

受贿案件口供依赖破解之法律检索指南

Legal Research Pathfinder--To Crack the Oral Confession Reliance in the Crime of Accepting Bribes

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第一部分 受贿案件口供依赖破解论题的提出背景

贿赂犯罪作为国家公职人员利用职务便利实施的贪利性犯罪, 在社会转型的时期更加复杂化和智能化, 并且呈现出国际化的趋势, 成为引发社会矛盾、诱发社会风险、毒化社会风气的重要源头性因素。

贪污贿赂罪, 是指国家工作人员利用职务之便, 贪污、挪用公共财物, 索取、收受贿赂, 不履行法定义务, 侵犯职务行为的廉洁性、不可收买性的行为。贪污贿赂罪分为两大类, 即广义的贪污犯罪与贿赂犯罪。贿赂犯罪包括各种受贿犯罪、行贿犯罪与介绍贿赂罪。贿赂犯罪表现为以职务换取财物或者相反, 侵犯了职务行为的不可收买性。¹

我国一直重视反腐败工作。2016 年 1 月 12 日, 中共中央总书记、国家主席、中央军委主席习近平在中国共产党第十八届中央纪律检查委员会第六次全体会议上全面总结了三年来的党风廉政建设和反腐败斗争成果, 强调党中央坚定不移反对腐败的决心没有变, 坚决遏制腐败现象蔓延势头的目标没有变。²加强研究贪污贿赂犯罪, 有利于依法有效查处和惩治贪污贿赂犯罪, 有利于建设干部清正、政府清廉、政治清明的廉洁政治。

贿赂犯罪不易被发现且犯罪证据收集也存在难度。间接证据限制了检察机关对贿赂犯罪的起诉。而口供包含的信息却能够满足贿赂侦查收集证据的需要, 突破因时间和技术等带来的侦破瓶颈, 因此法律实务中的侦查机关倚重犯罪嫌疑人的口供并采取法律禁止的方式、方法获取口供, 最终导致审判阶段对此类非法证据的排除或者生成冤假错案, 也严重侵犯犯罪嫌疑人或者被告人的人权, 撼动司法公信力。合法有效地收集贿赂案件中定罪量刑的证据对于准确打击此类犯罪, 实现立法初衷意义重大。本命题的论文试图借鉴域外国家的法律法规、司法实践及理论著述, 结合我国国情, 提出可行的破解我国贿赂案件口供依赖的思路。

第二部分 受贿案件口供依赖破解之文献检索指南概述

一、关键词

受贿 (taking bribes), 口供 (oral confession), 刑讯逼供 (extort confession by torture), 自证其罪 (self-incrimination), 沉默权 (the right to silence), 法律推定 (legal presumption), 正当程序 (due process), 特殊侦查措施 (special investigative measures), 污点证人刑事责任豁免制度 (immunity of witness)

¹张明楷著《刑法学》, 法律出版社 2011 年版, 1044 页。

²参见《习近平总书记谈 2016 年反腐败斗争: 要把握好“五点”》,

<http://cpc.people.com.cn/xuexi/n1/2016/0113/c385474-28046492.html>, 2016 年 4 月 30 日访问。

二、5W 分析法

(1) Who (贿赂案件口供涉及的主体)

法官 (judge), 法院 (the people's court), 检察院 (the people's procuratorate), 公务人员 (civil servant), 侦查人员 (investigator), 犯罪嫌疑人 (criminal suspect), 被告 (defendant)

(2) What (公诉机关及法院在贿赂案件中对口供的依赖)

证据 (evidence), 口供 (oral confession), 沉默权 (right of silence)

(3) Where (贿赂案件口供依赖存在的范围)

法院 (the people's court), 检察院 (the people's procuratorate)

(4) When (贿赂案件口供依赖的时间)

侦查 (criminal investigation), 起诉 (initiation of public prosecution), 审判 (trial)

(5) Why (贿赂案件口供依赖的可能原因)

侦查的措施 (investigative measures), 侦查人员的素质 (investigator's quality), 贿赂案件的特点 (the characteristics of taking-bribe cases), 口供的优点 (the advantages of oral confession), 法律推定的缺失 (the absence of legal presumption)

三、检索词语

1. 中文检索词语

口供, 贿赂, 法律推定, 证据

2. 英文检索词语

self-incrimination; evidence law; legal presumption; right to counsel; immunity of witness

四、阅读对象

作为客观现象的口供依赖在中国刑事司法实践中长期存在, 成为诸多问题之源。立法与司法实践中虽努力改进, 却一直未能走出治理模式固化、治理策略悖反、治理心态矛盾的困境。贿赂案件因为其天然的特性使得口供依赖问题更加严重和凸显。论文试图对贿赂案件口供依赖提出适合中国国情的、可行的破解路径, 因此与此论题相关的部门和人员都是本论文的阅读对象, 具体包括检察院的侦查人员、检察官; 法官; 专注于贪污贿赂犯罪或者刑事领域的律师; 刑法、刑事诉讼法领域的研究生与学者; 立法部门从事此领域立法工作的工作人员。

五、一次资源与二次资源 (Primary Source V. Secondary Source)

1. 一次资源 (Primary Source)

一次资源也称规范性法律资源。中国的规范性法文献主要指全国人大及其常委会制定的法律与有关法律问题的决议文件, 国务院及其所属政府部门制定发布的行政法规、规章与规范性文件, 拥有地方立法权的地方各级人大及其常委会制定发布的地方性法规, 地方政府与所属部门制定的地方政府规章与规范性文件, 国家最高审判与法律监督机关 (人民法院、人民检察院) 制定发布的司法解释性文件。³中国的规范性法文献也应包括人民法院的裁判文书和仲裁机构的裁决书。因此, 中国的规范性法文献还可包括成文法和判例法。⁴具体包括:

(1) 中国成文法

● 现行法律

³田建设、马杰:“对我国规范性法文件出版现状的认识”,《法律文献信息与研究》2002年第3期。

⁴罗伟主编:《法律文献引证注释规范(第二版)》,北京大学出版社2013年8月版。

- 国务院颁布的行政法规
- 国务院规范性文件（通知、意见、决定、批复）
- 国务院各机构发布的规章
- 国务院各机构发布的规范性文件（如公告、通知、意见等）
- 地方性法规
- 最高人民法院发布的司法解释、规则、条例等
- 最高人民检察院发布的司法解释、规则、条例等
- 行政、立法、司法部门联合通知
- 引自法律法规汇编
 - (2) 案例、裁判文书、仲裁裁决书
 - (3) 条约、公约、宣言、议定书、国际惯例

2. 二次资源（Secondary Source）

二次资源也称非规范性法律资源，指用来解释法律的法学教材、学习辅导、法律百科全书、法律期刊、学术专著、法律分题综述、执业指南等。

- 法学教材
- 学习辅导
- 法律百科全书
- 法律期刊
- 学术专著
- 法律分题综述
- 执业指南

六、检索工具

1. 中国检索网站：北大法宝，中国知网
2. 国外检索网站：Westlaw; Lexis; Heinonline

七、检索策略

资源检索时，选择从“一次资源到二次资源”还是“二次资源到一次资源”主要依赖于研究者对所研究课题的熟悉情况。一般情形下，如果对所研究的课题不熟悉，可以先从检索二次资源开始，从二次资源中了解研究问题可能涉及的知识，然后再进行一次资源的检索。关于本论题的法律检索，因对所研究的题目有所了解，我采用了从“一次资源到二次资源”这一路径。

第三部分 文献检索之中文一次资源与二次资源

一、中文一次资源

1. 现行法律

选用数据库：北大法宝

检索步骤：法律法规—中央法规司法解释—匹配：精确—标题，在检索框中输入“刑法”

检索结果：中央法规司法解释 30 篇，经筛选，

- 1997 年《中华人民共和国刑法》第 385 条、388 条（2015 年修正）（载“北大法宝”，【法宝引证码】 CLI. 1. 17010）

第三百八十五条 【受贿罪】国家工作人员利用职务上的便利，索取他人财物的，或者非法收受他人财物，为他人谋取利益的，是受贿罪。

国家工作人员在经济往来中，违反国家规定，收受各种名义的回扣、手续费，归个人所有的，以受贿论处。

第三百八十八条 【受贿罪】国家工作人员利用本人职权或者地位形成的便利条件，通过其他国家工作人员职务上的行为，为请托人谋取不正当利益，索取请托人财物或者收受请托人财物的，以受贿论处。

2. 最高人民法院和最高人民检察院发布的司法解释、规则、条例等

选用数据库：北大法宝

检索步骤：法律法规—中央法规司法解释—匹配：精确—标题，在检索框中输入“贿赂”

