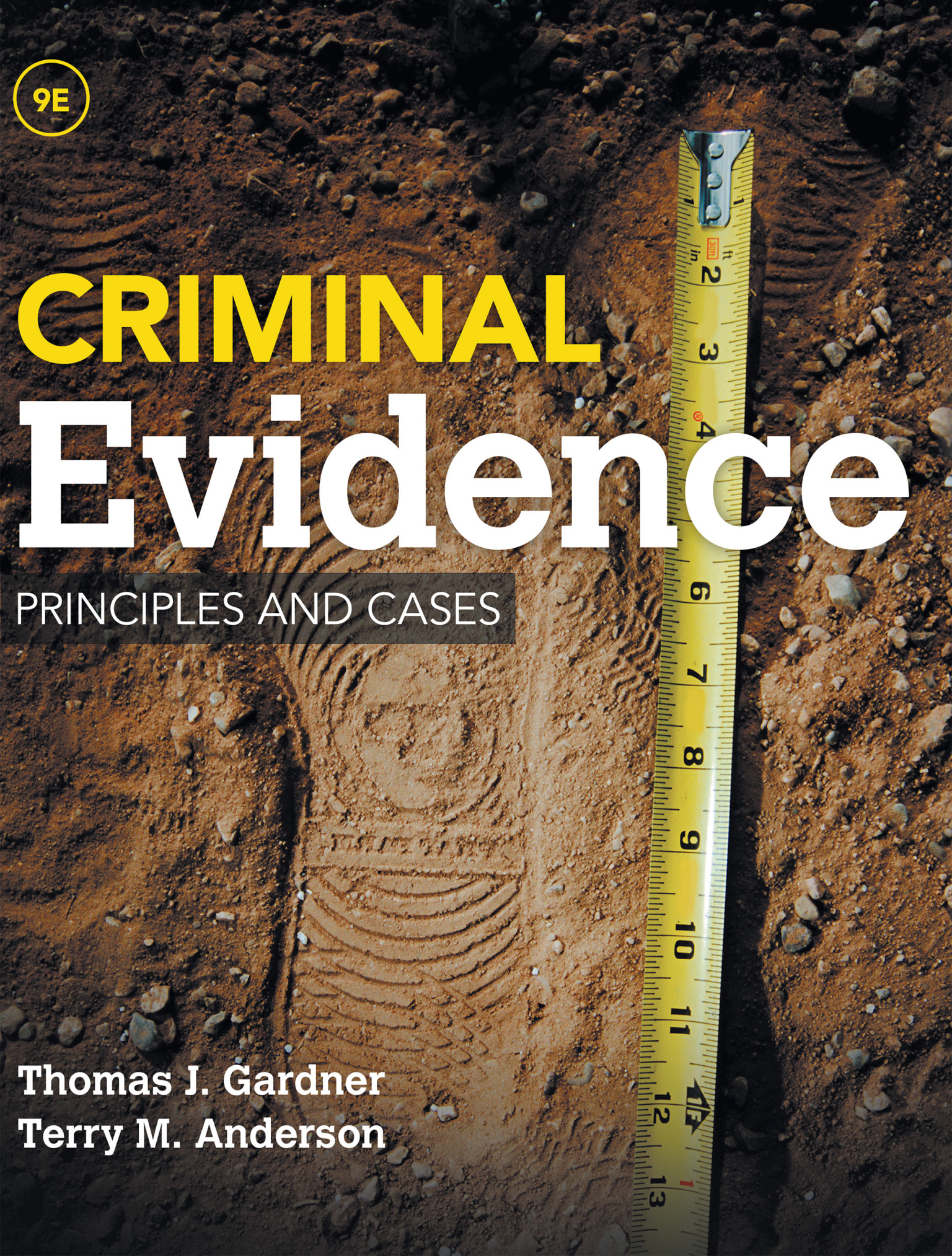
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CRIMINAL
Evidence
PRINCIPLES AND CASES
Thomas J. Gardner
Terry M. Anderson

CRIMINAL EVIDENCE
PRINCIPLES AND CASES

Ninth Edition

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***Criminal Evidence: Principles and Cases,* Ninth Edition**

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PREFACE

In 1791, just four years after the writing of the U.S. Constitution, representatives from the original thirteen states ratified the first ten amendments to the Constitution. These amendments, collectively called the Bill of Rights, reflect concerns of the Founding Fathers that the strong, central federal government would usurp rights then enjoyed in the American states. Although the first American Congress considered more than 145 proposed amendments to the Constitution, the ten that were adopted established the core of basic individual rights in the United States. Relevant selections from the Constitution and the Bill of Rights appear in Appendix A.

The Bill of Rights, as interpreted by the U.S. Supreme Court and state courts, has historically been the basis for the rules of evidence used in criminal trials in the United States. The federal government has promulgated the Federal Rules of Evidence, which many states have adopted outright or used as a pattern for their rules of evidence. These rules incorporate more than 200 years of judicial and legislative debate on the proper evidentiary rules to be used in court trials in the United States. We have added, as Appendix C, the most recent version of the Federal Rules of Evidence, which were amended effective December 1, 2011, to be more readable and understandable. Today, as in 1791, the Bill of Rights continues to be the beginning point for an understanding of the rules of evidence in criminal trials.

