Means for the control and regulation of human behavior exist in virtually every culture in the modern world. In fact, *law* in some form is noted in ancient civilization dating back thousands of years. Distinct from informal means of social control, laws provide formal guidelines and punishment for all members of society, irrespective of race, gender, age, ethnicity, or subculture. As such, they are deemed necessary for the maintenance of the particular society from which they derive. Indeed, the absence of such codification would result in a society in which conflict resolution could be achieved only through violence. Law, then, may be defined as the codification of social norms and expectations. This definition may be bifurcated further into laws of substance and laws of procedure. **Substantive law** defines the parameters of social behaviors, while **procedural law** defines the process of adjudicating those behaviors. Many similarities may be found cross-culturally within substantive laws, most particularly among crimes defined as inherently wrong. The *mala in se* crime of patricide, for example, is prohibited in virtually every civilized society. However, the procedure for the disposition of the same crime may be decidedly different across cultures. While some societies have large measures of both, Anglo-Saxon jurisprudence has been characterized most by procedural evolution.

***Mala in Se* versus *Mala Prohibita***

***Mala in se*** crimes are defined as behaviors that are inherently wrong or immoral in and of themselves—irrespective of the prevailing law. The rape of a child or the eating of one’s offspring would be examples of such in most societies. ***Mala prohibita*** crimes, on the other hand, are behaviors that are not naturally immoral but whose wrongness lies in their legal prohibition. Such crimes in the U.S. might include gambling, drug use, and vagrancy.

Firmly situated within the framework of procedural law, **evidence** may be defined as the demonstration of truth or untruth of allegations made within a court of law. Unlike other areas of law, however, the rules of evidence are not universally regarded or considered. Although the introduction of evidence within the United States is heavily codified, many cultures approach the introduction of evidence in a haphazard manner at best. In order to come to a complete understanding of the American system, it is essential to explore the history of law and jurisprudence throughout the world.

**WHO IS JOHN WIGMORE AND WHY IS HE IMPORTANT?**

John Henry Wigmore is considered by many to be the father of evidence law in the United States. He was one of the founding editors of the *Harvard Law Review*, but he is most famous for his multivolume treatise on evidence. His legal thinking is often cited by the Supreme Court to this day.

**THE HISTORY OF LAW AND LEGAL PROCESS**

Traditionally, legal systems—including the Egyptian, Mesopotamian, Hebrew, and Hindu—were based almost entirely on religious beliefs, grounded in assumptions that rulers were divinely guided in the development and application of justice. Secular systems emerged from the Greeks and, with few exceptions, contemporary systems have, as well.

**WIGMORE’S 16 SYSTEMS**

**PRE-CHRISTIAN ERA**

**Egyptian (4000 B.C.–800 B.C.)**. This Egyptian era proved to be the most pervasive and foundational of all the legal systems identified by John Henry Wigmore, elements or characteristics of which are noted in virtually all the others. The codes of law consisted of some 40 scrolls in which self-representation was key. Interestingly, this system granted a level of equity and independence for females much greater than in subsequent laws. For example, under Egyptian law of this period, women held the right to divorce. In fact, it appears that subsequent Semitic codes gradually eroded all marital rights of women. Despite its sophistication, this system was characterized as nepotistic, with administrative and judicial responsibilities contained within a single office (that is, the judge). In this system, petitioners represented themselves without the presence of advocates; Egyptians believed that other world systems were flawed in that an advocate’s eloquence, or lack thereof, might unfairly influence the decision. The system was replaced by the Roman emperor Octavian after his defeat of Antony and Cleopatra.

**Mesopotamian (4000 B.C.–100 B.C.)**. Best known for its development of a complex network of commercial custom and law, the Mesopotamian code is also one of the most preserved. The **Code of Hammurabi**, discovered in 1902 by the French explorer DeMorgan, is an 8-foot pillar of 300 sections. It currently resides in the Louvre. For the most part, the Code of Hammurabi included exhaustive provisions for marital relationships, with limited guidance for prosecution of crimes. It is characterized by the burden of proof resting solely with the accused and carried severe sanctions, including death, for failure to meet this burden.

**Hebrew (1200 B.C.–Present)**. Still in existence, Hebrew law has evolved over a progression of five periods: Mosaic, Classic, Talmudic, Medieval, and Modern. Before 300 B.C., Hebrew law was consistent with others then in existence in that laws were made by kings, judges, and prophets. Gradually, of course, church leaders became the legislators and arbiters of justice, and the “Scroll of the Law” (a.k.a. the Torah) resides in every synagogue in the world.

**Chinese (Pre-2500 B.C.–1949)**. Unfortunately, Wigmore’s conceptualization of the world’s legal systems was created prior to the rise of Chinese communism. However, before 1949, the Chinese proved to be “the most law-abiding people on the face of the globe—but the laws by which they [abided] were laws of which they approved” (Wigmore, 1936, p. 148). This society was characterized by conciliation and mutual adjustments, which were characteristics essential to the driving force behind their judicial system.

**Hindu (500 B.C.–Present)**. In the most basic sense, the Hindu Laws of Manu was a system of laws that rewarded some in society at the expense of others. Caste-based in nature, the laws were required to be adhered to by all members, but obedience was much simpler for the Brahmins, whose lives were made much easier by the subjugation of the Sudras.

**Greek (1200 B.C.–A.D. 300)**. Beginning in the Homeric period and ending with the Romans, the Greek system was the first to employ a jury system. During this period, citizens were ultimately responsible for interpreting the law, determining guilt, and administering punishment. During trial proceedings, magistrates acted merely as the chairperson of the assembly while average citizens, selected through the drawing of lots, served as judge, jury, and executioner. Many recognized the danger in such power, as Socrates cautioned, “The difficulty, my friends, is not in avoiding death, but in avoiding unrighteousness; for that pursues us faster than death.”

**Roman (400 B.C.–Fifth century A.D.)**. This period constituted the first comprehensive attempt at the incorporation of procedural law and produced a professional orator class (Cicero was considered the most successful orator of his time). During this period, a system that included a professional judge and jurists emerged, the jury-advocate system faded, and politics and law officially separated. According to Wigmore, the Roman system was characterized as such:

The praetor had become the typical judge of our modern ideals, the first of the kind—secular, not priestly; a lawyer, not a layman; an adjudicator, not an administrator … professional jurists in copious treatises expounded legal principles in systematic forms … schools of love-study arose and multiplied (p. 420).

