THE FIFTH AMENDMENT CRIMINAL PROCEDURE CLAUSES

By Paul Cassell and Kate Stith[1]

Three of the five clauses of the Fifth Amendment pertain to procedures that must, or must not, be used in criminal prosecutions.

Grand Jury Indictment

The first of the criminal procedure clauses requires that felony offenses in federal court be charged by grand jury indictment. (A grand jury is a panel of citizens that hears evidence that the prosecutor has against the accused, and decides if an "indictment," or formal criminal charges, should be filed against them.) This is one of only a few provisions of the Bill of Rights that the Supreme Court has not held to apply to the states through the Due Process Clause of the Fourteenth Amendment (the others being the Third Amendment's protection against quartering of soldiers, the Sixth Amendment's requirement of trial in the district where the crime was committed, the Seventh Amendment's requirement of jury trial in certain civil cases, and possibly the Eighth Amendment's prohibition of excessive fines).

That the Court has been reluctant to apply the grand jury requirement to the states is unsurprising. While the origins of the grand jury are ancient—an ancestor of the modern grand jury was included in the Magna Carta—today, the United States is the only country in the world that uses grand juries. In addition to the federal government, about half the states provide for grand juries—though in many of these there exist other ways of filing formal charges, such as a prosecutorial information followed by an adversarial but a relatively informal "preliminary hearing" before a judge (to make sure there is at least "probable cause" for the charge, the same standard of proof that a grand jury is told to apply). As early as 1884, the Supreme Court held that the grand jury is not a fundamental requirement of due process, and Justice Holmes' lone dissent from that judgment has been joined by only one Justice (Douglas) in the intervening years.

Recent scholarship has upset the previous understanding that the grand jury was from its inception venerated because it was not only a "sword" (accusing individuals of crimes) but also a "shield" (against oppressive or arbitrary authority). In its early incarnation in England, the grand jury was fundamentally an instrument of the crown, obliging unpaid citizens to help enforce the King's law. Over the centuries, the idea of a citizen check on royal prerogative

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became more valued. By the time of the framing of our Constitution, both the "grand" jury (from the French for large, in size—today grand juries are often composed of 24 citizens), and the "petit" jury (from the French for small—today criminal trial juries may be composed of as few as six citizens) were understood, in both Britain and the colonies, to be important bulwarks of freedom from tyranny.

Few in the modern era would espouse such a view. The former Chief Judge of the New York Court of Appeals (that state's highest court) famously remarked in recent years that because prosecutors —agents of the executive branch—control what information a grand jury hears, any grand jury today would, if requested, "indict a ham sandwich." While this is a useful exaggeration—the Supreme Court has held that federal grand juries need not adhere to trial rules of evidence, or be told of evidence exculpating the defendant—few prosecutors, fortunately, are interested in indicting ham sandwiches! Rather, the greatest advantage grand juries now provide (at least in federal courts, which are not as overburdened as state courts) is allowing the prosecutor to use the grand jury as a pre-trial "focus group," learning which evidence or witnesses are especially convincing, or unconvincing.

At least in federal court, grand juries are here to stay. The institution is written into the Fifth Amendment too clearly to be "interpreted" away. Moreover, neither pro-law enforcement forces (for obvious reasons) nor allies of those accused (because occasionally grand juries do refuse to indict—in the legal parlance, returning a "no true bill") have reason to urge their abolition through amendment of the Constitution.

Double Jeopardy Protections

The Fifth Amendment's second procedural protection is the Double Jeopardy Clause, which provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." The Clause's core purpose is straightforward: to prohibit the government from forcing a person to undergo repeated trials for the same crime. As Justice Black explained in an oft-quoted passage in *Green v. United States* (1957), "[t]he underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense . . . ."

While the Double Jeopardy Clause's underlying principle is straightforward, the Clause has spawned complex jurisprudence. The current rule, set forth in cases such as *Crist v. Bretz* (1978), is that jeopardy begins, or "attaches," in a jury trial when the jury is empaneled and sworn. Much of the double jeopardy jurisprudence addresses circumstances in which re-prosecution is either permitted or barred after jeopardy has attached. One common situation where this question arises is when the government seeks a retrial after a mistrial—a trial terminated before a final judgment is reached. If the defendant consented to the mistrial, retrial

