The Protection of Fundamental Human Rights in Criminal Proces. National Report on United States of America

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1. INTRODUCTION

Historically penal and criminal procedural law in the United States was entirely judge made. Today, most criminal law is statutory. However, state and federal courts, including the Supreme Court, have continued to develop, and often dramatically change criminal procedure.

State criminal and criminal procedural law governs the prosecution of most crimes. Only a relatively small number of criminal offences are committed against the federal government, either by virtue of their location – on Native American reservations, on US territory, in the District of Columbia, or on military installations – or their character – committed in interstate or international commerce or directed against the United States. Federal executive and legislative decisions therefore play a relatively limited role in the development of criminal law and procedure as they govern only federal law-enforcement authorities. The federal legislature – Congress – does not consider itself to have, or does not want to assume, jurisdiction over the ordinary activities of state and local police. As a result, no nationally uniform code of penal law or criminal procedure exists.

International treaty rights play only a very limited role in protections of the criminal defendant as U.S. treaty obligations are non-self-executing which means that an individual cannot sue directly under a treaty. In individual cases defendants have taken their cases to the Inter-American Commission on Human Rights or the United Nations Human Rights Committee. In a recent set of cases before the International Court of Justice (ICJ) foreign governments have espoused the rights of their citizens held on death row in the United States.

The baseline standards governing criminal process in the United States come from the United States Supreme Court's interpretation of the Constitution, in particular the Fourth, Fifth and Sixth Amendments, which form part of the Bill of Rights.[1] State law can only

[1] For a detailed discussion of the Supreme Court law of criminal procedure, as well as decisions of the United States Courts of Appeal and state courts, see LaFave, Israel & King, *Criminal Procedure* (2nd ed.), 1999 a six volume treatise that is updated annually. For even more intensive discussion of the law governing searches and seizures, see LaFave, *Search and Seizure*, 1993, also a six volume treatise updated annually.

grant criminal defendants more rights than the United States Constitution, as interpreted by the Supreme Court. Since states are usually unwilling to grant further rights beyond those guaranteed by the federal Constitution, state court decisions and state statutes are not a significant source of criminal procedure law.

Though amendments to the U.S. Constitution on their face apply only to the federal government, during the 1960's, the Supreme Court, in a series of cases founded on the "Due Process" clause of the post-Civil War Fourteenth Amendment, applied virtually every aspect of these amendments to the States as well.[2] To assure state (and federal) compliance, the Supreme Court, Mapp v. Ohio,[3] decided in 1961, required state courts to exclude all evidence seized in violation of the Fourth Amendment. The Court later extended the exclusionary rule to apply to testimony coerced in violation of constitutional guarantees (it had applied to federal law-enforcement officials since 1914). As a source of clear rules for police to follow, these complex lawyerly pronouncements leave much to be desired. While they have undoubtedly advanced the cause of civil rights, they are frequently unclear and sometimes inconsistent.

Annually the Supreme Court continues to decide a substantial number of criminal procedure cases, though in recent years it has limited rather than extended the rights of criminal defendants.

These decisions cover the entire array of criminal procedure, from investigation to sentencing. After the attacks of September 11, 2001, U.S. courts have had to struggle with the application of international humanitarian law treaties to prisoners held in the United States.

2. INTERNATIONAL OBLIGATIONS

The United States has been a party to the International Covenant on Civil and Political Rights (ICCPR) since 1992.[4] It has also ratified the Genocide Convention,[5] the Convention

[2] Constitutional issues must be raised before the case reaches the U.S. Supreme Court as every court has the power to interpret the U.S. Constitution. The U.S. Supreme Court is not only a constitutional court but also resolves many non-constitutional legal matters, such as questions of statutory interpretation.

[3] Mapp v. Ohio, 367 U.S. 643 (1961).

[4] International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171. The United States ratified the ICCPR in 1992, with a number of reservations. Articles 1-27 were declared not self executing. 138 Cong. Rec. S4781-84 (1992).

[5] Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277.. The U.S. ratified it in 1988.

against Organized Crime,[6] the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment,[7] and the Vienna Convention on Consular Relations.[8] Under none of these treaties do individuals have a direct cause of action against any state or federal law-enforcement or judicial entity. The United States has generally taken the position that the treaties incorporate those rights already granted criminal defendants under domestic rights. Should this not be the case, international treaties must be implemented through judicially enforceable statutes. [9]

The United States has generally added reservations, so-called "understandings" -- which some have interpreted akin to "reservations" -- and declarations, when it has ratified a treaty. The U.S. Senate resolution of advice on the ratification of the ICCPR, for example, includes reservations that retain for the United States the right to impose the death penalty based on domestic law, interpret the term "cruel, inhuman or degrading treatment or punishment" in accordance with the domestic interpretation of constitutional amendments with similar language, permit the United States to retain sentences even if subsequent legislation would allow for sentence reductions, and allow the United States to treat juveniles as adults.

Under the U.N. treaties, defendants may petition the respective international body but only once all domestic remedies have been exhausted. Most of the U.S. cases before the U.N. Human Rights Committee have pertained to the death penalty.

A number of foreign countries – Paraguay, Germany, and Mexico – have espoused their citizens' claims as to violations of the Vienna Consular Convention before the International Court of Justice (ICJ). Even though the ICJ has found such violations, the U.S. Supreme Court declared any state to be within its rights in not following the order, without the federal government having the power to enforce it.[10] The federal government, after the rendering of the Avena not previously cited or explained) decision, withdrew its consent to being sued under the Convention.

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[6] G.A. Res. 25/1, U.N. Doc. A/45/49 (2001). The United States became an official party to the convention on December 3, 2005.

[7] G.A. Rs. 39/46, U.N. Doc. A/39/51 (June 26, 1987). The United States ratified the treaty Oct. 21, 1994.
Among the most important reservations to the Convention are the one that allows the United States to interpret the term "cruel, inhuman or degrading treatment or punishment" in accordance with its domestic interpretation of the Eighth Amendment to the Constitution. The Senate also added an "understanding" that narrowed the definition of the term "torture."

[8] Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261. The United States proposed the Optional Protocol in 1963 and ratified it, but has since withdrawn from it.

[9] The Torture Convention, for example, was implemented through 18 U.S.C. 2340-2340B.

[10] Medellin v. Texas, No. 06-984 (Mar. 25, 2008).

The United States is also a party to the American Declaration of the Rights and Duties of Man but has not ratified the American Convention on Human Rights or the Inter-American Convention to Prevent and Punish Torture.[11] Therefore, a defendant may petition the Inter-American Commission but not the Inter-American Court of Human Rights.

The U.S. government has taken the position that the individuals detained as "enemy combatants" and "terrorists" on Guantanamo Bay, Cuba, and in secret detention facilities around the world do not have the right to access the criminal justice system with its attendant protections but merely have the right to an attenuated review process. Ongoing litigation in the U.S. Supreme Court will determine the parameters of the process due such individuals.

3. PLAYERS

A. Judiciary

In contrast to many civil law countries, U.S. state and federal judges enter the judiciary usually after having practiced law for a number of years. Often they have had a fairly extensive legal career prior to their ascension to the bench, rather than being career judges, as is common in many civil law countries. However, the judge's prior legal practice experience may not have included criminal cases. Federal judges, including Supreme Court justices, are all appointed for life by the President, with the consent of the U.S. Senate. Even though in recent years some federal judges have left the bench before retirement, the federal judiciary is our closest equivalent of a career judiciary. State judges may be appointed by state governors but more frequently are elected. The states differ considerably in their procedure for choosing judges. Training for all judges occurs largely on the job, though judges' and bar associations offer training courses. Judges are governed by a code of judicial ethics which penalizes judges for violations of the public trust, with sanctions ranging from a reprimand to disbarment and removal from the bench.

The role of judges during the trial is relatively limited, compared to the role in many other countries. The attorneys, rather than the court, conduct the trial. The judge functions as a referee, ruling on evidentiary admissions and objections by counsel, as well as instructing

[11] For geographic reasons, the United States is not a party to any European, African or Arab Convention or Declaration. It also does not adhere to most of the U.N. guidelines and codes.

the jury. Judges, and usually the same judge, also rule on line-up motions in the same case. It is within the judge's power to put questions to witnesses, especially if she feels that an attorney is not properly developing an important point, but this will likely happen only once or twice during a typical trial. The judge's independence is also meant to provide guarantees against political interference as well as against interference by prosecutors and police.

To guarantee such judicial independence, judges must recuse themselves from cases when they have a stake in the outcome of the case, such as a financial interest, or have a familial or friendly relationship with the defendant, any victim, or witnesses. They do the same if they have worked on the case in some prior capacity, for example as prosecutors in a case that is before the appellate court on which they now sit.

The judiciary is reasonably well paid though in recent years federal and state judicial salaries have not been raised, and sometimes not even been adjusted to cost of living increases. In light of the rapid acceleration of the income of large firm lawyers, the growing disparity has made recruitment to the judiciary difficult or made it more likely that less qualified lawyers were elected and appointed to the bench.

B. Prosecutors

Every state has its own prosecutorial service, as does the federal government through the Department of Justice and the U.S. Attorneys. Top state prosecutors are frequently elected, while federal prosecutors are appointed by the President with the consent of the Senate. Lower-level prosecutors are usually career civil servants. Many state prosecutors join immediately after law school; U.S. Attorney's offices frequently require a few years of prior legal experience. Individual offices run their own training programs.

Criminal prosecutions are the sole prerogative of the state prosecutor offices. They cannot be forced to bring a prosecution. Federal prosecutors are generally independent though the main Justice Department in Washington, DC, reviews prosecutions, and in some cases may override a local U.S. attorney's decision to prosecute or to seek a specific sentences. The Department of Justice assesses all potential capital cases. Generally state and federal prosecutors set down prosecutorial guidelines. Generally prosecutions and plea-bargaining

policies are dictated by the types and strength of evidence available and the public interest in a certain category of prosecutions.

All prosecutors are guided by the general rules applicable to all lawyers, and to specific ethical obligations that guide prosecutors. The relationship between prosecutors and police tends to be cooperative with the specific level of cooperation depending on the type of offence and the level of prior investigatory work needed. Ultimately, the prosecution will determine whether to proceed with the prosecution of a case, often in light of the quality of the police work, including the police's adherence to its rules. After all, it is the prosecution's role to gather evidence so as to persuade a jury of the defendant's guilty beyond a reasonable doubt.

C. Counsel

The United States does not have a split bar – all attorneys have the right to appear in the courts. Defence counsel fall into three categories. The federal government and most states have a publicly funded defender system. These attorneys are available to indigent defendants. Those with means can hire private attorneys. Finally, states that either do not have a defender system or whose defender system is insufficient in light of the demand, permit courts to appoint private lawyers to represent indigent defendants, with the state paying set rates for such representation. None of these attorneys are required to be member of a criminal law division of a state bar or the American Bar Association. Such membership is voluntary.

All defence lawyers are subject to the rules set out by the state bar of which they are members. Misconduct may result in sanctions ranging from a reprimand to permanent disbarment. However, they may not be prosecuted for statements made in court on behalf of a client.

Criminal defence lawyers often are portrayed as partisan representatives of their client. In this role it is their obligation to assist their client in preparation for trial, including the gathering and investigation of evidence. As the burden of proof with respects to the element of an offence is always on the prosecution, theoretically the defence does not have to introduce any evidence at trial. In addition to their partisan role, defence lawyers, like all

lawyers, also have obligations to the court, including those that preserve the decorum of the court.

Criminal defence lawyers enjoy a confidential relationship with their clients. Generally, this relationship must remain undisturbed unless there is substantial reason to believe that the attorney is involved in the commission of a criminal offence. The rare cases in which attorney-client confidentiality have been breached usually involve terrorist or organized crime cases. Generally, counsel has relatively unrestricted access to a client – subject however to the rules of a detention facility. The issue has been substantially more difficult for attorneys whose clients are held outside the regular criminal justice process, i.e., as enemy combatants inside or outside the Continental United States.

D. Police

There is no national police force, and the Supreme Court, rather than a national administrative bureaucracy, has taken it upon itself to regulate policing, often crudely in a piece-meal fashion. All the rights set out below generally apply to everyone present in the United States though a debate has developed as to whether all constitutional rights extend to undocumented persons.[12] Also, constitutional rights do not automatically extend outside the United States even if the person will be tried in the United States.[13]

4. POLICE PROCEDURES

A. Arrest, Search, and Seizure law (Fourth Amendment)[14]

a. Stops

In Terry v. Ohio[15] the Supreme Court held that police detention of a person on the street for the purposes of brief questioning is a "seizure" to which the Fourth Amendment applies. Nevertheless it need not he justified by probable cause, the constitutional standard for search warrants, but only by the lesser standard of "reasonable suspicion." The Court

[12] While immigration law recognizes a difference between nationals and citizens, this difference is irrelevant for purposes of fundamental rights in the context of criminal justice.
[13] With the exception of the suspension of the writ of habeas corpus in war time, fundamental trial rights have not been suspended in emergency situations.
[14] "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 of affirmation, particularly describing the place to be searched, and the person or things to be seized."
[15] Terry v. Ohio, 392 U.S. 1 (1968).

defined the term as "specific and articulable facts which taken together with rational inferences from those facts, reasonably warrant" a conclusion that "criminal activity is afoot." The Court has subsequently made it clear that reasonable suspicion of past criminal behaviour also justifies such a seizure, which the Court refers to as a "Stop."[16] Such stops may not be based on mere suspicion or hunches.

