is the practical result. The hope is that eventually, “in equilibrium” this would lead to fewer illegal searches of innocent people.\(^{62}\) However, until this happens, if ever, this rule helps only to free guilty defendants, since the innocent are not compensated for the harm they suffer.\(^{63}\)

To summarize, the Fourth Amendment’s exclusionary rule imposes costs on prosecuting and investigating authorities. Those costs include direct and indirect costs: (1) expensive alternative investigation methods, (2) time consuming trials, (3) opportunity costs of forgone cases/convictions.

The abovementioned costs can be applied to the equation presented in the introductory chapter - \((CP)(p(c)) < B\). If investigation and prosecution are more costly and the budget remains constant, fewer criminals are detected and convicted. Hence, the probability of conviction decreases. The rational criminal might therefore have lower expected costs than benefits and be incentivised to commit crimes.

To illustrate this point graphically, in Figure 1a and 1b the relations between costs and exclusion on the one hand and probability of conviction on the other hand, are presented. The former is based on the assumption about the complex casual chain (see diagram 1a).

---

\(^{62}\) Id. at 28

\(^{63}\) Wilkey, supra note 47, at 228.
As the number of illegal searches grows, so is the number of evidences which are regarded as inadmissible. This, in turn, leads to lower conviction probability since the defendants who would have been convicted with those evidences, are now acquitted. Now there are lower expected costs for criminals and higher incentives to commit crimes. If there are more criminals, clearly there are even higher costs of investigating and convicting them. (See figure 1a).

The casual chain between the costs and the probability of conviction can be illustrated in diagram 1b.
Diagram 1b:

If the enforcement budget is held constant, then higher costs of investigation and conviction will result in less solved crimes. This might lead to increasing number of criminals who see now higher benefits than the expected costs. In turn the probability of conviction will be even lower. If in the first stage, with the resources the state has, it could detect one criminal out of 20 for example, in the second stage, when there are more criminals it will be one criminal out of 30 for example. Hence, lower percentage of conviction. (See figure 1b).

Figure 1b: downward exponential curve presenting the decreasing probability of conviction, as a function of increasing costs of conviction.
2.2.2. The Right to Remain Silent and “Miranda Rules”

2.2.2.1. Background

Amendment 5 – Trial and Punishment

“No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation”. 64

The right to remain silent is an old rule which provides the person constitutional right not to answer questions during interrogation and trial. 65 One important feature of this right is that the defendant’s choice to remain silent cannot be held against him in trial. 66 There are several potential reasons justifying this rule, such as fairness, personal dignity, free-will, perjury, contempt, etc. 67

---

64 U.S. Const. Amend. V.
67 KESSEL G.V. “Quieting the Guilty and Acquitting the Innocent A Close Look at a New Twist on the Right to Silence”, Ind. L. Rev. 35, 2001-2002, pp. 925-988, p. 929. For interesting and innovative justification see SEIDMANN D.J. AND STEIN A. “The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege”, Har. L. Rev. 114( 2), 2000, pp. 430-510. The Authors assert that based on game theory model the silence rule can help distinguish guilty from innocent. If criminals obliged to answer questions they would imitate the behaviour of innocent and lie to save themselves from incrimination. In this way even the version the innocent tell lose credibility. On the contrary, if there is an option to remain silent, the guilty will choose this option to reduce the probability the police or prosecution would “catch” them in their lies. However, the innocent will still choose to talk and thus, give the authorities the tool to distinguish them from the guilty.
In 1966 the United States Supreme Court secured those rights in revolutionary case *Miranda v. Arizona*. The court asserted:

“...the person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him.”

Failure to comply with those rules would result in exclusion of statements obtained in this process, unless the person in custody knowingly waived his rights.

### 2.2.2.2. Costs

One of the main counter-arguments to the Miranda rules is that this decision is “handcuffing” the police. Suspects’ confessions are major contribution to solving crimes in two ways. First, the confession helps to know the offender. Secondly, the incriminating statements can lead to physical evidence.

Some empirical studies offer evidence that following the Miranda decision, the rate of confessions decreased. Consequently, the rate of clearance decreased.

---

69 *Id.* at 467-473.
70 *Id.* at 444, 473.
72 CASSEL P.G. “Miranda’s Social Costs: An Empirical Reassessment”, *Nw. U. L. Rev.* 90, 1995-1996, pp. 387-499. Interesting point mentioned in this study is that the Miranda rules had larger effect on violent crimes (463). One explanation for this result might be that in these crimes the confession is often the most important evidence. Unlike for example, the physical evidence which are often more important in property crimes.
Thus, the costs the Fifth Amendment’s and Miranda’s exclusionary rule imposed on the police can be divided into two groups. First, the direct costs of allocating more police resources to find evidence. Namely, a case can be “easily” solved if the suspect answers questions. In this way, there is higher probability he would give away information which would lead to evidence needed to solve the crime. However, if suspects choose to remain silent more often, police has to use alternative methods to gather evidence. Those methods might be more costly and time consuming.

Second group is the opportunity costs. If the less costly method to solve crimes is restricted and the budget is limited, the outcome is forgone cases. Namely, crimes the police could have solved if more suspects had confessed.74

On the same time, the exclusionary rule of Fifth Amendment imposes costs also on prosecution. Motions to suppress evidence based on violation of constitutional rights are less costly arguments then substantive arguments. Namely, the effort the defense needs to put to support exclusionary rule motions is not meaningful. It involves significantly less investigation than the evidence needed to support for example, self-defense claim. However, the benefits from those claims can be very significant, whether the result is dismissal of all charges, or the dismissal of some charges following very beneficial plea bargains. Consequently, those motions are raised very often.75

---

73 CASSEL (1998), supra note 71.
74 Id. at 1089, noting some crimes are cleared using confessions.
Similarly to the argument presented in previous section, Fifth Amendment’s hearings are time consuming and hence costly for prosecution. Since the resources prosecution has are scarce, dealing with numerous technical accounts impose high opportunity costs. The time and the effort invested in those hearings could serve substantive investigation for other cases.