is permitted. But an early Supreme Court case, *United States v. Perez* (1824), established that even without consent, the defendant may be retried as long as declaring a mistrial was a "manifest necessity." In Perez, the manifest necessity was a hung jury—a jury that could not agree upon a verdict. While the term "necessity" might imply a nearly impossible burden for a retrial, the Supreme Court has been fairly generous in recognizing such circumstances. On the other hand, retrial is not permitted after an acquittal, a finding that the defendant is not guilty. Although it has not addressed the rare situation where a jury has been bribed, the Supreme Court has made clear that the Double Jeopardy Clause flatly bars re-prosecution for the same offense. Controversially, this absolute bar applies even where the acquittal was the result of erroneous trial court rulings. (As a result, in federal and most state courts, the prosecution is able to take an immediate appeal of a pre-trial ruling suppressing evidence, before the jury is empaneled and jeopardy attaches.) To justify this approach, the Court has drawn analogies to the common law plea of autrefois acquit (formerly acquitted) and expressed concern that the Government, with its superior resources, not be permitted to wear down a defendant.

The rules for re-prosecution following a conviction are different. An 1896 decision, *Ball v. United States*, recognized an exception to the general prohibition against re-prosecuting someone who has already been convicted: when the convicted person has managed through an appeal to overturn the conviction (on grounds other than insufficiency of evidence, which is equivalent to an acquittal by the appellate court). In later decisions, the Court has explained that this exception rests on considerations related to the sound administration of justice. Society should not have to bear the burden of having a guilty defendant set free because a conviction is overturned for procedural error, such as erroneously admitted evidence or faulty jury instructions. And defendants, too, may benefit, as appellate courts might not zealously protect against errors if the price of reversal is irrevocably setting a defendant free.

To the general public, perhaps the most mysterious line of double jeopardy jurisprudence is the "dual sovereignty doctrine." Under this doctrine, a defendant can be prosecuted twice for what appears to be the same crime—once by federal authorities and once by state authorities, or even by two different states if they both have jurisdiction over the criminal conduct. In the Rodney King case, for instance, Los Angeles police officers were re-prosecuted for the beating of Rodney King and convicted of federal civil rights violations after having been acquitted in state court of the same beating. In such situations, the Court's theory has been that a defendant is not being prosecuted twice for the "same offence," but rather for separate offenses "against the peace and dignity of both" sovereigns and thus may be punished by both. Strong policy arguments can be made in favor of the Court's interpretation, as it prevents, for instance, a state from barring federal civil rights charges through bungling (or, worse, sabotaging) the initial state prosecution. Likewise, a person who has committed a serious crime will not be able to effectively immunize herself against prosecution by another sovereign

for that offense by convincing local or state officials to let her quickly plead guilty to a minor, lesser offense.

As a matter of original meaning, however, the Court's dual sovereignty jurisprudence is highly questionable. When the Bill of Rights was adopted, the double jeopardy principle was understood as providing inter-sovereign protection. The dual sovereignty doctrine may illustrate a situation where an "original meaning" interpretation of the Constitution provides greater protection for criminal defendants than does a more policy based approach. In addition, one might argue that the Fourteenth Amendment, understood to have applied double jeopardy protections against the states, also is a source of authority for the federal government to vindicate civil rights by means of re-prosecution in situations like the Rodney King case—but this would not justify the Court's allowance of dual state prosecutions.

Privilege Against Compelled Self-Incrimination

The third procedural protection in the Fifth Amendment is the right not to "be compelled in any criminal case to be a witness against" oneself. This right is often referred to as the Fifth Amendment Privilege or, more colloquially, as the right to "take the Fifth." The Supreme Court has many times affirmed the most natural understanding of these words: the defendant in a criminal case cannot be compelled to testify—that is, she can't be called to the stand and thereafter be held in contempt of court (usually leading to immediate imprisonment) if she refuses to answer questions relevant to the charges against her.

But over the years, the Court has read into these words many additional rights, both inside the criminal courtroom and in settings far removed from criminal court. *In Griffin v. California* (1965) the Court struck down a California rule of evidence that allowed the jury in a criminal case to consider as evidence of guilt the defendant's failure to testify—his silence in the face of the evidence the prosecution had introduced against him. The reasoning was that if the jury could draw a negative inference from the defendant's silence, this could induce a defendant who preferred not to testify to decide nonetheless to take the stand, at least where the defendant thought that his testimony would be less damaging than his complete silence. While knowing that the jury could draw a negative inference is not being legally "compelled" in the way that being held in contempt is, the Court implied that the true purpose of the Fifth Amendment Privilege is not only to protect a criminal defendant from compelled self-incrimination, but also to ensure that no one is made "worse off" by asserting the Fifth than by not asserting it.