检索结果：中央法规司法解释 94 篇。经筛选，

● 《最高人民法院、最高人民检察院关于办理贪污贿赂刑事案件适用法律若干问题的解释》（法释[2016]9号）

第四条 贪污、受贿数额特别巨大，犯罪情节特别严重、社会影响特别恶劣、给国家和人民利益造成特别重大损失的，可以判处死刑。

符合前款规定的情形，但具有自首，立功，如实供述自己罪行、真诚悔罪、积极退赃，或者避免、减少损害结果的发生等情节，不是必须立即执行的，可以判处死刑缓期二年执行。

符合第一款规定情形的，根据犯罪情节等情况可以判处死刑缓期二年执行，同时裁判决定在其死刑缓期执行二年期满依法减为无期徒刑后，终身监禁，不得减刑、假释。

第七条 为谋取不正当利益，向国家工作人员行贿，数额在三万元以上的，应当依照刑法第三百九十条的规定以行贿罪追究刑事责任。

行贿数额在一万元以上不满三万元，具有下列情形之一的，应当依照刑法第三百九十条的规定以行贿罪追究刑事责任：

（一）向三人以上行贿的；

（二）将违法所得用于行贿的；

（三）通过行贿谋取职务提拔、调整的；

（四）向负有食品、药品、安全生产、环境保护等监督管理职责的国家工作人员行贿，实施非法活动的；

（五）向司法工作人员行贿，影响司法公正的；

（六）造成经济损失数额在五十万元以上不满一百万元的。

第八条 犯行贿罪，具有下列情形之一的，应当认定为刑法第三百九十条第一款规定的“情节严重”：

（一）行贿数额在一百万元以上不满五百万元的；

（二）行贿数额在五十万元以上不满一百万元，并具有本解释第七条第二款第一项至第五项规定的情形之一的；

（三）其他严重的情节。

为谋取不正当利益，向国家工作人员行贿，造成经济损失数额在一百万元以上不满五百万元的，应当认定为刑法第三百九十条第一款规定的“使国家利益遭受重大损失”。

第九条 犯行贿罪，具有下列情形之一的，应当认定为刑法第三百九十条第一款规定的“情节特别严重”：

（一）行贿数额在五百万元以上的；

（二）行贿数额在二百五十万元以上不满五百万元，并具有本解释第七条第二款第一项至第五项规定的情形之一的；

（三）其他特别严重的情节。

为谋取不正当利益，向国家工作人员行贿，造成经济损失数额在五百万元以上的，应当认定为刑法第三百九十条第一款规定的“使国家利益遭受特别重大损失”。

第十条 刑法第三百八十八条之一规定的利用影响力受贿罪的定罪量刑适用标准，参照本解释关于受贿罪的规定执行。

刑法第三百九十条之一规定的对有影响力的人行贿罪的定罪量刑适用标准，参照本解释关于行贿罪的规定执行。

单位对有影响力的人行贿数额在二十万元以上的，应当依照刑法第三百九十条之一的规定以对有影响力的人行贿罪追究刑事责任。

第十二条 贿赂犯罪中的“财物”，包括货币、物品和财产性利益。财产性利益包括可以折算为货币的物质利益如房屋装修、债务免除等，以及需要支付货币的其他利益如会员服务、旅游等。后者的犯罪数额，以实际支付或者应当支付的数额计算。

第十三条 具有下列情形之一的，应当认定为“为他人谋取利益”，构成犯罪的，应当依照刑法关于受贿犯罪的规定定罪处罚：

- (一) 实际或者承诺为他人谋取利益的；
- (二) 明知他人有具体请托事项的；
- (三) 履职时未被请托，但事后基于该履职事由收受他人财物的。

国家工作人员索取、收受具有上下级关系的下属或者具有行政管理关系的被管理人员的财物价值三万元以上，可能影响职权行使的，视为承诺为他人谋取利益。

第十四条 根据行贿犯罪的事实、情节，可能被判处三年有期徒刑以下刑罚的，可以认定为刑法第三百九十条第二款规定的“犯罪较轻”。

根据犯罪的事实、情节，已经或者可能被判处十年有期徒刑以上刑罚的，或者案件在本省、自治区、直辖市或者全国范围内有较大影响的，可以认定为刑法第三百九十条第二款规定的“重大案件”。

具有下列情形之一的，可以认定为刑法第三百九十条第二款规定的“对侦破重大案件起关键作用”：

- (一) 主动交待办案机关未掌握的重大案件线索的；
- (二) 主动交待的犯罪线索不属于重大案件的线索，但该线索对于重大案件侦破有重要作用的；
- (三) 主动交待行贿事实，对于重大案件的证据收集有重要作用的；
- (四) 主动交待行贿事实，对于重大案件的追逃、追赃有重要作用的。

第十五条 对多次受贿未经处理的，累计计算受贿数额。

国家工作人员利用职务上的便利为请托人谋取利益前后多次收受请托人财物，受请托之前收受的财物数额在一万元以上的，应当一并计入受贿数额。

第十六条 国家工作人员出于贪污、受贿的故意，非法占有公共财物、收受他人财物之后，将赃款赃物用于单位公务支出或者社会捐赠的，不影响贪污罪、受贿罪的认定，但量刑时可以酌情考虑。

特定关系人索取、收受他人财物，国家工作人员知道后未退还或者上交的，应当认定国家工作人员具有受贿故意。

● 《最高人民法院人民检察院关于检察机关反贪污贿赂工作情况的报告》(2013年)

最高人民法院 2008 年以来反贪污贿赂工作情况报告：查办和预防贪污贿赂犯罪是法律赋予检察机关的重要职责。党中央对反贪污贿赂工作高度重视，纳

入全面推进惩治和预防腐败体系建设整体格局进行部署、提出明确要求。全国人大及其常委会及时修订完善相关法律规定，加强执法检查 and 监督指导，为反贪污贿赂工作提供了重要保障。全国检察机关认真贯彻党的十七大、十八大关于反腐败斗争的决策部署，坚持反腐败领导体制和工作机制，不断加强和改进反贪污贿赂工作，为促进反腐倡廉建设、推动科学发展、保障群众权益、维护和谐稳定发挥了积极作用。

检察机关将以这次全国人大常委会听取和审议专项工作报告为契机，坚持以邓小平理论、“三个代表”重要思想和科学发展观为指导，牢记使命，锐意进取，不断加强和改进反贪污贿赂工作，努力为推进反腐倡廉建设、保障经济社会科学发展、实现中华民族伟大复兴的中国梦作出新的更大贡献！

● 《最高人民法院、最高人民检察院关于印发〈关于办理商业贿赂刑事案件适用法律若干问题的意见〉的通知》（法发〔2008〕33号）

一、商业贿赂犯罪涉及刑法规定的以下八种罪名：（1）非国家工作人员受贿罪（刑法第一百六十三条）；（2）对非国家工作人员行贿罪（刑法第一百六十四条）；（3）受贿罪（刑法第三百八十五条）；（4）单位受贿罪（刑法第三百八十七条）；（5）行贿罪（刑法第三百八十九条）；（6）对单位行贿罪（刑法第三百九十一条）；（7）介绍贿赂罪（刑法第三百九十二条）；（8）单位行贿罪（刑法第三百九十三条）。

七、商业贿赂中的财物，既包括金钱和实物，也包括可以用金钱计算数额的财产性利益，如提供房屋装修、含有金额的会员卡、代币卡（券）、旅游费用等。具体数额以实际支付的资费为准。

八、收受银行卡的，不论受贿人是否实际取出或者消费，卡内的存款数额一般应全额认定为受贿数额。使用银行卡透支的，如果由给予银行卡的一方承担还款责任，透支数额也应当认定为受贿数额。

九、在行贿犯罪中，“谋取不正当利益”，是指行贿人谋取违反法律、法规、规章或者政策规定的利益，或者要求对方违反法律、法规、规章、政策、行业规范的规定提供帮助或者方便条件。

在招标投标、政府采购等商业活动中，违背公平原则，给予相关人员财物以谋取竞争优势的，属于“谋取不正当利益”。

● 《最高人民检察院关于印发〈最高人民检察院关于检察机关反贪污贿赂工作若干问题的决定〉的通知》（高检发〔1999〕27号）

检察机关恢复重建以来，各级人民检察院牢固树立为党和国家工作大局服务的思想，认真履行法律监督职责，深入开展反贪污贿赂工作，取得了很大的成绩，积累了丰富的经验。同时也应该看到，在发展社会主义市场经济，实施依法治国方略的新形势下，检察机关反贪污贿赂工作面临的任务仍然十分繁重而艰巨。为适应形势发展的要求，全面落实新时期检察工作方针，总结以往的经验，立足于检察机关反贪污贿赂工作的跨世纪长远发展，贯彻“规范、提高、建设、发展”的精神，特作如下决定。

- 一、统一执法思想，保证反贪污贿赂工作健康深入发展
- 二、正确执行法律，规范办案活动
- 三、完善反贪工作机制，提高工作水平
- 四、健全落实规章制度，加强反贪污工作管理
- 五、坚持高标准、严要求，加强反贪干部队伍建设
- 六、完善经费和装备保障机制，增强反贪工作的科技含量

3. 案例、裁判文书

选用数据库:北大法宝

检索步骤:司法案例-匹配:精确-标题,在检索框中输入“受贿”,参照级别:公报案例或者指导性案例

检索结果:检索到公报案例 4 篇,指导性案例 162 篇。指导案例 4 篇如下:

● 《赛跃、韩成武受贿、食品监管渎职案》,云南省昆明市中级人民法院,2013.04.20,载“北大法宝”,【法宝引证码】CLI.C.2452166。

● 《胡林贵等人生产、销售有毒、有害食品,行贿;骆梅等人销售伪劣产品;朱伟全等人生产、销售伪劣产品;黎达文等人受贿,食品监管渎职案》,广东省东莞市中级人民法院,2012.08.21,载“北大法宝”,【法宝引证码】CLI.C.2452160。

● 《杨某玩忽职守、徇私枉法、受贿案》,广东省深圳市龙岗区人民法院,2012.11.05,载“北大法宝”,【法宝引证码】CLI.C.890157。

● 《潘玉梅、陈宁受贿案》,(2009)苏刑二终字第 0028 号,载“北大法宝”,【法宝引证码】CLI.C.514015。

通过阅读裁判主文,发现法院作为判决依据的主要证据都有被告的主动供述,即自白,显示了口供在受贿案件的定罪量刑中发挥着决定性的作用。通过部分阅读公报案例,同样发现上述特点。

4. 条约、公约

选用数据库:北大法宝

检索步骤:法律法规-中外条约,匹配:精确-标题,检索框中输入“反腐败公约”

检索结果:我国已加入的国际公约一个,如下,

● 《联合国反腐败公约》(2003.12.10),载《北大法宝》,【法宝引证码】CLI.T.3956。

二、中文二次文献

1. 中文著作

选用数据库:浙江大学光华法学院“我的图书馆”

检索步骤:多库检索框输入关键词-贿赂、推定,以及所有字段-刑事证据法,经筛选,检索到的较为合适的书籍有:

1.1 关键词:贿赂

● 刘方:《贪污贿赂犯罪的司法认定》,法律出版社 2016 年版

贪污贿赂犯罪中新的犯罪现象和新的法律适用问题不断出现,罪刑法定和打击惩治贪污贿赂犯罪之间所表现出来的矛盾比较尖锐,本书为惩治贪污贿赂犯罪的刑法适用提供了一个全新的应用模式,并在这二者之间确定了一个清晰的界限并提供了恰当的处理方法,便于办案人员在司法实践中具体操作。