In addition, the obvious direct costs of excluding confessions are the forgone convictions. In many cases the confession is essential evidence for conviction, and its exclusion results in acquittal.

The abovementioned costs can also be illustrated in figures 1a and 1b. The higher the frequency of exclusion of confessions, the higher is the cost of investigation and conviction. In turn, the probability of conviction is lower, and the balance between the expected costs and the benefits for the criminal, is changed.

**2.2.3. Prosecutorial Discretion and Plea Bargaining**

As explained in the previous sections, defendant’s constitutional rights are protected by the exclusionary rule, which in turn, increases the investigation and conviction costs. On the contrary, discretionary power and the practice of plea bargains serve to reduce those costs, as explained in the following sections.

**2.2.3.1. Background**

Prosecutorial discretion and plea bargains are tools which transfer the power to prosecutors and in turn, reduce the costs of prosecution.
In the United States the prosecutor has very broad discretionary power. First, the prosecutor can refrain from prosecuting an individual even if there are sufficient evidences to file charges. Second, prosecutor can dismiss charges if the defendant agrees to plead guilty instead of standing trial. Third, prosecutor can decide to charge lesser offense, or fewer offenses, than could have lawfully been charged. This power makes the plea bargains - bargains between prosecutor and defendant for reduction/dismissal of charges, or agreed sentence in exchange to guilty plea - useful tool.

Plea bargaining in the United States can be traced back to the end of the eighteenth century. Of course, back then it was not a regulated field, but deals between prosecution and defendants for reduction of charges and guilty pleas in exchange, were done already then.

Prosecutorial discretion helped prosecutors use plea bargains to induce defendants to plead guilty. Namely, the prosecutor would “over-charge” by charging several accounts for one behavior, to gain leverage in plea negotiations. This in turn threatens the defendant with multiple punishments. In the next stage the prosecutor offers, or agrees, to dismiss some of the charges in exchange for the defendant’s guilty plea for the remaining charges.

---

78 Id. at 872.
This prosecutorial power is even more influential when there are statutory punishments in the law. Such law gives the prosecutor the power to set the punishment by choosing the charges. Furthermore, it secures the result and helps convince the defendant to agree to the bargain.\textsuperscript{79} In other words, this shifts the sentencing power from judges to prosecutors.

\textbf{2.2.3.2. Costs}

There is an economic rational to provide the prosecution with broad discretion. Prosecutors know their budget constrain and accordingly to that can design the optimal policy for deterrence. For example, as have mentioned above, the prosecutors have the authority not to prosecutor even where there are sufficient evidences. They can use this discretionary power to choose the cases with the highest probability of conviction, hence, using their scarce resources optimally. This power includes also the ability to prosecute selectively. Thus, economically speaking, they can keep charging as long as there is an additional marginal deterrence. If however, prosecuting another criminal who commits certain type of offences does not lead to the wanted deterrence, it is efficient to refrain from filing charges in this case.\textsuperscript{80}

One of the reasons for the development of plea bargains is the desire of prosecutors to manage the work load. In other words, it is a tool to reduce the costs of prosecution and make it more efficient.\textsuperscript{81}

\textsuperscript{79}Id. at 874.
\textsuperscript{80} Easterbrook, \textit{supra} note 7, at 304-305
\textsuperscript{81} Fisher, \textit{supra} note 77, at 893.
Since prosecution’s budget and time are constrained, there are a limited number of cases they can try. To indict a defendant and manage the whole trial against him, the prosecutor has to prepare evidence, witnesses, strategy etc. Those preparations, and the trial hearings where these evidences are presented, are time consuming. On the contrary, if the defendant pleads guilty before the trial begins, he saves the prosecution great deal of costs which will be otherwise spent on his trial.

Therefore, it can be understood why plea bargains are so appealing for prosecutors. If high percent of convictions are obtained by plea bargains rather than full trials, that means the prosecution can try more cases and convict more criminals using less sources.

As economically presented by Easterbrook (1983):

“…the prosecutor will accept a plea that exceeds the punishment his office could obtain by investing an equal amount of prosecutorial resources on other cases...The defendant, who buys the plea, pays by surrendering his right to impose costs on the prosecutor by demanding trial and by surrendering his chance of acquittal in trial...Prosecutors also prefer the agreements; they may put the released resources to use in other cases, thus increasing deterrence.”82

2.3. Germany83

The Federal Republic of Germany consist 16 states (Länder). The criminal law and procedure, except for few subject matters, is enacted on the federal level.84

---

82 EASTERBROOK, supra note 7, at 308-309.
83 The Federal Republic of Germany (hereinafter: Germany).
84
The German criminal system is an inquisitorial system where, according to the law, the judge is responsible for collecting the evidences which are needed to reach his verdict. In this system, unlike in American adversarial system, the judge is significantly involved in interrogating witnesses during the trial. However, the prosecution and police are the ones who in practice gather the evidence outside the courtroom and present it before the court.

2.3.1. Background to the Exclusionary Rule

The idea of excluding evidence to achieve extrinsic goals was introduced in Germany at the beginning of the twentieth century. This notion was first presented by Ernst Beling, an influential German scholar of that period. In his seminal work he asserted that there are important intrinsic interests which can limit the goal of truth finding (Beweisverwertungsverbote – “evidentiary use prohibition”). Namely, Beling spoke of several issues: state security, privilege of the royals, individual personality, family relation and protection of ownership.