In criminal trials, rules of evidence have as a primary goal securing a defendant's constitutional right to a fair trial. What is meant by a "fair trial" has varied over the years. What was considered a fair trial in the witchcraft trials in Salem, Massachusetts, in 1692 would not be regarded as such in any democratic nation in the world today. Most of the evidence introduced in those trials, as a result of which nineteen people were executed, would not be admissible today under the Bill of Rights and the Federal Rules of Evidence.

Rules of evidence are not only important for the protection of the fundamental rights of persons accused of crimes, but also are necessary in seeking to secure the interests of the American public in an efficient and effective criminal justice system. To accomplish those goals, a necessary trade-off must be made between the protection of individual rights and judicial efficiency. Understanding this trade-off adds greatly to the student's appreciation of the dynamics of the criminal justice system. As in previous editions, we continue in this edition to try to identify this trade-off between the legitimate requirements of an efficient criminal justice system and individual rights.

ORGANIZATION OF THE BOOK

This book is divided into eighteen chapters and organized into four parts. Part 1, which includes Chapters 1–4, focuses on the historical basis for the American criminal justice system and evidentiary rules. Part 2 (Chapters 5–8) examines in detail the role of witnesses in that system. In Part 3 (Chapters 9–15) we discuss some of the many facets of the exclusionary rule and related issues, such as the use of

confessions, the legal requirements for searches and seizures, and the "special needs" rules. In Part 4 (Chapters 16–18) we concentrate on the techniques used in gathering evidence for use in criminal trials and the legal rules to which those techniques must conform.

NEW TO THIS EDITION

In the ninth edition we strive to present the key rules of evidence, the rationale behind these rules, and the applicability of these rules in criminal prosecutions in a manner that is not encyclopedic or overwhelming to the student. We hope the text's clear explanations, accessible writing style, coverage of current issues, and numerous pedagogical aids combine to help students understand and be engaged by complex legal topics. Toward this same end, we use interesting, news-based examples wherever possible to help students understand and retain concepts. Boxes and charts are extensively incorporated to illustrate new and important developments in the rules of criminal evidence. Case discussions help add detail to the judicial decision-making process. Learning how laws evolve helps students to understand the laws themselves.

We have retained changes we made to the eighth edition of *Criminal Evidence*. These include revised Learning Objectives, which will help professors and students target specific subjects, and a "bullet" approach to chapter-ending summaries that attempts to align the summaries with the learning objectives. We also highlight the "Key Terms" feature by including them at the end of each chapter, together with a related feature, "Key Cases," which lists some of the important cases discussed in each chapter. We have retained the chapter-ending problems in all the chapters. We have retained the "Case Analysis" feature in this edition, and in all chapters we have added more recent cases to the feature.

The text addresses up-to-the-minute topics such as obtaining evidence from computers and smartphones, attaching GPS tracking devices to automobiles, and using social media like Facebook as evidence in criminal trials. The topic of search and seizure has been expanded, and historical coverage has been streamlined throughout the text. Subjects that have traditionally been confusing, such as the discussion of husband-wife privilege, have been retooled to be as clear to students as possible. We continue to try to improve the materials in certain key chapters, such as Chapters 8–10, and 14, which have in the past proved difficult for students to master. In this edition we discuss important recent changes to the subjects discussed in those chapters, and we continue to try to make that material more understandable to our readers. Where possible, we have incorporated recent developments that will be of interest to students who are associated with law enforcement.

We have added a new feature to many of the chapters in the ninth edition. Titled "You Be the Judge," this feature invites students to don the trial judge's robe and decide motions to admit or exclude evidence. Trial judges are routinely asked to decide difficult questions on admissibility of evidence, and we hope students will profit from doing the same.

In addition to the enhancements listed above, and the substantial changes to the eighth edition retained in this edition, the ninth edition also features the following chapter-by-chapter changes:

- In Chapter 1 we expanded the discussion of how federal courts handle habeas petitions, based on requests from some of those who use our book. This includes

a 2011 Supreme Court case on the subject. We updated boxes, such as the enemy combatant and 48-hour boxes, as well as the sections on the presumption of innocence and speedy trial doctrine. We included a 2013 case that is very helpful on how courts determine if the speedy trial right has been infringed. We also included two 2012 Supreme Court cases on when and how claims of ineffective assistance of counsel should be considered in criminal appeals.