● 布茹宁:《不要贿赂:发展中国家如何繁荣不腐败-how to thrive without bribes in developing》,光明日报出版社 2015 年版

本书介绍了西方一些发达国家关于反腐的成熟理念、经验和做法,发达国家的工业不只是向发展中国家提供工作岗位和物质财富,而且还应该提供建立在责任和信赖基础之上的工作文化,这种文化应该是所有经济行业基础的关键。

● 缪树权、张红梅:《贿赂犯罪的司法认定与证据适用》,中国检察出版社 2014 年版

本书主要通过对贿赂犯罪从概念构成、立案标准、司法认定、刑事责任、法律依据等方面并配以典型案例加以解读分析,并就贪污犯罪的证据适用中常见的问题提出了解决对策,最后梳理并总结了贪污犯罪收集证据的程序和方法。

- 詹复亮:《贪污贿赂犯罪及其侦查实务》,人民出版社 2013 年版

本书以实践为重点,从贪污贿赂罪的法律特征及其认定处理和贪污贿赂犯罪侦查实务两大方面,对贪污贿赂罪的特点、滋生条件和原因、法律特征及认定、侦查实务(包括程序、措施和方法、侦查终结等内容)进行了详细深入的探讨。

- 孙国祥、魏昌东:《反腐败国际公约与贪污贿赂犯罪立法研究》,法律出版社 2011 年版

本书挖掘中国惩治贪污贿赂犯罪的本土经验,探寻国际反腐败经验的移植价值。实证分析中国贪污贿赂犯罪刑规范的运行效果,厘清宏观理念与具体技术设计的关系,实现条文文本解读与历史、理论诠释的有机结合。

1.2 关键词:推定

- 雷谢尔:《推定与试探习惯认知的实践》,法律出版社 2015 年版

假设是一种用途十分广泛且无处不在的资源。本书试图表明,在理性探求和交流这些事务中,假设的过程在其中有着不可或缺的实际效用。假设或许源于法律,但其前途无疑在由其在信息管理理论和哲学的作用而得到保证。

- 龙宗智:《刑事证明责任与推定》,中国检察出版社 2009 年版
- 本书收录了“刑事推定及证明责任”研讨会上的论文,包括刑事推定和证明责任两部分。

1.3 所有字段:刑事证据法

- 陈瑞华:《刑事证据法理论问题》,法律出版社 2015 年版

本书立足于中国刑事证据立法的发展现状,按照“从经验事实中提炼出理论的方法”,通过对证据制度问题的理论思考,提出了一些具有解释力的概念和理论命题,是对我国刑事证据立法经验的学术总结。

- 陈瑞华:《刑事证据法学》,北京大学出版社 2014 年版

本书不仅全面讨论了证据的概念、推定等基本证据法问题,还系统总结了刑事证据法的基本原则、非法证据排除规则、量刑程序中的证据规则等证据理论问题。

- 闫召华:《口供中心主义研究》,法律出版社 2013 年版

本书梳理了新中国成立前我国口供的实践历史,揭示了口供中心主义在司法实践中的真实面相,在反思口供中心主义利弊的基础上,提出了克服现实制约,克减乃至消除口供中心主义弊害的可能路径。

2. 中文期刊

选用数据库:中国知网

检索步骤:可用主题、关键词、摘要进行一般检索,又可以在文章词频、作者单位上进行高级检索。此次检索选用,

主题:口供

时间:从 2009 年到 2016 年

来源类别:SCI 来源期刊、核心期刊、CSSCI

检索结果如下,

- 陈瑞华:“论被告人供述规则”,《法学杂志》(2012/6)

“两个证据规定”和我国《刑事诉讼法(修正案)》的相继颁行,为被告人供述和辩解的运用确立了一系列新的证据规则。概括起来,这些规则大体包括口供

自愿规则、口供排除规则、口供印证规则和口供补强规则,前两项规则都是与口供的证据能力密切相关的规则,而后两项规则则涉及法律对口供证明力的限制。准确地理解这些口供规则的含义以及立法背景,对于从理论上把握我国刑事证据法的发展脉络将是十分有益的。

● 龙宗智:“我国非法口供排除的‘痛苦规则’及相关问题”,《政法论坛》(2013/5)

“两高”司法解释,就非法口供,以“在肉体上或者精神上遭受剧烈疼痛或者痛苦”为核心判断要件,因此可称为“痛苦规则”,从而有别于“自白任意性规则”。痛苦规则适用于肉刑与变相肉刑、多种非法行为叠加达到同等程度,以及严重威胁等情况。对于违法、不适当地采用引诱、欺骗方法取供,可用不能“查证属实”即客观性标准将其排除。对于“指供”,可区别情况以其依托的非法手段作非法证据排除,或以不可靠而排除,或以法律行为成立要件欠缺为由而认为口供不存在。对于违法的时间或地点审讯形成口供,严重者可用不能排除非法取供可能性为由而将其排除。重复自白,除庭审自白及发现隐蔽性很强的物证、书证外,应认为受波及效力影响而排除。

● 李训虎:“口供治理与中国刑事司法裁判”,《中国社会科学》(2015/1)

口供依赖在中国刑事司法实践中成为诸多问题之源,文章立足于对口供依赖进行功能分析、文化解释以及现实考量的多维解说,从法官角度展开再阐释,作为身体治理与思想治理媒介的口供,在慰藉心理、规避责任的背后,更重要的功能在于补强刑事裁判合法性。刑事裁判合法性重塑与口供治理的协同推进,将会改变既有治理主体与被治理者的关联方式,对现行封闭式刑事司法治理模式产生冲击,进而促动中国刑事司法治理发生转型。

● 闫召华:“口供中心主义评析”,《证据科学》(2013/4)

刑事诉讼中,侦查、审查起诉和审判多是围绕口供而展开,形成了口供中心主义的理念和办案方式。口供中心主义虽然能保证绝大多数案件的正确处理,节约刑事诉讼的直接成本,但却异化了诉讼构造,增加了错误成本,损害了过程利益,导致刑讯逼供不止,冤假错案不断。为此,应当在程序法中构建激励型的取供机制,在证据法中确立“不轻信口供”的口供运用机制,逐步推动口供运用理念及方式的根本变革。

● 谢小剑、颜翔:“论同步录音录像的口供功能”,《证据科学》(2014/2)

实践中,同步录音录像多用作视听资料,证明讯问笔录的合法性,从而忽略了它由于记录了口供及其非文字信息而具有的作为口供证据的功能。为实现同步录音录像的口供功能,应提高侦查人员分析判断同步录音录像的能力,积极将同步录音录像作为供述证据使用,避免法官在查看同步录音录像时的认知偏见等。

● 杨文革:“美国口供规则中的自愿性原则”,《环球法律评论》(2013/4)

自愿性是美国口供规则的指导原则,体现了对人性尊严和人类意志自由、程序的正当性等现代价值的追求。尽管在自愿性的证明和判断上存在某些主观色彩和困难,自愿性原则仍然是贯穿美国口供规则的灵魂,是理解美国口供规则的钥匙。在完善我国口供规则过程中,应该围绕自愿性原则,借鉴美国的做法,在人权保障和惩罚犯罪之间保持适当平衡。

● 李昌盛:“口供消极补强规则的实质化”,《证据科学》(2014/3)

我国目前已经形成了一整套防范虚假口供的证据规则,即非法口供排除规则和口供补强规则。为使补强规则发挥功效,需要把积极补强规则的精神—补强程度—吸收到消极补强规则的规制方式—否定方式之中,并结合真假供述的判断原

理,使消极补强规则实质化。为实现消极补强规则的规制目标,刑诉法所确立的全程录音录像制度应当进一步完善。

● 黄维智:“再论‘口供中心’”,《社会科学研究》(2010/5)

刑事诉讼中,口供的特殊证明作用是任何其他证据形式无法取代的。为了克服口供的缺陷,构建“证据多元中心”势在必行。构建“证据多元中心”需要司法人员观念上的转变和技术上的支持,因此从“口供一元中心”到“证据多元中心”是一个渐进的过程。故通过法律手段保障犯罪嫌疑人、被告人的如实供述,注重口供补强的同时建立鼓励供述机制就显得尤为重要。

● 李明蓉:“贪污贿赂犯罪案件口供依赖的破解”,《国家检察官学院学报》(2016/2)

口供是贪污贿赂犯罪案件的重要证据。贪污贿赂犯罪案件的特性决定了其诉讼证明容易依赖口供,进而威胁口供自愿性,导致冤假错案的发生。要破解贪污贿赂犯罪案件对口供的依赖,应当从制度上增加证据的来源渠道,设立特殊的证明制度和规则,降低证明难度,并提供其他必需的条件支持,提高口供自愿性,实现严惩贪污贿赂犯罪的目的。

● 黄金华、黄鹂:“论讯问方法运用的正当性及其界限——以口供获取为视角”,《法学》(2014/10)

根据无罪推定原则以及人权保护的理念,学界对讯问方法的使用大多持否定态度。讯问方法的使用应被重新正名,以寻求其在现代国家所具有的正当性。为了克服实践中对讯问方法使用界限把握不清的局限,应当以合法性原则为先,以合理性原则作为补充。而在我国法律规定较为模糊的情况下,应进一步明确合理性判断标准,是否“导致无罪自陷”应作为讯问方法正当性的检验标准。

● 闫召华:“口供何以中心——‘罪从供定’传统及其文化解读”,《法制与社会发展》(2011/5)

口供在古代刑事司法中的作用被强调到无以复加的程度:“赃证”仅仅是获取和推核口供的辅助手段,孤供可以定罪,而无供情况下则通常只能办成悬案或疑案。相应的,作为取供中的“合法暴行”,最不可妄加的拷掠成了断狱中最不能离开的审讯手段。而有限的可知论、伦理秩序和“狱无淹滞”的价值诉求、反逻辑的自由心证及非对抗的刑事司法等则为口供主义提供了坚实的文化支撑。