In addition, Beling offered the following effects of the evidentiary prohibition rule: (1) prohibited evidence cannot be used in evidential investigation; (2) the prohibited evidence cannot be taken into consideration in a decision of the trial, (3) if

---

84 Comparative Criminal Law (2011), supra note 39, at 256.
85 Id. at 257.
the evidence was used in a trial it can lead to an appeal. Beling’s idea was to balance between the interests and not to give the sole weigh to truth finding.\textsuperscript{88}

However, courts began adapting the exclusionary rule only five decades later.\textsuperscript{89} According to the German courts, the exclusion of evidence is justified only where there is a violation of one of the two constitutional principles.\textsuperscript{90}

First, the “due process” (Verhältnismässigkeit): this principle encompasses the dignity of a person, his free development of personality, freedom, equality before the law and the prohibition of “inhuman treatment”. Second, principal of proportionality (Verhältnismässigkeit): the methods chosen to fight against crime should be proportional to the “seriousness of the offence and the strength of the suspicion”.\textsuperscript{91}

The constitutional rights protected by the exclusionary rule are specified mainly in three articles of the German constitution (Grundgesetz, hereinafter: GG).\textsuperscript{92}

Article 2 - Liberty:

“(1) Everyone has the right to \textbf{free development of his personality} insofar as he does not violate the rights of others or offend against the constitutional order or morality.

(2) Everyone has the right to life and to physical integrity. The freedom of the person is inviolable. Intrusion on these rights may only be made pursuant to a statute”.

\begin{flushleft}
\footnotesize
\textsuperscript{88} Id.
\textsuperscript{89} GLESS, \textit{supra} note 30, at 12.
\textsuperscript{91} Id.
\textsuperscript{92} GLESS, \textit{supra} note 30, at 12. Articles 2, 10, 13 GG.
\end{flushleft}
Article 10 - Letters, Mail, Telecommunication:

“(1) The privacy of letters as well as the secrecy of post and telecommunication are inviolable...”

And finally, article 13 – Home:

“(1) The home is inviolable.

(2) Searches may be ordered only by a judge or, in the event of danger resulting from any delay, by other organs legally specified, and they may be carried out only in the form prescribed by law...”

2.3.2. Search and seizure

The authorization to conduct searches is derived from Article 13 GG and section 105 to the German Criminal Procedure Code (Strafprozeßordnung, hereinafter: StPO). Although according to the rule all searches should be authorized prior by a judge, in case of “danger in delay” the prosecutor or the police may order the search. In practice the exception to the rule, is the rule. However, the main justification to exclude evidence is not the violation of the need to obtain search warrant, but the violation of the two principles mentioned in the previous section (due process and proportionality principles). 93

The two revolutionary cases in which the German courts excluded illegally obtained but reliable evidence, are the “Recording tape case” 94 (1960) and the “Diary case” 95 (1964). 96

93 BRADLEY, supra note 90, at 1038-1039.
In the recording tape case, the attorney of a rape victim was recorder trying to solicit to perjury. He was charged for his crime and the tape was presented in court. The court of first instance, as well as the appellate court, excluded the tapes and acquitted the attorney. In his ruling, the Federal Court of Appeal (Bundesgerichtshof, hereinafter: BHG or BGHSt) asserted that person’s right to his words is part of the constitutional right to self-determination of personality. Hence, recording his words secretly and without consent violates this constitutional right. Furthermore, the court argued that evidence should be excluded even if it is essential for conviction. The truth should not be achieved at any price.\textsuperscript{97}

In the diary case, the main evidence proving perjury of a female defendant was her own diary. In the court of first instance the defendant was convicted based on the diary. However, the conviction was reversed by the BGH asserting that the use of the diary is a violation of the defendant’s constitutional right to “free self-determination of personality”. In this case the court balanced, according to the principle of proportionality, individual’s right to privacy against the state’s interest to fight crimes.\textsuperscript{98}

In the following years the courts continued designing the exclusionary rule and clarifying the extent of personal privacy. They talked about three spheres of privacy: (1) Public sphere where the person can be observed, talk before audience, and be photographed. Evidence gathered in this sphere most probably will be admissible in

\textsuperscript{95} Judgment of Feb. 21, 1964, 19 BGHSt 325 (1964)
\textsuperscript{96} GLess, supra note 30, at 12.
\textsuperscript{97} CHO, supra note 87, at 17-18.
court. (2) Private sphere in public, for example, private conversations in restaurant. Evidence of this kind can be admitted only if in the process of balancing it is evident that the interest of enforcement is outweighing the privacy interests. The court will take into account the seriousness of the charges, the importance of the right to privacy, the relevance of the debatable evidence etc. (3) Inviolable private sphere, such as words written in a personal diary, which was not meant to be read by anybody else. Those evidences cannot be used in court.99

To illustrate this balancing practice, consider the “Tax Evasion case”.100 Married couple sold real estate property. In the course of the transaction the defendant asked the sellers to write lower value of the property in the contract for tax purposes. He paid the rest in cash. However, the sellers secretly recorded the defendant and brought this tape later on to the police. Following that the defendant was charge for tax offenses.101

The court asserted that evidence which violate the most basic rights of a person – dignity for example – should be excluded. This should be the practice regardless the severity of the relevant offence. In the next stage the court ruled that the current case relates to the second sphere of privacy, thus, evidences are not excluded automatically. However, it was decided that in this case the enforcement interest is not strong enough

---

99 GLESS, supra note 30, at 9.
101 BRADLEY, supra note 90, at 1044.
to justify the admission of the tapes.\textsuperscript{102} Hence the actual result of this kind of exclusionary rule is suppressing incriminating evidence and acquitting the guilty.