**CHRISTIAN ERA Japanese (A.D. 500–Present)**. The legal system in Japan evolved over five distinct periods beginning before the advent of Christianity and continuing through the present day. Initially, the evolution was influenced heavily by Confucianism. By the third period, a sophisticated system emerged—one that included complex credit systems, commerce, legislation, and law. In keeping with Confucian principals, legal rulings were distributed only to fellow magistrates—assuming that competent rulers created a content society. Along with this concept of conciliation, a national law—similar to that developing in England—emerged. In fact, Western thought continued to influence the Japanese systems and resulted in a system remarkably similar to European law.

**Mohammedan or Islamic (Seventh Century A.D.–Present)**. In contemporary society, Islam represents one of the three major world systems of law. According to Wigmore, the period between 800 and 1200 was marked by unrivaled advances in architecture, literacy, and education. As with early systems, Islamic laws were (and continue to be) religiously based—derived from three primary sources: the Koran, the word of God as written by Mohammed; Mohammed’s teachings, as recorded through tradition; and emerging jurist opinions. Of the three extant systems, the Mohammedan system is the oldest.

**Celtic (600 B.C.–A.D. 1400 to 1600)**. Characterized by three periods of extreme change, the Celtic system originally was based on mysticism and magic. Druids were considered to be both priests and jurists. It was believed that this was the perfect system, in that the Druids were actually bound by their own magic. Thus, unjust decisions resulted in actual physical harm to the practitioner. Only two of the protected areas of Gaul had any written legal procedure—Wales and Ireland. However, both of these were abolished through English conquest. Thus, their impact on contemporary legal thought is muted, at best.

**Slavic**. The Slavic culture was characterized by infighting and dissension, which ultimately resulted in a lack of a native legal system. Generally speaking, implementation of the Slavic “system” included areas as culturally diverse as Bohemia (now the Czech Republic), Poland, Yugoslavia, and Russia. Although the Bohemian and Russian systems never quite got off the ground because of the Parliament’s and Tsar’s refusal to give any ground to the peasants, the Poles and Slavs were more successful. However, both groups were influenced largely by other systems, including the Romanesque and Germanic.

**Germanic (Early B.C.–Present)**. The emergence of this system was religious, based entirely on mythology, and spread throughout western Europe as the population fled the invading Asiatic tribes. The Anglican institution of trial by jury was implemented by Charlemagne in conjunction with a gradual nationalization of law. In addition, procedural guidelines for criminal trials evolved and the sixth century saw the implementation of the Imperial Chamber of Justice, a central court of appeal in which 8 of the 16 judges were Romanesque scholars.

**Maritime**. One of the oldest and most universal systems of law, the Maritime system dates back to the ancient Phoenicians (3000 B.C.). With the exception of a trend toward a nationalized system, Maritime law never changed, stretching across race, ethnicity, and religion.

**Papal, or Canon, Law**. Governed by the Pope, the Roman Catholic Church reigned supreme for twelve centuries over one of the most ceremonial of systems, and many of its traditional rituals are still observed. For example, the *Sacra Romana Rota* (Roman Holy Wheel), a civil tribunal to which kings once presented their cases, is still held. Although the Church has lost most of its authority over heads of state, it enjoyed periods of absolute authority in which kings, governments, and entire societies paid homage. Papal courts were responsible for the heresy trials of Galileo and Joan of Arc. Papal law has proved invaluable to contemporary proceedings. The Church forbade “trial by battle,” for example, finding it to be irrational. It also revolutionized judicial procedure throughout western Europe and introduced the concept of equality under the law, erasing traditional distinctions between the rich and the poor. However, the temporal power of the Church was replaced by national courts beginning in the sixth century.

**Romanesque (A.D. 1100–Present)**. Although its application is anything but universal, Romanesque law is currently the most common throughout the world. During the twelfth century, a resurrection of Justinian’s law text in Italy resulted in an extensive period of philosophical study, while the fourteenth century witnessed the application of this Roman ideology to the extant Germanic and feudal customs in Italy. Gradually, such jurists branched out, bringing this application to Spain, England, France, the Netherlands, and Germany. However, the most notable event in this system’s development was, of course, the Napoleonic Code. This code was the first of its kind to merge various extant codes and the Roman Common Law successfully into a national code.

**Anglican (A.D. 1100–Present)**. Characterized by three distinct periods, the Anglican legal system is another of the legal systems currently spanning the globe. A code of common law began to evolve in early England, and Inns of Court were used to pass on such legal knowledge. Because of this unified legal code and entrenched legal profession (coupled with a heavy dose of nationalism), England did not fall to the Romanesque fever that was sweeping the Continent. As a result, the American system of justice was profoundly affected and many of the framers of the Constitution were trained at the Inns of Court.

**The Evolution of Law**

As stated previously, codification of social norms and mores has been noted throughout history. Pre-industrial societies were characterized by strong tribal leadership that dispensed justice in the name of the tribe. Contemporary Western societies, however, may trace their roots to the Code of Hammurabi (circa 2270 B.C.), the oldest known legal code. (See the photo above.) The Code of Hammurabi was a study in complexity, with some of the laws being quite primitive and others quite sophisticated. Primitive ideals included retaliatory penalties such as “an eye for an eye and a tooth for a tooth,” while sophisticated ideals included laws governing trade and commerce such as the beginning of concepts of product liability (229) and medical malpractice (220). As expected, early punishments were quite harsh. In the case of adultery (129), the Code provided that “if a man’s wife be caught lying with another man, both shall be bound and thrown into the water.”



*Secular systems began to emerge with the Romans. In approximately 450 B.C., the Twelve Tables were introduced as a means of satisfying both the patrician and plebian classes. Unlike the Ten Commandments, which delineated moral behavior, this particular code was primarily procedurally based. Although it provided for the form of presentation of a case, a formal jury system was not developed until much later. The tenets of the code, and the civil procedure included therein, spread to western Europe with the expansion of the Roman Empire. In fact, the pervasiveness of the Twelve Tables was such that much of it survived the fall of the Empire and was incorporated into the Napoleonic Code centuries later*.

**Product Liability and Medical Malpractice Under the Code of Hammurabi**

The Code of Hammurabi was not only the first legal code in the world to specifically define criminal behavior, but it also provided the framework for civil law, including product liability and medical malpractice.

229

If a builder build a house for any one and do [sic] not build it solid; and the house, which he has built, fall [sic] down and kill the owner; one shall put that builder to death.

220

If he opens an abscess with a bronze knife, and destroy [sic] the eye, he shall pay one-half what the slave was worth.

**Common Law.**

Before the Norman Conquest, English law had been created in an attempt to maintain social order. Most laws were class based and included manor relationships such as that between vassal and lord. Provisions for blood feuds were also included and were regulated by circumstances: Serfs avenging the murder of their lord, for example, could not be held liable by the kin of those slain in the lord’s name. At the same time, serfs who killed others without legal justification could be held liable to the highest standard. However, the English government prior to Norman administration was largely decentralized, involving various officials and fiefdoms.