● 龙宗智:“进步及其局限——由证据制度调整的观察”,《政法论坛》(2012/5)

调整证据概念与分类,有积极意义,但现定义仍然以偏概全。目前可以采取物证、书证、人证三分法上层划分和法律确定的细分方法的下层划分结构,今后重新设计分类体系。确立“不被强迫自证其罪”的原则有积极意义,必须在中国法的背景下重新阐释这一原则,一方面要与沉默权切割,另一方面要注意进一步禁止和排除刑讯逼供以外的其他强制方法获取的口供,以贯彻该原则。

● 张颖:“违反讯问录音录像规定所获供述之证据能力问题”,《证据科学》(2015/6)

2012年《刑事诉讼法》确立了讯问时的全程录音录像制度,但由于立法规定过于原则化,加之缺乏制裁性机制,导致在司法实践中大量存在违反该制度规定的现象。在借鉴其他国家和地区的相关规定的基础上,适用刚性模式,强制性地排除选择性录制和先审后录所获得的供述,对于讯问后补录或重录所获得的供述,则根据不同的情形采用推定模式予以排除。同时还应看到排除违法录音录像所获

供述还将面临着口供中心主义依然盛行、立法上缺乏相应的证据规则、以审判为中心的诉讼制度尚未建立等一系列现实因素的制约。

- 郑广宇：“反贪侦查取证原则及其适用”，《人民检察》（2011/16）

收集合法、来源可靠、全面客观、主动及时四个侦查取证的基本原则，是反贪侦查取证的基本要求。收集合法原则要求取证主体的身份、取证地点、取证时间、取证手段合法。来源可靠性原则要求证据来源清楚、真实可靠。全面客观原则要求侦查取证应做到“四个补强”：见证补强、口供补强、孤证补强、人证补强。主动及时原则要求反贪侦查应做到“四个优先”：原始证据优先、物证、书证优先、直接证据优先、隐蔽证据优先。

3. 学位论文

学位论文主要在中国知网上搜索，排除时间过于久远的论文。用受贿、口供作为主题，限定时间段。

选用数据库：中国知网

检索步骤：文献分类目录-选择学科领域：社会科学 I 辑、社会科学 II 辑

检索目录：博硕士

检索条件：摘要-受贿 证据 并含 口供

时间：从 2010 年到 2016 年

优秀论文级别：不限

检索结果：博士论文 1 篇，硕士论文 8 篇。经筛选，

- 能昌银：“论受贿罪侦查取证中的问题及对策”（山东大学硕士学位论文，2012 年）

受贿罪是一种特殊的职务犯罪，证据方面的特殊性和我的现行制度使得检察机关的侦查取证工作面临很多问题。破解目前受贿罪侦查取证过程中存在的问题，除了在侦查取证环节要有针对性的采取一系列完整对策之外，还应基于贿赂犯罪中证据的特殊性，建立特殊的证据规则。受贿罪的特殊证据规则主要有二，一是贿赂推定制度，二是污点证人制度。

- 卫东：“完善职务犯罪侦查一体化机制之我见”（华东政法大学硕士学位论文，2010 年）

目前职务犯罪侦查形势越来越严峻，如何进一步完善职务犯罪侦查一体化机制，要以侦查指挥中心为中枢，真正实现统一管理重大案件线索、统一组织重大侦查活动、统一调配侦查力量和侦查装备，统一整合全国检察机关的侦查资源。同时，要保证上述的侦查权在法治轨道上运行，要完善法律法规，实现“权责法定”，赋予侦查主体“充分高效，规范有限”的侦查权，同时建立科学完善的监督制约机制。

- 陈超：“检察机关提升职务犯罪取证能力研究”（华东政法大学硕士学位论文，2010 年）

文章试通过对各种取证手段的研究，分析世界主要国家经济犯罪侦查机关的取证手段以及法律规则，结合我国司法工作实际，论证检察机关运用更广泛取证措施的可行性与必要性，从实体运用和程序规则上对检察机关取证能力优化提高作出建议，促进检察机关在侦查领域更好地发挥作用。此外，笔者力图详细分析侦查机关内部结构，从检察机关机构职能以及人员素质、培训考核等因素入手，提出加强干警取证主观能力的方式，从另一方面论证检察机关提升取证能力的途径。使司法职能更加优化。

- 彭艳华：“刑事司法激励供述机制探究”（南京大学硕士学位论文，2014 年）

在梳理我国法律规定及司法实践相关做法的基础上，文章重点分析了现有口供获取制度存在的问题，并引入马斯洛需要理论分析激励供述机制的制度框架，主张构建一个包括激励机制与保障机制在内的口供获取制度，希望对构建我国的口供获取激励机制有所裨益。

- 苏云：“贿赂犯罪侦查研究”（西南财经大学博士论文，2012年）

第一章从贿赂犯罪侦查逻辑运作的起点即犯罪线索入手，对贿赂犯罪线索进行界定，审视犯罪线索在贿赂犯罪侦查中的作用；第二章首先对学界关于职务犯罪初查制度的争议进行了梳理；第三章重在对比贿赂犯罪侦查模式的解构来展现贿赂犯罪侦查中的权力（利）的具体运行及相互关系；第四章贿赂犯罪侦查之取证重点、难点及突破；第五章针对审讯在贿赂犯罪侦查突破和口供获取中几乎不可替代的作用，在研究犯罪嫌疑人抗审心理的基础上，重点探讨了以瓦解犯罪嫌疑人心理防线，消除拒供心理为目的的虚假示形、囚徒理论的运用、纳什均衡点的确定等贿赂犯罪审讯策略；第六章贿赂犯罪反侦查行为及利用；第七章介绍贿赂犯罪的特殊侦查方式。

第四部分 文献检索之外文一次资源与二次资源

一、外文一次资源

1. Statute

选用数据库：Westlaw

检索步骤：Statutes & Court Rules — Federal

检索结果：U.S. Constitution、Federal Rules of Criminal Procedure 、Federal Rules of Evidence

- U.S. Const. amend. V

No person shall be compelled in any criminal case to be a witness against himself.

美国宪法第五修正案规定：任何人不得被强迫自证其罪。

- U.S. Const. Amend. V

No person shall be deprived of life, liberty, or property, without due process of law.

美国宪法第十四修正案规定：任何人不经正当程序不能被剥夺生命、自由、财产。

- Federal Rules of Evidence Rule 401, 28 U.S.C.A.

Rule 401. Test for Relevant Evidence

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

美国联邦证据规则 401 规定了证据必须具有相关性。

- Federal Rules of Evidence Rule 402, 28 U.S.C.A.

Rule 402. General Admissibility of Relevant Evidence

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

美国联邦证据规则 402 规定了在四种情形下，相关的证据也不具有可采性，并明确不相关的证据不可采。

- Federal Rules of Evidence Rule 403, 28 U.S.C.A.

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

美国联邦证据规则 403 规定基于偏见、迷惑、浪费时间和其它原因可以排除相关的证据。

2. Case

选用数据库: Westlaw

检索步骤 1: 检索框内输入关键词 “self-incrimination、the defendant”

检索范围: All Federal

检索步骤 2: Statutes--Amendment V. Self-Incrimination clause—Notes of

Decisions

2.1 Purpose of Amendment V. Self-Incrimination clause

- Lefkowitz v. Turley, 414 U.S. 70, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973)

Object of privilege against compelled self-incrimination under this clause was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself has committed a crime.

此条款规定不被强迫自证其罪权利的目的是确保个人在调查中作为证人时，不被强迫作出证明自己犯罪的证词。

- Application of Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967)

One of purposes of privilege against self-incrimination is to prevent state, whether by force or by psychological domination, from overcoming mind and will of person under investigation and depriving him of freedom to decide whether to assist state in securing his conviction.

不被强迫自证其罪权利的目的之一是防止国家利用武力或者心里强制力迫使个人在被调查时被剥夺思想和意志自由以及自由决定是否协助国家确定自己有罪的权利。

- Tehan v. U.S. ex rel. Shott, 382 U.S. 406, 86 S. Ct. 459, 15 L. Ed. 2d 453 (1966)

Basic purposes that lie behind privilege against self-incrimination do not relate to protecting innocent from conviction, but rather to preserving the integrity of judicial system in which even the guilty are not to be convicted unless prosecution shoulder the entire load.

不被强迫自证其罪隐藏的基本目的不是保护无辜者不被定罪，而是保持司法系统的完整性。在这个司法系统中，除非起诉方已承担全部举证负担，否则有罪者不将被定罪。

- Knapp v. Schweitzer, 357 U.S. 371, 78 S. Ct. 1302, 2 L. Ed. 2d 1393 (1958)

The sole purpose of this clause is security of the individual against the exertion of the power of the federal government to compel incriminating testimony with a view to enabling that same government to convict a man out of his own mouth.

此条款唯一目的是确保个人能够反对联邦政府运用权力强制取得个人自证其罪的证词以及防个人因自己的证词而被同一政府定罪。

- *United States v. White*, 322 U.S. 694, 64 S. Ct. 1248, 88 L. Ed. 1542 (1944)

The privilege against self-incrimination is designed to prevent the use of legal process to force from lips of accused individual evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him.

不被强迫自证其罪的权利是为了防止使用法律程序强迫被指控的个人说出对其定罪的必要证据以及出示或者证实可能对其定罪的任何个人文件或者伤害。

- *Counselman v. Hitchcock*, 142 U.S. 547, 12 S. Ct. 195, 35 L. Ed. 1110 (1892)

It is impossible that the meaning of this clause can only be that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself; it is not limited to such cases, but the object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime.

此条款的含义不仅仅是在不利于个人的刑事司法程序中，他不被强迫成为对其不利的证人。它不限于此类案件，但是目标是确保任何调查活动中，个人充当证人时，不被强迫作出可能证实其犯罪的证词。

- *Sprosty v. Buchler*, 79 F.3d 635 (7th Cir. 1996)

Underlying purpose of Miranda rule is to protect individuals from compelled self-incrimination.