In 1968 a statute authorizing the use of wiretapping was enacted. The first part deals with national security purposes, and the second part – section 100a StPO – deals with law enforcement purposes. Section 100a provides very limited list of crimes which justify the wiretapping. Additional condition for wiretapping is that there are “definite facts on which to base the suspicion”.\textsuperscript{103}

Even though the “fruits of the poisonous tree” doctrine is not commonly practiced in the German criminal system, there were two cases related to the wiretapping which excluded evidence using this doctrine.\textsuperscript{104}

In the first case\textsuperscript{105} the police put legally wiretapping devise to record a suspect of a conspiracy - one of the listed crimes. However, the recording tape revealed only evidence of non-listed crime. Following that the police arrested the suspect, who confessed committing the non-listed crime after listening to the tape. Later on the suspect was charged and convicted for the crime. This after repeating his confession before a judge and stating no pressure was imposed on him while giving this confession. However, in 1978 the appellate court excluded the tapes and both confessions as the direct fruits of the poisonous tree. Nevertheless, the court limited the

\textsuperscript{102} Id. at 1045.
\textsuperscript{103} Id. at 1054-1055.
\textsuperscript{104} Id.
\textsuperscript{105} Judgment of Feb. 22, 1978 BGH, 27 BGHSt 355 (1978)
use of the doctrine asserting that the police may use clues derived from illegal wiretapping to find other legal evidence.\textsuperscript{106}

In the second case (\textit{Der Spiegel}\textsuperscript{107}) which expanded the use of the doctrine, a newspaper published secret information about the federal Office of Constitutional Protection. The suspect of leaking this information was a journalist of this paper, who was also former employee of the federal office. The suspect’s phone was wiretapped in the course of investigation of a listed crime. The recorded conversations led the police to conduct a warranted search which revealed incriminating documents. However, the documents were related only to lesser crimes which are not listed in the law. The suspect was later convicted based on those documents. Nevertheless, the appellate court excluded the evidence and reversed the conviction. The court asserted that although the wiretapping itself was legal, the indirect evidence derived from the clues obtained by the tape, cannot be used. Hence, forbade not only the use of derived evidence in court, but also the use in further investigation of unlisted crimes.\textsuperscript{108}

Since then, the German courts continued to develop the exclusionary rule which sometimes led to “lost convictions” even in severe cases.\textsuperscript{109}

\textsuperscript{106} BRADLEY, supra note 90, at 1055-1056.
\textsuperscript{107} Judgment of Apr. 18, 1980, BGH, 29 BGHSt 244 (1980)
\textsuperscript{108} BRADLEY, supra note 90, at 1056-1057.
\textsuperscript{109} One example is a murder case from 2005, BGH NSiZ 2005, 700 (Hospital Room Case), for this case and other examples see GLESS, supra note 30 and CHO, supra note 87, at 25-27.
2.3.3. The Right to Remain Silent and Interrogation Methods

Unlike the United States’ Fifth Amendment, the German right to remain silent can be found only in the StPO. Section 136 to the StPO provides the accused Miranda type rights, and obliges the authorities to inform the accused about his right before first examination.

However, over the years the German courts changed the extent to which those rights are protected. At the beginning, despite the rhetoric of the StPO, the right to remain silent was not really secure. Accused who exercised his right was sometimes “punished” for that. First, the accused could have been detained for not answering questions. Second, the court could use the silence as evidence for lack of remorse, and hence, impose harsher punishment. Third, under certain circumstances, accused’s silence could even serve as the only evidence for guilt. Furthermore, there was no obligation to inform the accused about his rights.

Later on this situation was changed. Regarding the consequences of remaining silent; the Federal Court asserted that the accused cannot be punished for exercising the right to remain silent. Moreover, in 1974 the court decided that in case of failure to inform the accused about his rights by a judge, the confession obtained can be excluded. However the court ruled that the defendant carries the burden to prove he was not aware of his right and otherwise would exercise it. In addition the court had

---

110 StPO § 136.
112 GLESS, supra note 30, at 19.
113 Judgment of May 14, 1974, BGH 25 BGHSt 325 (1974)
emphasized that this rule is not applicable to pre trial procedures, namely, police interrogations.\textsuperscript{114}

Nevertheless, in 1993 the exclusionary rule was expanded by the Federal Court to apply also to police interrogation. Since then it is mandatory for the police to inform a suspect about his right to remain silent and to consult to an attorney. Failure to conform to this rule, in principle, leads to the exclusion of the confession. As in the judge’s interrogation, if the suspect was aware of his rights despite the failure to inform him, the confession can be admitted.\textsuperscript{115}

Further consequence of this rule is the inadmissibility of confession obtained for example by undercover agent. However, the police are entitled to use the information gathered this way to find other untainted evidence.\textsuperscript{116}

Clearer exclusionary rule can be found in section 136a to the StPO. This section talks about forbidden measures of interrogation\textsuperscript{117} and it is related to the constitutional rights in Articles 1 and 104(1) to the German Constitution.\textsuperscript{118} The exclusionary rule related to this section is absolute and applies to all suspects involved in the case.\textsuperscript{119}

\textsuperscript{114} BRADLEY, \textit{supra} note 90, at 1052.


\textsuperscript{116} Id. GLESS, at 26-27.

\textsuperscript{117} The forbidden methods listed in the code: “…ill-treatment, induced fatigue, physical interference, administration of drugs, torment, deception or hypnosis…”.

\textsuperscript{118} GLESS, \textit{supra} note 30, at 19.

\textsuperscript{119} Id. at 21.
2.3.4. Costs

Although the purpose and the justification for the exclusionary rule vary between Germany and the United States, the impact on the investigation and conviction costs is similar (see sections 2.2.1.2. and 2.2.2.2.). Unlike in the United States courts, the main purpose of the German courts is not to deter the police from misbehaving, but to protect the constitutional rights.\textsuperscript{120} In addition, exercising the “balancing” case by case theory\textsuperscript{121} makes the exclusionary rule unclear and imposes even further costs on investigators.

