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Prohibited Methods of Obtaining and Presenting Evidence

Report for the United States

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Background Information

The criminal justice process in the United States culminates in an adversary trial. Judges (appointed for life in the federal system; often elected in the states) preside over the trial, rule on evidentiary and constitutionally-based objections, and instruct the jury on the law, but do not play an active role in obtaining or presenting evidence. Evidence is gathered and presented by the lawyers for the prosecution and defense. Most evidence is presented through the in-court testimony of witnesses, who are subject to cross examination. Documentary evidence is admissible, but only if it satisfies the rules governing cross-examination discussed below. A defendant's out-of-court incriminating statements (including voluntary confessions satisfying the prophylactic *Miranda* rules discussed below) are admissible against him, but the defendant may not be compelled to testify at trial.

During the pre-trial investigative phase, judges play a somewhat more active role, ruling on whether applications by the police or prosecutor for search and arrest warrants, when required, meet the standard of "probable cause." In settings where no warrant is required, judges determine, after the fact, whether an adequate justification existed to obtain the evidence. In the absence of a valid warrant, or adequate justification in settings where no warrant is required, the evidence may not be used at trial.

The investigatory phase often involves a Grand Jury, a panel of citizens who decide whether sufficient evidence exists to bring criminal charges against a defendant. Federal defendants are constitutionally entitled to the protection of Grand Jury. States remain free to decide whether to use the device. Grand Jury proceedings are *ex parte*, permitting the prosecutor to submit evidence without the participation of the defense. While the Grand Jury was initially conceived as a protection for the accused, it has evolved in the United States into an important investigatory tool of the prosecution. Witnesses may be compelled to testify under oath before a Grand Jury, subject to 5th Amendment protections discussed below. Witnesses may also be required to produce documents for the Grand Jury's inspection. While Grand Jury subpoenas of documents are not technically searches or seizures within the meaning of the 4th Amendment, similar constraints are imposed by the Due Process Clause.

The prosecution's evidence is usually gathered by the police or the Grand Jury and turned over to a government prosecutor who presents it in court. In all but the most minor offenses, the prosecution is conducted by a government lawyer operating as a full-time prosecutor. The prosecution is under a constitutional duty to disclose to the defense all evidence tending to prove innocence.[1] Failure to do so is grounds for dismissal of the prosecution. The defendant is entitled

[1] See *Jencks v. United States*, 353 U.S. 657 (1957); *Brady v. Maryland*, 373 U.S. 83 (1963). For a comprehensive study see Laval L. Hooper *et al*, *Treatment of Brady v. Maryland Material in United States District and State Court*

to counsel of choice. If the defendant cannot afford counsel, the Due Process Clause of the Fifth Amendment and 14th Amendments, and Trial Clause of the Sixth Amendment require that defense counsel be appointed free of charge in all cases involving the potential for incarceration.[2] Representation of indigent defendants in urban areas is usually provided by a government agency (often called the "Public Defenders Office"), or a government-subsidized private group (often called "the Legal Aid Society"). In rural areas, counsel for the indigent are usually drawn from voluntary panels of private lawyers who are paid (poorly) to represent indigent defendants. Controversy exists in the United States over whether the legal defender caseload is too high, and whether underfunding results in inadequate representation of indigent defendants. The problem is particularly acute in capital cases.

The Due Process Clauses of the Fifth and 14th Amendments, and the Jury Trial Clause of the Sixth Amendment, require the prosecution to prove each element of a crime to a jury beyond a reasonable doubt.[3] Jury trial may be waived, but both the prosecution and defense must agree on the waiver. Juries in criminal cases usually consist of 12 persons drawn from jury pools chosen at random from the community, although the Supreme Court has approved six-person juries.[4] Verdicts must usually be unanimous, although the Supreme Court has approved convictions with 9 of 12 jurors voting to convict,[5] it has required 6 person juries to be unanimous.[6] Race and gender may play no role in jury selection.[7] While the trial must be public, jury deliberations are secret.