米兰达规则潜在目的在于保护个人不被强迫自证其罪。

- *United States v. Yurasovich*, 580 F.2d 1212 (3d Cir. 1978)

Privilege against self-incrimination embodies the decision of our society to opt for an adversarial rather than an inquisitorial system of justice.

不被强迫自证其罪的权利显示了我们的社会决心选择对抗式而非纠问式的司法系统。

- *Napolitano v. Ward*, 409 U.S. 1037, 93 S. Ct. 512, 34 L. Ed. 2d 486 (1972)

Thrust of constitutional privilege against self-incrimination has two interrelated objectives: (1) to prevent compulsion to elicit self-incriminating statements, and (2) to prevent use in criminal trial of self-incriminating statements elicited by physical or mental coercion.

宪法性权利不被强迫自证其罪的主旨有两个相互关联的目标：（1）防止强制取得自证其罪的陈述，及（2）防止刑事审判中使用通过身体或者精神强制取得的自证其罪的陈述。

- *United States v. Dist. Council of New York City*, 941 F. Supp. 349 (S.D.N.Y. 1996)

Fifth Amendment privilege insulates witnesses against dangers of self-incrimination, not hassle, stress or expense associated with testifying.

第五修正案的权利使证人免遭自证其罪的危险，免受因作证而带来的麻烦、压力和代价。

2.2 Comprehensive nature of privilege of Amendment V. Self-Incrimination clause

- *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981)

This clause's privilege is as broad as the mischief against which it seeks to guard and the privilege is fulfilled only when a criminal defendant is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will,

and to suffer no penalty for such silence.

此条款的权利正如它所保护使之免遭的危害一样广泛。当刑事犯罪被告被保障享有保持沉默的权利,可以选择在其意志自由时讲话且不会因沉默遭受处罚的权利时,此权利才得以实现。

- Application of Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967)

Scope of privilege against self-incrimination is comprehensive.

不被强迫自证其罪的权利范围是广泛的。

2.3 Self-executing nature of privilege of Amendment V. Self-Incrimination clause

- Roberts v. United States, 445 U.S. 552, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980)

Although Miranda's requirement of specific warnings creates a limited exception to the rule that the privilege against self-incrimination is not self-executing and must be claimed, the exception does not apply outside the context of the inherently coercive custodial interrogation for which it was designed.

米兰达规则中具体警告事项要求创立了此规则的有限例外,即不得自证其罪的权利不能自动实施而必须被声明。但是,此例外在已创设的固有的强制性羁押审问之外不得被运用。

- United States v. Saechao, 418 F.3d 1073 (9th Cir. 2005)

This clause is self-executing and thus a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. If an individual is subjected to a practice that denies him a free choice to admit, to deny, or to refuse to answer, then the Fifth Amendment is considered self-executing, and an individual does not need to invoke the privilege against self-incrimination in order to have his admissions suppressed in an ensuing criminal prosecution.

此条款的自动实施性可以保障证人被强迫放弃他的反对意见时无需任何法律保护即可免于自证其罪。当个人选择承认、拒绝或者拒绝回答的自由权利被剥夺时,第五修正案自动实施。个人无须开启自证其罪的权利以防止在随后的刑事程序中使用他的自白。

- Waldrop v. Thigpen, 857 F. Supp. 872 (N.D. Ala. 1994), aff'd sub nom. Waldrop v. Jones, 77 F.3d 1308 (11th Cir. 1996)

Fifth Amendment privilege against self-incrimination must be asserted or claimed; it is not self-executing.

第五修正案不被强迫自证其罪的权利必须被宣称或声明,它不能自动执行。

2.4 Rights protected--Generally

2.41 False statements, rights protected (虚假陈述)

- United States v. Wiener, 96 F.3d 35 (2d Cir.), supplemented, 104 F.3d 350 (2d Cir. 1996), and aff'd sub nom. Brogan v. United States, 522 U.S. 398, 118 S. Ct. 805, 139 L. Ed. 2d 830 (1998)

Fifth Amendment privilege against self-incrimination does not apply when person falsely denies criminal wrongdoing, rather than remaining silent.

当个人不是保持沉默而是虚假地否认犯罪行为时,第五修正案反对自证其罪的权利不被适用。

2.42 Perjury, rights protected (作伪证)

- United States v. Handlin, 366 F.3d 584 (7th Cir. 2004)

The Fifth Amendment privilege against self-incrimination does not give a defendant license to perjure himself.

第五修正案反对自证其罪的权利未认可被告作伪证的权利。

2.43 Silence, rights protected (保持沉默)

- *Salinas v. Texas*, 133 S. Ct. 2174, 186 L. Ed. 2d 376 (2013)

Defendant normally does not invoke privilege against self-incrimination by remaining silent. (Per Justice Alito, with the Chief Justice and another Justice concurring, and two Justices concurring in the judgment).

通常，被告保持沉默时不能引发不被强迫自证其罪的权利保护。

- *Freeman v. Class*, 911 F. Supp. 402 (D.S.D. 1995), *aff'd*, 95 F.3d 639 (8th Cir. 1996)

Defendant has constitutional right to remain silent when taken into custody.

被告被监禁时也有保持沉默的宪法权利。

2.5 Balancing of interests

- *California v. Byers*, 402 U.S. 424, 91 S. Ct. 1535, 29 L. Ed. 2d 9 (1971)

Question of infringement of privilege against compulsory self-incrimination must be resolved by balancing public need against individual claim to constitutional protections. (Per Chief Justice Burger with three Justices concurring and one concurring in result.)

侵害反对强制性自证其罪权利的问题必须通过均衡公共利益和个人权利的宪法性保护两者之间的关系来解决。

- *Serafino v. Hasbro, Inc.*, 82 F.3d 515 (1st Cir. 1996)

Balancing of parties' interests must be weighted to safeguard a party's assertion of Fifth Amendment privilege against self-incrimination; burden on party asserting it should be no more than is necessary to prevent unfair and unnecessary prejudice to the other side.

平衡双方利益时必须确保一方主张的第五修正案反对自证其罪的权利，主张此权利的一方义务仅是避免给对方造成不公正且不必要的偏见。

2.6 Proceedings to which clause applicable generally

- *United States v. Sharp*, 920 F.2d 1167 (4th Cir. 1990)

Fifth Amendment's protection against self-incrimination applies in any type of proceeding whether civil, criminal, administrative, investigatory, or adjudicatory; right applies not only to evidence which may directly support criminal conviction, but to information which would furnish link in chain of evidence that would lead to prosecution, as well as evidence which individual reasonably believes could be used against him in criminal prosecution.

第五修正案不得自证其罪的权利适应于所有民事、刑事、行政、侦查或者审判程序。此权利不仅适用于直接支持刑事定罪的证据，而且适用于将形成导致起诉证据链的起诉书以及个人合理相信可以在刑事起诉中用来指控他的证据。

- *Garner v. United States*, 424 U.S. 648, 96 S. Ct. 1178, 47 L. Ed. 2d 370 (1976)

Privilege against self-incrimination is available to a potential criminal defendant well before proceedings actually begin as well as to a witness in criminal, civil, grand jury, or legislative proceedings.

不得自证其罪的权利适用于诉讼程序开始之前可能的刑事被告，也适用于刑事、民事、大陪审团或者立法程序中的证人。

- *Bruner Corp. v. Balogh*, 819 F. Supp. 811 (E.D. Wis. 1993)

There need not be parallel criminal proceeding for witness to properly invoke Fifth Amendment privilege against self-incrimination.

证人主张第五修正案的权利时无需并行的刑事程序。

2.7 Investigatory stage, criminal proceedings, proceedings to which clause applicable

- *Petition of Groban*, 352 U.S. 330, 77 S. Ct. 510, 1 L. Ed. 2d 376 (1957)

Privilege against self-incrimination is available in investigations as well as in prosecutions.

不得自证其罪的权利适用于侦查和起诉。

- *Sornberger v. City of Knoxville, Ill.*, 434 F.3d 1006 (7th Cir. 2006)

Phrase “criminal case,” as it is employed in the Self-Incrimination Clause, requires, at the very least, the initiation of a legal proceeding, rather than mere police questioning, before a suspect's self-incrimination rights are implicated.

正如在不得自证其罪条款中使用的那样，“刑事案件”这一短语要求嫌疑人主张不得自证其罪的权利至少要在法律程序开始时，而不是在警察询问时。

2.8 Link in evidence chain, incriminating nature of evidence generally

- *Ohio v. Reiner*, 532 U.S. 17, 121 S. Ct. 1252, 149 L. Ed. 2d 158 (2001)

Fifth Amendment privilege against self-incrimination extends not only to answers that would in themselves support conviction, but also to those which would furnish a link in chain of evidence needed to prosecute claimant.

第五修正案不得自证其罪的权利不仅适用于支持定罪的回答，而且适用于利于形成起诉申请人所需证据链的回答。

- *United States v. Rendahl*, 746 F.2d 553 (9th Cir. 1984)

To support assertion of privilege against self-incrimination, witnesses had to show that their testimony would support conviction under federal criminal statute or furnish link in chain of evidence needed to prosecute them for federal crime.

证人主张不得自证其罪的权利时必须证明其证词依联邦刑事法律将导致其被定罪或者对起诉其犯有联邦罪行所需的证据形成证据链有助力。

2.9 Length of questioning, compulsion or coercion

- *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)

Confessions obtained by federal agents in incommunicado interrogation were not admissible in federal prosecution, although federal agents gave warning of defendant's right to counsel and to remain silent, where defendant had been arrested by state authorities who detained and interrogated him for lengthy period, both at night and the following morning, without giving warning, and confessions were obtained after some two hours of questioning by federal agents in same police station.