First, excluding reliable evidence impose the obvious opportunity costs of “lost convictions”. As in the United States, German courts do not refrain from excluding substantial evidence for conviction. The immediate result of this kind of exclusion is acquittal of the accused.

Secondly, exclusion of evidence imposes direct costs on investigation. Now the police needs to allocate more resources to obtain other evidence which may serve the basis for conviction.

Moreover, if the exclusionary rule is not clear it may make the investigation less efficient. One option is that the police will put additional effort to obtain more evidences than is needed. If they cannot know in advance which evidence will be excluded they might try to gather as many evidence as possible allocating too many resources for that purpose. Second option is under-investigating. If policemen know

\textsuperscript{120} BRADLEY, supra note 90, at 1044.
\textsuperscript{121} GLESS, supra note 30, at 28.
many evidence are excluded, they will be reluctant to investigate the more difficult cases. Consequently this will lead to opportunity costs of “lost cases”.

However, in order to make a full theory and reach strong conclusions about the effect of the German exclusionary rule on the costs of conviction and investigation, it should be tested empirically.

### 2.3.5. Prosecutorial Discretion and Plea Agreements

Interestingly, not long after the courts began developing the exclusionary rule, the prosecutorial discretion broadened and the practice of plea bargains emerged.

#### 2.3.5.1. Background

Although the StPO still contain provision of mandatory prosecution,\(^\text{122}\) in 1975 the legislator broadened prosecution’s discretion.\(^\text{123}\) Since then the prosecution has the authority to dismiss charges in misdemeanor cases if the accused agrees to certain terms. Furthermore, many offences which are considered felony in the United States are defined as misdemeanor in Germany. Hence, this section provides the prosecution with broad discretion ary power.\(^\text{124}\)

Moreover, when the indictment includes multiple charges, the prosecution can dismiss some of them or not to charge from the beginning. The condition is that the expected punishment for the dismissed charges is negligible compared to the expected

---

\(^\text{122}\) StPO § 152.
\(^\text{124}\) *Id.* HERRMANN, at 757-758.
punishment of the remaining charges. Another justification for dismissal of charges is if the ruling cannot be expected in a reasonable time.\textsuperscript{125}

In addition, the prosecution has discretion in deciding to which court to file charges. Crimes with medium seriousness can be charges either in county court panel or in the district court. Moreover, less serious crimes can be brought before single professional judge or county court penal. Even thought in theory this choice should not influence the outcome, in practice it has an effect. First of all, the county courts are forbidden to impose higher punishment than 4 years imprisonment. And secondly, the choice of the court influences the perception of the seriousness of the case by the judges.\textsuperscript{126}

As to filing charges discretion, under the German law, the indictment should be always authorized by the court. However, in practice this rule is not limiting the prosecutorial power since the charges are rarely rejected by the courts.\textsuperscript{127}

The German plea bargains began developing in lower courts rather by legislators. Until the 1980s this practice was not discussed in public and exercised only in certain cases (mainly petty crimes).\textsuperscript{128} In 1982 began a vide debate about the legality of the practice. However, only in 1997 did the German Federal Court of appeals

\textsuperscript{125} StPO § 154. Frase R. and Weigend, supra note 115, at 339. It should be mentioned that aggregated punishment for multiple charges cannot exceed fifteen years imprisonment (except for life imprisonment). In additional the aggregated punishment should be less than the sum of the individual punishments. (StGB § 54(2)).
\textsuperscript{126} Id. Frase & Weigend.
\textsuperscript{127} Id. at 340.
\textsuperscript{128} Herrmann, supra note 123, at 775. Later on the practice expanded to complicated cases as white color crimes, drugs, tax evasions and environmental crimes.
approve the legality of such practice and set ground rules for it.\textsuperscript{129} Furthermore, only in 2009 this practice was eventually added to the StPO. This section specifies the procedural rules of this practice, including the defendant’s right to withdraw his confession if the judge deviated from the agreed sentence. Although according to the law the court still has to determine the relevant facts of the case, in practice the issues of substantive law are mere “bargain chips”.\textsuperscript{130}

In Germany there are several types of bargaining. First, negotiations between the prosecutor and the defense counsel for dismissal of charges according to section 153a. According to this section, in less serious offenses the prosecutor can dismiss the charges. In return, the accused has to fulfill certain conditions imposed on him.\textsuperscript{131} Despite the fact the use of this section was meant to remain the exception, very fast it became the ground for often bargaining.\textsuperscript{132} Furthermore, in complicated cases prosecutors sometimes offer settlement in early stages of the trial threatening that this is the last chance to negotiate.\textsuperscript{133}

Second, in misdemeanor cases with requested punishment of a fine, the prosecutor can apply ex parte for a penal order. Namely, the prosecutor drafts the

\begin{footnotes}

\textsuperscript{130} Comparative Criminal Law (2011), supra note 39, at 257-258.

\textsuperscript{131} For example, compensation for the damages caused by the offense, or donation to a non-profit-making institution.

\textsuperscript{132} HERRMANN, supra note 123, at 758-759. The “deals” were for example to pay high amount to charity in economical crimes, where the punishment will anyway be a fine. Furthermore, prosecutors were negotiating even in cases where they were not confident about the actual guilt.