The presence of the jury complicates the burdens of proof and increases the stakes of excluding evidence from a criminal proceeding. At the close of the prosecution's case, the presiding judge must determine whether the prosecution has satisfied its "production burden" by presenting sufficient admissible evidence to allow a reasonable jury to find each element of the charged criminal offense beyond a reasonable doubt. If insufficient admissible evidence has been presented, the judge must dismiss the case before it goes to the jury. When the admissible evidence is sufficient to satisfy the prosecution's production burden, the jury is vested with the sole power to decide whether the admissible evidence satisfies the prosecution's "persuasion burden" of proving guilt beyond a reasonable doubt. A judge may direct a verdict of acquittal, but may not direct a jury to convict in a criminal case.

Rules, Orders and Policies: Report to the Advisory Committee on Criminal Rules of the Judicial Conference of the United States (Federal Judicial Center 2004)

[2] *Griffin v. Illinois*, 351 U.S. 12 (1956) (free transcript for felony); *Mayer v. City of Chicago*, 404 U.S. 189 (1971) (free transcript for minor offense); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (trial counsel); *Douglas v. California*, 372 U.S. 553 (1963) (appellate counsel); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (counsel required for any offence punishable by incarceration). Appointed counsel is not constitutionally required for post-appeal proceeding, but is often provided. *Ross v. Moffit*, 417 U.S. 600 (1974). In the United States, unlike systems where indigent defendants use vouchers to hire a lawyer of choice, appointed counsel is selected by the court.

[3] *In re Winship*, 397 U.S. 358 (1970). *Winship* is applicable to the sentencing process in connection with any fact that causes the possible maximum sentence to rise. *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005)

[4] *Williams v. Florida*, 399 U.S. 78 (1970)(upholding 6 person jury); *Ballew v. Georgia*, 435 U.S. 223 (1978)((5person jury unconstitutional)

[5] *Johnson v. Louisiana*, 406 U.S. 356 (1972)(9-3 verdict constitutional);

[6] *Burch v. Louisiana*, 441 U.S. 130 (1979)(5-1 verdict unconstitutional)

[7] *Batson v. Kentucky*, 476 U.S. 79 (1986)(race); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994)(gender)

In systems that do not use juries, the trial judge also acts solely on basis of admissible evidence. But, having heard the inadmissible evidence in order to rule on its admissibility, a judge may be affected by it, even subconsciously. In the United States, juries neither hear inadmissible evidence, nor learn of its existence.

A Brief Note on the Structure of the Bill of Rights

Limitations on obtaining and presenting evidence in criminal trials in the United States flow from two sources – Rules of Evidence established by legislatures and courts,[8] and rules of governmental behavior imposed by the Constitution, usually one of the provisions of the Bill of Rights (the first 10 Amendments to the Constitution). The key provisions of the Bill of Rights bind both federal and state governments.

Students of constitutional law should note the careful structure of the Bill of Rights. The First Amendment sets out six ideas – freedom from religion, freedom of religion, freedom of speech, freedom of the press, freedom of assembly, and freedom to petition the government for redress of grievances - describing the Founders' ideal tolerant, democratic polity. The next two amendments – the 2nd Amendment right to bear arms, [9] and the 3rd Amendment freedom from quartering soldiers - were designed to limit military influence. The next four amendments were designed to prevent the criminal process from threatening the ideal polity – the 4th Amendment governs the investigatory phase, prohibiting the government from conducting unreasonable searches or seizures; the 5th Amendment governs the interrogation phase, forbidding compulsory self-incrimination and guarantying due process of law; the 6th Amendment governs the adjudication phase, guarantying trial by jury, confrontation, and the right to counsel; and the 8th Amendment governs the sentencing phase, banning cruel and unusual punishment and excessive fines.[10] The final two amendments instruct judges on how to read the constitutional text. The 9th Amendment instructs that rights-bearing provisions be generously construed. The 10th Amendment instructs that power-conferring provisions be narrowly construed.[11]

I. Limitations on the Investigatory Process Imposed by the Fourth Amendment

The Fourth Amendment provides:

[8] The Federal Rules of Evidence enacted by Congress control in federal courts. Each state legislature enacts Evidence rules for its courts. New York is an exception, relying entirely on judge-made rules of Evidence. Many states have adopted the Federal Rules. In recent years, there has been a tendency for state evidence law to evolve towards the federal norm, although there are numerous exceptions.

[9] Controversy exists in the United States over the modern extent of the right to bear arms. The Supreme Court has ruled that the 2nd Amendment is an individual right, but has not yet ruled on its precise contours. See *District of Columbia v. Heller*, 554 U.S. ___ (2008)

[10] The 7th Amendment protects jury trials in civil proceedings.