- In Chapter 2 we updated several cases, like the *Bond* case mentioned in the box on the Tenth Amendment and Individual Rights. The Supreme Court considered the underlying criminal case in *Bond* in 2013. We also updated the SORNA material with a 2013 Supreme Court case that gave a partial answer to the power of Congress to pass legislation like SORNA. Our first "You Be the Judge" box appears in this chapter.
- In Chapter 3 we expanded, in various parts of the chapter, our discussion of guilty pleas. For example, we updated the fast-track plea box to reflect the Justice Department's plan, announced in 2012, to make such pleas available in all districts for re-entry prosecutions. We added a new box that discusses the ability of a defendant to withdraw a guilty plea. We deleted old and added new cases on nolo contendere pleas, and added a new case on the consequences of making an *Alford* plea. One of the case analysis assignments invites students to study two recent Supreme Court cases and see how the Court is split on some important issues.
- As the new vignette in Chapter 4 illustrates, we are using this feature as more of a discussion tool, and less of a current example exposition. We rewrote many sections in this chapter to improve understanding, including the "bad acts" rules. Recent legislative acts and court decisions have made changes in the admissibility of that type of evidence in sexual assaults. We also expanded the section on silence/self-incrimination to include a 2013 Supreme Court case on the subject, as well as 2013 federal cases that show how the rules about use of a defendant's silence have developed. We added a "You Be the Judge" box to include "Be the Jury" in a 2012 murder case.
- In Chapter 5, in response to helpful suggestions from our readers, we expanded the voir dire section to make it clearer. We also added a new subsection, "Vouching", as a limit on permissible testimony of a witness. We discuss at some length the practice of using police officers as both expert and lay witnesses, and include a "You Be a Judge" box on that issue.
- In Chapter 6 we clarified the attorney-client privilege where a third party was present during a communication. We also added a new box on the survival of the attorney-client privilege following the death of the client. We expanded the discussion of the crime/fraud exception to the attorney-client privilege, with a new case showing how judges respond to claims the privilege should be lost. We added a "You Be the Judge" box on the psychotherapist-patient privilege.
- The Confrontation Clause jurisprudence continues to evolve, as the Supreme Court and lower courts provide guidance on the "testimonial" vs. "non-testimonial" distinction. In Chapter 8 we added a new box that provides guides to students seeking Confrontation Clause solutions. We address specific examples of the testimonial-non-testimonial hearsay problem, including the 2012 Supreme Court decision on forensics reports as hearsay; a new box on autopsy reports; the child-sexual abuse exception; and examples of hearsay testimony that is non-testimonial, and thus not subject to the Confrontation Clause.

- In Chapter 9 we rewrote the text's historical exposition of the exclusionary rule, in response to helpful suggestions from some of our readers. If, as many believe, the role of the exclusionary rule is changing, it is important that students see its origins. We have a "You Be the Judge" box in this chapter that focuses on live witness testimony as derivative evidence for purposes of the exclusionary rule.
- In Chapter 10 we highlight the 2014 Supreme Court case that places limits on the ability of a co-resident, under *Georgia v. Randolph*, to prohibit another co-resident to give consent to search their shared residence. We added a new box on abandoned real estate for search purposes, and added new cases on what constitutes a private search. We added a new section on good faith and changes in the law. A number of courts have considered whether the good faith exception to the exclusionary rule first identified in *United States v. Leon* should apply to good faith reliance by police officers on existing practices that subsequently are held invalid by a reviewing court. We discuss those cases.
- In Chapter 11 we updated many sections with recent cases. These include the sections on random searches of luggage at airports, school searches of students' backpacks and cell phones, and sham roadblocks. We also discuss the 2013 decision of the Supreme Court on collection of DNA samples in *Maryland v. King*.
- In response to requests from some readers, we have added materials to the corpus delicti rule section in Chapter 12. Specifically, we have a new box, "Making Sense of the Corpus Delicti Rule," that examines problems for courts in those states that retain the requirement of corroborating evidence in cases of confessions of child sexual abuse. We focus on two recent Illinois Supreme Court cases, and ask students to compare the results in those cases. Our "You Be the Judge" box in this chapter invites students to make the voluntary-involuntary decision for the admissibility of confessions in several situations taken from recent cases. We retitled the section on invoking the Fifth Amendment right to remain silent, and discuss several recent cases that highlight the need for those in custody to clearly invoke the right to remain silent. We deleted older cases and added four new cases that illustrate how the public safety exception is applied to pre-*Miranda* questioning. Finally, we extensively rewrote the Silence, *Miranda*, and Impeachment section, and added a chart that explains how and when silence of a defendant may be used in a criminal trial.
- In Chapter 13 we deleted the chapter-opening photograph of a police lineup. As one reader suggested, it created the wrong impression of how a lineup is done. We hope the photograph in this edition is better. We added, at various places, new cases on how courts are treating eyewitness identification evidence, and expert testimony about the limits of such testimony.
- The vignette that opens Chapter 14 updates the status of the New York Police Department's controversial stop-and-frisk policy. We extensively rewrote the section on *Terry* stops based on reasonable suspicion. We hope we better show the difference between reasonable suspicion and probable cause, and to that end include recent cases that analyze the requirement in the context of common police operations. We also discuss the 2014 Supreme Court decision in *Navarette v. California* on anonymous 911 callers and reasonable suspicion. The "You Be the Judge" box in this chapter asks students to evaluate the quantum of suspicion police had in several settings, and decide if evidence discovered should be excluded. Under a new section title, "Searches without

Warrants: Detentions and Arrests", we reorganized materials that previously appeared under several different titles. We hope the reorganization makes this area more understandable. We added important recent Supreme Court decisions on police actions without warrants: the 2014 decision in *Riley v. California* for searches of cell phones incident to an arrest; the 2013 decision in *Missouri v. McNeeley* on nonconsensual blood samples in DUI arrests; and the 2013 decision in *United States v. Bailey* on detentions, without probable cause or reasonable suspicion, of persons leaving premises subject to a search warrant.