What is a 'stop?'

Not all police-citizen contacts are seizures. For example, approaching a person in a public place and putting a few questions to him has been held not to be a seizure and therefore, such an approach need not be justified by any particular level of suspicion. If the suspect is "free to leave" without answering police questions, no stop has occurred.[17] In Florida v. Bostick,[18] the Court went further, holding that police (who lacked "reasonable suspicion") approaching a passenger on a bus and asking him if he would consent to a search of his luggage was not necessarily a stop. Even though Bostick did not feel free to leave out of fear that the bus would leave him behind, the Court held that the issue is "whether a reasonable person would feel free to decline the officers' request or otherwise terminate the encounter." Having determined that Bostick was not 'stopped' the Court went on to find that his consent to search his luggage was valid. Thus, a stop requires police detention where it is apparent to the person stopped that he is not free to leave because of police action.[19]

Similarly, in California v. Hodari D.[20] the Court held that merely chasing a suspect was not a stop (or seizure) under the Fourth Amendment. Only if the police use physical force or the suspect submits to authority does a stop occur. Consequently, narcotics thrown away by the suspect during the chase were usable in evidence because, despite the lack of probable cause or reasonable suspicion by police, there had been no seizure at the time the suspect discarded the drugs.

When does a "stop" become an "arrest?"

[16] United States v. Hensley, 469 U.S. 221 (1985).
[17] Michigan v. Chesternut, 486 U.S. 567 (1988).
[18] Florida v. Bostick, 501 U.S. 429 (1991).
[19] *See also* United States v. Drayton, 546 U.S. 194 (2002).
[20] California v. Hodari D., 499 U.S. 621 (1991).

A seizure of the person for more than brief questioning is no longer a stop but is considered an "arrest" which must be justified by the higher standard of "probable cause." In Florida v. Royer[21] when narcotics agents at an airport, noting that a passenger fit the "drug courier profile" asked to see his ticket and driver's license, and questioned him for several minutes, this was a stop, justified by reasonable suspicion. But when the agents told Royer that he was suspected of smuggling narcotics and asked him to accompany them to a police room while retaining his ticket and driver's license, an arrest had occurred. While the suspicions of the agents, based on the drug courier profile, were sufficient to satisfy the reasonable suspicion standard of Terry, they did not amount to probable cause. As Royer's arrest was invalid, so was his consent to search his luggage. Even where a suspect was free to go, the Court held police detention of his luggage for an extended period to constitute an arrest.[22]

In United States v. Sharpe,[23] however, when an auto stop lasted twenty minutes due to the efforts of a co-suspect in a separate vehicle to avoid apprehension, the Court held that the mere passage of time did not turn a stop into an arrest. The test is whether a reasonable person would feel that he was being subjected to a brief, investigatory detention, or whether he would feel that he was being subjected to extended custody. The Court found that since the police "diligently pursued a means of investigation that was likely to confirm or dispel suspicions quickly," the stop had not turned into an arrest. The police believed that the two vehicles were travelling in tandem, with the fleeing vehicle transporting a large quantity of marijuana and the stopped vehicle acting as an escort. When the fleeing vehicle was stopped, large quantities of marijuana were found.

Most recently, in Illinois v. Caballes,[24] the Court held that use of a drug sniffing dog during a legitimate traffic stop, did not render that stop improper as long as it was not unduly prolonged. This was so despite the fact that no reasonable suspicion existed that the suspect was transporting drugs.

What constitutes "reasonable suspicion?"

In Florida v. J.L.[25] police received an anonymous tip that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. The Court held that such

[21] Florida v. Royer, 460 U.S. 491 (1983).
[22] United States v. Place, 462 U.S. 696 (1983).
[23] United States v. Sharpe, 470 U.S. 675 (1985).
[24] Illinois v. Caballes 543 U.S. 405 (2005).
[25] Florida v. J.L., 529 U.S. 266 (2000).

an uncorroborated anonymous tip was not enough to constitute reasonable suspicion. Contrast this case with Alabama v White[26] where the suspect's behaviour corroborated an anonymous tip that predicted certain specific behaviour. Finally, in Illinois v Wardlow[27] the Court held that a person running away when the police drove up in a "high crime area" was sufficient to constitute "reasonable suspicion" for a stop.

Stopping vehicles

In Delaware v. Prouse[28]the Court held that police may not stop an individual automobile at random, but only if they have reasonable suspicion that an offence, traffic or otherwise, is being committed. However, roadblocks that briefly detain all passing motorists to check, for example, for drunken driving, may stop cars without any particularized suspicion.[29] If a vehicle is appropriately stopped, the police may order both the driver and the passengers out of the car as a safety precaution. It is not necessary for the police to have particularized suspicion to do this.[30] However, in Indianapolis v. Edmond[31] the Court held that such "suspicionless" roadblocks may not be for ordinary criminal investigation purposes but only for traffic related reasons like driver's license checks or detecting drunk drivers.

b. Frisks

If the police have reasonable suspicion that someone is "armed: and dangerous" they may also conduct a "pat down" of his outer clothing for weapons. This is allowed during a "Stop" but may also be allowed without a stop.[32] In Minnesota v. Dickerson[33] the Court discouraged the use of a frisk as a means of obtaining evidence (as opposed to protecting police) by invalidating a frisk in which the officer felt a small lump in the suspect's clothing and only after manipulating it was able to conclude that it was actually a lump of crack cocaine. While non-threatening contraband may he seized if discovered during a frisk, such a seizure is only appropriate if the criminal nature of the object felt is "immediately apparent" to police.

[26] Alabama v. White, 496 U.S. 325 (1990).
[27] Illinois v Wardlow, 528 U.S. 119 (2000).
[28] Delaware v. Prouse, 440 U.S. 648 (1979).
[29] Michigan Dep't of Police v. Sitz, 496 U.S. 444 (1990)
[30] Maryland v. Wilson, 519 U.S. 408 (1997).
[31] 531 U.S. 32 (2000).
[32] In Adams v. Williams, 407 U.S. 143 (1972), a policeman was informed that a certain individual, whom the police had not "stopped," was armed. The Court upheld the policeman's reaching into a car to seize a gun from the suspect's waistband.
[33] Minnesota v. Dickerson, 508 U.S. 366 (1993).

Another important limitation on frisks can be found in Ybarra v. Illinois.[34] In that case, police, executing a search warrant for a bar at which drugs were sold, searched the patrons of the bar, finding heroin on Ybarra. The Court held that the search was inappropriate since there was no probable cause to suspect Ybarra of possessing heroin. The Court then held that a frisk of Ybarra was also inappropriate as there was no individualized suspicion that Ybarra was armed and dangerous -- the only legitimate basis for a frisk. Mere presence in the bar, despite information that narcotics were sold there, was not enough.

The Court did not address the issue of how the police should proceed in such a potentially dangerous situation. Presumably it would be permissible to order the patrons out of the bar, or, possibly, to make them stand with their hands against the wall while the search of the bar proceeded. The uncertainty on this point illustrates another problem with the American system of court-made "rules." Since the two techniques mentioned would not lead to the discovery of evidence, the appropriateness of either of these actions is likely never to be tested. Most criminal procedure law is developed by criminal defendants litigating to exclude improperly seized evidence. If no evidence is seized, the only way to challenge the police action is by civil suit, not an avenue the usual criminal suspect is likely to pursue successfully. Constitutional limitations prevent the Supreme Court[35] from giving advisory opinions on such matters, though the Court frequently does include detailed advice when deciding an actual case. Consequently, there are a number of areas, especially pertaining to interrogations and general treatment of arrestees, where most countries have detailed provisions in their Codes but as to which the United States Supreme Court has been silent.

c. Arrests (seizures of the person)

An arrest is also a "seizure" of the person, governed by the Fourth Amendment. It must always he justified by probable cause both that a crime has been committed and that the arrestee has committed it. An arrest occurs whenever a reasonable person would not feel that he is "free to go" within perhaps 15-20 minutes after he is detained, depending on the circumstances. However, handcuffing him, or putting him into a police car without indicating that it was for some very limited purpose, or otherwise making the suspect feel that he is "in custody," would generally turn a stop into an arrest immediately. If a suspect

[34] Ybarra v. Illinois, 444 U.S. 85 (1979).
[35] Article III S2 of the Constitution limits the judicial power to certain specified "Cases" and "controversies."

is told he is being returned to the crime scene to see if the victim can identify him as a thief or robber, this is not an arrest. Taking a suspect to the police station "for questioning" is an arrest, regardless of what police call it.[36] As discussed above, pulling the suspect's car over for the purpose of giving him a traffic ticket, and/or asking him some questions, is a stop that must be justified by reasonable suspicion, not an arrest[37] or "custody" which would require Miranda warnings as well.[38] In Hodari the Court held that chasing a suspect is not a stop or an arrest, but once the police catch a chased suspect, a seizure (stop or arrest depending, on the circumstances) occurs.

While an invalid arrest will not prevent the defendant from being tried, it will result in exclusion of any evidence found in a search incident to that arrest or due to consent to search, as well as exclusion of any statements made by the defendant subsequent to the arrest. Consequently, the issue is crucial in many cases and often litigated.

Arrest warrants

An arrest of an individual in a public place must be based on probable cause but need not be authorized by a written warrant.[39] Only if the police seek to arrest a suspect at his home or the home of another need they obtain a warrant, which a judicial officer must issue. If the arrest is to be at the suspect's home, the warrant must demonstrate that the police have "probable cause," plus the police must have "reason to believe the suspect is within,"[40] though this need not appear on the warrant. If he is sought at the home of another, the warrant itself must set forth both probable cause that the individual has committed a crime and that he is to be found at the place specified in the warrant.[41] As noted, violation of this rule will not prevent the arrestee from being tried, but may cause much evidence to be excluded, including evidence that may inculpate the homeowner where the suspect is found, since the warrant requirement is also for the non-suspect homeowner's protection.

Searches incident to arrest

[36] Dunaway v. New York, 442 U.S. 200 (1979).
[37] Berkemer v. McCarty, 468 U.S. 420 (1984).
[38] See § Cla, *infra*.
[39] United States v. Watson, 423 U.S. 411 (1976).
[40] Payton v. New York, 445 U.S. 1371 (1980).
[41] Steagald v. United States, 451 U.S. 204 (1980).

If a suspect is placed under arrest, his clothing, and any parcels or handbags he may be carrying are subject to a "full search" which is more extensive than a "frisk." He can, for example, be forced to empty his pockets, to open containers he is carrying, or to remove a jacket. This may occur either at the scene of the arrest or at the police station, or both. Such a search is appropriate for any "custodial arrest" regardless of the seriousness of the crime or the likelihood that the search will produce evidence or weapons.[42] After his arrival at the police station, the arrestee may also be compelled to give fingerprints, blood samples, or hair samples, though, except for fingerprints and "breathalyzer" (i.e., alcohol) tests, this is usually done pursuant to a judicial order. Some states limit the search incident to arrest to a pat-down for weapons.