\textsuperscript{133} Id. at 759.
\end{footnotes}
details of the case and the requested punishment. In practice, courts usually sign this application and the decision is sent to the accused. The accused, in turn, has a limited time to object and request a criminal trial, otherwise the punishment is final.\footnote{For explanation of the Penal Order see LANGBEIN J.H “Controlling Prosecutorial Discretion in Germany”, U. Chic. L. Rev. 41(3), 1974, pp. 439-467, p. 456.}

Not surprisingly, many defense counsels negotiate with prosecutors stating the accused is willing to plead guilty if the prosecutor will apply for a penal order with agreed fine.\footnote{HERRMANN, supra note 123, at 761.} This system bestows prosecution great deal of power to decide whether the case goes to trial and which punishment the accused will receive.\footnote{HAGLICH H.A. “A Comparison of Guilty Plea Procedure in the United States and Germany”, Dick. J. Int’l. L. 10, 1991-1992, pp. 93-112, p. 103.}

Third option is bargaining confessions. The main parties to this bargaining are the judge and the defense counsel. However, the prosecutor may play an active role by offering the defense not to bring charges for unrelated offenses allegedly committed by the defendant. Under this negotiation, the judge promises not to exceed certain maximum punishment in exchange for the defendant’s confession.\footnote{WEIGEND, supra note 129, at 45.}

\textit{2.3.5.2. Costs}

As in the United States, so is in Germany, the “plea” bargains serve to reduce costs of conviction. Since in Germany fines are common way of punishment\footnote{HERRMANN, supra note 123, at 761.} prosecutors have high incentives to reach agreements with the defense. Especially in complicated cases
which demand extended investigation and preparation, using section 153a to “punish” criminals without having a trial, makes the process “cheaper”.\textsuperscript{139}

Furthermore, the penal order offers the German prosecutors a short cut to end cases. In this way they can increase the number of convictions without increasing the costs (no need to spend time and effort in preparing the case and managing the trial).\textsuperscript{140}

One of the studies concerning the plea bargains mentioned that this practice is especially needed when defendants practicing their right to remain silent.\textsuperscript{141} Hence, while the exercising of defendant’s constitutional rights raises the conviction costs, the bargain for confession reduces those costs.

To summarize, the broadening of prosecutorial discretion and the practice of plea bargains make the prosecution less costly and more efficient. Hence, the state may solve more crimes while maintaining the same budget.\textsuperscript{142}

\textsuperscript{139} Id. at 759.
\textsuperscript{140} HAGLICH, supra note 136, at 102.
\textsuperscript{141} WEIGEND, supra note 129, at 46.
\textsuperscript{142} Id. at 53.
3. Substantive Criminal Law

The development of the procedural rules protecting the defendants’ constitutional rights, or transferring the prosecution more power, are not the sole changes in the criminal system. Changes of the substantive criminal codes can also be observed, both in the United States and in Germany.

3.1. United States

Over the years, the United States’ federal criminal law broadened, as have the states laws. To illustrate this practice consider the growth of the criminal offences in several US states: Illinois’ criminal law contained 131 offenses in 1856. By the year of 2003 this number have rose to 421 offenses. At the same period approximately Virginia’s criminal law grew from 170 offenses up to 495 offenses (though the magnitude of the growth is even larger since many slavery-related offenses were cancelled). Similarly, Massachusetts’ number of offenses went from 214 to 535 offenses.\(^{143}\)

At the same time, the Federal Criminal Code had also expanded. The number of offenses grew from 183 in 1873 to 643 separate sections in 2000.\(^{144}\) Moreover, since some of the sections define more than one offense, in practice there are more than 3,000 federal criminal offenses.\(^{145}\)

\(^{143}\) STUNTZ (2001), supra note 23, at 90-10.
\(^{144}\) Id. at 11.
Obviously, to reach the conclusion that criminal code is really broadening and criminalizing larger scope of behavior, it is not enough to look only on the number of offenses. The next step is to see which acts are criminalized. Take for example some offenses where punishment of imprisonment is permitted: In Florida - selling untested sparkles or changing tested ones, presenting deformed animals. In California – allowing animal’s corpse to be put in some distance from a street, sale of alcohol to “common drunkard”, cheating at cards. In Ohio – homosexual propositions. Texas – overworking animals, making dogs to fight, and violating the rules of college recruitment of athletes. Massachusetts – scaring pigeons away from “beds which have been made for the purpose of taking them in nets”.146

Furthermore, some states criminalize negligent endangerment which doesn’t oblige the proof of harm, or the realization of the risk. The only element that needs to be proved is the creation of the risk. Consequently, the possession of screwdrivers is criminalized based on the notion this is a burglary tool.147

United States’ Federal Criminal Code criminalizes even broader and minor behavior. The most famous example is the criminal ban on the unauthorized use of “Woodsy Owl” image. Other examples can be found in the “federal law of fraud and misrepresentation”. This law encompasses almost all kinds of lies a person may tell, even those which generally not considered criminal. Some provisions even cover misleading but not false statements. Moreover, there is a general ban on false

147 Id. at 14.
statements, but also long list of specific bans. Hence, the prosecution can charge overlapping offenses.\textsuperscript{148}

The federal mail and wire fraud statuses criminalize almost all breaches of fiduciary duty. The problem it is hard to agree which breach is considered serious and as a result, extremely large amount of wrongful behavior is considered criminal. However, it is important to understand that not every wrongdoing should be defined as criminal.\textsuperscript{149}

State codes also have overlapping offenses. Consequently, the defendant can commit a single crime but be charges for many different offences.\textsuperscript{150}

In addition, some crimes remained part of the criminal code despite the fact there is less interest to enforce it. Those crimes also give the prosecution power in plea negotiations. One example is the sodomy statute which helps obtain guilty pleas in sexual assaults.\textsuperscript{151} Another example is the adultery statute\textsuperscript{152} which can be used for the same purpose.