- We reorganized the material in Chapter 15 so that search warrants come before, rather than after, computer searches. That seems more logical. We added recent cases to the section on extended detention of articles lawfully seized to focus on the permissible length of such detentions. The "You Be the Judge" box for this chapter examines the technical requirements for getting a search warrant, and asks students to respond to challenges by a defendant that the search warrant was not properly obtained or issued. We added new cases on computer search protocols, a subject courts continue to find vexing. We also added cases decided after *California v. Riley* that distinguish between a search of a cell phone and other ways a suspect's cell phone may be used by police. We greatly expanded the section on state and federal wiretapping laws, with cases illustrating when evidence will be excluded for violation of those laws. Finally, we continue to add cases that discuss the introduction and authentication of evidence obtained from social media locations.
- As suggested by a reader, we added cases on "staging" crime scenes to Chapter 16's discussion of the crime scene and chain of custody. For similar reasons, we included a summary of what most experts regard as the mistakes in the crime scene and chain of custody requirements made by the prosecution in the Casey Anthony trial.
- In Chapter 17 the new vignette looks at the ubiquitous use of cell phones as video recorders, and how a video can be used in the prosecution of crimes captured in the video. We also added a new box on the crime of "video voyeurism," with a 2014 case showing how that crime is committed and proved.
- In Chapter 18 we updated the section on DNA testing in light of the Supreme Court's decision in *Maryland v. King*. We also added new information on familial DNA searches. We updated CODIS statistics, and highlighted some of the recent scandals at private and state-run crime labs.

ANCILLARIES FOR THE INSTRUCTOR

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An improved and completely updated *Instructor's Resource Manual with Test Bank* is available. The manual includes learning objectives, detailed chapter outlines and summaries, key terms, and Internet resources. Each chapter's test bank contains questions in multiple-choice, true/false, fill-in-the-blank, and essay formats, with a full answer key. The test bank is coded to the learning objectives that appear in the main text and includes the section titles in the main text where the answers can be found. Finally, each question in the test bank has been carefully reviewed by experienced criminal justice instructors for quality, accuracy, and content coverage.

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Thomas J. Gardner

Terry M. Anderson

History and Development of the Law of Criminal Evidence


KING JOHN SIGNS THE MAGNA CARTA

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CHAPTER CONTENTS

LEARNING OBJECTIVES

In this chapter we provide a summary of the history of the use of evidence in criminal trials, with a special focus on criminal defendants' rights contained in the U.S. Constitution. The learning objectives for this chapter are

- Explain the importance of the Magna Carta.
- Explain the function of the writ of habeas corpus.
- Identify how the U.S. Supreme Court made the Bill of Rights applicable in state court criminal cases.
- List the rights identified and made available to a criminal defendant under the U.S. Constitution.

In 2012 David Rivera pled guilty in U.S. District Court in California to the federal crime of transportation of 214.4 grams of methamphetamine. Under the plea agreement reached with the prosecution, the parties stipulated that Rivera would be sentenced at base level 31 under Federal Sentencing Guidelines, but that each side could argue to the District Court judge for a reduction or increase of that base level. The base level plays a significant role in the length of the sentence imposed under Federal Sentencing Guidelines.

At the first sentencing hearing Rivera brought his 7-year-old son with him to the hearing. There, his lawyers argued Rivera should be given a "minimal role" reduction in his sentence because of his limited role in the crime. The district judge expressed displeasure about the presence of Rivera's son in the courtroom, stating that he (the judge) would not be manipulated by such actions. The judge continued the sentencing hearing, and told Rivera he could not bring family members to the continued hearing.

At the continued hearing, where only Rivera and his attorney were present, the Judge declined to give Rivera the "minimal role" reduction, and sentenced him to 97 months in prison. Rivera appealed to the Ninth Circuit Court of Appeals, contending his Sixth Amendment right to a "public trial" was violated when the District Judge excluded his family members from the hearing.

What do you think are the reasons for the "public trial" requirement? Does the First Amendment play a role? Should "public trial" include the sentencing part of the trial? Why did it matter if Rivera's family, including his young son, were excluded from the sentencing hearing? Can you think of good reasons for a judge to order a closed hearing? Were the judge's reasons in Rivera's case good enough? *See United States v. Rivera*, 682 F.3d 1223 (9th Cir. 2012).

In this chapter we examine the history of rules of evidence, and show their relationship to many of our most important Constitutional guarantees and privileges. One of those guarantees, the Sixth Amendment right to a "speedy and public trial," was invoked by Rivera in the case cited above.