州政府机构逮捕被告并对其进行拘留，没有对其进行权利告知并且对其审问时间过长、夜以继日，自白由联邦特工在同一警察局经过 2 小时的询问取得。在前述情况下，即使联邦特工告知了被告有获得律师帮助的权利和保持沉默的权利，联邦特工在隔离审问中取得的自白在联邦起诉程序中不可采。

- *Miller v. United States*, 510 U.S. 894, 114 S. Ct. 258, 126 L. Ed. 2d 210 (1993)

Record did not support defendant's contention that “continual and unrelenting” pace of questioning exhausted him and coerced his confession, where defendant was not in custody during interrogation and was free to leave at any time, he was given meal breaks, bathroom breaks upon request, and allowed to telephone his wife, and defendant returned home alone each night but one, when he was accompanied home for consent search.

被告在被询问时没有被拘留，可随时自由离开，并且在其提出要求时，享有进餐休息时间、去洗手间的的时间，也可以给其妻子打电话。除了在同同意搜查的情形下被陪伴回家，其它情形下，被告都可以独自回家。上述情形下，被告主张其

遭受“连续的且残酷的”询问使其筋疲力尽并强制其自白的观点不被支持。

2.10 Lying and deception, compulsion or coercion

- *United States v. Anderson*, 755 F.3d 782 (5th Cir. 2014)

District Court's finding, in determining that defendant's in-custody statement was knowing and voluntary, that defendant's will was not overborne by the size of law enforcement officers and their bombarding him with false accusations was not clearly erroneous, where interrogation video demonstrated that officers introduced themselves to defendant and immediately provided him with Miranda warnings, defendant was not handcuffed during the interview, officers never displayed any weapons, and they never placed their hands on him.

地区法院裁决，当讯问录像显示执法人员在向被告介绍自己之后，立即告知被告米兰达规则，被告没有带着手铐，执法人员也没有向被告展示任何武器，也没有将手放在被告身上。上述情形下，判断被告被监禁时的叙述是否自知和自主时，被告的意志没有被执法人员的数量压服，执法人员用错误的指控对其进行连珠式的质问是没有明显错误的。

- *United States v. Lux*, 905 F.2d 1379 (10th Cir. 1990)

Detective's action of lying to defendant about her codefendant's statement and leaning forward and hitting his fist on table and accusing defendant of lying did not negate voluntariness of defendant's subsequent admissions; trial court properly determined that detective's actions were not so extraordinary or egregious as to warrant finding that they overbore defendant's will.

侦探的下述行为如相关同案被告证词的谎言、身体前倾、用拳头击打桌面、谴责被告说谎，不会否定被告随后自白的自愿性。审判法庭合理地认为侦探的行为没有过于特殊或异乎寻常以致他们抑制了被告的意愿。

2.11 Promises of leniency, compulsion or coercion—Generally

- *United States v. Sanchez*, 866 F. Supp. 1542 (D. Kan. 1994)

In deciding whether confession was unconstitutionally coerced by promise of leniency, court considers: whether there was express or implied promise of leniency made to defendant; if no such promise was made, whether defendant reasonably believed that he had been promised leniency; whether defendant's confession was induced by promise or defendant's reasonable belief in promise; and whether inducive promise was coercive.

判断自白是否通过给予宽大处理的许诺而违宪强制取得时，法庭需要考虑以下因素：是否明示或者暗示地向被告作出给予宽大处理的承诺；若无此类承诺，被告是否合理地相信他被承诺给予宽大处理；是否被告的供述源于承诺或者被告对于承诺的合理信赖；或者诱导性的承诺是强制性的。

2.12 Plea bargains, promises of leniency, compulsion or coercion

- *N. Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (U.S. 1970)

Guilty plea which represented voluntary and intelligent choice among alternatives available to defendant, especially where he was represented by competent counsel, was not compelled within meaning of this clause merely because plea was entered to avoid possibility of death penalty.

在被告可有的选择范围内的，特别是其被称职的律师代理时，有罪答辩是自愿和睿智的。此答辩不是此条款所含强迫之意，仅因为答辩的达成防止了适用死刑的可能。

2.13 Sanctions or penalties for assertion of privilege, compulsion or coercion--Generally

- *Erwin v. Price*, 778 F.2d 668 (11th Cir. 1985)

Public employee may not be coerced into surrendering privilege against self-incrimination by threat of sanctions, and if he has been coerced into waiving privilege, his answers are not admissible against him in subsequent criminal trial.

公职人员在遭受制裁威胁情形下，可能不会被强制放弃自证其罪的权利。假如他被强制放弃此权利，他的回答在随后指控他的刑事审判中不具有可采性。

2.14 Deception, voluntary statements, compulsion or coercion

- *Green v. Scully*, 850 F.2d 894 (2d Cir. 1988)

Even though detective's repeated promises of assistance and assertions of friendship might have increased likelihood of habeas petitioner's confession, under totality of the circumstances, officer's conduct did not have a coercive effect, since interrogation was post-Miranda, officer did not indicate to defendant that confession would affect either nature of charge or length of sentence and officer's misrepresentation of evidence was not, when viewed with all circumstances surrounding the interrogation, sufficient to make petitioner's statement involuntary.

即使侦探反复的协助许诺以及对友谊的宣称可能提升人身保护令上诉人自白的可能性，就总体情况而言，警官的行为没有强制的效果。因为讯问是在米兰达警告之后，警官没有表明供述将影响指控的性质或者刑期的长短。综合审讯的情况，警官关于证据的虚假陈述不足以导致上诉人陈述的非自愿性。

9. Physical abuse, voluntary statements, compulsion or coercion

- *United States v. Rullo*, 748 F. Supp. 36 (D. Mass. 1990)

Defendant's incriminating statements made after his arrest were not voluntary and were obtained in violation of his Fifth Amendment rights where, after defendant surrendered to police, he was thrown to ground and surrounded by at least six officers who began to punch and kick him; although officers acted at least in part out of fear that defendant was still armed, language they used and violence of arrest demonstrated that, in addition to seeking gun, they wished to punish defendant for shots that they believed he had fired at officers.

被告向警察投降之后，他被扔在地上，被至少 6 个警官所包围。警官们随即对其拳打脚踢。虽然警官担心被告仍携带枪支，警官使用的语言和逮捕被告时所用暴力都显示，除了搜查枪支之外，他们希望惩罚被告人，因为他们认为被告之前向警官们开枪射击。上述情形下，被告被逮捕后所做的有罪供述不具有自愿性，是违反第五修正案权利的。

2.15 Threats or intimidation, voluntary statements, compulsion or coercion

- *United States v. Sturdivant*, 796 F.3d 690 (7th Cir. 2015)

Officer's purported promise, that if defendant cooperated he could see his mother, did not override defendant's free will and coerce him into confessing to bank robbery; after having received and waived his *Miranda* warnings for the second time in as many days, it was defendant who broached the subject of seeing his mother, and officer did not harp on the subject or hang it over defendant's head, but merely responded to defendant's request.

警官承诺如果被告合作，他可以看到他的母亲。警官的声称并不能压制被告的自由意志，强制他作出抢劫银行的供述。在多天内，被告获得米兰达警告后，第二次放弃其权利，被告提出要见他的母亲，警官没有不停地提及此话题，也没有使被告受此话题影响，仅对被告的要求做了回应。

- *United States v. Williams*, 793 F.3d 957 (8th Cir. 2015)

Even if law enforcement officer made a statement threatening to charge defendant with obstruction of justice if defendant refused to talk with officer, such a threat did not render defendant's statements to officer involuntary, where there was no showing that the officer's statements overbore defendant's will and capacity for self-determination.

即使执法人员声称如果被告拒绝和警官交谈其后果是会被以妨碍司法罪起诉，此威胁不会使得被告向警官的自白不具有自愿性，因为警官的声称并不会压制被告的意志，剥夺其自由决定的能力。

- *United States v. Gannon*, 531 F.3d 657 (8th Cir. 2008)

Defendant's statements and confession to detectives were not involuntary, even assuming that detectives threatened to imprison defendant's ex-wife if he did not confess, where there was no showing that the defendant's will was overborne and his capacity for self-determination critically impaired.

被告向警官作出的陈述和自白具有自愿性，即使假定侦查人员威胁被告如果不认罪，就要监禁被告的前妻。因为在上述情况下，没有迹象表明被告的意志被压制，其自我决定的能力受到严重损害。

- *United States v. Goodpaster*, 65 F. Supp. 3d 1016 (D. Or. 2014), appeal dismissed (June 24, 2015)

Law enforcement agents' mentioning of defendant's wife once, and mentioning that she would be interrogated in association with defendant's alleged theft of prescription medication from mail packages by abusing his position as a postal service employee was not coercive, and thus, under *Miranda*, defendant's statements made during custodial interview, including a confession, were not involuntary.

执法人员曾提及到被告的妻子一次，并告知被告她将因为和被告被指控的盗窃罪有关联而被讯问。在盗窃案件中，被告滥用其邮政服务雇员的身份从邮递包裹中盗窃处方药。执法人员提及的事实不具有强制性，在米兰达规则之下，被告在监禁会谈中的陈述包括自白具有自愿性。

- *United States v. Vargas-Saenz*, 833 F. Supp. 2d 1262 (D. Or. 2011)

Drug defendant's confession was extracted by physical intimidation or psychological threats, and thus involuntary under Fifth Amendment, where interrogator had established that defendant feared that her parents, with whom her two-year-old daughter had been placed following her arrest, could be deported for immigration violations, and interrogator had overcome defendant's resistance to interrogation by threatening to send Immigration and Customs Enforcement (ICE) agents after parents.

审问者确信被告担心她的父母因违反移民法会被驱逐出境，而此时她2岁的女儿在她被捕后被安置于其父母处。审问者威胁让移民与海关执行局（ICE）去查处她的父母。上述情形下，毒品犯罪被告的供述是通过身体恐吓或者心理威胁取得的，因此违反第五修正案而具有非自愿性。

- *United States v. Pacheco*, 819 F. Supp. 2d 1239 (D. Utah 2011)

Under totality of the circumstances, defendant's confession to bank robbery during interrogation by police officer was involuntary; officer told defendant that he had made a deal with the other robbery suspect, implied that he had power to make a deal with defendant if he confessed, and repeatedly indicated that he would be the one deciding how defendant would be charged, and officer said he would not go after defendant's wife if defendant helped him out, and that otherwise, he could seize

property from defendant's family, and although defendant had prior experience with criminal justice system and knew of his *Miranda* rights, he was detained for eight hours, and he submitted evidence that his personality made him more susceptible to coercion when threats were made against his family.