[11] The structure of the Bill of Rights is explored at perhaps obsessive length in Burt Neuborne, *"The House Was Quiet and the World Was Calm – The Reader Became the Book: Reading the Bill of Rights as a Poem*, 57 Vanderbilt L. Rev. 2007 (2004).

> 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.

The 4th Amendment's protection against "unreasonable searches and seizures" is designed to safeguard privacy by limiting the government's ability restrain a person's freedom of movement, or to obtain information about a person's activities. The government may impinge on the privacy of the individual by conducting a search, seizure or an investigative stop only if adequate justification exists to initiate the intrusion.

Ideally, the decision about whether adequate grounds exist (phrased as "probable cause") to conduct a search or to make an arrest is made by an independent magistrate in response to evidence presented by the police. In settings where prior permission is impractical (such as a felony arrest in a public place), a judge decides, after the fact, whether adequate justification existed. Warrantless searches and arrests must also be based on probable cause. Investigative street stops must be based on "articulable suspicion," a standard lying between hunch and probable cause.

In order to deter conduct in violation of the 4th Amendment, the "exclusionary rule" requires that evidence obtained in violation of the 4th Amendment must be excluded from state or federal criminal proceedings.[12] In settings where such additional deterrence is deemed unnecessary, such as when the police mistakenly violate the 4th Amendment under a good-faith, reasonable belief that a search or seizure is lawful, the Supreme Court does not apply an exclusionary rule.[13]

The 4th Amendment applies to any governmental activity that impinges on a "reasonable expectation of privacy." The Supreme Court has held that since a wiretap interferes with a reasonable expectation of privacy, it is a 4th Amendment search requiring a warrant based on probable cause.[14] The Court has ruled, however, that aerial surveillance of land abutting a residence,[15] thermal imaging of a home, [16] and compulsory production of voice exemplars pursuant to a Grand Jury subpoena[17] do not interfere with reasonable expectations of privacy and are not 4th Amendment searches. The Court has also ruled that the warrantless use of drug sniffing dogs does not interfere with a constitutionally protected privacy interest.[18]

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[12] *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914)

[13] *United States v. Leon*, 468 U.S. 897 (1984)(good faith reliance on defective warrant); *Herring v. United States*, 555 U.S. 1 (2009)(good faith reliance on negligently maintained information).

[14] *Katz v. United States*, 389 U.S. 347 (1967). Federal wiretaps are governed by statute. 18 U.S.C. §§ 2510-2522. Foreign intelligence wiretaps are authorized by 50 U.S.C. §§1801-1811, which provides for a special court to rule on wiretap requests. Surveillance of electronic communications on the Internet and stored in computers is governed by 18 U.S.C. §§2701-2711. Internet searches are governed by *Katz*.

[15] See *California v. Ciraolo*, 476 U.S. 207 (1986).

[16] *Kyllo v. United States*, 533 U.S. 27 (2001)

[17] *United States v. Dionosio*, 410 U.S. 1 (1973) (Grand Jury subpoenas not 4th Amendment "searches or seizures," but are subject to similar limitations under Due Process clause)

[18] *Illinois v. Caballes*, 543 U.S. 405 (2005)

The Supreme Court has construed the 4th Amendment to require judicial warrants based on probable cause for most searches, seizures or arrests,[19] but has recognized that warrantless searches, seizures, and arrests can take place in settings where it would be too difficult, dangerous, or impractical to obtain a warrant, as long as adequate justification, in fact, existed. For example, warrantless felony arrests in a public place are permissible as long as the arresting officer has probable cause to believe a felony took place, or is about to happen.[20] If the suspected felon flees into her home, the officers may execute a warrantless "hot pursuit" arrest.[21] In the absence of hot pursuit, felony arrests in the home must be authorized by a warrant, in the absence of an emergency or similar exigent circumstance.[22] Warrantless arrests can take place in a public space for misdemeanors only if committed in the officer's presence.[23] Warrantless searches incident to a lawful arrest are an exception to the 4th Amendment,[24] including a search of the automobile in which the arrestee was riding.[25] Similarly, seizure of evidence "in plain view" is an exception to the warrant clause.[26] Finally, the Supreme Court has ruled that a warrantless investigatory stop on the street does not require probable cause. Rather, it requires a lower threshold described by the Court as an "articulable suspicion," resting somewhere between hunch and probable cause[27] The police may conduct a limited "*Terry* frisk" in connection with such an investigatory stop as a matter of self-protection. Evidence uncovered during a *Terry* frisk is admissible. The Supreme Court has also upheld random traffic stops designed to test for sobriety, registration and traffic safety, and immigration status near the border.[28]