The idea that "taking the Fifth" should not lead to any penalty took hold in settings outside the criminal courtroom as well. In a series of cases in the late 1960s and 1970s, the Supreme Court held that the government as employer may not condition continued

employment on cooperation in the investigation of possible violations of its policies (though private employers routinely do this without any constitutional limitation). For instance, in *Gardner v. Broderick* (1968), the New York City Police Department was held to have violated the Fifth Amendment rights of a police officer when it fired him after he refused to waive the Privilege and testify before a grand jury that was investigating police corruption. Many observers think the better approach in these cases would have been to hold that continued public employment (or an occupational license) may be conditioned on providing pertinent information (after all, there is no constitutional right to be a police officer or a licensed attorney), but that the individual has a right to assert the Privilege in any governmental investigation related to her public employment or occupational license.

Indeed, it has long been understood that the Fifth Amendment Privilege can be asserted by any witness (not just the defendant) in a criminal trial, and by any witness in a civil trial, grand jury, legislative hearing, or other government proceeding. In effect, the words "in any criminal case" in the Fifth Amendment have been understood not to refer to the type of proceeding where the Privilege may be asserted, but as short-hand for the idea that a witness should not be required to give responses that could be used against him in a present or future criminal case. Given its broad applicability, the Privilege is commonly referred to as the right against compelled "self-incrimination." Importantly, however, whereas the jury in a criminal case can't hold the defendant's failure to testify against her in any way (according to Griffin), the fact-finders in these other settings are permitted to draw a negative inference from the witness's assertion of the Privilege. While the Privilege may thus be invoked by any witness, the government can defeat the Privilege and require that the witness testify (under pain of contempt) by granting the witness "immunity." Except for a perjury prosecution, neither the witness's immunized statements nor any evidence deriving from those statements may be admitted against her in a criminal prosecution. *Kastigar v. United States* (1972).

The most important, and controversial, decision applying the Fifth Amendment Privilege outside the criminal trial is *Miranda v. Arizona* (1966). In order to protect criminal suspects from not only "physical brutality" but also "informal compulsion" that is "inherent" in custodial interrogation, the Supreme Court in *Miranda* devised a set of warnings that the police must give before custodial questioning takes place. The individual must be told that she has a right to remain silent, that any statements she makes may be used against her, and that she has the right to have an attorney present during questioning, including the right to a court-appointed attorney if she cannot afford one. The Court recognized that an individual could "knowingly and intelligently waive these rights." Critically, the Court fashioned an exclusionary rule to enforce the right to Miranda warnings: "unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against" the defendant at trial.

Some heralded *Miranda* as a better way to regulate police interrogations than the due process approach the Supreme Court had forged during the previous three decades. In *Brown v. Mississippi* (1936), a deputy sheriff leading a mob of white men had obtained confessions from two black defendants by sustained and brutal lashings using "a leather strap with buckles on it." This clearly constituted "compulsion," but the Fifth Amendment Privilege had not yet been applied against the states though the Fourteenth Amendment's Due Process Clause. (That would not come until *Malloy v. Hogan* (1964).) So the Court invoked the Due Process Clause directly, holding that confessions were "involuntary" and their admission at the men's trial violated their due process rights. In the view of some justices, however, the subjective "totality of the circumstances" test the Court developed to determine whether a defendant's confession was "involuntary" was unwieldy. And it provided murky guidance for both lower courts and law enforcement, especially in cases with no physical coercion. *Miranda*, in the view of its supporters, seemed to provide a clear line-in-the-sand for everyone. Although the Court made clear that even if *Miranda* was followed, a confession might be inadmissible on due process/voluntariness grounds, in fact both the Supreme Court and lower courts have tended to consider a statement presumptively voluntary if made after waiver of Miranda rights.

Miranda was controversial for many reasons. The most serious charge was that whether or not the warnings were good policy, the decision was illegitimate: the Court had just made up a new rule, nowhere found in the Constitution. To be sure, there is much circumstantial evidence that the Fifth Amendment Privilege was adopted in part to constitutionalize a common-law maxim that both British citizens and their American counterparts thought fundamental: *nemo tenetur prodere seipsum* (no one is bound to accuse himself). In the late eighteenth century, this was understood to forbid extracting confessions by means of physical or spiritual coercion; the latter consisted of forcing a person to take an oath to God and state the truth—undoubtedly coercive in a highly religious society. But nearly two centuries later the Supreme Court was saying that the Fifth Amendment also prohibited the assertedly "inherent coercion" that exists in routine station-house questioning, unless Miranda's warnings are given and waived. Most pointedly, the warnings themselves looked more like legislative rule-making than constitutional interpretation. The Court, in *Miranda* and two other cases decided shortly before *Miranda*, seemed bent on reducing, if not eliminating, an important tool of evidence-gathering in criminal cases—questioning the defendant upon arrest. After all, who wouldn't leap at the chance to have a lawyer before dealing with the police? And no lawyer would allow a client to submit to immediate questioning, as all of the justices knew.