As have explained before, this kind of system transfers the power to law enforcers. With broad criminal codes the police will decide who to arrest and the prosecutors will decide against whom to file charges. Furthermore, prosecutors can use

\begin{footnotes}
\footnote{\textit{Id.} at 16.}
\footnote{\textit{Id.} at 22.}
\footnote{\textit{Id.} at 22.}
\footnote{\textit{Id.} at 17.}
\footnote{\textit{Id.} at 59.}
\footnote{NY. Penal Code § 255.17. ("A person is guilty of adultery when he engages in sexual intercourse with another person at a time when he has a living spouse, or the other person has a living spouse. Adultery is a class B misdemeanor").}
\end{footnotes}
the threat of overlapping charges to induce offenders to plead guilty to some of the charges. This competence reduces the costs of investigation and conviction.\textsuperscript{153}

### 3.2. Germany

The German Criminal Code (Strafgesetzbuch, hereinafter: StGB) was originally enacted in 1871.\textsuperscript{154} After the world war two and up until the 1970s the StGB had been narrowed, and many crimes were abolished as part of “liberalization” practice.\textsuperscript{155}

However, starting from 1975 drastic change has occurred. Interestingly the substantive criminal law was expanded and each reform since then was encompassing more and more behavior. The number of offenses grew, the description of the offenses got broader and the reach of criminal law extended.\textsuperscript{156}

In 1976 the first act of the Fight against White Collar Crimes was enacted. After ten years the second act of the Fight against White Collar Crimes was complemented. Those acts added new criminal offences, e.g. subsidiary fraud and credit fraud, crimes related to check transactions, computers and investment fraud. A lot of offenses are merely endangerment offences, meaning, there is no need to prove actual damage.\textsuperscript{157}

\textsuperscript{153} STUNTZ (2001), supra note 23, at 18.
\textsuperscript{154} European criminal procedures, supra note 86, at 294.
\textsuperscript{156} \textit{Id.} at 641.
Later on, in 1980, criminal environmental offenses were introduced and environmental harms were criminalized. ¹⁵⁸

Following those reforms, subsequent legislative changes were made concerning aggravated punishment and new elements of criminal offenses. E.g. the Terrorism Act in 1986,¹⁵⁹ The Combating Drug Trafficking and Other Forms of Organized Crime Act (OrgKG) in 1992 and the Crime Suppression Act of 1994. The latter two acts introduced new offenses of money laundering, protection and extortion, distribution of counterfeit money and forged credit cards, serious criminal offenses against the environment, etc.¹⁶⁰ The Fight Against Crime Act in 1994, which aggravated the punishment for xenophobic offenses.¹⁶¹ In 1997 the criminal law was amended again and the Anti-Corruption Act (KorrBekG) was added.¹⁶² And finally, the Sixth Criminal Reform Act of 1998 which increased the statutory ranges of punishment was made.¹⁶³

During this period and later on, the law of abortion was amended (1976, 1992), marital rape became punishable (1997), the Fight against Sexual Offenses and other Dangerous Crimes was introduced (1998). Moreover, changes to the criminal law were made subsequently to 11 September 2001 events.¹⁶⁴

¹⁵⁹ KREHL, supra note 157, at 426.
¹⁶¹ KREHL, supra note 157, at 426.
¹⁶³ KREHL, supra note 157, at 426-427.
¹⁶⁴ Id.
The introduction of new endangerment offences makes the convictions easier. The court has to establish merely that the accused committed the act, without proving the actual damage or specific danger to the victim.\textsuperscript{165} This can be referred to as reduction of conviction costs, namely, there are less elements to prove in order to obtain conviction. Theoretically, more criminal offenses and expanded definition of criminal behavior may also extend the investigatory power. It provides further justification for conducting searches and broader interests to admit evidence which otherwise may be considered illegal.

\textsuperscript{165} Id. at 429.
4. Concluding remarks

This paper examines from law and economics perspective the relationship between defendants’ constitutional rights, and the criminal law (namely, the breadth of the substantive criminal law, and certain procedural rules). The American scholar, William Stuntz introduced new theory which explains the expansion of the criminal substantive law. Unlike other scholars in this field, Stuntz asserted that the decision of the legislator to criminalize more behavior can be attributed to their will to solve the principal-agent problem. More specifically, as the constitutional rights of defendants are more and more protected by the courts, the investigation and the prosecution of crimes becomes more costly. Since the resources of the enforcement authorities stay the same, this situation leads to under-investigation and under-prosecution. In turn, to assist the prosecution and reduce the costs of investigation and prosecution, the legislator over-criminalizes.

Over-criminalization can be used as a tool to reduce conviction costs especially in a system where the prosecutors have broad discretionary power and plea bargaining practice.

To test the above model, this paper examines the German criminal system. Although many believe this is a “free proof” system, there have been interesting changes in recent decades which prove the contrary. Namely, German courts had developed the exclusionary rule to protect defendants’ constitutional rights. Similarly to the United States, those rules exclude reliable evidence and lead to acquittal of the accused.
Interestingly, as this paper shows, not long after the courts started to exclude evidence, the legislator broadened prosecution’s discretion power. Moreover the practice of plea bargains emerged. Hence, the hypothesis, which was found correct, was that the German criminal code should also go through reforms. On the one hand, reforms which will extend the reach of the substantive criminal law. On the other hand, procedural changes which will transfer more power to prosecution.

The first chapter reviews the economic analysis of criminal law, starting from Becker (1968). It introduces the balance which should be kept in order to deter crime. Namely, the authorities should maintain that the cost of punishment multiplied by the probability of conviction will be higher than the benefits the criminal derives from the crime. Furthermore, the different ways to achieve this goal and their disadvantages are discussed.

Subsequently the model of Stuntz is explained in length. According to this model, broad definition of criminal acts, alongside prosecutorial discretion and plea bargains, can contribute to the increase of probability of conviction. What is more interesting is that this method, unlike other options, does not compel the increase of enforcement budget.