In settings where a warrant is required, sufficient evidence must be presented to a judge to justify an inference of probable cause that a crime has been or will be committed, or that evidence of crime exists at the designated place to be searched.[29] Conclusory assertions are inadequate; but hearsay assertions are sufficient. Anonymous tips may constitute probable cause, but only if there is independent corroboration of the information.[30]

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[19] Although the word "arrest" does not appear in the 4th Amendment, the Supreme Court has treated an arrest as a "seizure."

[20] *United States v. Watson*, 423 U.S. 411 (1976)

[21] *United States v. Santana*, 427 U.S. 38 (1976)

[22] *Payton v. New York*, 445 U.S. 573 (1980). See *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006) for a discussion of the emergency exception to *Payton*.

[23] *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001)

[24] *United States v. Robinson*, 414 U.S. 218 (1973)

[25] *United States v. Belton*, 453 U.S. 454 (1981); *Arizona v. Gant*, 556 U.S. ___ (2009)

[26] *Horton c. California*, 496 U.S. 128 (1990)

[27] *Terry v. Ohio*, 392 U.S. 1 (1968); *Arizona v. Johnson*, __ U.S. ___ (2009)(approving pat down of passenger in car stopped for minor safety violation).

[28] *Mich. Dept' State Police v. Sitz*, 496 U.S. 444 (1990); *Delaware v. Prouse*, 440 U.S. 648 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). The issue is brilliantly discussed in Erin Murphy, *Paradigms of Restraint*, 57 Duke L. J. 1321 (2008).

[29] *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969). A discussion of the meaning of "probable cause" takes place in *Maryland v. Pringle*, 540 U.S. 366 (2003).

[30] In *Illinois v. Gates*, 462 U.S. 213 (1983), the Court upheld a warrant on the basis of an anonymous tip because sufficient corroborating evidence was presented.

Once a search warrant has been issued, police officers executing the warrant may detain the occupants of the premises while the search is being conducted,[31] including placing them in handcuffs if it appears reasonably necessary.[32] Ordinarily, police officers are obliged to "knock and announce their presence" before entering a premises to execute a warrant.[33] If, however, police have a "reasonable suspicion" that knocking and announcing would create a physical risk, or risk the destruction of evidence, they may execute a "no-knock" entry. The Supreme Court has refused to order suppression of evidence obtained through a valid search warrant executed in violation of the knock-and-announce rule.[34]

Much government invasion of privacy, like massive government snooping on the Internet, widespread national security wiretaps, and randomized stops in public places[35] involves the pure gathering of data that does not result in the presentation of formal evidence in a criminal proceeding. It is extremely difficult to learn about such techniques, much less to obtain judicial review of them.[36] In addition, the system depends on close factual determinations, often made after the fact, where judges are asked to free potentially dangerous persons on what appears to be a technicality. The result is unpredictable fact-finding. Some of the best creative fiction in America is written during 4th Amendment motions to suppress illegally obtained evidence. Finally, once the system vests police officers with discretion to initiate street stops on less than probable cause, the issue of racial and class discrimination in the use of such discretionary power inevitably arises. Controversy has arisen over whether urban police departments are targeting minority neighborhoods for particularly aggressive "stop and frisk" and random vehicle stop programs designed to deter crime, especially possession of firearms and drugs. For example, in New York City, during 2006, more than 500,000 persons were stopped and questioned by the police. Approximately 200,000 were *Terry*-frisked. In 98% of the encounters, no contraband was discovered. The street encounters took place overwhelmingly in minority neighborhoods, which also happen to have the highest incidence of crime.[37]

II. Constitutional Limitations Imposed on Interrogation by the Fifth Amendment

The 5th Amendment is designed to limit interrogation techniques once a police investigation has zeroed in on a suspect. The Supreme Court has invoked two constitutional provisions – the Due Process Clause of the 5th and 14th Amendments, and the prohibition on self-incrimination in the 5th Amendment (which has been binding on the states since 1964), to limit police behavior during the interrogation phase.