HISTORY OF THE RULES OF EVIDENCE

One cannot understand the rules of evidence applicable in criminal trials today without some appreciation of the historical development of those rules. Evidentiary rules are the gates through which information flows into our judicial courtrooms; the size and shape of the gates have varied over the life of the United States and other English-speaking nations.

The United States and England share a common judicial heritage. Most of the early rules of evidence were made by English courts, although some were made by English parliaments. These early rules of evidence were brought to the American colonies and used by the first English settlers. The same rules were used by other English-speaking colonies, such as Canada and Australia, and were known as common-law rules of evidence.[1] Because of this common heritage, many similarities exist even today in the laws of evidence used in English-speaking countries. The following account of the first murder trial in the American colonies would also describe the court proceedings used in other English colonies:

> The first reported murder in the American colonies occurred in 1630. John Billington, one of the original band of 102 Pilgrims to sail on the Mayflower, waylaid a neighbor and killed the man by shooting him with his blunderbuss. As the colonies had no written criminal laws, Billington was charged with the English common-law crime of murder and tried using the English common-law rules of evidence and criminal procedure. After a prompt trial and conviction, Billington was sentenced to death and hanged.[2]

Rules of evidence are an important part of all criminal justice systems, just as rules are important in baseball, football, and basketball games. In a democracy,

rules of evidence are important not only to safeguard the rights of accused persons in a fair trial but also to ensure the interests of the public in the proper functioning of the criminal justice system. Some rules of evidence are highly controversial and cause arguments over what would best serve the overall needs of society.

Early Methods of Determining Guilt or Innocence

Today, persons charged with criminal offenses are presumed innocent until proven guilty. Defendants may admit or deny a criminal charge, and if the charge is denied, place the burden of proof on the government to come forward with sufficient, credible, and admissible evidence proving guilt beyond a reasonable doubt.

But the rights we enjoy today did not always exist. They developed slowly over the centuries and were incorporated into the common law. Many were made part of the U.S. Constitution by our Founding Fathers.

ordeal A medieval method of proof that was an appeal to God to determine guilt or innocence.

At the time the Normans conquered England in 1066, the use of **ordeals** to determine guilt or innocence was a common practice. A titled person or one of noble birth could demand trial by battle to determine his guilt or innocence. Winning a sword fight would prove innocence, whereas losing would show guilt. Because the loser was often killed or seriously injured, the case would ordinarily be disposed of by the outcome of the battle.

The guilt or innocence of a common person was determined by other types of ordeals. The nineteenth-century English judge Sir James Stephens described these ordeals in his treatise *History of the Criminal Law of England:*

> It is unnecessary to give a minute account of the ceremonial of the ordeals. They were of various kinds. The general nature of all was the same. They were appeals to God to work a miracle in attestation of the innocence of the accused person. The handling of hot iron, and plunging the hand or arm into boiling water unhurt, were the commonest. The ordeal of water was a very singular institution. Sinking was the sign of innocence, floating the sign of guilt. As any one would sink unless he understood how to float, and intentionally did so, it is difficult to see how anyone could ever be convicted by this means. Is it possible that this ordeal may have been an honourable form of suicide, like the Japanese happy despatch? In nearly every case the accused would sink. This would prove his innocence, indeed, but there would be no need to take him out. He would thus die honourably. If by accident he floated, he would be put to death disgracefully.[3]

The ordeals adjudicated guilt by appeals to God (or the supernatural). People living in the Middle Ages believed in frequent divine intervention in human affairs and thus were content to leave questions of guilt or innocence to such interventions.

All this changed in England, however, at the Lateran Council of 1215, when clergy were prohibited from taking part in ordeals. Without the clergy, one could not be sure God had ordained the result of the ordeal. Indeed, in the reign of King John (1199–1216), the ordeal went from being the standard of proof to completely nonexistent.

In its place came the oath and oath-helpers. Although still an appeal to divine guidance, the oath, in which the accused swore before God his innocence, began the journey toward trial by jury. To support his oath, the accused gathered oath-helpers to swear to his innocence. Over time, these oath-helpers began to swear not to the ultimate guilt or innocence of the accused but to facts relevant to his guilt or innocence. In essence, they became witnesses.

presentment juries English forerunners to grand juries; gave information that crimes had been committed.

At the same time, itinerant justices holding court around England began to impanel groups of local residents into **presentment juries**, whose purpose was to inform the justices of crimes committed by other residents. The accused then put himself "on the oath" of his fellow residents (often referred to as the "petit" jury), rather than producing his own oath-helpers. Over time, it came to be realized that those serving on the presentment jury should not serve on the smaller petit jury. By the fourteenth century, the origins of our grand jury and trial jury system were firmly established in English law.

As the use of presentment and petit juries became widespread in England, rules developed to control and direct the tasks of those juries. Then, as now, the presentment jury had few evidentiary limitations. The petit jury, however, became charged not only with determining the guilt or innocence of the accused but also with finding the facts upon which its determination depended. Once the jury was established as a fact-finding body, rules of evidence controlling how facts could be presented to the jury began to develop.