Arrests in buildings

If a person is arrested in a building, the search incident to arrest may he extended to include the "area within his immediate control."[43] While one might suppose that this is a very limited area if the suspect is in handcuffs, the courts have construed this to mean areas into which he might have reached to grab a weapon or to destroy evidence, before the police gained control of him. The police may also perform a "protective sweep" to make sure that no one who might harm them is waiting in adjacent rooms. However, a full search of such rooms, for example, looking in drawers, is not justified.[44] The police may seize and use as evidence contraband or evidence spotted in "plain view" during a search or sweep incident to arrest. It need not be evidence of the crime for which the suspect is being arrested. However, as in a "frisk," the police must have probable cause that the item found is evidence when it is discovered. They cannot obtain probable cause by picking up the item and examining it, or testing it.[45]

Arrests in vehicles

If a suspect is arrested while a driver or a passenger in a vehicle (including a recreational vehicle) then the passenger compartment, but not the trunk can be fully searched. It does

[42] United States v. Robinson, 414 U.S. 218 (1973). In *Robinson*, the defendant was arrested for driving with a suspended license, for which offence the police found no evidence. Nevertheless, he was convicted of narcotics possession after the search incident to arrest disclosed narcotics in a cigarette package in his shirt pocket.
[43] Chimel v. California, 395 U.S. 752 (1969).
[44] Maryland v. Buie, 494 U.S. 325 (1990).
[45] Arizona v. Hicks, 480 U.S. 321 (1987).

not matter if the suspect has been removed from the vehicle prior to the search, or even if he exited the vehicle before the police apprehended him.[46] This is so regardless of whether the police have any reason to believe that additional evidence will be found in the vehicle and even though the crime may be one, such as driving with a suspended license, for which there is no evidence to be found. Moreover, the search may also extend to containers found within the passenger compartment.[47] The Supreme Court, however, recognized that if a trailer or recreational vehicle is rendered immobile, such as one that is up on blocks and attached to utilities in a trailer park, it should be treated as a "home" for the purposes of arrest and search, not as a "vehicle."[48]

Dealing with other people

As in the Ybarra case, if a suspect is arrested in a place where others are present, the police may not routinely frisk such people for weapons or search them. Rather they must have individualized suspicion that each person they frisk is armed and dangerous. If they wish to perform a full search, they must have probable cause that the person possesses evidence of a crime. This rule may be more honoured in the breach than the observance.[49]

Arrests pursuant to a statute that is later declared unconstitutional

In Illinois v. Krull[50] the Supreme Court held that if the police arrest someone pursuant to a statute that is later declared unconstitutional, the search incident to arrest is still valid, and any evidence seized during the arrest may he used against the defendant at trial of a charge that developed as a result of the search, even though a conviction on the original, unconstitutional statute will no longer stand.

Use of force and arrests

In Tennessee v Garner[51] police shot and killed a teenager who fled from an apparent burglary. In a civil suit brought by his parents, the Court held that deadly force may not be used to apprehend a fleeing felon unless the officer has probable cause to believe that the

[46] Thornton v. United States 541 U.S. 615 (2004).
[47] New York v. Belton, 453 U.S. 454 (1981).
[48] California v. Carney 471 U.S. 386 (1985).
[49] For the reasons, see "Enforcing the Rules," §A5 *infra*.
[50] Illinois v. Krull, 480 U.S. 340 (1987).
[51] Tennessee v. Garner, 471 U.S. 1 (1985).

suspect poses a threat of serious physical harm either to the officer or to others. This is one of the few cases where criminal procedure rules have been developed as a result of a civil suit.

d. Appearance before a judicial officer

The Supreme Court has only fairly recently clarified this matter, long specified in codes of most countries. In County of Riverside v. McLaughlin[52] the Court held that ordinarily a judicial officer must review the police determination of probable cause to arrest within 48 hours of arrest, though if the defendant can establish that a delay of 48 hours or less was "unreasonable," he may show a violation. A delay of more than 48 hours is presumptively unreasonable unless the government can establish that the delay was due to "a bona fide emergency or other extraordinary circumstance." However, if the defendant has been arrested pursuant to a warrant (which must be issued by a judicial officer) no such hearing need be held. If a delay has been found to be "unreasonable" then any evidence obtained due to that delay, including incriminating statements, may not be used at trial, though the trial itself will not he barred. Ordinarily, this appearance, usually called 'arraignment," occurs within 24 hours of arrest – except on Saturday night/Sunday morning – and legal counsel is either appointed, or appears, for the defendant at that time.

e. Searches

The Fourth Amendment forbids not only unreasonable seizures but also unreasonable searches, though not all activity that might be considered searching in ordinary parlance fails within its protections. Rather the Court has defined a search as an intrusion by police into an area to which an individual has a "reasonable expectation of privacy."[53] Thus, if the police are walking down the street and see what they think may be a stolen car through the door of an open garage attached to the house this is not a search because no one has an expectation of privacy as to something the public can observe. If they then go onto the property for a closer look, this is a "search" since one is thought to have an expectation of privacy as to his house and the area immediately surrounding it (known as the "curtilage").

[52] County of Riverside v. McLaughlin, 500 U.S. 44 (1991).
[53] Katz v. United States, 389 U.S. 507 (1967).

By contrast, if police trespass on an open field (i.e., all land except the curtilage) to find evidence, the Supreme Court has held that neither a warrant nor probable cause is required. This is not a "search," because a person does not have a reasonable expectation of privacy in an open field.[54] By "reasonable" the Court means, what it considers reasonable, regardless of what the suspect's actual expectations may be. Even putting a fence around the field and posting "No Trespassing" signs will not render such a field subject to Fourth Amendment protection. By contrast, attaching a listening device to a phone booth is a "search" because in the Court's view, a person has a reasonable expectation that police will not overhear his phone conversations.[55] But entering a phone booth to search for contraband that the suspect may have put there is not a "search" because any expectations of physical privacy he may have in such a public place are not "reasonable." Hard questions arise when the police enter semi-public areas, like the hallway of a large apartment building. The Court has not yet resolved these issues.

The Supreme Court has held the following police activities not to be "searches": flying over a suspect's land in a helicopter in order to see if he was growing marijuana in a greenhouse;[56] searching trash that had been left at the curb to be picked up;[57] using an electronic "beeper" to more easily track a car's location on the highway.[58] While defendants might have had a subjective expectation of privacy in these cases, the Court was unwilling to recognize it as "reasonable." However, in United States v. Karo[59] the Court held that using an electronic "beeper" concealed in a drum of chemicals to determine if the drum was still located in the suspect's house was a search because it gave information about what was going on inside the house that would not have been available to a passerby. Similarly, in Kylo v. United States[60] the Court held that use of a heat sensing device that disclosed heat emissions from a house (and hence the use of marijuana "grow lights" inside) was a "search" and could only be done with a search warrant based on probable cause. Thus, the Court has rejected even relatively minor intrusions into the house.

If certain police action is deemed a search, it must generally be justified by probable cause, although, as noted, searches incident to arrest can be based on the probable cause to arrest,

[54] Oliver v. United States, 466 U.S. 170 (1984). The field was fenced and posted with "No Trespassing" signs.
[55] *Katz*, 389 U.S. 507 (1967).
[56] Florida v. Riley, 488 U.S. 445 (1989)
[57] California v. Greenwood, 486 U.S. 35 (1988).
[58] United States v. Knotts, 460 U.S. 276 (1983).
[59] United States v. Karro, 468 U.S. 705 (1984).
[60] Kylo v. United States, 533 U.S. 27 (2001).

even if the police had no particular expectation of finding evidence in the possession of the arrestee. Moreover, if the search is inside a structure, absent an emergency, pursuant to a written search warrant issued by a judicial officer, probable cause must appear on the face of the warrant application The failure of the police in Karo to obtain a warrant to use the beeper led to the suppression of the evidence, even though they had obtained a warrant to search the house based on the information supplied by the beeper. Keep in mind however, if a police activity is not considered a "search," then it need not be justified by either probable cause or a warrant.

Search Warrants

As noted, although the Supreme Court has never specifically held this, the gravamen of recent cases is that searches of structures, including business premises, warehouses, garages, and hotel rooms (and the curtilage of houses), must be authorized by a warrant, whereas outdoor searches including searches of vehicles and of an arrestee's person and possessions, may be performed on probable cause alone.[61]

Moreover, the probable cause must not be stale. Thus, it is not sufficient that an informant saw X selling narcotics from his house two weeks ago, because it is no longer probable that the narcotics are still there. The warrant must specify a particular address, including an apartment number if applicable, and the police may not search any place else. The warrant must also specify for what the police are searching. Thus, if the warrant is for stolen 27 inch television sets, police may not look in drawers. If it is for narcotics, they may.

Plain View Doctrine

The plain view doctrine applies in the search warrant context as well as in non warrant situations. If the police find something incriminating while executing a search warrant or when performing any other legitimate activity, they may seize it as long as they were looking in a place where they were allowed to look and they had probable cause that the item was evidence of a crime. Taking a plain view is not itself a search, but the seizure of the object is a "seizure" under the Fourth Amendment and must he based upon probable cause. Thus, if the police see marijuana growing in the window of a house, they must

[61] For a discussion of this position, see Craig Bradley, *The Court's "Two Model" Approach to the Fourth Amendment:* Carpe Diem, 84 J. Crim. Law & Criminology, 1993, p. 429.

obtain a warrant in order to enter the house and seize it, unless they can establish that it was likely to be destroyed during the delay.

Moreover, as the Supreme Court made clear in Arizona v. Hicks,[62] the police may not create a "plain view." In Hicks, the police legitimately entered an apartment because they heard a gunshot from within. When they arrived, the apartment was deserted, but they noticed expensive stereo equipment, inconsistent with the squalid surroundings. They picked up the equipment to see the serial numbers, called them in, and found out that the equipment was stolen. The Supreme Court excluded this evidence. While the police had a legitimate "plain view" of the equipment, they lacked probable cause to seize it. Picking it up amounted to an unjustified search. On the other hand, had they been able to see the serial numbers without moving the equipment, their action would have been acceptable.

The plain view doctrine has been extended to sounds and smells, including dog-sniffs that reveal narcotics.[63] It also applies when the police enhance their ability to observe by use of a flashlight or binoculars. The Court's reasoning is that people do not have a reasonable expectation of privacy as to matters the public can so easily observe and therefore, the police obtainment of plain view in such a case is not a search. This reasoning is not wholly consistent with the dog sniff case, but the limited and "low tech" nature of the intrusion led to the Court's conclusion that this is also not a search. If the police obtain their plain view by means of sophisticated electronic devices, by contrast, this does intrude on a citizen's reasonable expectations of privacy and must be justified by probable cause, as Kylo held.

Exigent Circumstances

The main exception to the warrant requirement for structures is that the police are not required to obtain a warrant in case of "exigent circumstances" but they must still have probable cause. This applies when the police are seeking a fleeing suspect, have reason to believe evidence will be destroyed, or are otherwise engaged in investigative activities. When police are performing a protective, as opposed to investigative, function, such as when they hear a cry for help, a mere reasonable belief (less than probable cause) that their

[62] Arizona v. Hicks, 480 U.S. 321 (1987).
[63] United States v. Place, 462 U.S. 696 (1983).

assistance is required is sufficient, as the Court held in City of Brigham v. Stuart,[64] and no warrant is required.

Execution of Warrants

Even though the police are not allowed to exceed the scope of the warrant, the mere fact that they do not find what they came for, but do find something else, will not invalidate the search, as long as the trial court determines that probable cause was adequately set forth in the warrant.

In Wilson v. Arkansas[65] the Supreme Court held that, ordinarily, the police should "knock and announce" prior to executing a search warrant. In 2006, however, the Court decided that failure to knock and announce will not cause evidence to be excluded.[66] There is no uniform rule as to whether search warrants may be executed at night. Also, unlike many countries, there is no requirement that anyone else, such as a prosecutor, judicial officer or representative of the suspect, must be present when the warrant is executed, though in some cases prosecutors are. If the police desire, they can compel the occupant of the premises searched to remain during the search either to assist them, or to be subject to arrest if they find for what they are looking.[67]

Wiretaps

These are governed by federal statute, 18 U.S.C. §§25l0, et seq. Federal agents are only permitted to use them for certain, specified crimes, and only once certain high level officials in the Department of Justice have made an application to a judge on a special court. This statute governs state law-enforcement officials. There are, however; exceptions to this warrant requirement for "emergencies" involving: "conspiratorial activities threatening to national security," "conspiratorial activities characteristic of organized crime," and "immediate danger of death or serious bodily injury to any person."[68] Wiretapping authority was expanded somewhat as to suspected terrorists after the September 11, 2001 World Trade Centre bombings. Congress also approved the government's "warrantless" obtaining of e-mail addresses and routing information but not the content of e-mails. The

[64] City of Brigham v. Stuart, 547 U.S. 398 (2006).
[65] Wilson v. Arkansas, 514 U.S. 927 (1995).
[66] Hudson v. Michigan, 126 S.Ct. 2159 (2006).
[67] Michigan v. Summers, 452 U.S. 692 (1981).
[68] 18 U.S.C. § 2518 (7).

rules for foreign intelligence surveillance are substantially more relaxed and allow for more extensive surveillance, often subject only to permission of the Attorney General or a special court set up under the Foreign Intelligence Surveillance Act (FISA).

Warrantless Searches

Warrants are generally required only for searches of structures. "Full searches of automobiles including the trunk, and containers found therein, may be made on probable cause alone, with no warrant."[69] Searches of the passenger compartment incident to the valid arrest of the driver are also permitted without either a warrant or any particular probable cause to search. Searches incident to arrest on the street may be founded on the probable cause to arrest and include a full search of the person and any containers he is carrying.

If a person is to be arrested inside his home or the home of another, a warrant is required for the arrest, but it need not specify grounds to search the person of the arrestee or the "area within his immediate control" incident to arrest nor need such grounds exist. The arrest itself justifies the search. While a protective sweep of the adjoining portions of the house is also allowed to look for people who may pose a threat to police, a full search of any part of the house not in the arrestee's immediate control may only he performed with a search warrant, absent exigent circumstances.