The relevant provisions of the Fifth Amendment provide:

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[31] *Michigan v. Summers*, 452 U.S. 692 (1981)

[32] *Meuhler v. Mena*, 544 U.S. 93 (2005)

[33] *Wilson v. Arkansas*, 514 U.S. 927 (1995)

[34] *Hudson v. Michigan*, 547 U.S. 586 (2006)

[35] Random searches of persons on public transit systems were upheld in *Macwade v. Kelly*, 460 F.3d 260 (2nd Cir. 2006). DNA databanks were upheld in *Nicholas v. Goord*, 430 F.3d 652 (2nd Cir. 2005).

[36] The Executive has successfully invoked the "state secret" privilege to block turning over information on certain aspects of anti-terrorism surveillance to a reviewing court, forcing dismissal of the proceedings.

[37] See *New York City Police Dep't Stop, Question and Frisk Database*, 2006. http://dx.doi.org/10.3886/ICPSR21660.

> 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[38]….

Corporations do not have 5th Amendment rights against self-incrimination,[39] although individual corporate employees may invoke the 5th Amendment privilege.[40]

A defendant may not be compelled to testify at his criminal trial. The prosecution may not comment on the refusal of a defendant to testify.[41] It is routine for judges to admonish juries not to draw an adverse inference from a defendant's refusal to testify. Compelled display of identifiable physical characteristics at trial or in a line up does not, however, violate the 5th Amendment because it is not deemed "testimonial."[42]

A witness may not be forced to give testimonial evidence that might incriminate him before a Grand Jury or any other governmental body.[43] The government may compel incriminating testimony by granting "testimonial" immunity to a witness in an investigatory proceeding such as a Grand Jury interrogation, or testimony before a legislative or administrative body.[44] "Testimonial" immunity forbids the government from using the compelled testimony (or any evidence derived from the compelled testimony) against the witness in a subsequent criminal proceeding. It does not bar the government from prosecuting the witness for the criminal "transaction" described in the testimony, as long as the evidence is independently derived.

The introduction of a defendant's involuntary pre-trial confession or incriminating statement into evidence in a criminal proceeding is prohibited as a deprivation of liberty without due process of law and a violation of the privilege against self-incrimination. A confession or incriminating statement is involuntary if it was induced by force or threat of force,[45] or obtained under circumstances indicating a lack of free will, such as prolonged custodial interrogation under harsh conditions.[46] A confession may be voluntary even if the defendant is mentally unstable[47] or was tricked into confessing.[48] The voluntariness of a confession is a question of

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[38] The 14th Amendment contains identical language prohibiting a State from depriving "any person of life, liberty, or property without due process of law."

[39] *Hale v. Henkel*, 203 *U.S.* 43 (1906). No "collective entity" may claim a 5th Amendment privilege. *Braswell v. United States*, 487 U.S. 99 (1988)

[40] Corporations do, however, possess rights under the Due Process Clause and the First Amendment

[41] *Griffin v. California*, 380 U.S. 609 (1965)

[42] *Holt v. United States*, 218 U.S. 245 (1910)(requiring defendant to put on clothes for identification purposes not a violation of 5th Amendment); *Schmerber v. California*, 384 U.S. 757 (1966) (compulsory fingerprinting, photographing, handwriting exemplars, measurements, voice prints, blood samples do not violate 5th Amendment); *United States v. Wade*, 388 U.S. 218 (1967) (compulsory participation in line-up and repetition of words used by perpetrator not 5th Amendment violation).

[43] *Garrity v. New Jersey*, 385 U.S. 493 (1967)

[44] *Kastigar v. United States*, 406 U.S. 441 (1972)

[45] *Brown v. Mississippi*, 297 U.S. 278 (1936) (confessions produced by torture)

[46] *Watts v. Indiana*, 338 U. s. 49 (1949)(sustained interrogation while held in solitary confinement)

[47] *Colorado v. Connelly*, 479 U.S. 157 (1986)(confession voluntary even though "voices" induced the defendant to confess)

[48] *Frazier v. Cupp*, 394 U.S. 731 (1969)(confession induced by false assertion that co-defendant had confessed)

fact determined by the trial judge. The prosecution has the burden of establishing voluntariness by a preponderance of the evidence.