**Common Law Versus Civil Law**

**Common law** refers to the system of law established in England that spread to much of the English-speaking world. Civil law developed during the Roman Empire and was modernized by the French in the nineteenth century under the direction of Napoleon Bonaparte.

William of Normandy’s conquest of England in 1066 signaled the beginning of the rules of evidence and contemporary criminal procedure in the English system of justice. After the Conquest, although the Normans actually administered the cultural laws of the land that had existed prior to their domination, they also developed entirely new systems of government and justice. While maintaining the traditional notions of a governing council, the English system was transformed into the precursor to the American bicameral legislature. One of the first initiatives involved the appointment of county sheriffs, who were puppets of the king, and the administrative council, who largely were responsible for taxation and financial considerations within their jurisdictions. Papal authority within the newly developed courts was denounced, separating the secular and ecclesiastical. Continental feudalism, in which landowners were given responsibilities accompanied by privileges that allowed them to own lands in perpetuity rather than the length of time that their swords were needed, was created.

**First Use of Common Law in a Colonial Criminal Court**

John Billington, one of the original Pilgrims on the *Mayflower*, killed a neighbor in 1630. Because there was no statutory criminal law in place at the time, the court used the common-law crime of murder and the common-law rules of evidence. He was subsequently tried, convicted, and hanged.

By the thirteenth century, the Norman courts and laws had been firmly established. Such entities, national (or common to all) in scope, came to be known as a system of *common law*. Proceedings and decisions of the courts were written down, summarized, and disseminated throughout Normandy so that consistency would be maintained. Ironically, this practice—undertaken to ensure consistency of application—resulted in a secondary source of law. As the practice took root, jurists increasingly justified their rulings on custom, tradition, and—most importantly—prior judicial decisions. This, in some cases, actually supplanted the legislation it was designed to uphold and became increasingly popular because of the infrequency of legislative meetings. Common law, then, is by definition a compilation of judge-made law.

**Precedent and the Doctrine of *Stare Decisis*.**

Under the English common law system that emerged, decisions made by judges created **precedents**. Such rulings included justifications based on case characteristics, applicable law, and community standards. Rulings in seminal or unique cases proved especially valuable because jurists could substantiate their judicial opinion on previously published rulings. Such precedents, by nature, were binding on both the originating court and any lower court included within that jurisdiction. Theoretically, decisions of lower courts were not binding on higher courts, and in some cases, the higher courts did their own reasoning and concluding. This practice was brought to the United States with the colonists and continues to this day.

Essentially the doctrine of precedent, ***stare decisis*** is a Latin phrase meaning “to stand by that which is decided.” Theoretically, it requires courts to adhere to the law as decided by the highest court within a jurisdiction when such decision could be applied to the matter at hand and was reasonable in its inception. In fact, it “carries such persuasive force that the Court has always required a departure from precedent to be supported by some special justification” (*Dickerson v. United States*, 530 U.S. 428, 2000). In practice, this means that rulings from the U.S. Supreme Court are binding upon the entire federal court system, and rulings from state supreme courts are binding upon lower courts within the state. Precedents established in one state, however, are not binding upon bordering states. It is entirely possible, then, that a particular piece of exculpatory evidence introduced, for example, in an Alabama court may not be admitted in one in Georgia, even if it is critical to the defense. This style of law is quite different from the *civil law* system.

**Civil law** is a legal system derived from Roman law, especially the *Corpus Juris Civilis* (circa 529–534) of Emperor Justinian I. Although it evolved throughout the Middle Ages, it was changed most dramatically after the French Revolution with the introduction of the Napoleonic Code. Such codification had immeasurable impact upon areas around the globe, including Continental Europe, Japan, Latin America, and North America. Even in the United States, in which common law was well established, the Napoleonic Code would become the basis of the legal system in Louisiana before the Louisiana Purchase. Of course, this was entirely inconsistent with the legal principles espoused in the northeastern states colonized by English settlers. However, both currently are bound by the U.S. Constitution and Bill of Rights and by subsequent interpretations by the Supreme Court. Thus, it can be argued that the primary distinction between common and civil law may be found in the methodological approach employed in their creation. Civil law systems, for example, are based primarily on legislation: Courts apply the provisions of statutes, thus creating a system of consistency through decisions based on principles. Case law, on the other hand, is a system in which cases are the primary source of law. In a system such as this, statutes are viewed as attacks on the system itself and thus are interpreted narrowly. This is not to suggest, however, that common law systems are completely implacable or that the doctrine of *stare decisis* prohibits reconsideration.

**American Versus English Law**

American society currently relies upon common law *and* civil law. Theoretically, American courts attempt to apply statutes as intended by the legislature, while English courts do not make provisions or have consideration of legislative intent. Unlike English law, the American system provides for judicial review of legislation at all levels of the court structure. Although federal courts can strike down federal and state statutes that contravene the Constitution, state courts can nullify state statutes that they interpret as violating state or federal constitutions. Though not the norm, a handful of other countries provide for a limited amount of judicial review of legislation. These countries include Germany, Brazil, and Japan.

As a general rule, courts and jurists would prefer to not reverse previous decisions, because to do so would pronounce their own fallibility. However, reversals are not uncommon in American courtrooms. In a 2002 case, for example, the Supreme Court held that the execution of a mentally retarded person violated the Eighth Amendment’s prohibition against cruel and unusual punishment, essentially reversing its opinion on the subject. Such reversals, though not uncommon, are usually couched in terms that negate the concept of partiality or hypocrisy on the part of the presiding jurists. Instead, courts attempt to justify their inconsistency by identifying or distinguishing the present case from earlier ones. As was evidenced in the justification supplied by the Court in *Atkins v. Virginia* (00-8452, 536 U.S. 304, 2002; 260 Va. 375, 534 S. E. 2d 312):

First, there is a serious question whether either justification underpinning the death penalty—retribution and deterrence of capital crimes—applies to mentally retarded offenders. As to retribution, the severity of the appropriate punishment necessarily depends on the offender’s culpability. If the culpability of the average murderer is insufficient to justify imposition of death, see *Godfrey* v. *Georgia*, 446 U.S. 420, 433, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. As to deterrence, the same cognitive and behavioral impairments that make mentally retarded defendants less morally culpable also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the death penalty’s deterrent effect with respect to offenders who are not mentally retarded. Second, mentally retarded defendants in the aggregate face a special risk of wrongful execution because of the possibility that they will unwittingly confess to crimes they did not commit, their lesser ability to give their counsel meaningful assistance, and the facts that they are typically poor witnesses and that their demeanor may create an unwarranted impression of lack of remorse for their crimes. (pp. 12–17)

Summarily, civil and common law systems provide for change. Common law systems originated in England and were transferred to various parts of the globe by conquest and custom. Initially, such law was largely unwritten because of the absence of statutory law, the infrequency of legislative meetings, and the lack of education among the general populace. Civil law, on the other hand, was a system of legislative codes of law, comprehensive in nature that delineated statutory-defined wrongs by private persons. Although previous cases are not necessarily ignored in this type of system, they are not afforded any level of binding authority.