The only exception to the de facto rule that warrants (either search or arrest) are required for indoor searches or arrests but not outdoor ones is in the unusual case where the police, outdoors, see someone with a suitcase, purse, or other container which they have probable cause to believe contains evidence, but they lack probable cause to arrest him. The Supreme Court still holds to the view that, though the suspect may be stopped and questioned, a warrant is required to search the container. However, a warrant would not be required if the person had put the container in a car, or had been arrested. It seems unlikely that this narrow and rather tortured exception will long be retained.

Consent Searches

[69] California v. Acevedo, 500 U.S. 585 (1991).

If the police can get a suspect to consent to a search, including in his home, none of the above rules apply. In Schneckloth v. Bustamonte,[70] the leading case in the area, police stopped a car for a traffic violation and then asked one of the passengers, who claimed to be the owner's brother, if they could search it. He consented and some stolen checks were found. The Court rejected the argument that the police must inform the suspect of his right to withhold consent. Rather, the only criterion that must be met is "voluntariness." In Florida v Bostick,[71] the Court held that the test for "voluntariness" was whether a reasonable innocent "person would feel free to decline the officers' requests or other-wise terminate the encounter." Thus, even though the suspect knew that acceding to the request would result in finding incriminating evidence, and therefore he must have felt that he had no choice but to allow the search, the evidence will still be allowed in as long as a person with nothing to hide would have felt free to refuse.

Consents are widely used as a method of avoiding search requirements. In her concurring opinion in Ohio v. Robinette,[72] Justice Ginsburg reported that the policeman in that case had requested consent to search cars in 768 traffic stops in one year. It does not matter that the police motive in making an automobile stop was primarily to obtain consent to search, as long as the stop was for a true traffic, or other violation. In other words, "pretext searches" are allowed.[73] There is, however, a limit on consents: if the police have illegally stopped or arrested the suspect, any consent is deemed invalid, even though it may have been "voluntary" in the sense that no threats or coercion were employed.[74]

Consent of anyone who lives in a dwelling with common authority over the premises is acceptable and the evidence will be admissible. This is the case even if a person lacked such authority, as long as it reasonably appeared to the police that they had it.[75] However, any person with common authority may deny consent to the police, even if another such person grants it.[76]

f. Enforcing the rules

[70] Schneckloth v. Bustamonte, 412 U.S. 218 (1973).
[71] Florida v. Bostick 501 U.S. 429 (1991).
[72] Ohio v. Robinette, 519 U.S. 33 (1996).
[73] Whren v. United States, 517 U.S. 806 (1996).
[74] Florida v. Royer, 460 U.S. 491 (1983).
[75] Illinois v. Rodriguez, 497 U.S. 177 (1990).
[76] Georgia v. Randolph, 126 S.Ct. 1515 (2006).

In the United States, unlike other countries, the exclusionary rule is mandatory, not subject to the discretion of the trial judge. That is, once it has been determined that the police conduct in question broke the "rules," as set forth in the cases discussed, then the evidence that was obtained as a result of that violation (including indirect "fruits of the poisonous tree") may not be used in court, at least in the prosecution's case-in-chief. This rule has applied to both federal and state authorities since 1961. The reason for the mandatory rule stems from the fact that the "rules" the police are to follow come, via the Supreme Court, from the Constitution, rather than from a legislative body, and the Court has found it difficult to say that certain constitutional violations are less important than others. This creates problems because it encourages the courts, including the Supreme Court, to deem police behaviour in a given case acceptable to avoid the exclusion of important evidence, even though it seemed, based on previous cases, to be unacceptable. Subject to the exceptions below, there is no illegal or improper police search where evidence obtained may nevertheless be used in the prosecution's case-in-chief.

In United States v. Leon, the Court established the only significant exception to the exclusionary rule.[77] Leon held that if the police obtain a search warrant (which must be issued by a judge), then, even if the warrant is later found defective, the evidence will not be excluded as long as the police relied on the warrant in "reasonable, good faith." The Court reasoned that the police have satisfied their constitutional obligation by seeking a warrant. If the warrant proves defective because it does not adequately set forth probable cause, or for some other reason, the mistake is that of the judge who issued the warrant, not that of the police. Since the exclusionary rule was designed to deter police misconduct, and since the only mistake here was of the judge, not the police, there was no cause to exclude the evidence.

Even though Leon has been criticized as an intrusion on personal liberties, it does have the salutary effect of encouraging the police to get search warrants. Moreover, Leon does not mean that anytime a warrant was obtained, the evidence will be admissible. In particular if the police gave the issuing judge false information, even unintentionally, the mistake is nevertheless that of the police, and the evidence must be excluded. Also, if the warrant application was obviously deficient, then the police could not have had a reasonable belief

[77] United States v. Leon, 468 U.S. 897 (1984). *See also* Illinois v. Krull, 480 U.S. 340 (1987) (reliance by police on invalid statute); Arizona v. Evans, 514 U.S. (1995) (reliance by police on erroneous computer entry by court clerks).

in the validity of the warrant. Finally, improper execution of the warrant, such as extending the search beyond the limits authorized, could also lead to exclusion.

In Groh v. Ramirez[78] the Court refused to apply the "reasonable good faith exception" to a warrant that, due to a clerical error, did not specify the evidence to be seized as required by the Fourth Amendment. Although Groh was a civil suit, its ruling applies equally to the question of whether evidence is admissible under the Leon exception. As noted above, in 2006 the Court held that failure of the police to "knock and announce" when executing a search warrant would also not lead to exclusion of evidence.

The Court's adherence to the notion that the purpose of the exclusionary rule is to deter police misconduct has led to some other limitations of its use, though these are not considered "exceptions." For example, the Court has held that both illegally obtained physical evidence and confessions (but not coerced confessions) may be used as rebuttal evidence if the defendant testifies in a way that is inconsistent with the excluded evidence.[79] The Court felt that excluding the evidence from the prosecution's case-in-chief was sufficient to deter police misconduct. Similarly, a grand jury may use illegally obtained evidence in deciding whether to indict the defendant; and such evidence is permissible at probation and immigration hearings.[80] Rules of evidence, which are applied in court, also do not govern such proceedings.

Standing

Somewhat inconsistent with the deterrence rationale for the exclusionary rule is the Court's insistence that a defendant must have "standing" to press an exclusionary rule claim. Thus if the police illegally interrogate A, or illegally search his house, any evidence they acquire that incriminates B may be used at B's trial (but not at A's). Since B's rights were not violated, the Court reasons, he has no right to exclude the evidence. Overnight guests share "standing" with their hosts,[81] but business visitors lack it.[82] It remains unclear whether non-overnight social guests have standing. Arguably, though, since the police engaged in

[78] Groh v. Ramirez, 540 U.S. 551 (2004).
[79] *See, e.g.,* United States v. Havens, 446 U.S. 629 (1980). In that case customs officers had illegally searched the defendant's suitcase after he had cleared customs. They seized a T-shirt from which swatches had been cut that matched pockets sewn into a co-defendant's T-shirt in which the co-defendant had concealed cocaine. The T-shirt was inadmissible against the defendant until he took the stand and denied any involvement in the co-defendant's smuggling activities. At this point, the Court held that the prosecution could impeach that claim by using the T-shirt found in the defendant's luggage.
[80] *See* United States v. Calandra, 414 U.S. 338 (1974); Pennsylvania v. Scott, 524 U.S. 357 (1998) and cases cited therein.
[81] Minnesota v. Olson, 495 U.S. 91 (1990).
[82] Minnesota v. Carter, 525 U.S. 83 (1998).

wrongdoing, any affected party ought to be able to exclude the evidence if the purpose of exclusion is to deter police misconduct. "Standing" doctrine illustrates the Court's general distaste for the exclusionary rule, and the Court's consistent efforts in recent years to cabin the use of the rule, while still retaining it where it seems likely to have a meaningful deterrent impact on police.

Fruit of the Poisonous Tree

As noted above, the exclusionary rule applies not only to real evidence or statements obtained directly by violating the rules, but also to the "fruit of the poisonous tree." Thus, if the police, illegally searching A's house, find a map that shows where stolen money is hidden, the money must also be excluded from the prosecution's case. It is a "fruit" of the illegal search. Similarly, consents to search, and incriminating statements, obtained after illegal stops and/or arrests are not usable.

However, if the later evidence is "sufficiently attenuated" from the illegality, it may be used. For example, if an illegally arrested defendant has been released, and the police later go to his home and get him to voluntarily consent to a search of his yard, this would be proper. The Court has further held that a live witness, even though he may have been located by means of an illegal search, will not ordinarily be considered a "fruit of the poisonous tree."[83] But merely informing a suspect of his Miranda rights after an illegal arrest will not "purge the taint" of the illegal arrest. Thus, any incriminating statements of such a defendant, even though voluntary and with full knowledge of rights, must be excluded.[84] This exclusionary rule also applies to the "fruits" of coerced confessions. However, a Miranda violation by the police does not have "fruit of the poisonous tree" consequences. Thus a confession obtained in violation of Miranda must be suppressed, but either subsequent, warned, statements, or real evidence obtained by means of the original inadmissible statement may be used in the government's case-in-chief.[85]

Also, if the evidence would have been "inevitably discovered" by legal actions of the police or others, the fact that it came to light through illegal behaviour may not force its exclusion,

[83] United States v. Ceccolini, 435 U.S. 268 (1978).
[84] Brown v. Illinois, 422 U.S. 590 (1975).
[85] Oregon v. Elstad, 470 U.S. 298 (1985). The Court reasoned that the *Miranda* warnings are not constitutionally required, but are a "prophylactic" device to promote compliance with the Fifth Amendment. As such, a *Miranda* violation does not have "fruit of the poisonous tree" consequences. Though the Court subsequently reaffirmed *Miranda's* constitutional status, it also reaffirmed the lack of poisonous tree consequences for a *Miranda* violation in *United States v. Patane,* 541 U.S. 630 (2004).

Thus, in Nix v. Williams,[86] the police, through improper (but not coercive) interrogation, ascertained where the defendant had left the victim's body. However, search parties were already in the area and, the Court found, would have inevitably discovered the body. Therefore, the body, but not the defendant's statements to the police, could be used in the prosecution's case. Similarly, if a policeman illegally enters a warehouse and finds marijuana, while other police, with no knowledge of this illegality, are on their way to the warehouse with a search warrant, then the marijuana will be admissible on the ground that it was discovered by a source independent of the illegal entry (i.e., the second, warrant-authorized, entry).[87]

g. Line-ups and other identification procedures

Line-ups (identification parades)

After a person has been arrested, he can, without any further showing or judicial authorization, be required to stand in a line-up. A suspect who is not under arrest can be compelled to appear in a line-up by court order.

A line-up must not be "unnecessarily suggestive or conducive to irreparable misidentification,"[88] Ordinarily, police will photograph or videotape a line-up so that the jury can see that it was fair, but this is not required by federal law. After "formal proceedings have begun" (e.g., indictment or arraignment), a defendant is entitled to have counsel at a line-up but in the early stages of investigation, which is when line-ups usually occur, counsel is not required.[89] Photo "show-ups," where a witness is shown a group of photographs, are also admissible in court, subject to the "unnecessarily suggestive" limitation that applies to line-ups. "Alley confrontations" between a victim and a suspect, immediately after a crime, are admissible despite the fact that only one person has been presented to the victim.

Other identification procedures

[86] Nix v. Williams, 467 U.S. 431 (1984).
[87] Murray v. United States, 487 U.S. 533 (1988). *Murray* goes even further as the agents who made the illegal entry were the *same* agents that subsequently obtained the search warrant but without mentioning in the warrant application that they had already found the marijuana. For a critique of the result, see Craig Bradley, Murray v. United States*, The Bell Tolls for the Search Warrant Requirement,* 64 IND. L.J. 907 (1989).
[88] Stovall v. Denno, 388 U.S. 293 (1967).
[89] Kirby v. Illinois, 406 U.S. 682 (1972).

Fingerprinting of arrestees is routinely allowed without any judicial approval. Other identification procedures, such as taking hair samples or voice printing, are usually done on court order, or pursuant to a subpoena issued by the prosecutor. However, the bodily intrusion required by taking a blood sample requires a judicial warrant based on probable cause.[90] Moreover, in Winston v. Lee,[91] the Court excluded from evidence a bullet obtained from the defendant's body after court-ordered surgery on the ground that the government had not demonstrated a "compelling need" for the evidence given the intrusiveness of the procedure. Short of surgery, however a court order, without any particular showing of cause or need by the government, will suffice to justify such evidence gathering.

h. Interrogation

Before formal charge in court

The Supreme Court has required, under the Fifth Amendment to the Constitution,[92] that Miranda[93] warnings be given to every criminal suspect prior to "custodial interrogation." The warnings need not be given in any particular form as long as they reasonably inform the suspect of his rights.[94] Those rights are: that the suspect has a right to remain silent, that anything he does say may be used against him, that he has a right to counsel and, if he cannot afford to hire one, a lawyer will be appointed to represent him. The Court has refused to extend the warnings requirement beyond the warnings enumerated. For example, a suspect does not have a right to be informed of the subject matter under investigation[95] or, if a consent to search is being sought, that he has a right to refuse consent,[96] or even that he has a lawyer who wants to see him.[97]

What Is "Custody?"