Persons undergoing custodial interrogation by the police in connection with crimes, including minor offenses, must be warned that their statements may be used against them, and must be informed of their right to remain silent and their right to retained or court-appointed counsel.[49] Failure to provide a suspect undergoing custodial interrogation with his *Miranda* warning renders the suspect's confession or incriminating statement inadmissible, even when no other evidence of involuntariness exists.[50] Whether a target undergoing interrogation is in custody depends upon the target's reasonable perception of whether he is free to leave.[51] Since the prophylactic *Miranda* rule applies only to custodial interrogations, an incriminating statement to an undercover agent does not require a *Miranda* warning,[52] even when the target is in custody on another charge.[53] Questioning during a *Terry* stop-and-frisk or a random vehicle stop may or may not trigger *Miranda* depending on the level of "custodial restraint" used by the police.[54] *Miranda* does not apply to interrogations by private persons, such as store detectives.

If a suspect responds to a *Miranda* warning with a request for a lawyer, all interrogation must cease.[55] If, after receiving a *Miranda* warning, the suspect waives his right to consult a lawyer, questioning may continue. The waiver need not be express, and may be implied from the suspect's behavior.[56]

If a statement in violation of *Miranda* is otherwise voluntary, it may be used to discover other evidence,[57] and to impeach the defendant if he testifies.[58] Moreover, *Miranda* is subject to a "public safety" exception designed to permit custodial interrogation to discover nearby weapons and victims in danger.[59] Finally, *Miranda* does not bar the use of a subsequent voluntary statement made in compliance with *Miranda* even though it may have been induced in part by an earlier voluntary statement made without *Miranda* safeguards, as long as a sufficient time elapses to reinstate the target's free will.

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[49] *Miranda v. Arizona*, 384 U.S. 436 (1966); *Berkemer v. McCarty*; 486 U.S. 420 (1984)(rejecting minor offense exception to *Miranda*). In *United States v. Dickerson*, 530 U.S. 428 (2000), the Supreme Court reaffirmed the constitutional basis of *Miranda*, rejecting a Congressional effort to overturn the opinion.

[50] Miranda was subjected to two-hours of non-coercive custodial questioning in the police station before confessing to a brutal rape.

[51] *Stansbury v. California*, 511 U.S. 318 (1994)(subjective intent of police irrelevant); *Beckwith v. United States*, 425 U.S. 341 (1976)(voluntary questioning by tax authorities in target's home not custodial); *Oregon v. Mathiason*, 429 U.S. 492 (1977)(voluntary questioning at stationhouse non-custodial); *Yarborough v. Alvarado*, 541 U.S. 652 (2004)(two hour formally voluntary interrogation of juvenile in stationhouse arguably non-custodial).

[52] *Hoffa v. United States*, 385 U.S. 293 (1966)

[53] *Illinois v. Perkins*, 496 U.S. 292 (1990)

[54] *Berkemer v. McCarty*, 468 U.S. 420 (1984)(statements at sobriety traffic stop admissible; subsequent post-arrest statements at police station inadmissible)

[55] *Arizona v. Roberson*, 486 U.S. 675 (1988)(no police-initiated questioning after request for counsel; *Edwards v. Arizona*, 451 U.S. 477 (1981)(continued questioning in absence of voluntary and knowing waiver violates *Miranda*); *Rhode Island v. Innis*, 446 U.S. 291 (1980) (voluntary admission after request for lawyer admissible)

[56] *North Carolina v. Butler*, 441 U.S. 369 (1979)

[57] *Michigan v. Tucker*, 417 U.S. 433 (1974)

[58] *Oregon v. Hass*, 420 U.S. 714 (1975)

[59] *New York v. Quarles*, 467 U.S. 649 (1984)

The system falls short of the ideal in several settings. First, disturbing reports of violent conduct in police stationhouses continue to emerge, although the level of police violence appears to have diminished. Second, close factual determinations about voluntariness, custodial setting, and waiver must be made. It asks a lot to have a judge suppress a confession to a serious crime where the constable has blundered, but no force was used. In the absence of egregious behavior, there is often a tendency to stretch the facts to admit the confession. Under existing jurisdictional rules, federal *habeas corpus* is not an effective check on state fact-finding in both 4th or 5th Amendment contexts.