In the long period between the fourteenth century and today, rules governing the introduction of facts into criminal trials developed slowly and inconsistently. For example, even though hearsay evidence was regarded as unreliable even in the early thirteenth century,[4] such evidence was still widely permitted in the American colonies. Other nonjudicial forces helped move the nature of criminal trials and rules of evidence forward.

WHEN EVIDENCE OF WITCHCRAFT WAS PERMITTED IN THE COURTS OF THE AMERICAN COLONIES

Not too many years prior to the signing of the American Declaration of Independence, evidence of the crime of witchcraft was permitted in the criminal courts of some of the American colonies. Massachusetts, Connecticut, and Virginia permitted prosecutions for the crime of witchcraft based on superstition and ignorance.

Witchcraft was first prosecuted as a crime in the Roman Empire. Over the years, thousands of people in Europe were tried, convicted, and put to death for being witches or practicing witchcraft. For example, in 1431 Joan of Arc was convicted in France of being a witch and burned at the stake by a tribunal under the direction of English invaders. The English used the accusation of witchcraft as a convenient way of eliminating a very effective French military opponent.

A crop failure, a sickness, or an epidemic within a community could lead to accusations that a local person was a witch and the cause of the problems. The Salem, Massachusetts, witchcraft trials of 1692 resulted in the execution of 19 people and the imprisonment of over 150 others. Arthur Miller's famous play *The Crucible* is a modern dramatization of the Salem witchcraft trials. In Miller's play, the accusations were not of crop failure or an epidemic but of sexual improprieties, and were made by teenage girls. The book form of Miller's play contains commentary by the author. Miller observes in the introduction to his play that after the accusations by the teenage girls were made, "long-held hatreds of neighbors could now be openly expressed … one could cry witch against one's neighbors … old scores could be settled … and any envy of the miserable toward the happy could and did burst out in the general revenge."[a]

The crime of witchcraft no longer exists, and under the American criminal justice system could never be resurrected.

[a]Arthur Miller, *The Crucible* (New York: Viking Press, 1953).

MAGNA CARTA AND HABEAS CORPUS

In twelfth-century England, people could be jailed based on anonymous accusations of wrongdoing, or they could be seized on mere suspicion or on the whim of a government official. English kings suppressed political opposition by jailing anyone who dared criticize the Crown or the government. Absolute loyalty was compelled by the arrest of those suspected of antigovernment sentiments or statements.

Because of these abuses by English kings, the great barons of England revolted against the Crown. After many years of fighting, King John met with the barons in 1215 at a field in Runnymede, England. An agreement between the parties to stop the fighting resulted in the king and the barons signing a document called **Magna Carta**, or the Great Charter. Among other clauses, Magna Carta stated that there would be no criminal "trial upon … simple accusation without producing credible witnesses to the truth therein" and that "no freeman shall be taken, imprisoned … except by lawful judgment of his peers or the law of the land." Magna Carta was a historic first step toward democracy and the establishment of minimum standards for arresting and imprisoning people accused of crimes. Under this new concept of law, no one could be taken into **custody** on mere suspicion, on a whim, or without substantial good cause. Magna Carta began the development of the concept in law that there had to be **probable cause**, or "reasonable grounds to believe," to justify arresting or holding a person in custody.

Magna Carta The Great Charter signed by King John of England and his barons in 1215; created the first standards for arresting and imprisoning those accused of crimes.

custody Under police control, whether or not physically constrained.

probable cause The quantum (amount) of evidence required by the Fourth Amendment to make an arrest or to issue a search warrant; greater than reasonable suspicion but can be less than proof or reasonable doubt.

Magna Carta deeply affected the drafters of the American Declaration of Independence:

> The event became the rallying cry of individual liberty in England during the 17th century, and so influenced the Founding Fathers of our country that the Seal of the Magna Carta was emblazoned on the cover of the *Journal of the Proceedings of the First Continental Congress*, held in Philadelphia on September 5, 1774, where our forefathers laid the foundation stone of individual liberty in the United States.[5]

Another important milestone in the protection of personal liberties was the development of the Writ of Habeas Corpus. This famous writ is believed to date to the fourteenth and fifteenth centuries. The Writ of Habeas Corpus was and is a safeguard against the illegal or improper holding of a person against his or her will. The word *writ* means a "writing," and **habeas corpus** is a Latin term meaning "have the body." This writ, when signed by a judge, is served upon the government official who has custody of a person and orders that official to appear before the court and show cause for holding the person. If such cause is not shown the person may be released.

habeas corpus Latin name of the writ used to compel a government official, such as a prison warden, to show cause why the official is holding a person in custody.

Magna Carta and habeas corpus not only are very important legal concepts in the English-speaking world but also have had an important impact worldwide. Magna Carta first expressed the idea that a person should not be jailed or held without just cause. The Writ of Habeas Corpus was the earliest legal procedure by which illegal or improper jailing or detention could be challenged in a court of law. If a person is held without just cause and legal authority, the judge presiding at the habeas corpus hearing must order his or her release.