**SOURCES OF LAW IN THE AMERICAN SYSTEM**

American jurisprudence may be divided into two distinct forms of law. The first, common law, is characterized by judge-made law and is based on the concept of *stare decisis*. The second, traditionally referred to as *civil law* but hereafter called *legislative law*, is composed of laws established by government entities. This second category includes constitutions, legislative acts, and administrative regulations from state and federal sources. It is the area of law characterized by codification and bears heaviest on criminal procedure. Unfortunately, it often is complicated by questions of jurisdictional sovereignty.

**Misconceptions of Power**

Many individuals labor under the misconception that the Federal Bureau of Investigation (FBI) is some sort of national police force. Nothing could be further from the truth. The U.S. Constitution fails to grant the federal government any police power over its citizenry.

Since its inception, the American legal system has been one in which a strong central government provides a national infrastructure simultaneous to state governance of a judicial entity. To wit, as expressed in *Rochin v. California* (342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, 1952):

The power to define crimes belongs to Congress only as an appropriate means of carrying into execution its limited grant of legislative powers … broadly speaking, crimes … are what the laws of the individual States make them subject to the limitations … in the original Constitution, prohibiting bills of attainder and ex post facto laws, and of the Thirteenth and Fourteenth Amendments.

As such, most crimes are defined by state statute.

Theoretically speaking, each state is sovereign—having its own constitution, criminal code, and rules of procedure. As stated, most criminal offenses are violations of *state* codes not federal ones. In fact, there is no national police force, nor does the Constitution provide for one. Furthermore, there is not now, nor has there ever been, a federal common law. Indeed, all federal crimes are statutory crimes as defined and enacted by Congress—common law is reserved for the states. Criminal laws on the federal level may be enacted by Congress only in the following areas: the protection of Congress and its interests, including personnel, property, and information; the regulation of interstate and foreign commerce; the protection of civil rights; and the sovereignty of areas not otherwise claimed or accounted for, such as the District of Columbia, federal territories, and federal enclaves.

State and federal governments have the right (and responsibility) to pass laws to promote the health, safety, and welfare of their citizens, but states must conform to the requirements set forth in the U.S. Constitution. In other words, states may not abridge the rights guaranteed to individuals under the Constitution or the Bill of Rights. However, they may enhance or further protect those liberties at their discretion.

**The Magna Carta and the Bill of Rights**

Before the first quarter of the thirteenth century, English citizens were routinely arrested solely on the basis of unsubstantiated, anonymous accusations or at the whim of the social elite. In fact, the monarchy and corresponding government were considered sacrosanct—eternally secured by the imprisonment of dissidents. The **Magna Carta**, however, remedied much of this. An agreement between King John and thirteenth-century barons, the Magna Carta established the concept that no criminal trial would be based upon an unsubstantiated accusation and, perhaps more importantly, that no freeman shall be taken, imprisoned … except by lawful judgment of his peers or the law of the land.

**The U.S. Constitution and the Bill of Rights**

On July 4, 1776, the Declaration of Independence was issued by the Second Continental Congress. Divided into three parts, the Declaration negated the traditional notion of the divinity of rulers and argued that, irrespective of social class, all individuals were granted certain unalienable rights including life, liberty, and the pursuit of happiness. It included a preamble, a list of grievances, and the declaration itself. The grievances delineated those wrongs committed against the colonies by the king. This document was followed by the U.S. Constitution, which reiterated and expanded the fundamental rhetoric found within the Declaration of Independence. The Constitution was largely adopted by the new American republic in 1791, and after the addition of the **Bill of Rights**—the first 10 amendments. Without equivocation, this document represents the supreme law of the land in the United States. Designed to create a strong central government while protecting the individual rights of sovereign states, the **U.S. Constitution** represents the oldest codified national constitution in the contemporary world. In the purest sense, this document was intended to remedy past injustices and provide safeguards for the citizenry.

We the People of the United States, in Order to form a more perfect Union, establish justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity …

In the most basic sense, the U.S. Constitution provides for the development of a legal system in which the Supreme Court is the final arbiter and in which lower courts have varying jurisdictions. Although there are some exceptions, very little of the wording contained in the original Constitution directly addressed criminal law in general or criminal evidence in particular. However, the first 10 amendments to the Constitution (Bill of Rights) began to correct this oversight and, coupled with case law, provided for the exclusion of evidence collected in violation of its tenets.

In a nutshell, the Bill of Rights reiterated and expanded the fundamental rhetoric found within the Declaration of Independence.



*Seen here is the original United States Constitution document, featuring the text of the famous Preamble*.

**First Amendment**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of Grievances.

Commonly referred to as the Freedom of Speech and Religion clause, the First Amendment provides protection from persecution to individuals of different religions and ideologies and, through Supreme Court interpretation of the **establishment clause**, formally separates the church and state. In addition, it prevents government censorship of the media, allowing for public criticism of government entities—a practice long prohibited in England. Largely included because of past religious persecutions, the First Amendment allows a platform for free speech, assembly, and, of course, religious practice.

**Second Amendment**

A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

Although the Second Amendment has absolutely nothing to do with the laws of evidence, it has been hotly debated for several decades. Although many anti-gun lobbyists have argued that the right to bear arms does not include handgun ownership, opponents of the lobby wrap themselves in the verbiage, claiming that the Second Amendment specifically provides for private ownership of weapons. Historical analysis would suggest that the Amendment was directed at the creation of militias or citizen groups in the face of tyrannical government, but the Supreme Court has provided little guidance with the exception of allowing states to regulate gun ownership. Thus, the Second Amendment remains open to individual interpretation.

**Third Amendment**

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, or in time of war, but in a manner to be prescribed by law.

Obsolete in contemporary society, the Third Amendment protected the rights of homeowners from governmental abuse of their property. Specifically prohibiting the involuntary occupation of residences by government officials or military personnel, the Third Amendment was another attempt to recognize the sanctity of homesteads.