The warnings are only required in case of "custodial interrogation." Since the Supreme Court of the last 35 years has been, at best, unenthusiastic about the warnings, but reluctant

[90] Schmerber v. California, 384 U.S. 757 (1966).
[91] Winston v. Lee, 470 U.S. 753 (1985).
[92] "No person shall...be compelled in any criminal case to be a witness against himself..."
[93] Miranda v. Arizona, 384 U.S. 436 (1966).
[94] Duckworth v. Eagan, 442 U.S. 195 (1989).
[95] Colorado v. Spring, 479 U.S. 564 (1987).
[96] Schneckloth v. Bustamonte, 412 U.S. 218 (1973).
[97] Moran v. Burbine, 475 U.S. 412 (1986).

to overrule such a well known case, it has carefully refused to extend Miranda, or even, according to many, to give the case its full weight.[98] One way to limit Miranda has been to closely define the terms "custody" and "interrogation." The thrust of the Court's cases in recent years is that "custody," in Fifth Amendment terms, means the same thing as "arrest" under the Fourth Amendment. That is, that a reasonable person would feel that the police will hold him for a substantial period of time. The Court has refused to extend the Miranda requirement to a "stop."[99] On the other hand, although most of the discussion in Miranda focused on stationhouse interrogations, the Court has made it clear that the warnings requirement applies even to a low-key conversation in the living room of an arrested suspect's home,[100] but not to an interview in the police station which the suspect attended voluntarily[101] unless the circumstances of that interview became such that a reasonable person would have felt "arrested."[102] One technique used by police is to conduct an "interview" at the station-house without the warnings, making it (relatively) clear to the suspect that he is not under arrest. This practice was allowed in Yarborough v. Alvarado[103] so long "a reasonable person" would have felt "free to terminate the interrogation and leave." Thus, there are many police-citizen encounters where the police are not required to give the warnings.

What Is "Interrogation?"

The Court has also limited Miranda in its definition of "interrogation." In Rhode Island v. Innis,[104] the Court defined the term rather broadly to include not only express questioning, but "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." In that case, police transporting an arrested suspect discussed among themselves their concern that a child from a nearby school may find a missing murder weapon. The suspect then volunteered the location of the shotgun. This, strangely, was held not to be interrogation on the ground that "the record in no way suggests that the

[98] *See, e.g.,* Yale Kamisar, Dickerson v. United States*: The case that Disappointed* Miranda's *Critics and then its Supporters, in* THE REHNQUIST LEGACY 106 (Craig Bradley ed., 2006).
[99] Berkeiner v. McCarty, 486 U.S. 420 (1984).
[100] Oregon v. Elstad, 470 U.S. 298 (1985).
[101] Oregon v. Mathiason, 429 U.S. 492 (1977).
[102] Stansbury v. California, 511 U.S. 318 (1994).
[103] Yarborough v. Alvarado 541 U.S. 652 (2004).
[104] Rhode Island v. Innis, 446 U.S. 291 (1980).

officers' remarks were designed to elicit a response."[105] Yet any reasonable reading of the police remarks suggests that this is exactly what the police sought to do. This is an example of the Court's being unwilling to declare police conduct unacceptable, even when it seems to violate the "rules" because to do so would mean that important evidence would have to be excluded. This narrow application of the rule suggests that unless the police are directing their statements or actions at the suspect, "interrogation" will not be found to have occurred. This is consistent with Miranda's primary concern: direct pressure being put on suspects during incommunicado questioning at the police station.

Surreptitious questioning

In Illinois v. Perkins,[106] the Court held that it was not interrogation under Miranda for the police to plant an informer in an arrestee's jail cell to pump him for an admission of guilt or other details of the crime, so long as the admissions are not coerced. The Court reasoned that a suspect who was unaware that he was being "interrogated" was not subject to the sort of official pressure against which Miranda was designed to guard.

Exception

There is only one exception to the rule that the warnings must precede any "custodial interrogation." In New York v. Quarles,[107] a rape suspect, who was believed to be armed, was chased into a supermarket. He was caught and arrested at the rear of the store and, after he was handcuffed, was asked where the gun was. He told the police who found the gun. Both his statement and the gun were admissible despite the fact that he had received no warnings. The Court, while agreeing that this was a "custodial interrogation," held that there was a "public safety" exception to Miranda, presumably limited to weapons or destructive devices. The Court has never decided whether location of a dangerous co-felon would fall under the public safety exception, but assuming it does not, only the original arrestee's statement would be excluded at his trial. The co-felon would lack standing to protest the breach of the original arrestee's rights. Moreover, because "fruit of the

[105] *Id*. at fn. 9
[106] Illinois v. Perkins, 496 U.S. 292 (1990).
[107] New York v. Quarles, 467 U.S. 649 (1984).

poisonous tree" rules do not apply to Miranda violations,[108] any statements or evidence that came to light as a result of the co-felon's arrest would not be excluded from the original arrestee's trial. Similarly, in Quarles itself, the gun was admissible. The dispute in that case, resolved in the prosecution's favour, was whether the statement could also be used.

Waiver

The Court has made it easy for the police to establish that a suspect has waived his rights to silence and counsel after he has been informed of them. He need not sign a written waiver nor even specifically state that he wishes to waive his rights. Merely answering police questions after having been warned is sufficient.[109] Also, unless the suspect specifically states that he wishes to remain silent or have a lawyer, he will not be considered to have "invoked" his Miranda protections. Thus, where the suspect asked to see his probation officer, this was held not to he an invocation of his Miranda rights and questioning was allowed to continue.[110] Similarly, saying "maybe I should talk to a lawyer" was not an invocation of rights when, upon request for clarification by the officers, the suspect concluded that he did not want a lawyer.[111] However, once he has actually requested counsel, his "post-request responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself."[112]

Invocation of right to silence

According to Miranda, if the suspect indicates that he wishes to remain silent, "questioning must cease." While this seems clear enough, the Supreme Court subsequently cast some doubt on this command. In Michigan v. Mosley,[113] the Court held that, where a suspect who had asserted his right to remain silent was questioned two hours later about a different case by different police who again advised him of his rights, the interrogation was lawful. The Court was unclear about which of these factors governed its conclusion in Mosley. However, it is generally agreed that at least three factors must be present before a suspect who asserts his right to silence may be questioned further: 1) immediately ceasing the

[108] If the police *intentionally* violate *Miranda*, and obtain an unwarned confession, they cannot use either the first or a subsequent confession unless the suspect has been informed that the first confession is inadmissible. Missouri v. Seibert, 542 U.S. 600 (2004)
[109] North Carolina v. Butler, 441 U.S. 369 (1979).
[110] Fare v. Michael C., 442 U.S. 707 (1979).
[111] Davis v. United States, 411 U.S. 233 (1994).
[112] Smith v. Illinois, 469 U.S. 91 (1984).
[113] Michigan v. Mosley, 423 U.S. 96 (1975).

interrogation, 2) suspending questioning entirely for a significant period of time, and 3) giving another set of warnings at the outset of the second interrogation.[114]

According to Oregon v. Bradshaw, the police can wait to see if the arrestee himself "initiates" further conversation about the case. Then, at least if he is rewarned before questioning resumes,[115] they can question him further. This exception is evidently quite broad since the "initiation" the Court relied upon in Bradshaw was simply the defendant asking, "What is going to happen to me now?"

Invocation of right to counsel

In contrast to the Court's equivocal approach to assertion of the right to silence in Mosley, it has treated invocation of the right to counsel much more strictly. In Edwards v. Arizona,[116] the Court distinguished between the two rights, reasoning that, whereas assertion of the right to silence showed that the suspect felt in control of the situation, assertion of the right to counsel was a kind of cry for help. Consequently, once a suspect asserts his right to counsel, questioning must cease "until an attorney is present." This was so despite the fact that the interrogation had ceased and was not resumed until the next day after the suspect had been rewarned. Moreover, the Court has held that such an "Edwards defendant" cannot even be questioned about another crime[117] and that, even after the suspect has consulted a lawyer, questioning cannot resume unless the lawyer is present.[118] However, the Court has never required that a suspect who requests a lawyer need actually be provided with one, but only that interrogation must cease.[119] It is thus not unusual for an arrestee to request a lawyer but not to receive one until his appearance in court, usually the day after his arrest. This is so regardless of whether the lawyer is court appointed or privately retained, even if he has been retained immediately after the arrest.

In certain cases police may choose to continue questioning the suspect, realizing that though his statements will not be admissible against him, evidence that his statements lead them to will not be excluded and that the statements may be used to impeach the

[114] KAMISAR, LAFAVE, ISRAEL & KING, MODERN CRIMINAL PROCEDURE 646 (11th ed. 2005).
[115] Oregon v. Bradshaw, 462 U.S. 1039 (1983).
[116] Edwards v. Arizona, 451 U.S. 477 (1981).
[117] Arizona v. Roberson, 486 U.S. 675 (1988).
[118] Minnick v. Mississippi, 498 U.S. 146 (1990).
[119] In Moran v. Burbine, 475 U.S. 412 (1986), the Court approved a confession, even though the defence attorney had asked to see the suspect, and had been incorrectly informed that interrogation of the suspect had ceased. Since the *suspect* had not invoked his right to counsel, he did not qualify as an "*Edwards* defendant."

defendant's testimony if he testifies at trial.[120] In addition to these legal loopholes, since interrogations and confessions, as well as Miranda waivers, need not be recorded or in writing (at least as far as the federal Constitution is concerned, though some states have different rules), the police can simply deny that the suspect ever asserted his rights.

Threats and promises

The police may not commit or threaten, directly or indirectly, physical harm to a suspect if he does not confess. In Arizona v. Fulminante,[121] a child molestation case, the Court excluded the testimony of a prison informant who offered the suspect protection from other inmates if he "told the truth" about the alleged murder of his stepdaughter. Although the Supreme Court has not (yet) addressed the issue, it is, however, probably acceptable for the police to tell a suspect that they will drop the charges against another person if the suspect confesses or that they will "put in a good word" to the prosecutor on the suspect's behalf. It is also proper for the prosecutor to make binding promises to the suspect, though such bargaining is usually done through counsel. Such promises may include allowing the defendant to plead to a lesser charge, dismissing some of the charges, taking the death penalty off the table, or agreeing to a sentence bargain, permitted in some jurisdictions.

Police deception

The police may not deceive a suspect as to his rights or the legal consequences of waiving them.[122] Thus, they could not assure a suspect that his confession was "off the record" and then attempt to use it in court or tell him that assertion of his constitutional rights could be used against him in court -- which it cannot. However deception of a suspect as to the course of the investigation, such as "we found the murder weapon" or "your co-defendant says you pulled the trigger," while never specifically endorsed by the Court, is widely considered an acceptable interrogation technique. But this only applies to suspects who have been warned but have not asserted their rights to silence or counsel. Neither deception, nor any other technique, may be used to encourage a suspect to talk once he has invoked his right to counsel or, usually, his right to silence. However, it is undoubtedly the case that

[120] New York v. Harris, 495 U.S. 14 (1990); Oregon v. Elstad, 470 U.S. 298 (1985).
[121] Arizona v. Fulminante, 499 U.S. 279 (1991).
[122] Moran v. Burbine, 475 U.S. 412 (1986).

police sometimes violate this principle by suggesting to the suspect that such non cooperation makes him "look bad" in their eyes.

i. After defendant is formally charged

After a defendant has been formally charged with a crime – by grand jury indictment, prosecutorial "information," (depending on the state) or, in the usual case, his first formal appearance in court following arrest (arraignment) – the rules change. Now he is formally a "defendant," and no longer a "suspect," so his Sixth Amendment right to counsel "in all criminal prosecutions" has attached – rather than merely Fifth Amendment rights. Such a defendant need not assert his right to counsel for it attaches automatically.[123]

It is unclear whether, and how, police may seek a waiver of counsel's presence from such a "Sixth Amendment" defendant. In Patterson v. Illinois[124] where such a defendant initiated conversation about the crime, giving him the Miranda warnings and obtaining further voluntary statements from him was held sufficient to establish waiver of the right to counsel. Lower courts have considered such points as whether the defendant had asserted his right to counsel, and whether the police tried to talk him out of consulting with counsel in assessing the validity of a waiver.[125] The Supreme Court has indicated that a failure to inform a defendant that he had an attorney who was trying to reach him during questioning would invalidate a Sixth, but not a Fifth, Amendment waiver.[126] An informant may not question a "Sixth Amendment" defendant, though courts have held it acceptable to plant an electronic "bug" in the defendant's cell to overhear conversations among inmates, and even to use a human informant who did not question the defendant or urge him to talk, but did say that his initial story "didn't sound too good."[127]

j. Enforcing the rules

As previously discussed, coerced confessions cannot be used at all, even to develop leads, or to impeach a defendant's testimony in court. By contrast, confessions or statements obtained in violation of the rules developed in Miranda and its related cases also may not be used in the government's case-in-chief, but may be used for these ancillary purposes.