III. Limitations Imposed by the Sixth Amendment on Interrogations and Admissibility of Evidence

The relevant provisions of the Sixth Amendment provide:

> In all criminal prosecutions, the accused shall have a right to speedy and public trial, by an impartial jury of the State and district where the crime shall have been committed …and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The adjudicatory ideal described in the 6th Amendment calls for trial before a representative jury, with the defendant assisted by competent counsel and the prosecution required to prove each element of the offense beyond a reasonable doubt. The system works well in requiring proof beyond a reasonable doubt, and has made great progress in achieving representative juries. While formal legal representation is now provided to all defendants, the quality of representation varies dramatically, often because the defender system is badly underfunded. It should be noted, as well, that the full scale criminal jury trial is a vanishing phenomenon. More than 95% of prosecutions result in a negotiated plea of guilty. While the system permits a defendant to obtain a pre-trial judicial ruling on the admissibility of evidence under the 4th and 5th Amendments before making a plea decision, the plea bargain system often operates in the dark, risking the emergence of unfair patterns of behavior.

The Confrontation Clause bars the introduction of incriminating testimonial evidence against the accused if the evidence cannot be tested by cross-examination.[60] The Confrontation Clause does not, however, block the introduction of voluntary pre-trial statements of an accused who has invoked a 5th Amendment right to remain silent at trial.[61] Thus, while the prosecution may rely on a pre-trial confession or other incriminating statement of the accused even if he refuses to testify, the prosecution may not introduce prior incriminating statements of a deceased[62] or absent witness,[63] even if the statements were sworn, made in connection with a

[60] *Crawford v. Washington*, 541 U.S. 36 (2004) (incriminating statement to police by co-defendant)

[61]The inapplicability of the Confrontation Clause to the pre-trial admissions of a defendant rests on the defendant's ability to explain away an incriminating statement – a form of self-cross examination.

[62] A narrow, historically-based exception exists for pre-trial statements of deceased victims identifying their killers made under knowledge of impending death. *Mattox v. United States*, 156 U.S. 237 (1895)

formal proceeding, and appear credible, unless the statements were subjected to adequate cross-examination at some point in the process.[64] If one co-defendant invokes a 5th Amendment right to decline to testify at trial, his pre-trial statements to the police or before the Grand Jury implicating his co-defendant may not be admitted against the implicated co-defendant because the statement cannot be tested by cross-examination at trial, and was not tested by cross-examination when made.[65]

Confrontation Clause protection is absolute, but applies only to statements that are "testimonial" in nature. Although the full contours of a "testimonial" statement remain to be mapped, its core is a narrative description of events to the authorities. Statements designed to do something other than narrate events, such as a statement of a co-conspirator in furtherance of the conspiracy, or a 911 call for help, are non-testimonial and may be admitted if they satisfy the non-constitutional rules governing hearsay evidence discussed below. [66]

The Confrontation Clause applies to the prosecution, but not to the defense. Similar constraints on the use of out-of-court statements by the defense are imposed by the hearsay rules, which often parallel the restrictions imposed by the Confrontation Clause.

Although, in recent years, the Supreme Court has focused on the 5th Amendment right against self-incrimination to limit the use of pre-trial custodial statements, the Court has also invoked the accused's right to the assistance of counsel when interrogation takes place after the formal commencement of criminal proceedings and the retention of counsel. Statements elicited by post-indictment interrogation of a defendant in the absence of his lawyer by government informants or other government agents are inadmissible.[67]

The Supreme Court has also occasionally experimented with placing prophylactic limits on the length of time federal agents may interrogate a suspect without presenting him before a judge. Any statement elicited after the prophylactic time limit is deemed involuntary.[68] Presentation to a judge must take place as quickly as reasonably possible.

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[63] *Pointer v. Texas*, 380 U.S. 400 (1965)(preliminary hearing testimony of absent witness inadmissible because not tested by cross examination). If the defendant procured the witness's absence, he is equitably estopped from invoking the Confrontation Clause. *Reynolds v. United States*, 98 U.S. 145 (1879)

[64] *Mancusi v. Stubbs*, 408 U.S. 204 (1972)(adequate pre-trial cross examination permits use of testimony at trial); *California v. Green*, 399 U.S. 1970)(ability to cross "turncoat" witness at trial about pre-trial statement satisfies Confrontation Clause)

[65] *Bruton v.United States*, 391 U.S. 123 (1968). As a practical matter, under *Bruton*, co-defendants are often tried separately to avoid reciprocal Confrontation Clause issues.