**Fourth Amendment**

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

Arguably the most important provision contained within the Bill of Rights, the Fourth Amendment specifically precludes searches and seizures without probable cause. It was designed to halt the issuance of general warrants. In colonial times, such writs enabled British officers to search private residences, business locales, and public facilities at will. Such abuse by the government was thought to be one of the most important factors leading to the American Revolution. As such, the introduction of the Fourth Amendment was intended to provide security of citizens against tyrannical governments. The **probable cause** provision, in particular, required the state to demonstrate a level of certainty rising above mere suspicion. Not clearly articulated in the original verbiage of the Fourth Amendment, the standard has been consistently interpreted since by the courts. Discussed exhaustively in Chapter 4, it is sufficient to say here that the standard is established somewhere between “reasonable suspicion” and “beyond a reasonable doubt.” For the most part, the standard is represented as a balancing act demonstrating that the probability of a crime having occurred is ascertained and that the evidence of such a crime is contained within the specified location.1

**Fifth Amendment**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fifth Amendment contains several important provisions that act as safeguards against an oppressive government. These include the right to a grand jury, freedom from double jeopardy, freedom from self-incrimination, the right to due process, and the right to just compensation for private property taken for public use. The right to a grand jury and the right to due process were in direct response to the past abuses of the monarchies on private citizens—entities that used institutions such as the Star Chamber and the Spanish Inquisition. In both instances, sessions were held in secret, with no presentment of indictment, no right of appeal, no jurors, no witnesses, and no advocates. Such practices allowed officials to target political rivals and personal enemies, as well as create a system of bribery and extortion. Thus, the Fifth Amendment’s requirements of due process and grand jury indictment are pivotal to the freedoms enjoyed in contemporary American society.

**ENGLAND’S STAR CHAMBER**

The Star Chamber was constructed under the reign of Edward II to house meetings of the King’s Council. Although the etymology of the term *starred chambre* is unclear, it is alternatively thought to refer to either the shape or decoration of the room or its original purpose of hearing contracts between Jews and Christians. Theoretically, the Chamber was designed to allow for suits against the aristocracy by the lower class. In addition, it was originally created to serve in a supervisory capacity, and was the precursor to the appellate system. At the same time, sessions were held in private, and no provisions for the introduction of witnesses or evidence were available. This weakness was exploited under the House of Stuart, and the Chamber became synonymous with inequity and abuse of power during the reign of Charles I.

It had become a political court and a cruel court, a court in which divines sought to impose their dogmas and their ritual upon a recalcitrant nation by heavy sentences; in which a king, endeavouring to rule without a Parliament, tried to give the force of statutes to his proclamations, to exact compulsory loans, to gather taxes that the Commons had denied him; a whipping, nose-slitting, ear-cropping court; a court with a grim, unseemly humour of its own, which would condemn to an exclusive diet of pork the miserable puritan who took too seriously the Mosaic prohibition of swine’s flesh.

The Star Chamber was formally abolished by Parliament in 1641. However, the term has lived in infamy, and is often used to refer to any system of judicial proceeding that lacks procedural safeguards.

In addition to due process, the Fifth Amendment was also created to eliminate the barbarism of torture chambers. One of the most heinous of abuses in Europe throughout the Middle Ages and beyond, for example, included the practice of coercing testimony through torture. Both the rack and the “scavenger’s daughter” involved the stretching and crushing of body parts, respectively, and were used routinely in England not as a form of punishment but as a mechanism to extract confessions. As a result, the Fifth Amendment prohibits compulsory testimony of defendants. Such rights have been expanded through case law, most notable of which was *Miranda v. Arizona*.



*In 1963, Ernesto Miranda was charged with a variety of offenses including rape and kidnapping. While in police custody, Miranda, possessing only an elementary school education, confessed to the police. He was subsequently convicted and sentenced to a lengthy prison term. On appeal, the Supreme Court ruled that, prior to custodial interrogation, the police must notify an individual of his or her right to remain silent and right to an attorney. Today, these rights, commonly known as the* Miranda Rights, *are read to suspects in custody*.

In *Miranda*, the Supreme Court ruled that suspects may refuse to speak to the police upon their arrest and may choose to not testify in their own defense at trial. Other case law has barred the state from addressing the defendant’s refusal to testify as indicative of his or her guilt. In fact, the Court has prohibited even the mention of the exercise of such right, asserting that such would negate the right itself. Such rights, unheard of in many regions of the world, are so well recognized by the average American that little consideration is given to their importance. The Fifth Amendment protection against self-incrimination, however, is not absolute. In fact, it only protects individuals from compulsory testimony. It does not protect them from being compelled to provide blood, urine, fingerprint, or DNA samples; nor does it extend to giving writing and voice samples needed for comparison. Finally, the privilege does not extend to police lineups or photographs.

The final protection contained within the Fifth Amendment is the prohibition of governmental persecution through repeated prosecution. In essence, it prohibits the repeated prosecution of an individual for the same crime in the same jurisdiction if they have formally been punished for or acquitted of the crime. However, various exceptions exist. The Fifth Amendment does not preclude, for example, retrying an individual whose original trial resulted in a mistrial or a hung jury. It does not preclude the retrying of an individual who has successfully secured a new trial through the appellate process nor does it preclude the prosecution of an individual for the same set of circumstances in multiple jurisdictions. For example, three of the four officers involved in the Rodney King beating were acquitted of all charges in their state trial. However, Officer Laurence Powell and Sergeant Stacey Koon were convicted of civil rights violations in federal court and sentenced to prison for the same incident. Such practice is made possible under the *dual sovereignty doctrine*.

Under the **dual sovereignty doctrine**, individuals may be prosecuted for the same offense by two different government entities. Thus, individuals may be tried in state *and* federal courts for the same set of circumstances. However, they may not be charged in municipal and state courts, because the two are byproducts of the same government and derive their authority from the same body of law (that is, the state constitution). Though such practice and ideology are hotly debated among legal scholars, the Supreme Court has continued to uphold the constitutionality of the doctrine.

**Sixth Amendment**

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 the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Sixth Amendment grants individuals the right to a speedy and public trial, the right to an impartial jury of one’s peers, the right to be informed of the charges, the right to confront witnesses, the right to subpoena, and the right to counsel. Each of these rights represents essential threads in the fabric of the American criminal justice system. Although some legal scholars deny it, others argue that these rights were initially articulated in the Magna Carta. Before the first quarter of the thirteenth century, English citizens were routinely arrested solely on the basis of unsubstantiated, anonymous accusations or at the whim of the social elite. In fact, the monarchy and corresponding government were considered to be sacrosanct—eternally secured by the imprisonment of dissidents. The Magna Carta, established in 1215, was a document representing an agreement between King John and thirteenth-century barons. To wit, there would be no criminal trial based on an unsubstantiated accusation, and perhaps more importantly, that “no freeman shall be taken, imprisoned … except by lawful judgment of his peers or the law of the land.” In addition, the Magna Carta established the preliminary concept of *reasonable grounds—*a standard higher than the traditional standard of mere suspicion—that was subsequently transformed into our contemporary standard of *probable cause* now embedded in the Fourteenth Amendment.