The American Founding Fathers guaranteed the right of habeas corpus in the U.S. Constitution. ARTICLE I, SECTION 9 of the U.S. Constitution provides that "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The original 13 states, and all those that subsequently joined the union, did the same. Some states

strengthened the constitutional guarantee by statutes, such as Wisconsin statute 782.09, which provides that "any judge who refuses to grant a writ of habeas corpus, when legally applied for, is liable to the prisoner in the sum of $1,000." Other statutes impose penalties for "refusing papers" ($200), "concealing" or "transferring" the prisoner ($1,000 or six months' imprisonment), and "reimprisoning party discharged" ($1,250 and misdemeanor violation).

The famous English writer Sir William Blackstone wrote that habeas corpus is "the most celebrated writ in the English law." Chief Justice Marshall of the U.S. Supreme Court called the writ a "great constitutional privilege," and the U.S. Supreme Court has stated a number of times that "there is no higher duty than to maintain it unimpaired."

Habeas corpus writs provide a form of review of criminal convictions and sentences in addition to the normal appeal process. Every state has some form of appellate review for those convicted of crimes. In addition, so-called "direct review" of a state conviction is possible in the U.S. Supreme Court, though petitions for such review are not commonly granted by the Supreme Court. Federal convictions may be appealed to the appropriate U.S. Court of Appeals, and again direct review by the U.S. Supreme Court is possible, but infrequent.

U.S. courts, mainly federal district courts in whose jurisdictions prisons are located, are authorized under 28 U.S.C. § 2254 to hear petitions for habeas corpus by persons convicted in state courts. 28 U.S.C. § 2255, called post-conviction relief, provides similar procedures for federal prisoners. Generally speaking, habeas corpus petitions and petitions under 2255 are filed after the normal appeals process through the state (or federal for 2255) appellate system has been exhausted. Section 2254 specifically requires that the petition show that state remedies have been exhausted. Petitions must allege that the prisoner is being held in violation of federal law or the U.S. Constitution.

Prior to 1996 federal courts hearing habeas petitions by state prisoners reviewed questions of law under "de novo" review, which gave little deference to the decision of the state court. Purely fact questions, however, were reviewed with great deference to the findings of the state court. The Antiterrorism and Effective Death Penalty Act of 1996 made important changes in how habeas corpus petitions by state prisoners were reviewed in federal courts, if the petitioners' claim had been "adjudicated on the merits" in the state courts. That Act, now codified as 28 U.S.C. § 2254(d) (1) (2), limits application of the writ to cases where the conviction or sentence was contrary to, or an unreasonable application of, a "clearly established Federal law, as determined by the Supreme Court of the United States," or based on an "unreasonable determination of the facts" in light of evidence admitted at the state court trial. If the claim of a violation of federal law or the U.S. Constitution had not been "adjudicated on the merits" in the state courts, the pre-1996 form of review is used.

Cullen v. Pinholster, 131 S. Ct. 1388 (2011) is an important case on how federal courts are to review the claims in the habeas petition. (Citations in criminal cases typically include the name of a state or the federal government: e.g. *State* (or *People,* or *Commonwealth*) *v. Smith*, or *United States v. Smith*. In habeas cases the person seeking relief is incarcerated. As a result, the name of the other party in the habeas petition is typically the warden of the penitentiary where the prisoner is held. "Cullen" is the name of the warden of the penitentiary where Pinholster was incarcerated.)

In *Cullen*, a petitioner claimed a murder conviction and resulting death sentence were flawed because his attorney failed to adequately raise the petitioner's mental

condition at the penalty-phase of the trial. The petitioner introduced new medical evidence at the habeas hearing that supported his claim that he had mental problems that should have been a factor in his sentence. The full Ninth Circuit Court of Appeals sitting *en banc* agreed and granted the petition.

The U.S. Supreme Court reversed. It held that when reviewing a decision of a state court, the "record" for review was the evidence before the state court at the time it made its decision. Evidence introduced at the habeas hearing on an issue already reviewed in the state court could not be considered.

Thaler v. Haynes, 130 S. Ct. 1171 (2010) illustrates how the "clearly established Federal law, as determined by the Supreme Court" also serves as a limit on habeas petitions. In that case a federal circuit court of appeals ordered a retrial in a Texas murder case, based on the defendant's claim that the trial judge should not have accepted the state's "race-neutral" reason for using a peremptory challenge to exclude a Black juror. (See the discussion of peremptory challenges in Chapter 2.) The prosecution gave its reason for excluding the juror as based on the juror's demeanor. The trial judge who accepted that as an adequate reason did not personally conduct the *voir dire* (jury selection), and thus did not see the juror's demeanor. The circuit court held that "demeanor" cannot be an adequate "race neutral" reason unless the trial court personally observed the juror in *voir dire*. The Supreme Court reversed, stating that such a legal principle is not a "clearly established" rule because no Supreme Court opinion actually reached such a result.

LEGAL CASES

Habeas Corpus and Enemy Combatants

Since 2001, the U.S. military has detained alien enemy combatants at Guantanamo Naval Base in Cuba. Some of these detainees have sought to obtain review of their detentions by use of the habeas corpus writ. The U.S. government initially contended that federal courts had no jurisdiction over the naval base, but in *Rasul v. Bush* [542 U.S. 466 (2004)], the U.S. Supreme Court held that under existing jurisdictional statutes, federal courts did have jurisdiction over the naval base.