[66] *Davis v. Washington*, 547 U.S. 813 (2006)(recording of telephone call seeking help from police and implicating defendant is not covered by Confrontation Clause because it was non-testimonial); *United States v. Inadi*, 475 U.S. 387 (1986)(co-conspirator's incriminating statement in furtherance of conspiracy not barred by Confrontation Clause because non-testimonial)

[67] *Spano v. New York*, 360 U.S. 315 (1959)(invalid interrogation after retention of lawyer); *Massiah v. United States*, 377 U.S. 201 (1964)(taping conversation with government informant after indictment and retention of counsel violates right to counsel); *Brewer v. Williams*, 430 U.S. 387 (1977); *Maine v. Molton*, 474 U.S. 159 (1985)

[68] *McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957). In 1968, Congress enacted legislation potentially superseding *McNabb-Mallory*. 18 U.S.C. §3501. Under *Miranda*, an accused can put an end to any interrogation by demanding counsel.

IV. Limitations on Admissibility Imposed by the Rules of Evidence

The prosecution may not introduce evidence about an accused's prior behavior, past convictions or prior criminal acts to prove that he acted consistently with a propensity to commit bad acts.[69] The rule is, however, honeycombed with exceptions that permit evidence of past activities to be introduced as long as the evidence proves something other than mere propensity.[70] Moreover, if a defendant testifies in his own defense, his prior criminal record and prior bad acts may be introduced during cross examination to challenge his credibility. Unlike the prosecution, a criminal defendant is permitted to introduce "character" evidence designed to negate the likelihood that he committed the charged offense. If a defendant does so, he opens the door to the prosecution's adverse character evidence.

The hearsay doctrine codified in the rules of Evidence forbids the introduction of out-of-court statements that are not subject to cross-examination. Hearsay rules often parallel the admissibility rules imposed by the Confrontation Clause. Occasionally, though, the hearsay rules are more constraining than the Confrontation Clause. For example, in most jurisdictions, hearsay rules do not distinguish between "testimonial" and "non-testimonial" statements. Similarly, while the Confrontation Clause applies only to the prosecution, the hearsay rules limit the testimony of both the prosecution and defense. As with the *Zackowitz* rule on evidence of past behavior, the hearsay doctrine is honeycombed with exceptions.[71] Judges, confronted with an out-of-court statement that is not subject to cross examination, first determine whether a hearsay exception exists, and then test the statement against the Confrontation Clause.

Finally, a cluster of evidence rules under the rubric of privilege limit the introduction of evidence in both civil and criminal proceedings. The principal evidentiary privileges are: attorney-client, preventing the use of a client's statements made to counsel;[72] the spousal privilege, preventing the compulsory testimony of one spouse against another;[73] the doctor-patient privilege, preventing the use of statements made to physicians for the purpose of treatment; and the clergy-penitent privilege, preventing the use of statements made to clergy. Journalists and social workers have been relatively unsuccessful in asserting a similar relationship-based privilege.

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[69] *People v. Zackowitz*, 254 N.Y. 192, 172 N.E. 466 (1930). A major exception to the general rule exists in rape prosecutions, where the victim's past sexual activities are usually deemed inadmissible, but the defendant's past sexual encounters may be introduced to prove a pattern of sexually deviant behavior.

[70] Evidence of past crimes or prior bad acts tending to prove motive, intent, absence of mistake, identity or participation in a common course of conduct are exceptions to the *Zackowitz* rule.

[71] The leading hearsay exceptions in a criminal context are party admissions (such as confessions), declarations against financial or penal interest, excited utterances, prior inconsistent statements, and descriptions of present sense impressions.

[72] The principal exception to the attorney-client privilege is the "crime-fraud" exception, lifting the privilege for conversations designed to facilitate the commission of crime or fraud.

[73] Several variants of the spousal privilege exist, ranging from an absolute spousal privilege invocable by either spouse, to one waivable by the testifying spouse.