In fact, *Miranda* has not prevented people from making incriminating station-house statements, as initially some of its detractors had feared and some of its supporters had anticipated. It appears to be an aspect of human nature that many recently accused persons are eager to talk their way out of trouble. *Miranda*'s critics, however, believe that *Miranda* has noticeably reduced the number of confessions by allowing suspects to "lawyer up" rather than

face questioning; while *Miranda*'s supporters contend that any reduction in confessions is quite modest, and note that police officers have learned to live with the decision.

In a series of subsequent decisions, the Supreme Court gave further ammunition to those who considered *Miranda* to be nothing more than judicial legislation, by creating exceptions to the broad exclusionary rule the decision had announced. In *Harris v. New York* (1971), the Court held that even if Miranda was violated, any voluntary statements could be admitted to attack the defendant's credibility if the defendant took the stand. In *New York v. Quarles* (1974), the Court held admissible the defendant's statement, obtained without Miranda warnings, as to where he had hidden his gun in a supermarket, because of the "public safety" need to secure the weapon immediately. Quarles created a potentially large loophole and undercut the constitutional basis for *Miranda*, as the Court said that there was no "actual coercion" in that case even though *Miranda* warnings weren't given. That same year, the Court held in *Michigan v. Tucker* (1974) that *Miranda*'s exclusionary rule applied only to the defendant's statements, not to testimony by other witnesses whom the police discovered on the basis of the defendant's statements. Ten years later the Court held that that statements elicited in violation of *Miranda* could be used in deportation proceedings. The Court also cast doubt on the scope of the "right to remain silent," holding in *Fletcher v. Weir* (1982) that states could adopt rules allowing the defendant's silence after arrest but before receiving Miranda warnings, to be used to attack his credibility.

It appeared to many that *Miranda* would in due course be overturned. Quarles had referred to *Miranda* warnings as merely "prophylactic," and Tucker had conceded that the warnings were "not themselves rights protected by the Constitution." In 1999, the Fourth Circuit agreed with the latter statement, and applied a little-noticed statute that Congress had enacted in 1968 in response to *Miranda*, under which "a confession . . . shall be admissible in evidence [in federal court] if it is voluntarily given." 18 U.S.C. § 3501(a). The Supreme Court reversed, 7-2, holding that Congress was without authority to enact § 3501(a); despite language in *Quarles* and *Tucker*, *Miranda* had indeed "announced a constitutional rule." *Dickerson v. United States* (2000).

Even in the wake of Dickerson, however, the scope and status of Miranda remain unclear. In *Chavez v. Martinez* (2003), four justices squarely held that violation of Miranda is not a violation of the Fifth Amendment Privilege, which only prohibits the government from admitting compelled statements in a subsequent prosecution of the suspect. Two other justices, concurring, distinguished between this "core" prohibition and "extensions" such as *Miranda*. The Court has also further cut back on *Miranda*'s exclusionary rule, holding in *United States v. Patane* (2004) that as long as the defendant's statements were voluntary, any physical fruits of them are admissible. And in *Salinas v. Texas* (2013), the Court further equivocated on the "right to silence": it was proper to admit the defendant's silence during police questioning that took

place when the defendant was not in police custody, despite the absence of *Miranda* warnings, and the defendant had waived the Privilege by failing to affirmatively assert it.

Miranda's future remains uncertain. While the waiver and warning requirement has seemingly become entrenched in American police practices, the decision's approach to regulating police questioning still draws fire from all quarters. Critics of police questioning believe that the *Miranda* line of cases does not go far enough, because it has permitted psychological tricks and other aggressive tactics so long as an officer obtains a *Miranda* waiver at the start. Supporters of broader questioning counter that *Miranda* is perverse public policy, since career criminals are most likely to lawyer up while the vulnerable and the innocent are most likely to waive their *Miranda* rights. As a result, considerable interest remains in alternatives (or supplements) to *Miranda*, such as a requirement that police officers record interrogation sessions.