The second chapter first reviews from economic perspective the procedural rules which exclude evidence from being admitted in trial. It explains the general rules and discusses more broadly the rules which serve to protect defendants’ constitutional rights.
In the second stage this chapter reviews the exclusionary rules protecting the main constitutional rights and their costs. In the United States this rule mainly protects the rights mentioned in the Fourth and Fifth Amendments. In addition, it serves to deter the authorities from misconduct. Those rights talk about being secured from unreasonable search and seizure, and not to be compelled to incriminate yourself. The latter right is also secured by court-made-rules which demand the authorities to inform the suspect about his rights (“Miranda rules”).

The costs of Fourth and Fifth Amendments’ exclusionary rule are explained and demonstrated in details. Those costs include the investigation direct costs, namely, the additional effort and resources which is allocated to cases with high probability of exclusion. In this kind of a system police have to work harder to obtain the information or evidence which will fulfill the requirement of “probable cause” (Fourth Amendment). Furthermore, if the suspects chose to exercise their right to remain silent during interrogation, they eliminate very important source of solving crimes (confessions and incriminating statements which lead to other evidence).

Consequently, there are opportunity and indirect costs. The resources which are allocated to solve crimes are limited. Hence, increasing costs of investigation, inevitably leads to “lost cases”. In other words, there are crimes which are now cannot be solved, criminals who walk free. This reduces the probability of being detected and convicted and makes the crime more appealing for potential criminals. Thus, the indirect costs are the increasing rates of crime.
For prosecution, the exclusion of evidence causes opportunity costs, namely, “lost convictions”. The result of excluding evidence is often acquittal of defendants who would otherwise be convicted. Moreover, the time spent on motions to suppress evidence could have been spent on managing other cases.

As shown in this chapter, the exclusionary rule is not unique for the United States. It is also practiced by the German courts starting around the 1960s. However, the goal of the rule is to protect the constitutional rights and not to deter enforcement authorities. In addition, it is guided by the two main principles of the German criminal system, namely, “due process” and proportionality principles.

The development of the German exclusionary rule is reviewed in details and cases regarding search and seizure and the right to remain silent, are presented. Interestingly, the constitutional rights which are most protected in Germany are privacy, freedom to self-development and the inevitability of home.

Similar to United States, the exclusionary rule protecting the constitutional rights, impose costs on investigation. In Germany as well, reliable evidence which otherwise would lead to conviction, are excluded. Moreover, additional costs are presented in the German case. Since the exclusionary rule has no clear boundaries, this might impose further costs. Namely, investigators might obtain more evidence than is actually needed, fearing some of them will be excluded.

The second chapter also presents the procedural rules which reduce conviction costs. Namely, broad discretionary power and the practice of plea bargaining. Whereas
those features are well familiar in the United States criminal system, it is new development in the German criminal system. Those practices enable short and “cheap” convictions.

In Germany, in line with the hypothesis, starting from the 1970s the prosecution received more freedom in charging decisions. The main two competences they had received relates to dismissal of charges and the penal order. In the same time, the courts started practicing plea agreements. In the first stage, it was exercised subtlety in the lower courts in very specific crimes. Next it appeared in other courts and broader crimes, with further legalization of the practice by the Federal court. And finally, it became legislated practice.

The third chapter first presents the expansion of the American criminal law, the States’ as the Federal’s. Interestingly, Stuntz’s work showed that the American criminal law had mainly the tendency to expand over the years, but not to be narrowed. This inclination is the over-criminalization. Short explanation of the cost reduction achieved by this method is presented.

In the next stage the development of the German substantive criminal code is examined. Interestingly, and in accordance with the initial hypothesis, the German code has gone through a great number of reforms. Contrary to the decriminalization practice observed up until 1975, starting from this year, the tendency of the reforms was reversed. As from 1975 great deal of the reforms extended the reach of criminal law. In other words, the German legislator added new offences and defined broader behavior
as criminal. Those reforms and the possible ways to reduce conviction costs are shortly presented and explained.

It seems like these changes, substantive and procedural, found in the German criminal system can suggest some support to Stuntz’s model. Even if certain new crimes were introduced due to substantive needs, the timing of the reforms as a whole has some meaning. As shown in this paper, all those changes were approximately around the same time.

It should be kept in mind that originally the German civil law jurisprudence is very different from the American common law system. Hence, the observed changes in Germany which bring the system closer to the American system are even more interesting. As shown in this paper, exclusionary rules impose costs on investigatory and prosecution authorities. If it reduces probability of conviction it is not surprising that the criminal system needs to adjust and find a way to reduce the costs. Hence, the development of those mechanisms which might serve to reduce conviction and investigation costs in Germany might not be a mere coincidence. All the more so when it is in such a short period after the exclusionary rule development.

However, even if the findings might strengthen Stuntz’s model, further research is needed to have firm conclusions. First, empirical studies should be conducted to examine the cost impact of the substantive and procedural changes in Germany. Second, to show the cost relation between the rules protecting constitutional rights and the criminal law, more systems should be explored. Results which will shed a light on
this subject can be achieved by examining true “free proof” systems. Those systems usually do not have exclusionary rules, or have lax rules. Hence, in theory if the model is correct, their substantive criminal law should not significantly expand over the years (beyond the normal needs). Furthermore, we should not observe significant changes in their procedural rules such as broadening of prosecutorial discretion and emergence of plea bargaining practices.
Bibliography


- Osborne E. "Is the Exclusionary Rule Worthwhile?", *Contemp. Econ. Pol'y* 17(381), 1999, pp. 381-389.


Court rulings

United States:
- U.S. v. Montgomery, 561 F. 2d 875 (D.C. Cir. 1977)

Germany:
- Judgment of Feb. 21, 1964, 19 BGHSt 325 (1964)
- Judgment of Apr. 18, 1980, BGH, 29 BGHSt 244 (1980)