考虑整体情况，被告在警察局警官审问过程中所做的抢劫银行的供述不具有自愿性。警官告诉被告他已经和另外一个抢劫罪的犯罪嫌疑人达成交易，暗示如果被告认罪，警官有权利和被告达成交易；警官不停地表明他是决定被告如何被起诉的人。警官告知如果被告帮助他摆脱困境，他不会追击他的妻子。否则，他将扣押被告人家庭的财产。尽管被告之前有过刑事司法系统的经历，知晓米兰达规则的权利，他在被拘留八小时后，最终提交了证据。证据显示他的个性使他在其家庭受到威胁时，更易受到胁迫的影响。

- *United States v. Daubmann*, 474 F. Supp. 2d 228 (D. Mass. 2007)

Although defendants were in custody when they made statements to Internal Revenue Service (IRS) Agents who were executing search warrant on their home, defendants' statements were not procured by impermissibly coercive police tactics, and thus they were voluntary despite the failure of the agents to administer *Miranda* warnings; agents made no threats of extrajudicial violence, did not engage in trickery or deceptive conduct, and did not make promises of leniency in order to induce defendants into making incriminating statements.

国税局（IRS）特工在执行搜查被告住处的搜查令时，此时被告即使被羁押并向特工们作出陈述，此种陈述不是通过不被允许的强制性的警察策略取得，因此即使特工没有执行米兰达规则，供述也是自愿的。特工没有威胁使用法外暴力，没有从事哄骗性或者欺骗性的行为，没有为得到被告人的有罪陈述而承诺对其宽大处理。

2.16 Threats and intimidation, compulsion or coercion

- *United States v. Goins*, No. 3:15-CR-47 (VAB), 2016 WL 67689 (D. Conn. Jan. 5, 2016)

Defendant's confession to possessing a firearm located in his fiancé's vehicle that he was driving, with his mother as a passenger, at the time of a traffic stop and search that yielded the firearm, was not involuntary under the Fifth Amendment, notwithstanding that law enforcement officers allegedly threatened to arrest his fiancé and mother if defendant did not admit possession; law enforcement officers had probable cause to arrest both the fiancé and the mother under Connecticut law because the fiancé owned the vehicle, and the mother was in the vehicle at the time the gun was found.

被告驾驶其未婚妻享有所有权的车辆，他的母亲也坐在车里。路检时，车内被发现藏有武器。被告声称对武器拥有所有权。根据第五修正案，被告的声明具有自愿性。即使执法人员曾威胁假如被告不承认拥有武器，他的未婚妻和母亲将被逮捕。执法人员依据康涅狄格州法律有适当理由逮捕被告的未婚妻和母亲，因为未婚妻是车辆的所有人，母亲在枪支被发现时乘坐此车。

二、外文二次资源

1. Monograph

选用数据库：浙江大学光华法学院“我的图书馆”

检索步骤：书目检索栏键入“evidence law” -- 西文文献库

检索范围：主题词 -- evidence law

检索结果：115 本相关著作。经选择，

- Monaghan, Nicola, Law of Evidence (Cambridge University Press, 2015)

《证据法》通过解释和专家的分析，清晰、深入地阐释了覆盖证据法领域的全部话题。它强调法律运行的背景，通过主要判决书、法规以及学术文章和书籍，聚焦实践焦点。

- Haack, Susan, Evidence matters: science, proof, and truth in the law (Cambridge University, 2014)

《证据问题：证据科学、证据与法律真相》运用跨学科的文章展示关于科学、证据和法律真相之间的整体联系。作者在书中特色鲜明地展示了基于真实生活的法律事件产生的关于科学的知识和哲学理论。

- Richard O. Lempert, James S. Liebman, Samuel Gross, A modern Approach To Evidence: Text, Problems, Transcripts and Cases (4th Revised Edition, West Academic Press, 2011)

《证据的现代研究：文本、问题、文字整理稿及案例》以问题为导向而不是使用上诉判决书来探究证据规则及其基础理论。书中讨论了新近的重要案例，介绍了社会科学的调查结果和基于证据规则及其基础理论的科学和技术的新近发展。

2. Law Reviews & Journals

选用数据库：Westlaw

检索步骤：Home-- Secondary Sources-- By Type-- Law Reviews & Journals-- Federal Law Reviews & Journals

检索关键词：self-incrimination

检索方式：sort by-- Date

- Matthew J. Thompson Jr., Salinas v. Texas: The Fifth Amendment Self-Incrimination Burden, 43 Cap. U. L. Rev. 19 (2015)

A Fifth Amendment bright-line rule would fix the pre-arrest, pre-Miranda silence problem by precluding the government from using a suspect's silence during any police inquiry. At first glance, the bright-line rule may appear to exalt its status over Miranda rights. However, the bright-line rule is merely an extension of current Miranda case law, and Miranda is still needed to provide necessary procedural tools that the bright-line rule does not offer. Furthermore, the Fifth Amendment bright-line rule passes the Jenkins impermissible burden test. Regarding the legitimacy of the bright-line rule, the government should actually prefer that a suspect remain silent instead of possibly burdening the government further with a coerced confession. Furthermore, a suspect that cannot remain silent might also be tempted to lie, creating misinformation and wild-goose chases. The bright-line rule also does not burden the policies underlying the Fifth Amendment because the defendant has a choice to not incriminate himself by simply remaining silent, thereby avoiding any problems of compulsion or a burden on the defendant's Fifth Amendment privilege against self-incrimination

通过排除政府使用犯罪嫌疑人在警察询问时的沉默，第五修正案的明线规则可以弥合逮捕前和先于米兰达规则告知前的沉默问题。乍一看来，明线规则可能凌驾于米兰达规则权利之上。然而，明线规则仅仅是现今米兰达案例法的延伸。我们仍然需要米兰达规则，因为它提供了明线规则无法提供的必要程序工具。第五修正案明线规则还通过了詹金斯不允许的负荷试验。至于明线规则的合法性，政府实际应该更偏好犯罪嫌疑人保持沉默而不是可能的使政府担负强制供认的指控。如果犯罪嫌疑人不能保持沉默，他也有可能被诱使说谎话、提供虚假信息、引发荒谬无益的追查。明线规则不会限制第五修正案包含的政策，因为被告可以

通过仅保持沉默避免自证其罪，从而防止出现强制问题或者第五修正案不得自证其罪的责任问题。

- Zaur D. Gajiev, *Turmoil Surrounding the Self-Incrimination Clause: Why the Constitution Does Not Forbid Your Silence from Speaking Volumes*, 6 *Faulkner L. Rev.* 231 (2015)

The privilege against compelled self-incrimination emerged first as the product of religious and political persecution, as defendants before the English Church and State fought unceasingly in self-defense for a right against being compelled to incriminate themselves under oath. That right crystallized in the English common law and migrated to the colonies, where the Founding Fathers incorporated it into the Constitution of the newly-established United States. The language of the Fifth Amendment's Self-Incrimination Clause explicitly prohibits *compelling* individuals to incriminate themselves. However, the privilege's meaning has been distorted in recent years by a judicially active Supreme Court that has strayed from constitutional foundations. As a result, the instability in self-incrimination interpretation and a split among jurisdictions regarding prosecutorial comments on pre-arrest silence have detrimentally impacted criminal procedure throughout the United States.

Nonetheless, the current turmoil surrounding the Self-Incrimination Clause can be tempered by a return to the compulsion analysis. As the tribunal that all others look to in times of uncertainty, the Supreme Court's reestablishment of the compulsion analysis as the primary tool with which to address self-incrimination questions will return the privilege to constitutional footing and prevent future turbulence in its interpretation. More importantly, the Court in future years must be “more circumspect before bending constitutional principles in the service of what it takes to be the fairer result in an individual case.” As such, it must stay true to the privilege's language, history, and logic. “A legal system that ignores the truth is simply not doing its job, and neither is a court that cannot make the Constitution cohere.”

不得强迫自证其罪的权利是被告在英国教会和国家面前不断地自我防卫以争取反对在誓言之下自证其罪的权利时，作为宗教和政治迫害的产物而首次出现的。此权利形成于英国普通法，并传播到殖民地。开国元勋们将这一权利载入刚建国的美国的宪法之中。第五修正案反对自证其罪的条款明确禁止强迫个人自证其罪。然而，近年来此权利的含义被一个司法活动活跃、已偏离宪法根基的最高法院所扭曲。由此带来的后果是，涉及逮捕前的起诉意见时，自证其罪诠释的不稳定性及司法管辖区域之间的的分歧已在全美范围内对刑事程序产生不利影响。

虽然如此，萦绕不得自证其罪条款的混乱可以通过回归强制性的分析得到缓和。作为所有其它法庭面临不确定性时倚重的特别法庭，最高法院可以将强制性分析作为处理自证其罪问题的基本工具进行重塑，使得不得自证其罪的权利回归宪法基点，防止将来对此权利的诠释出现混乱。更为重要的是未来几年内，最高法院必须“处理个人案件时，为得到公平结果对宪法原则作通融解释时必须更加审慎。”因此，它必须忠实于此权利的语言、历史和逻辑。“一个忽视真理的法律系统和一个不致力于宪法内恰的法庭都不会做此工作。”

- Luke M. Milligan, *The Right "To Be Secure": Los Angeles v. Patel*, *Cato Sup. Ct. Rev.*, 2014-2015, at 251

The *Patel* decision affects Fourth Amendment doctrine in two notable ways. It loosens the restrictions on Fourth Amendment facial challenges and narrows the administrative search exception to the warrant requirement. Yet the real significance of *Patel* lies in its reasoning. This brief article argues that the *Patel* majority was influenced by the “to be secure” text of the Fourth Amendment. This influence can be

gleaned from the majority's emphasis on the “relative power” of hotel operators during police encounters, Tom Goldstein's focus on “tranquility” at oral argument, and the EFF's lengthy discussion as amicus on the original meaning of “to be secure.” The upshot is that the original meaning of the Fourth Amendment appears to have played a silent but important role in *Patel*.