In addition, the right to an impartial jury is contained within the Sixth Amendment. Simply put, all individuals have the right to a jury drawn from the community in which the offense was committed and who are not prejudiced in their examination of the offense. This does not suggest, however, that jurors must be completely ignorant of the crime or the defendant. It only requires that those selected are not predisposed to the defendant’s guilt. Changes of venue are often granted in cases receiving significant media coverage to diminish the possibility of partiality. However, many cases are so notorious and so widely covered that changes of venue have little impact. In fact, the judge in the Scott Peterson case denied a change of venue for the sentencing of the man convicted of killing his wife and unborn child, arguing that the media coverage throughout the state of California had been so pervasive that a change of venue was a waste of time.

The **Confrontation Clause** is also firmly embedded in the Sixth Amendment: “The accused shall enjoy the right … to be confronted with the witnesses against him.” It is primarily an attempt to halt the British practice of using anonymity to mask unfounded or politicized charges, as in the case of Sir Walter Raleigh who was charged with treason after the death of his benefactor. Although his primary accuser was known to him and was his former friend and alleged co-conspirator, Lord Cobham, Raleigh was unable to mount a defense, because he was never granted the right to question Cobham. (His request was, however, duly noted: “Good my Lords, let my accuser come face to face, and be deposed. Were the case but for a small copyhold, you would have witnesses or good proof to lead the jury to a verdict; and I am here for my life!”). Unfortunately for Raleigh, and for the interests of due process and fundamental rights, he was summarily convicted and executed.

Finally, the Sixth Amendment provides for the assistance of counsel. It ensures that individuals have the right to an attorney irrespective of financial situation. Thus, indigent defendants are entitled to a court-appointed or government-provided lawyer. The Supreme Court has ruled that this right extends to any indigent defendant facing a possible sentence in excess of six months. The Court has also ruled that all individuals have the right to *effective* counsel. This does not suggest, however, that they are entitled to the best possible attorney, just a competent one.

**The Sixth Amendment and José Padilla**

In May of 2002, José Padilla was arrested at Chicago’s O’Hare International airport upon his arrival from Pakistan. Suspected of scouting sites in which to detonate radioactive bombs and conspiring with senior Al Qaeda officials, he was declared an enemy combatant and transferred to a military prison in Charleston, North Carolina, where he remained for more than three years. In February 2005, U.S. District Judge Henry F. Floyd ruled that the government must either charge him or release him. He was formally indicted by a grand jury in November 2005. Of the original three charges, one has been dismissed in whole, and another in part. Initially set for trial on January 22, 2007, a federal judge has once more postponed proceedings. Ironically, the latest delay is one of Padilla’s own making. His attorneys have claimed that he is suffering from Post-Traumatic Stress Disorder as a result of his ordeal, and cannot assist in his defense. His trial is now scheduled to begin on April 16, 2007.



**Seventh Amendment**

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

The rights guaranteed under the Seventh Amendment have not been applied to the states via the Fourteenth Amendment. Thus, the right to a trial by jury in any civil trial is only applicable to federal courts.

**Eighth Amendment**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Eighth Amendment protects American citizens from imposition of excessive bail or fines and any punishment regarded as cruel and unusual. Although it specifically precludes *excessive* bail, the amendment does not mandate the establishment of bail for all defendants: “Where Congress has mandated detention on the basis of some other compelling interest … the Eighth Amendment does not require release on bail” (*United States v. Salerno*, 481 U.S. 739, 1987). Indeed, the Supreme Court consistently has ruled that the government’s “regulatory interest in community safety” can be more compelling than an individual’s “liberty interest.” (*United States v. Salerno*). However, some state statutes do include a provision for the establishment of bail for any defendant not charged with a capital offense. In Delaware, for example, “[a]ll prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is positive or the presumption great” (Delaware Constitution, Article I, Section 12). For the most part, **excessive bail** is defined as any bail in excess of that which is necessary to ensure the appearance of the defendant at the action in question.

The Eighth Amendment also prohibits the imposition of **excessive fines**. Created to prevent prosecutorial misconduct, it does not apply to punitive damages awarded in cases between private parties, nor does it “constrain such an award when the government neither has prosecuted the action nor has any right to recover a share of the damages awarded.” (*Browning-Ferris Industries v. Kelco Disposal*, 492 U.S. 257, 1989)

Finally, the Eighth Amendment prohibits the use of **cruel and unusual punishment**. Unfortunately, a definition of the phrase is not as obvious as might be expected. Ambiguity has existed since inception of the concept and was formally recognized by the Supreme Court as early as 1878. As Justice Clifford stated: “[D]ifficulty would attend the effort to define with exactness the extent of the constitution provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture are forbidden.” (*Wilkerson v. Utah*, 99 U.S. 130, 1878)

**The Eighth Amendment and the Death Penalty**

Of the rights articulated in the Eighth Amendment, perhaps the most commonly cited regards the prohibition of cruel and unusual punishment. While courts have grappled with the issue for centuries, the imposition of the death penalty is the most controversial. Early courts upheld the use of the death penalty; *In Re Kemmler* (136 U.S. 436, 1890) stated that:

Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, and something more than the mere extinguishment of life.

This ideology went largely unchallenged until the latter part of the twentieth century. In a landmark decision in 1972, the Supreme Court ruled that the imposition of the death penalty violated both the Eighth and Fourteenth Amendments (*Furman v. Georgia*, 409 U.S. 902, 1972). The prohibition of cruel and unusual punishment was:

… not limited to torturous punishments or to punishments which were considered cruel and unusual at the time the Eighth Amendment was adopted; that a punishment was cruel and unusual if it did not comport with human dignity; and that since it was a denial of human dignity for a state arbitrarily to subject a person to an unusually severe punishment which society indicated that it did not regard as acceptable, and which could not be shown to serve any penal purpose more effectively than a significantly less drastic punishment, death was a cruel and unusual punishment.