[123] Brewer v. Williams, 430 U.S. 387 (1977).
[124] Patterson v. Illinois, 487 U.S. 285 (1988).
[125] § LAFAVE, ISRAEL & KING, CRIMINAL PROCEDURE 6.4(f) (4th ed. 1992).
[126] Patterson v. Illinois, 487 U.S. 285, fn. 9 (1988) (referring to *Moran v. Burbine*).
[127] Kuhlmann v. Wilson, 477 U.S. 436 (1986).

Likewise, "fruit of the poisonous tree" strictures do not apply to Miranda violations unless they are intentional.[128] Statements obtained through violation of a formally charged defendant's Sixth Amendment rights, however, cannot be used directly or indirectly.

5. COURT PROCEDURES

As a consequence of the diversified state system, there is no national code of court procedures, just as there is none for police procedures. While most police procedures have become somewhat standardized because of Supreme Court case law, there is less case law on the structure of the court system. What follows then, is a description of how a criminal case usually proceeds through the system. Individual state practices may vary. The extent to which federal constitutional law has standardized procedures will be noted where applicable.

A. Pre-trial

a. Initial court appearance

In the usual case, an arrested suspect is brought before a judicial officer[129] within 24 hours of his arrest, and, in any case, no longer than 48 hours after arrest unless police released him pending further proceedings.[130] Prior to, or at, this appearance, the magistrate or judge must make a determination that there is probable cause to hold the defendant. This may be an ex parte, rather than an adversarial determination, based on the material in the police report, and, if required, can be supplemented by additional information provided by the prosecutor.[131] If a defendant has been arrested pursuant to a warrant, which was itself based on a judicial determination of probable cause, no such decision is required. In the rare case that the magistrate finds no probable cause, the defendant must be released, but this is not a bar to subsequent arrest if more information is developed. This appearance is most commonly called an "arraignment."

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[128] Oregon v. Elstad, 470 U.S. 298 (1985); Missouri v. Seibert, 542 U.S. 600 (2004).

[129] In some states and in the federal system, "magistrates" handle preliminary matters such as the issuance of search warrants, and arraignments and, in some jurisdictions, misdemeanor trials. They are "judicial officers," independent from the prosecution.

[130] The Constitution requires that an arrestee has a right to a "prompt" judicial determination of probable cause to arrest. This right is presumptively satisfied by an appearance in court within 48 hours of arrest, though the defendant has the right to show that even that period constituted an "unreasonable delay." County of Riverside v. McLaughlin, 500 U.S. 44 (1991).

[131] Gerstein v. Pugh, 420 U.S. 103 (1975).

At this appearance, the defendant will be informed of the charges against him and of his constitutional rights. If the defendant does not have counsel, one will be appointed. Only if no incarceration is possible, or the defendant insists on proceeding without counsel,[132] may the case continue without the defendant being represented by counsel.[133] About half of all criminal defendants are "indigent" and receive free counsel, provided by either a public defender service (available in more heavily populated areas), or a private attorney appointed by the court. Indigent defendants are entitled to appointed counsel through the trial and the first appeal, which is mandatory in all states. However, this right does not extend to subsequent, discretionary review which is usually in the highest state and federal courts.[134] Following appearance of counsel at arraignment, the defendant will be asked to enter a plea. This is usually "Not Guilty" though sometimes a defendant, after consultation with his counsel (if he has one) and with the prosecutor may enter a "Guilty" plea at this time.

Finally, the defendant's custody status pending trial must be established. If he has already been released from custody, that status will usually continue pending trial. If he has been incarcerated since his arrest, bail must be set, subject to the Eighth Amendment's prohibition of "excessive bail." In general, the judge/magistrate is required to impose only such conditions on the defendant as will ensure his return for trial, though some jurisdictions allow for "preventive detention" based on dangerousness and regardless of the likelihood of return.[135] The defendant may be released on cash bond supplied by a private bail bondsman (who will forfeit the bond if the defendant does not return for trial), by a cash bond arranged directly with the court, or on his "own recognizance," i.e., a mere promise to appear. In addition, conditions, such as remaining employed or staying away from the victim, may be imposed and the defendant be incarcerated if they are not met. If the court feels that no set of conditions will ensure his return, he may be held without bail. Failure to reappear as ordered is an additional criminal offence.

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[132] The defendant has a constitutional right to proceed without counsel, Faretta v. California, 44 U.S. 806 (1975), but the judge may appoint a "standby counsel" even over the defendant's objection, to advise the defendant as to courtroom procedure and other matters. However, this counsel may not take over the trial of the case without the defendant's consent. McKaskle v. Wiggins, 465 U.S. 168 (1984). Such trials are very rare.

[133] Scott v. Illinois, 440 U.S. 367 (1979).

[134] Ross v. Moffitt, 417 U.S. 600 (1974). The indigent defendant petitioning for further review will have the benefit of the brief, and the free trial transcript provided for the first appeal. Moreover, it is customary for appointed counsel to file a petition for review by a higher court, and to represent the defendant should review be granted.

[135] United States v. Salerno, 481 U.S. 739 (1987).

No special pre-trail detention rules apply to terrorists or other offenders considered dangerous, as the regular bail procedure will keep them incarcerated. The criminal justice system in its line-up and trial procedure does not make a distinction. However, alleged terrorists who are non-citizens may be detained under the immigration regime which allows for longer detention periods pending investigation of someone's immigration status and reasons for removal. Also, military proceedings and detention through non-law-enforcement agencies, such as the Central Intelligence Agency (CIA), are not regulated through these procedures.

b. Charging instrument

The Fifth Amendment provides that, "No person shall be held to answer for a capital, or otherwise infamous crime, unless upon a presentment or indictment of a Grand Jury." The grand jury is a group of ordinary citizens (twenty three is a common number) who sit for an extended period of time—frequently about six months. However, they need not all be present at any one session. Unlike the trial jury, unanimity is never required.

This is the only criminal provision of the Constitution's Bill of Rights the Supreme Court has not made applicable to the states. Consequently, about half the states initiate criminal prosecutions through an "information" issued by the prosecutor (though prosecutors in these states may convene grand juries for investigative purposes). The other states and the federal government (as it must), proceed by Grand Jury indictment. However, this does not provide any meaningful protection against prosecutorial abuse since the grand jury rarely refuses to abide by the prosecutor's will, and if they do, the prosecutor may convene another grand jury. On the other hand, the grand jury may choose to indict a defendant against the prosecutor's recommendation. In this rare event, the prosecutor can dismiss the indictment immediately after it issued.

Sometimes, usually in complex cases, a prosecutorial investigation, using the grand jury to subpoena witnesses, who must testify, under oath without counsel (but who retain their Fifth Amendment right against self-incrimination) will precede arrest. In these cases, "formal criminal proceedings" for the purpose of interrogation law, begin when the grand jury issues an indictment or the prosecutor issues an information. Subjects of grand jury investigations invariably retain private counsel during the investigation.

c. Preliminary hearing

In the usual case where the arrest and arraignment have marked the beginning of formal proceedings, the next step for the incarcerated defendant is the preliminary hearing. This is an adversarial proceeding with counsel[136] before a judge or magistrate in which the government must establish probable cause to continue to incarcerate the defendant while awaiting grand jury action. Hearsay information is allowed at this hearing which is ordinarily brief and informal. Many defendants waive the preliminary hearing, usually when they contemplate a guilty plea. Otherwise, it is a good opportunity for the defence to gain information about the prosecution's case (different levels of discovery are provided in different states) and to put prosecution witnesses on the record. The prosecution thus tries to use as few witnesses as possible, usually just the chief investigating officer who will summarize what other witnesses have told him. If the judge finds probable cause, the government may continue to hold the defendant, either in jail or on bail, pending action of the grand jury in an "indictment state," or pending trial in an "information" state. If no probable cause is found, the case is dismissed. However, the government can then take the case to the grand jury and reinstate proceedings, or, avoid the preliminary hearing altogether by getting an indictment first. "Information states" differ on the use of preliminary hearings. It is unclear whether any such further judicial/grand jury determination of probable cause is constitutionally required as long as there has been at least one since arrest.

d. Pre-trial motions

Most jurisdictions require the defence to file pre-trial motions to suppress evidence due to the operation of the various exclusionary rules discussed above. This is both to make the trial run more smoothly and to give the prosecution the opportunity to appeal an adverse ruling. Otherwise, if an erroneous adverse ruling during trial leads to the defendant's acquittal, double jeopardy principles would forbid prosecutorial appeal. Some states allow an interlocutory appeal by the government of adverse rulings during trial (but never after acquittal) to avoid this problem.

[136] Counsel is required. Coleman v. Alabama, 399 U.S. 1 (1970).

Generally, U.S. courts do not exclude evidence collected abroad, even if it constituted a violation of U.S. law if done so in U.S. territory.[137] The Supreme Court has also upheld the kidnapping and luring of an individual to the United States to bring the individual to trial.[138] The question whether such action would lead to the dismissal of the case if the defendant were to be tortured remains open.

Pre-trial motions also address discovery of the other side's case. States vary greatly on this with increasing numbers requiring both sides to disclose in advance all witnesses and evidence to be used at trial. In rare cases where the life of witnesses may be at risk, witness lists do not have to be turned over to counsel, or counsel may be prohibited from sharing them with their clients. Virtually all jurisdictions require disclosure of any statements of the defendant in the government's possession, as well as the results of scientific tests.[139] The prosecution also has a constitutional duty to disclose all "material," i.e., possibly outcome determinative, exculpatory evidence to the defence, including evidence which, while it does not directly cast doubt upon the defendant's guilt, tends to impeach the credibility of a government witness.[140] Other matters dealt with by pre-trial motion include various other defence arguments as to constitutional objections to the trial such as violation of the defendant's Sixth Amendment right to a speedy trial (see below), of his Fifth Amendment right against being tried twice for the same offence, or claims that the trial should be moved because of local prejudice against the defendant.

Access rights of defendants to any type of evidence collected by the government have been severely restricted in terrorism prosecutions conducted before military commissions. In some terrorism cases conducted in front of civilian courts, courts have also relieved the government from turning over evidence on national security grounds.

B. Trial

a. Nature of the trial

The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein

[137] United States v. Verdugo-Urquidez, 494 U.S. 259 (1990)(Fourth Amendment does not apply to search and seizure of property owned by non-citizen and located abroad, even if the search is conducted by U.S. law enforcement).
[138] United States v. Alvarez-Machain, 504 U.S. 655 (1992); United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991).
[139] LaFave, Israel & King, *supra*, §20.3.
[140] *See* United States v. Bagly, 473 U.S. 667 (1985) (disclose fact that witness was an alcoholic and may have been impaired in his observations of the crime).

the crime shall have been committed." The Supreme Court has applied all of these provisions to the states. The prosecution must prove every element of the crime "beyond a reasonable doubt"[141] before the defendant can be convicted.

Speedy trial

All criminal codes contain statutes of limitations that provide that charges must be brought within a certain period after the crime has been committed. Five years is typical. This is not a constitutional right and certain crimes, such as murder, can be excepted from the statute of limitations. The speedy trial right, by contrast, applies after formal proceedings have begun, whether by indictment, information or arrest/arraignment.[142] It is not a specific time limit, and each case must be assessed on its own facts. Factors to consider include whether the defendant has demanded a: trial, the length of the delay, the reason for the delay and prejudice to the defendant caused by the delay.[143] In Doggett v. United States[144] a delay due to government negligence in locating the defendant, who had been jailed in Panama but had returned to the United States six years before his arrest and lived openly under his own name, was held to violate the Speedy Trial right, requiring that the case be dismissed. In general, the courts have considered a delay of about a year "presumptively prejudicial," requiring the government to justify it.[145]

Public trial

The defendant has a right to a trial open to the public and the media. This also extends to pre-trial proceedings and sentencing. Parts of a trial may be closed if the party seeking closure can cite an "overriding interest." Thus, it may be possible to close a hearing on a motion to suppress evidence on the ground that, if the evidence is suppressed, public knowledge of the excluded evidence would make it impossible to secure an unbiased jury. Similarly, it is not uncommon to exclude the public from a sex crime trial during the testimony of the victim, particularly if the victim is a child, where public presence would likely adversely affect the victim's ability to relate the details of the crime.[146] An improper

[141] This fundamental principle does not appear in the Constitution but was always assumed to be present. The Supreme Court did not formally recognize it until 1970. In re Winship, 397 U.S. 358 (1970).
[142] United States v. Marion, 404 U.S. 307 (1971).
[143] Barker v. Wingo, 407 U.S. 514 (1972).
[144] Doggett v. United States, 505 U.S. 647 (1992).
[145] *Id*. at 652, n.1.
[146] LaFave, Israel and King, *supra*, §24.1(b).

exclusion of the public from the trial is grounds, per se, for a new trial without the defendant being required to show prejudice.[147] The defendant may not, however, compel a private trial since the public and the press have an independent First Amendment right to attend.[148] Such right does not always extend to audio-visual media, though they are increasingly permitted in court rooms. The U.S. Supreme Court does not permit cameras into the courtroom. Generally, however, media are given special access rights.