帕特尔判决从两个方面显著影响着第四修正案的原则。它放松对第四修正案表面的挑战，限制持有搜查令进行行政搜查的例外。然而帕特尔判决的真正意义在于他的推理。这篇简短的文章认为支持帕特尔案中多数法官受到第四修正案文本中“保证安全”的影响，此影响可从多数法官对于与警察冲突的酒店经营者的“相对权利”的强调中得到印证。汤姆·金斯坦强调口头争论的“平和性”，法院之友 EFF 详尽讨论了“确保安全”的初始含义。判决结果显示第四修正案的起初含义在帕特尔判决中扮演了沉默但重要的角色。

● Becky Abrams Greenwald, Maimonides, Miranda, and the Conundrum of Confession: Self-Incrimination in Jewish and American Legal Traditions, 89 N.Y.U. L. Rev. 1743 (2014)

This Note has shown how two disparate legal systems struggle to strike a fair balance in applying the privilege against self-incrimination. On the one hand, there are many reasons to reject self-incriminating evidence--suspicions of unreliability, respect for personal integrity, the need for boundaries between state and individual, and the exceedingly private and self-destructive nature of confessions. On the other hand, self-incriminating evidence may be the missing piece in solving the puzzle of a crime. Weighed against the values of protecting the innocent and respecting the dignity of defendants are the values of reaching justice on behalf of victims and protecting society from perpetrators of violence. In addition, confessions can enable guilty defendants to admit their crimes and begin the process of rehabilitation. An examination of the American and Jewish legal systems reveals that, whichever values take precedence in a particular case, the decision whether to admit or reject a confession will always involve a conundrum: Do we believe the confessor that he has raped, murdered, or stolen but assert that he is now telling the truth? Or, do we refuse to accept that he is a rapist, murderer, or thief but find him to be liar?

意见书显示了在适用不得自证其罪权利时，两个完全相异的法律系统如何寻求平衡。一方面，许多理由可以用来拒绝采纳自证其罪的证据，诸如不可靠性的怀疑、人格完整性的尊重、国家与个人界限划分的需要、供述的极其私密与自我毁灭的特性。另一方面，自证其罪的证据可能是解决犯罪拼图游戏中所缺失的部分。权衡保护无辜与尊重被告尊严的价值是从保证受害人获得司法公正和保护社会免遭暴力侵害的角度而言的价值。此外，供述可促使有罪的被告承认罪行、开启矫正程序。关于美国及犹太人法律系统的研究显示，对于特定的案件而言，无论什么价值处于优先位置，无论承认还是拒绝供述，判决总是面临着困境：我们相信承认自己已犯下了强奸、谋杀或者盗窃罪行的自白，但坚信他现在正说出真相吗？或者，我们拒绝接受他是强奸犯、谋杀者、盗贼，但发现他在说谎吗？

● Nicholas Soares, The Right to Remain Encrypted: The Self-Incrimination Doctrine in the Digital Age, 49 Am. Crim. L. Rev. 2001 (2012)

The steady flow of technology inevitably changes the way people interact with the world around them. This truism is especially applicable, and potentially especially dangerous, when it comes to the manner in which technology impacts the law. Modern encryption schemes may on a practical level be impossible to break. When faced with the potential that the Government may be unable to obtain evidence needed for conviction in a crime as unpopular as real estate fraud or as heinous as

child pornography, courts will inevitably be drawn to a facially reasonable constitutional analysis that can nearly always be manipulated to yield a victory for the Government. The Fifth Amendment's guarantee against compelled self-incrimination, however, is not qualified by the phrase "so long as it is convenient." If a criminal is to go free or to suffer reduced punishment because of the strictures of the Amendment, this is a cost that is not only anticipated but demanded by the Constitution, and a choice thoughtfully made by those who ratified it. As Justice Brandeis famously noted more than eighty years ago:

In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means--to declare that the Government may commit crimes in order to secure the conviction of a private criminal--would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

稳定的科技传播不可避免地改变人们和周围世界相处的方式。对于科技影响法律的方式而言，此真理尤为正确，但却是特别危险的。现代加密体系在实践层面不可能突破。当政府有可能无法取得类似不常见的房地产欺诈或者令人发指的儿童色情犯罪的定罪证据时，法庭将不可避免地运用表面合理的宪法分析，分析结果几乎总是有利于政府。然而，第五修正案确立的不得自证其罪权利不适用“只要方便”的说法。如果罪犯因为此修正案的限制而逍遥法外或者被减轻处罚，这不是宪法预料和需要的代价，而是那些批准适用它的人们深思熟虑后的选择。正如布兰迪斯法官八年以前影响广泛地指出的那样：

对法治政府而言，政府如果不能严格恪守法律，其存在必将会被危及。我们的政府是强大且无处不在的老师。或好或坏，它以自己为榜样教育全体人民。犯罪是易传染的。政府违反法律的后果是引发对法律的蔑视、人人自行其是以及无政府状态。宣告在刑法的实施中为达目的可以不择手段、宣告政府为确保私人犯罪的定罪可以触犯法律，这些都会导致可怕的报复。法庭应当坚决反对那个有害的信条。

3. Texts & Treatises

选用数据库：Westlaw

检索步骤：Home-- Secondary Sources-- By type--Texts & Treatises--By Topic--Criminal Law --Criminal Law Texts & Treatises--Criminal Procedure--Primary Source with Annotations

检索结果：文本内容如下，

Part I. Introduction and Overview

Part II. Detection and Investigation of Crime

Part III. The Commencement of Formal Proceedings

Part IV. The Adversary System and the Determination of Guilt and Innocence

Part V. Post-Conviction Review: Appeals and Collateral Remedies

文本很多章节包含与文章论题相关的内容，归因于内容庞杂和篇幅，不具体全部引注。

4. Survey

选用数据库：Westlaw

检索步骤: Home-- Secondary Sources-- By type-- 50 State Surveys-- 50 State Statutory Surveys --Criminal Laws -- Criminal Procedure-- Right to Appointed Counsel

- Thomson Reuters , Right to Appointed Counsel, October 2015

Generally, defendants in criminal proceedings have a constitutional and/or statutory right to representation by counsel if conviction may result in incarceration. If a defendant cannot procure legal counsel with his or her own resources, the court will appoint counsel for the defendant. This survey covers that right to counsel.

This survey covers only statutory provisions regarding the right to counsel. Many states provide specific provisions for the appointment of counsel in capital cases and in extradition proceedings, but those statutes are not included here. This survey also does not include statutes regarding the rights of juveniles or incompetents, nor does it include the procedures for the appointment of counsel.

The attached table organizes the content into the following subtopics:

- Definition of Indigency
- Determination of Right to Appointed Counsel – Factors
- Application or Evidence of Indigency
- Obligations of Defendant (Fees)

通常说来,如果定罪能导致监禁,刑事程序中的被告拥有宪法或者法律规定的律师帮助权。如果被告自己无法获得律师的帮助,法庭应该为被告指定一个律师。这个调查涉及到律师帮助权。

这个调查报告仅涉及与律师帮助权相关的法律条文。许多州关于死刑案件和引渡程序中的律师帮助权有特殊规定,但是那些特殊规定在此报告中未提及。这个调查报告也不涉及青少年与残疾人的律师帮助权,不涉及指定律师帮助的程序。

附件中的表格用下述四个副标题为展示调查内容:贫穷的定义、获得律师帮助权的决定因素、贫穷依据的运用以及被告的义务(费用)。

2012年的刑事诉讼法实施之后,我国刑事辩护制度的运行有一定改善,但也存在一定问题,如职务犯罪的会见问题。刑事法律案件的律师辩护主要适用于审判阶段,其次是审查起诉阶段,侦查阶段的适用比较少。比较美国50个州律师帮助权的规定,可以给我国刑事辩护制度的完善提供域外视角。

第五部分 结论

犯罪嫌疑人、被告人供述和辩解是我国刑事诉讼法明确规定的八种证据种类之一。我国以证据种类为标准确立起一套中国式的可采性体系,将中国传统的证据种类与英美式证据排除规则体系杂合在一起。按照2012年刑事诉讼法及两个刑事证据的规定,采用刑讯逼供等非法方法收集的犯罪嫌疑人、被告人供述,应当予以排除。

2012年的《刑事诉讼法》第50条规定“不得强迫任何人证实自己有罪”,这是我国刑事诉讼法人权保障的重要进步。但是该规定与“不得自证其罪”还有差距。在法治国家,“不得自证其罪的权利”是刑事被告人或者证人的诉讼权利,美国宪法第五修正案确立了此宪法权利,意在保障个人不被政府强迫作证并提供可能导致其受到刑事指控的证言。不得自证其罪的权利与无罪推定原则共同确保由国家承担刑事指控的证明责任。该权利蕴含着沉默权,因此该权利的完整含义是,不得强迫任何人正式自己承认有罪或无罪。第50条只是确立了“不得强迫任何人证实自己有罪”,但未触及不被强迫自证无罪的权利,即沉默权。

贿赂案件口供依赖问题成因源于证据的稀缺。但口供依赖的破解不仅要保障口供的取得出于犯罪嫌疑人或者被告的自愿性，而且必须满足国家打击腐败犯罪的政策需要，因此要从顶层设计综合考量。一方面要重视口供对于案件侦破的重要性，另一方面也不能形成口供中心主义。

首先要完善讯问制度，规范侦查人员的行为，确保口供取得的合法性。如我国现行的职务犯罪实行同步录音录像制度，美国对录音录像的讨论可以为我国完善这一制度提供域外视角。其次，科学合法地适用技术侦查手段取证，增加证据的来源。再次，要建立污点证人制度，降低犯罪证明难度。最后，建立贿赂犯罪的法律推定制度。推定制度有利于解决证明困难，提高司法效率。