Immediately following the edict, death sentences were converted to prison terms across the country, angering many legislators and private citizens alike. Many states scrambled to create statutes that would support government-sanctioned executions. Georgia’s solution was to create a bifurcated trial process for capital cases in which judges (or juries) were provided the opportunity to hear mitigating *and* aggravating factors and in which defendants who were sentenced to death were afforded an automatic appeal. So, 4 years after declaring that the death penalty, on its face, constituted cruel and unusual punishment, the Supreme Court reversed itself, declaring that the imposition of the death penalty on murderers did not necessarily violate the Constitution. (*Gregg v. Georgia*, 428 U.S. 153, 1976)

Among other things, the Supreme Court has found that cruel and unusual punishments include the revocation of citizenship (*Trop v. Dulles*, 356 U.S. 86, 1958), the execution of mentally retarded citizens and juveniles (*Atkins v. Virginia*, 536 U.S. 304, 2002; *Roper v. Simmons*, 541 U.S. 1040, 2005), and terms of imprisonment disproportionate to the crime (*Solem v. Helm*, 463 U.S. 277, 1983). In addition, the Court has formally recognized that the cruel and unusual punishment clause of the Eighth Amendment has three distinct roles: the delineating of acceptable punishment, the balancing of punishment with the severity of the crime, and the limiting of criminalization of behavior. (*Ingraham v. Wright*, 430 U.S. 651, 1977)

To these ends, the Supreme Court has attempted to apply a formula in the assessment of punishment. Thus, in determining whether a particular punishment violates the Eighth Amendment’s prohibition of cruel and unusual punishment, the Court has used a scale of measurement that includes:

(i) [T]he gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction, that is, whether more serious crimes are subject to the same penalty or to less serious penalties; and (iii) the sentences imposed for commission of the same crime in other jurisdictions. (*Solem v. Helm*, 463 U.S. 277, 1983)

**Ninth Amendment**

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The Ninth Amendment was intended to recognize that individuals held rights outside of those specifically mentioned in the Constitution generally and in the Bill of Rights in particular. In fact, many of the framers were concerned that such enumeration would significantly harness the rights of the people, in that the absence of specific verbiage addressing other areas would be tantamount to outright denial of their existence and that the articulation of specific limitations on governmental powers would fail to prevent abuses in areas outside of those written. More succinctly, as James Madison put it in 1789:

[B]y enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure.

Such rights, while sacrosanct, were simply too numerous to mention.

Largely overlooked since its inception, the Ninth Amendment has received much attention in recent years as individuals and institutions alike attempt to apply such reasoning to various issues including the right to life, the right to own handguns, the right to self-determination, the right to education, the right to an adequate standard of living, and the prohibition of genocide. Although not specifically articulated in the Constitution, the existence of certain fundamental civil liberties is argued for by many contemporary groups and protected by the language of the Ninth Amendment.

**Tenth Amendment**

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people.

As with the Ninth Amendment, the Tenth Amendment has been embraced by various groups to support controversial political agendas. Intended to ensure the rights of individual states and citizens, the Tenth Amendment was included by the framers as a formal declaration of the limitations imposed upon the federal government. Basically, it prohibits an expansion of power by the federal government unless so authorized by the Constitution and provides for federal sovereignty only in the areas contained therein. With the exception of the time period surrounding the Civil War, the Tenth Amendment largely has been ignored by both the population and the courts. For whatever reason, Supreme Court rulings have recognized the rights of individual states but failed to address the merits of the Tenth Amendment.

**RULES OF EVIDENCE**

The Constitution and the Bill of Rights are fundamental to the administration of justice and protection of individual rights, yet they do not provide rules pertaining to the law of evidence. In fact, the vast majority of evidence law has been founded upon common law principles, such as relevancy, competency, hearsay, and privileged communications. Subsequent case law has provided a clearer picture, but a formal codification of evidence law was not undertaken until the second half of the twentieth century.

**Uniform Rules of Evidence**

In 1974, the Uniform Rules of Evidence (U.R.E.) was created by the National Conference of Commissioners on Uniform State Law as a result of the arbitrary and capricious nature of laws among bordering states. American jurisprudence at the time was contingent largely upon prevailing community standards, which resulted in a patchwork of evidence law. The introduction of the Uniform Rules signaled an end to the common law of evidence.

**Federal Rules of Evidence**

Immediately after the passage of the Uniform Rules, the federal government introduced the Federal Rules of Evidence (F.R.E.)—a code of law binding upon federal entities. In the most basic sense, the F.R.E. was designed to ensure uniformity and consistency in judicial rulings, interpretations, and applications and to replace previous statutory and common law within the federal court system. The Federal Rules list is organized by article in the following manner (and will be discussed in detail in subsequent chapters):

ARTICLE I

General Provisions

ARTICLE II

Judicial Notice

ARTICLE III

Presumptions in Civil Actions and Proceedings

ARTICLE IV

Relevancy and Its Limits

ARTICLE V

Privileges

ARTICLE VI

Witnesses

ARTICLE VII

Opinions and Expert Testimony

ARTICLE VIII

Hearsay

ARTICLE IX

Authentication and Identification

ARTICLE X

Contents of Writings, Recordings, and Photographs

ARTICLE XI

Miscellaneous Rules

Most states adopted the Uniform Rules of Evidence; however, some modeled their state codes after the F.R.E. While the U.R.E. initially unified many legal constructs, the Federal Rules halted the unification efforts, as states were provided a variety of choices. In recent years, the National Conference has attempted to bring the U.R.E. as close as possible to the rules enacted by Congress. By all accounts, the U.R.E. is far less vague than its counterpart.

States that have adopted their rules, and links to their respective codes (where available), are as follows:

Alaska

http://www.touchngo.com/lglcntr/ctrules/evidence/htframe.htm

Arizona

http://azrules.westgroup.com/home/azrules/default.wl

Arkansas

http://courts.state.ar.us/rules/index2.html#Evidence

Colorado

Delaware

http://courts.state.de.us/Rules/?uniform\_rules.pdf

Florida

http://www.flsenate.gov/Statutes/index.cfm? App\_mode=Display\_Statute&URL=Ch0090/ titl0090.htm&StatuteYear=2000&Title =-%3E2000-%3EChapter%2090