In highly publicized cases the judge may prohibit the prosecution and the defence from commenting to the press about the case. Should they not follow the mandate, the court may sanction the offender, and in the extreme case declare a mistrial. The court cannot sanction third parties who may comment about the case.

Location of the prosecution

As the Sixth Amendment provides, the defendant has a right to be tried in the state and district, usually the county, where the crime was committed. However, as long as a crime has an impact on a state, or partially occurs there, that state may try it, even if another state also has such a right. Indeed, double jeopardy does not prohibit a state's retrying a defendant who has already been tried, whether convicted or acquitted, in another state.[149] The defendant may move to change the location (venue) if he would be prejudiced by holding the trial in the district where the crime was committed.

Trial by jury

The defendant has a right to a jury trial for all but "petty" offences.[150] The defendant may waive this right only if the prosecution agrees (though the shorter non-jury trial is ordinarily to the prosecutor's liking). A defendant may elect a bench-trial in complicated white-collar prosecutions or if the defendant believes a jury to act unreasonably because of the atrocious character of the crime.

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[147] *Id*. §24.1 (a).

[148] Gannett Co. v. DePasquale, 443 U.S. 368 (1979).

[149] Heath v. Alabama, 472 U.S. 82 (1985). In *Heath*, the defendant was convicted of murder in Georgia, where part of the crime was committed, but did not receive the death penalty. He was then tried in Alabama for the same murder and sentenced to death. The Supreme Court upheld the two trials/sentences on the ground that the states are "separate sovereigns" whereas double jeopardy only prohibits dual prosecution by the "same sovereign." The same rule allows subsequent prosecution by the federal government after a state court acquittal, assuming a federal statute was also violated by the defendant's actions. Double jeopardy principles, are therefore not implicated if a defendant is convicted abroad or by an international or regional tribunal of an offence that also violates U.S. laws. *Youseff or Yunis*.

[150] In Baldwin v. New York, 399 U.S. 66 (1970), the Court defined as presumptively "petty" a crime for which a sentence of no more than six months is authorized by statute, regardless of whether the defendant is actually imprisoned or not. Note that this differs from the right to counsel, where a defendant can be tried without counsel for a crime with an authorized penalty of more than six months, but cannot then receive any actual jail time.

A jury may contain as few as six members and need not render a unanimous verdict. However, a guilty verdict by a 5-1 vote was struck down. Considering the various cases, the minimum size/margin for a guilty verdict is probably 6-2.[151] The jury venire (i.e., the group of potential jurors) must be a "representative cross section of the community." Thus, in Taylor v. Louisiana[152] a male defendant's conviction was reversed because women were not selected for jury service unless they had filed a written declaration stating their desire to serve. There were no women in the defendant's venire.

This representative cross-section requirement has not been extended beyond race and gender and does not apply to the petit jury that actually hears the defendant's case, for it would be too difficult to ensure that every jury contained a representative cross section of the community as to gender and race. However, neither the prosecution nor the defence can attempt to bias the petit jury by using peremptory challenges[153] to exclude potential jurors on account of their race or gender.[154] Nevertheless, the parties select the jurors through voir dire.

b. Guilty pleas

At any time, the defendant can interrupt the proceedings and offer to plead guilty to the entire indictment/information. Usually, however, the defendant pleads guilty prior to trial. The guilty plea is ordinarily given in exchange for the prosecution's promise to drop some of the charges, to recommend a lower sentence or at least not to ask for any particular sentence, or to drop a separate case pending against the defendant. The prosecution is not required to engage in any bargaining. In some jurisdictions, the judge participates in plea bargaining, and a specific sentence can be agreed upon. Ordinarily, the plea bargain is reached before the trial so that the prosecution can avoid the expense and difficulty of preparing its case for trial. The initial decision as to what bargain, if any, to offer is for the prosecutor, but in many jurisdictions, the judge must approve the dropping of any charges, as well as sentence bargaining where that is allowed.

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[151] *See* LaFave, Israel &King, *supra*, §22.1(d) and (e).
[152] Taylor v. Louisiana, 419 U.S. 522 (1975).
[153] "Peremptory challenges" cause a juror to be removed from the panel without the attorney doing so being required to state a reason. These are to be distinguished from "challenges for cause" for which the attorney must provide a legally acceptable reason.
[154] The first case on this subject forbade the prosecution's use of peremptories to exclude black jurors from the trial of a black defendant. Batson v. Kentucky, 476 U.S. 79 (1986). Subsequent cases have extended this rule to apply to defence use of peremptories, to use of peremptories to exclude black jurors from the trial of a white defendant, and to the use of peremptories to exclude men from a man's trial.

Before the court can accept a guilty plea it must address the defendant personally, on the record, and ascertain that the plea is knowing and voluntary. That is, the defendant must understand at least the "critical" elements of the charge to which he is pleading guilty and that he is giving up his constitutional rights, including the rights to a jury trial and to confront witnesses.[155] He must also understand the sentencing consequences of the plea. Furthermore, the judge must ascertain that the plea is not the result of any threats or promises beyond those spelled out in the plea bargain, the terms of which must appear on the record. Finally, in federal courts, and in most states, the judge must determine that there is a factual basis for the plea. This can he done either by the judge asking the defendant what he did, or the prosecutor stating what the government would prove if the case went to trial.[156] In states not requiring this, it suffices for the defendant to knowingly and voluntarily agree that he is guilty, without the facts being discussed.

It is not constitutionally necessary that the defendant actually admit to the deeds constituting the crime. Rather, he can plead guilty in order to take advantage of the plea bargain, without admitting culpability.[157] In such a case it is required that the prosecutor fully set forth the factual basis for the plea. A similar plea of nolo contendere is allowed in federal courts and those of many states in which the defendant simply agrees not to "contend" the prosecution's case, but this is not strictly a "guilty" plea, and may not have the same collateral consequences, such as civil liability, or enhanced sentence following subsequent convictions, as a plea of guilty. Nolo pleas, however, are very rare.

c. Defendant's rights at the trial

The defendant has a constitutional right to testify which must be done under oath,[158] though this is not expressly provided in the Constitution. The Fifth Amendment does specify that he may not "be compelled ... to be a witness against himself." This encompasses not only the right not to testify, but to be free from adverse prosecutorial comment if one exercises the right,[159] and to demand a jury instruction that the defendant's failure to testify may not be held against him.[160] The practical value of the jury instruction, however, appears

[155] Henderson v. Morgan, 426 U.S. 637 (1976).
[156] *See* LaFave, Israel & King, *supra*, §21.4.
[157] Alford v. North Carolina, 400 U.S. 25 (1970).
[158] Rock v. Arkansas, 483 U.S. 44 (1987). At common law, the defendant was allowed to speak in his own defence, but not under oath.
[159] Griffin v. California, 380 U.S. 609 (1965).
[160] Carter v. Kentucky, 450 U.S. 288 (1981). The defendant *may not* prevent the court from giving such an instruction should the court so desire. Lakeside v. Oregon, 435 U.S. 333 (1978).

minimal in cases where the defendant's testimony could have shed light on the events at issue. The defendant is not required to refuse to testify in open court.

The Sixth Amendment provides that the defendant has a right "to be confronted by the witnesses against him" and "to have compulsory process for obtaining witnesses in his favour." The confrontation clause further implies the right of the defendant to be present at "every stage of the trial," including pre-trial hearings, though this can be abridged if the defendant is disruptive.[161] Also, the defendant can give up this right if he absents himself during the trial.[162] These rights also imply a duty on the state to preserve evidence for the use of the defence, but this will lead to the reversal of a conviction only if the defendant can establish bad faith on the part of the government.[163] Finally, the confrontation right includes a principle of orality – witnesses must appear in court and testify in person. Hearsay statements may not generally be used against the defendant, subject to several exceptions. Preliminary hearing testimony, which was subject to cross-examination, may be used at trial, but only if the witness is unavailable at trial.[164] In rare circumstances the court may permit government witnesses to keep part of their identity, such as their home address, for example, confidential. The Supreme Court has barred even juvenile victims of intra-family sex offences from testifying from behind a screen,[165] but in a later case permitted the use of one-way close circuit television to spare the victim serious emotional trauma.[166] Certain other "non-testimonial" evidence, such as the transcript of the emergency 911 call to the police, can also be used if the declarant is unavailable for trial, but transcripts of a police interrogation of a witness are considered "testimonial" and can only be used if the witness is available for trial.[167] The crucial issues are therefore question of availability and whether the defendant had the opportunity to test the witness's testimony through cross-examination.

The defendant has a right to an interpreter in a criminal case so as to understand the proceedings against him.[168] Interpreter services are required under the due process clause

[161] Illinois v. Allen, 397 U.S. 337 (1970).
[162] Taylor v. United States, 414 U.S. 17 (1973).
[163] Arizona v. Youngblood, 488 U.S. 51 (1988).
[164] California v. Green, 399 U.S. 149 (1970).
[165] Coy v. Iowa, 487 U.S. 1012 (1988).
[166] Maryland v. Craig, 497 U.S. 836 (1990). *See generally* Nora V. Demleitner, *Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options?*, 46 AM. J. COMP. L. 641 (Supp. 1998).
[167] Davis v. Washington, 547 U.S. 813 (2006).
[168] Court Interpreters Act, 28 U.S.C. 1827-1828 (judges must generally use "certified interpreter" unless none is available).

and if necessary, are paid for for in-court and out-of-court proceedings, such as attorney-client conferences and pretrial and pre-sentence interviews.

d. The lawyer's role

As noted earlier the defendant has a constitutional right to be represented by counsel anytime "actual imprisonment" is to be imposed.[169] If imprisonment is a possible penalty for the defendant's crime, then he must be represented by counsel unless the prosecution has determined in advance that, if he is convicted, he will not be imprisoned. Counsel plays an active role at trial, cross examining the prosecution's witnesses, conducting a direct examination of the defence witnesses if there are any, and arguing the case to the jury.

The right to counsel includes the right to "effective assistance" of counsel. If a defendant appeals on the ground of ineffective assistance of counsel, the burden is on him to establish both that "counsel's performance was deficient" and that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[170] These two elements of the test are referred to as the "performance" and the "prejudice" prong. It is possible that a defendant could show that his lawyer's performance was deficient, but not succeed on his appeal because the prosecution's case was sufficiently strong that he failed to show "prejudice." This "effective assistance" requirement applies equally to trials and capital (death) sentencing proceedings (which, unlike ordinary sentencing proceedings, can be very elaborate—in some states a virtual second jury trial).

Under limited circumstances the defendant will be excused from establishing the "prejudice" prong. One of these is state interference with counsel's performance. For example, in Davis v. Alaska[171] the trial judge prohibited the defence counsel from questioning a witness about the latter's juvenile record because of a state statute rendering this information confidential. This was a violation of Davis's confrontation right. Davis was not required to prove "prejudice" on appeal; it was presumed. A conflict of interest by counsel, such as representing two defendants whose defences are inconsistent, will also excuse the defendant from having to show prejudice.

[169] Scott v. Illinois, 440 U.S. 367 (1979).
[170] Strickland v. Washington, 466 U.S. 668 (1984). The defendant must show a "reasonable probability that, but for counsel's unprofessional conduct, the result of the proceeding would have different."
[171] Davis v. Alaska, 415 U.S. 308 (1974).

e. Witnesses

Both the defendant and the prosecution have the right to compel witnesses to appear at trial. However, the witness may refuse to testify on the ground that his testimony would tend to incriminate him, in violation of the witness's Fifth Amendment rights. The prosecution can compel such a witness to testify by granting "immunity" from prosecution based on the testimony (but not necessarily from any prosecution at all). The defence does not have a comparable power to compel a witness to testify since immunity decisions are solely within the prosecutor's discretion.

Expert witnesses

The parties, rather than the court, choose expert witnesses. This means that the experts who testify may be chosen more for their ability to testify strongly in one party's favour than for their actual expertise. An indigent defendant has the right to have certain expert witnesses, such as a psychiatrist to establish an insanity defence or a ballistics expert to establish that the bullet in the victim did not come from the defendant's gun, paid for by the government.[172] However if, as is usually the case, the government has already obtained an expert opinion on the issue, the defendant would have to make an additional showing as to why another expert opinion was necessary. This right is founded on the "due process" clause of the Fifth and Fourteenth Amendments, which generally entitles the defendant to a fair trial. Indigent defendants may have difficulty retaining experts of their choice when they cannot provide sufficient compensation.

f. Victims

There is no generally applicable law as to the rights of victims. However, Congress has enacted a law applicable in federal trials which gives victims certain rights,[173] and a number of states have adopted similar requirements. The federal law requires prosecutors to consult the victim or her family as to the disposition of the case, including plea bargains and sentencing. Victims may also be heard as to the appropriate sentence, but, this is only a right of consultation. Victims cannot formally block, or force, action by the prosecutor.

[172] Ake v. Oklahoma, 470 U.S. 68 (1985).
[173] The Victim and Witness Protection Act of 1982, 18 U.S.C. §1512.

However, a victim who suffers from "memory loss" can, in effect, render a case unprosecutable.

C. Sentencing

In the United States sentencing occurs in a separate proceeding, following conviction. With the exception of capital cases in which a jury recommends the sentence, sentencing is usually conducted by the court alone, and follows a sentencing hearing. The judge usually relies heavily on a sentencing report, compiled by the probation office.

The Eighth Amendment prohibits "cruel and unusual punishment." The Supreme Court's interpretation of the Amendment considers neither the death penalty nor life sentences without parole prohibited. Humilitating treatment is not specifically prohibited.

Sentencing in the United States tended to be relatively unregulated by appellate procedure, and dictated only by legislatively mandated minimum, if existent, and maximum sentences. Many states have retained such an indeterminate sentencing regime in which sentence appeals are relatively limited and the parole board ultimately determines the precise release date of a convict. Other states and the federal system, however, have adopted so-called sentencing guidelines which either mandate or recommend to judges to impose a sentence within a much narrower band based on sentencing factor, which include the offence of conviction, the defendant's prior criminal history, and certain other relevant individual characteristics. In addition, states and the federal system have increasingly adopted restrictive minimum sentences for drug and sex offenders and for recidivists, including the so-called "three-strikes" legislation.

Beginning with its decision in Apprendi v. New Jersey,[174] the U.S. Supreme Court has found the Sixth Amendment right to a jury trial violated whenever a court imposed a sentence above the maximum guideline range.[175] In Booker v. United States, the Court found the federal Sentencing

Guidelines unconstitutional but ultimately declared them advisory. The Court continues to develop the meaning of advisory guidelines.

[174] Apprendi v. New Jersey, 530 U.S. 466 (2000).
[175] Blakely v. Washington, 542 U.S. 296 (2004).

All guideline sentencing regimes incorporate the following features: structured sentencing which requires the court to explain its sentence; abolition of parole release; and appellate review of sentences. Recently some states have adopted more risk-based sentencing where they consider the likelihood of recidivism at the time of sentencing or prior to release. These regimes, therefore, combine incapacitative elements with retribution.

The death penalty continues to survive in about two-thirds of all U.S. states and the federal system.[176] Currently it may be imposed only for killings in which aggravating circumstances where present. Among aggravators count the killing of specific protected individuals, such as police officers, or killings under particularly heinous circumstances, such as in conjunction with torture or with the commission of another felony, such as robbery.[177] Capital sentencing hearings are being conducted in front of juries, with prosecutors and defence counsel presenting aggravating and mitigating factors, respectively. Jurors are then instructed to find for or against death. Only jurors who do not categorically oppose the death penalty will be permitted to sit in capital cases.

The number of times in which it has been imposed or executed has decreased since the turn of the century, and it remains an important sanction in only a handful of states.[178] Most of recent legislative efforts to undermine the existence of the death penalty have centred on restricting it,[179] have been part of the innocence movement, or have challenged select methods of execution.[180] Challenges on the international front have also included legal action before the International Court of Justice on behalf of non-U.S. citizens on death row.[181]

D. Appeals

Although it has never been constitutionally required, the defendant in every state and federal trial has a right to at least one appeal of his conviction. He also has a constitutionally guaranteed right to effective assistance of counsel, and to a free transcript

[176] There are no special obligations on the state -- and no special rules apply -- to instigate criminal investigations if reliable information points to a life threatening situation.

[177] The Supreme Court is currently considering whether the rape of a young child – without her being killing – is sufficiently proportionate an offence to make the defendant death-eligible. James Vicini, *Supreme Court to Rule on Death Penalty for Child Rape*, Reuters.com, Jan. 4, 2008, http://www.reuters.com/article/topNews/idUSN0432297020080104.

[178] *In 2007, 42 inmates were executed, 11 fewer than in 2006,* at www.ojp.usdoj.gov/bjs/glance/exe.htm (visited last Mar. 9, 2008); *Advance count of executions: January 1, 2007 – December 31, 2007*, at www.ojp.usdoj.gov/bjs/pub/html/cp/2006/tables/cp06sta.htm (visited last Mar. 9, 2008)(jurisdictional breakdown of number of executions).

[179] Roper v. Simmons, 543 U.S. 551 (2005).

[180] *See, e.g.*, Baze v. Rees, 217 S.W.3d 207 (Ky.), *cert. granted*, 128 S. Ct. 34 (2007).

[181] Avena and Other Mexican Nationals (Mexico v. United States of America), 2004 I.C.J. 12 (Mar. 31).

and government-paid counsel if he is indigent.[182] However, these rights do not extend to subsequent appeals the state may allow.[183] Only the defendant can appeal from an adverse trial verdict. Even if the defendant was acquitted because an erroneous ruling by the trial judge excluded critical evidence from the government's case, principles of Double Jeopardy forbid the defendant's retrial. That is why these matters are usually settled, and appealed if the prosecution loses, before the actual trial. Double Jeopardy would also prevent the retrial of a defendant who was convicted or acquitted only of a lesser included offence because the government had failed to charge him with the greater offence.[184]

The appellate court may reverse convictions because of lack of evidence, ineffective assistance of counsel, failure of the trial court to suppress evidence that was unconstitutionally obtained, improper prosecutorial argument, improper instructions to the jury, and many other legal grounds. In general, the thrust of recent cases is that the defendant will only succeed in a constitutional challenge on appeal if he can establish not only that there was error, but that the error "so infected the trial with unfairness as to make the resulting conviction a denial of due process."[185]

In Darden v. Wainwright,[186] for example, the Supreme Court disapproved of the prosecutor's repeated references to the defendant in closing argument as a "vicious animal." However given the strength of the government's case and the viciousness of the murder in question, the Court concluded that this did not render the trial unfair. In earlier cases, however, the Court was more inclined to reverse the conviction due to constitutional error, without requiring the defendant to establish the unfairness of the trial taken as a whole, and many of these cases are still good law.[187]

In federal courts, appeals were successful about eight percent of the time in 1990, with successful appeals in state courts ranging from five to ten percent.[188] However, a "successful" appeal usually only wins the defendant a new trial, and not a complete dismissal of the charges, and it is not uncommon for such a defendant to be retried. Only if

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[182] *See* Ross v. Moffitt, 417 U.S. 600 (1974), and cases cited therein.
[183] *Id*. The Court's reasoning was that subsequent appeals, usually to the state supreme court, are discretionary with the court, and are more for the purpose of resolving questions of law than for providing the defendant with a second chance to reverse his conviction. The defendant in such discretionary review has the benefit of a transcript and a brief from his first appeal. If the highest court grants discretionary review, states invariably appoint counsel to fully brief and argue the case.
[184] Brown v. Ohio, 432 U.S. 161 (1977). *But see* United States v. Dixon, 509 U.S. 688 (1993) (limiting this doctrine in certain circumstances).
[185] Darden v. Wainwrig*ht,* 477 U.S. 168 (1986).
[186] *Id*.
[187] *See, e.g*., Griffin v. California, 380 U.S. 609 (1965) (prosecutorial comment on the failure of the defendant to testify at trial is reversible error *per se*) *See also* Mapp v. Ohio, 367 U.S. 643 (1961) (admission of illegally seized evidence at trial is reversible error *per se*).
[188] Kamisar, LaFave, Israel & King, *supra*, at 20.

the appellate court reverses the conviction for insufficient evidence does this amount usually to an outright acquittal.

In addition to these "direct appeals" many states allow defendants to "collaterally attack" their convictions on certain limited grounds. Once these state remedies are exhausted, the defendant may go to federal court to claim that his conviction violated the United States Constitution. This is referred to as "habeas corpus," a writ directed to the prison warden who has physical custody of the prisoner ordering him to release the prisoner. In 1996, Congress severely cut back on the ability of state prisoners to get habeas corpus relief, an action the Supreme Court upheld.[189] The availability of this collateral relief causes long delays between the imposition of death sentences and the actual execution of those sentenced to death. A substantial percentage of such prisoners die of other causes, or have their death sentences commuted or their convictions reversed, before they are executed.

Should a miscarriage of justice be detected either once the time has passed for an appeal or a post-conviction attack on a conviction or should the evidence available not fit into the legal categories available for such legal action, the only remedy available to a prisoner is the pardon power of the governor or President, respectively. Pardons or sentence commutations, however, are acts of mercy, and have been given out increasingly less frequently as many consider them elitist.

Both defence and prosecution may appeal from a sentence – except that the prosecution may not appeal the rejection of a capital sentence. Sentence appeals are more likely in guideline states where they may be based on the court's incorrect application or interpretation of the guidelines. Some constitutional objections may also be raised in such appeals, including Eighth Amendment[190] or Sixth Amendment objections.[191] The Court has failed to develop a robust proportionality analysis in non-death cases, in contrast to capital cases.[192]

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[189] *Id.*

[190] *See, e.g.,* Ewing v. California, 538 U.S. 11 (2003) (rejecting claim that 25-to-life sentence for recidivist under California's three-strikes-law was "cruel and unusual punishment"); Harmelin v. Michigan, 501 U.S. 957 (1991)(life sentence without parole upheld for first-time offender who possessed 672 grams of cocaine).

[191] Booker v. United States, 543 U.S. 220 (2005); Blakely v. Washington, 542 U.S. 296 (2004); Apprendi v. New Jersey, 530 U.S. 466 (2000).

[192] Coker v. Georgia, 433 U.S. 584 (1977) (death sentence disproportionate for rape of an adult woman); Tison v. Arizona, 481 U.S. 137 (1987)(killers must have at least mens rea of reckless indifference to human life to be subject to the death penalty); Atkins v. Virginia, 536 U.S. 304 (2002)(execution of mentally retarded offenders barred by the Eighth Amendment); Roper v. Simmons, 543 U.S. 551 (2005) (death sentence only applicable to those who were at least 18 at the time of the commission of the capital offence).

6. CONCLUSION

The most fundamental aspects of the American criminal justice system stem from English common law. These include an adversarial trial with counsel presenting the evidence to a jury drawn from the state and locality in which the crime was committed.

However, close governance of police procedures leading up to an arrest was not a part of the common law heritage, and, until the 1960's, even constitutional limits on federal agents' conduct did not apply to the States. In interpreting the Constitution to set rather detailed rules for the police to follow, the United States Supreme Court was in the vanguard in international terms. Since the "criminal procedure revolution" in the United States, many other countries have adopted rules that more formally restrict police powers, and advance the rights of defendants, than had been the case.

There are, however, two significant aspects of the American system other countries have not, and likely will not, adopt. These are the "mandatory" exclusionary rule and the judicial declaration of criminal rules, rather than their declaration in a legislatively promulgated code of procedure.

On the other hand, however, neither the judiciary nor the legislature has developed rules restricting punitive sentences so that U.S. criminal sanctions today count among the most punitive in the Western world and the United States has the largest prison population in the world. Because of the severity of potential penalties, protections of the rights of criminal defendants become ever more crucial and the stakes about winning the exclusion of evidence are high on both sides.

Attempts to deal with national security matters have so far largely taken place outside the regular criminal justice process through the creation of special military commissions. Legislation extending wire-tapping authority and interrogation measures has largely aimed at expanding the powers of national security agencies. They are also empowered to secretly arrest and detain individuals, at least outside the United States. In addition, the immigration system through its power to deport has been used to remove individuals from the United States who are considered security threats. It may also exclude select individuals from entering the United States. Finally, national security agencies and law-enforcement agencies have taken advantage of extraordinary rendition procedures. While such circumvention of the criminal justice process will protect that process, it opens the

possibility of increasingly coercive measures being used, including the expansion of so-called border searches ever further into U.S. territory and the expansion of wire-tapping authority.