Hawaii

Idaho

http://www.isc.idaho.gov/rules/evididx.htm

Indiana

http://www.in.gov/legislative/ic/ code/title34/

Iowa

http://www.legis.state.ia.us/ Constitution.html#a5s8

Kentucky

http://162.114.4.13/KRS/KRE-00/CHAPTER.HTM

Louisiana

http://www.legis.state.la.us/lss/lss.asp

Maine

http://www.courts.state.me.us/rules\_ forms\_fees/rules/MREvidOnly7-05.htm

Minnesota

http://www.courts.state.mn.us/ rules/R\_Evid.htm

Mississippi

http://www.mssc.state.ms.us/rules/ RuleContents.asp?IDNum=4

Montana

http://data.opi.state.mt.us/bills/ mca\_toc/26\_10.htm

Nebraska

Nevada

http://www.leg.state.nv.us/NRS/

New Hampshire

http://www.courts.state.nh.us/rules/index.htm

New Jersey

http://njlawnet.com/njevidence/

New Mexico

North Carolina

North Dakota

http://www.ndcourts.com/rules/ evidence/frameset.htm

Ohio

http://www.sconet.state.oh.us/Rules/evidence/

Oklahoma

Oregon

http://landru.leg.state.or.us/ors/040.html

Rhode Island

http://www.rilin.state.ri.us/Statutes/TITLE9/9-19/INDEX.HTM

South Carolina

http://www.judicial.state.sc.us/courtReg/listEVDRules.cfm

South Dakota

http://legis.state.sd.us/statutes/Display Statute.aspx?Type=Statute&Statute=19-9

Tennessee

http://www.tncrimlaw.com/law/rules/trev.html

Texas

http://www.courts.state.tx.us/ publicinfo/TRE/Toc.htm

Utah

http://www.utcourts.gov/resources/ rules/ure/index.htm

Vermont

Washington

http://lib.law.washington.edu/ ref/evidence.html

West Virginia

http://www.state.wv.us/wvsca/rules/ RulesEvidence.htm

Wisconsin

http://www.legis.state.wi.us/statutes/ 1975/75Stat0901.pdf

Wyoming

http://courts.state.wy.us/CourtRules\_Entities.aspx? RulesPage=Evidence.xml

On the federal level, law is also a product of legislation established by Congress and rulings issued by the Supreme Court. As a general rule, Congress has not attempted major revisions to the Federal Rules of Evidence. Throughout history, however, it has been quite active in the passage of legislation involving criminal law, criminal procedure, and the criminal justice system. Such acts include provisions for the custody of federal prisoners, surveillance limitations on federal agents, and the criminalization of specified behaviors. Congress has increasingly passed crime legislation, and a *federalization* of criminal law has emerged. In recent years, Congress has passed several different acts that specifically criminalize certain activities committed through the use of technology. For example, the passage of the Child Pornography Prevention Act trumpeted a federal commitment to penalize those who used the Internet to exploit children. In particular, the act criminalized the creation, possession, or distribution of computer-generated child pornography.

Attempts by Congress to legislate online behavior have not been entirely successful. In fact, the Child Pornography Prevention Act was struck down by the Supreme Court as being too vague and ambiguous. Such friction is necessarily a component of the American system of checks and balances. The Court’s interpretation and application of the Constitution to congressional legislation is as important to evidence law as federal and state rules.

**State Rules of Evidence**

**FEDERAL RULES OF EVIDENCE**

**ARTICLE IV. RELEVANCY AND ITS LIMITS Rule 401. Definition of Relevant Evidence**

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The issue of state sovereignty, alien to most cultures, is fundamental to the American system of criminal justice. Each state is sovereign—having its own constitution, criminal code, and rules of procedure. Such sovereignty is limited only by provisions of the U.S. Constitution that directly apply to the states. Although states may not abridge the rights guaranteed under the Constitution and the Bill of Rights, they may enhance or further protect those liberties at their discretion. Thus, with the exception of constitutional mainstays, states remain independent in their interpretation of evidentiary rules. This often results in inconsistency across state lines. For example, some states have recognized a limited media–informant privilege, but others have not.

Although all states have developed rules of evidence, most have modeled them after the Federal Rules of Evidence or the Uniform Rules of Evidence. However, some have developed a piecemeal approach in which case law has emerged as an important consideration.

**DEFINING EVIDENCE**

In law, *evidence* may be defined as “any matter of fact, the effect, tendency, or design of which, when presented to the mind, is to produce a persuasion concerning the existence of some other matter of fact; a persuasion either affirmative or disaffirmative of its existence” (Jeremy Bentham, 1827, p. 17). More succinctly, it is the means of establishing the truth or untruth of a disputed fact. It may include all sorts of information introduced and accepted at trial, including physical objects, writings, scientific evaluation, and the like. Presented through the medium of witnesses, evidence is material that speaks to the issue at hand.

Historically, the introduction of evidence had to meet tests of **relevancy** and materiality. *Relevant* evidence refers to any material evidence having *probative value* regarding something at issue, with **probity** defined as evidence that has an impact upon the jury. **Materiality**, on the other hand, refers to evidence that is logically connected to a fact at issue. Contemporary courts have merged the two concepts into the single issue of *relevance*. In order to determine the relevancy of an item in question, the court may employ deductive or inductive reasoning. Although the relevancy of a proffered item may appear to be obvious in nature, the judge may require an explanation of relevancy in his or her determination. However, not all relevant evidence is admissible. Relevant evidence may be excluded from presentment whenever it is unduly a prejudicial violation of the Hearsay Rule, privileged, or collected in violation of constitutional safeguards. It also may be excluded whenever it has only minimal relevance and is lengthy in its presentation or cumulative.

**CONCLUSIONS**

In the respective jurisdictions of State, Federal, and Territorial Courts in the United States, each is governed in its own trials, independently of the others, by its own rules of Evidence, on the principle of Rule 7, except so far as the Federal Constitution compels or the respective State statutes permit a variation. (Wigmore, 1942: p. 13)

Without exception, all modern cultures have some mechanism for the administration of justice. While the processes and procedures are far from universal, grounded in cultural norms and mores, the notion of jurisprudence is worldwide. A combination of English and American traditions, jurisprudence is intended to eradicate abusive practices by government entities and to ensure equal protection under the law.2

In the United States, the criminal process is designed to find fact—an adversarial system that protects the rights of the accused while finding the truth. Rules of evidence, however, may appear contrary to this notion, whenever pivotal information or product is excluded from trial.

The strength of American jurisprudence generally, and evidence law particularly, is that it is considered a living entity and continues to change. It is not developed in a vacuum—contemporary laws are a product of the intersection of social, legal, and historical beliefs with custom, culture, and nature happenings. In addition, all American rules are guided by community standards and current ideologies. Regarding technology, it is anticipated that the evolution of evidence law will increase exponentially as judges and legislators attempt to keep pace with a high-tech society.

**DISCUSSION QUESTIONS**

**1**. What is the importance of *Dickerson v. United States?*

**2**. What is the difference between common law and civil law? Where are these types of law practiced?

**3**. To what extent does the Fourth Amendment influence the American legal system?

**4**. How does the double jeopardy protection in the Fifth Amendment vary from the dual sovereignty doctrine? Give examples of the dual sovereignty doctrine.

**5**. According to the court, what are some of the provisions of the cruel and unusual punishment clause?

**6**. What are the sources of state evidence law?

**7**. What implications exist as a result of the varying state evidence laws?

**8**. What is the difference in relevant and material evidence?

(Britz 2-25)

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