In response to that decision, Congress passed the Military Commissions Act of 2006 [28 U.S.C. § 2241 (e)], which contained a clause stating that federal courts had no jurisdiction to hear habeas corpus claims made by alien enemy combatants detained at military installations. Several detainees appealed dismissal of their habeas corpus petitions. On review the Supreme Court held that enemy combatants detained at military installations had the constitutional right to bring habeas corpus petitions, and as a result section 2241(e) was an unconstitutional violation of the Suspension Clause [Art. I, § 9, cl. 2], which prohibits the suspension of the writ except in cases of "Rebellion or Invasion." See *Boumediene v. Bush* [128 S. Ct. 2229 (2008)].

Suspected enemy combatants detained at Guantanamo were tried in military tribunals during the Bush administration. President Obama initially ordered the military tribunals to cease such trials, but in 2011 revoked that order to permit the military trial of Khalid Sheik Mohammed, the suspected mastermind of the 9/11 attacks. Although the Justice Department stated it wished to try Mohammed in federal district court in New York City, the anticipated cost for such a trial—in the hundreds of millions of dollars—led the Justice Department to reopen the military tribunals. Mohammed remains detained at Guantanamo. Some suspected terrorists have been tried in federal court. Abu Gaith, the son-in-law of Osama bin Laden, was tried in federal court in New York in March 2014, and was convicted on terrorism charges on March 26, 2014.

THE AMERICAN DECLARATION OF INDEPENDENCE

When students are asked where their personal freedoms come from, they will often answer that personal freedoms come from government. This answer was correct hundreds of years ago, when it was believed that kings received their authority to rule from God. What few personal rights the ordinary person had in those days came from the ruler. This was known as the divine right of kings. Generally accepted and promoted throughout the world in the Middle Ages, this doctrine stated that monarchs received absolute authority to govern from God and that their subjects had only such personal freedoms as fit their status under their sovereign.

SOME ABUSES LEADING TO THE SIGNING OF THE DECLARATION OF INDEPENDENCE

The American Declaration of Independence, celebrated each year on the Fourth of July, lists more than 25 abuses by the "King of Great Britain" against the American colonies. It was these abuses that caused the colonies to declare their independence from Great Britain. About two-thirds of the abuses concerned the English mercantile system, which Great Britain forced upon the American colonies. Under this system, Americans had to buy only English products and goods at prices set by the English. The system was enforced against the colonies by military force and heavy taxation, which led to the famous cry "No taxation without representation" and incidents like the Boston Tea Party. The famous Scottish economist Adam Smith, who wrote the *Wealth of Nations* in 1776 and opposed the English policy of mercantilism, became known as the father of the American economic system. The following is a brief summary of the remaining one-third of the abuses listed in the Declaration of Independence:

Abuses Concerning Liberty, Freedom, and the Judiciary	**Correction of the Abuse in the U.S. Constitution**
"He has made Judges dependent on his will alone …"	Article III, creating an independent judiciary
"He has kept among us in times of peace Standing Armies … [and] has quartered large bodies of armed troops among us."	Third Amendment to the Bill of Rights (Soldiers may not be quartered without consent)
He "… protect[s] [the armed troops], by a mock trial, from punishment for any Murders which they should commit on the Inhabitants."	The establishment of an independent judiciary, an elected president and Congress, and grand juries
"… depriving us in many cases, of the benefits of Trial by Jury."	"… the accused shall enjoy the right of a … trial … by an impartial jury" (Sixth Amendment)
He "… transport[s] us beyond the Seas to be tried for pretended offenses."	The right to an "indictment by a Grand Jury" and the right to be tried in "the State and district where the crime shall have been committed …" (Fifth and Sixth Amendments)
"He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people."	The establishment of an independent judiciary, an elected Congress and president, and grand juries
"He is at this time transporting large Armies of foreign Mercenaries to compleat the work of death, desolation and tyranny …"	Limiting the powers of the president and the Congress to those specifically set forth in Article I and II, and the protection of the Third Amendment

This theory, actively promoted by those in power, helped monarchs rule and maintain control over their subjects.

Early American documents show that the American colonies did not accept the European concept of the divine right of kings. The 1641 Massachusetts Body of Liberties commenced by discussing the "free fruition of such liberties, Immunities and privileges … as due every man."[6] The 1765 Declaration of Rights spoke of "inherent rights and liberties," "freedom of a people," and "the undoubted rights of Englishmen."[7]

The American Declaration of Independence of 1776 specifically repudiated the doctrine of the divine right of kings, pointing out that personal freedoms do not come from government or kings. Every Fourth of July, we celebrate the signing of the document that established the following propositions:

- That the United States is independent from Great Britain (the document details the "history of repeated injuries and usurpations" of the king of Great Britain, who sought to establish "an absolute Tyranny over these States")
- That "Governments are instituted among Men, deriving their just powers from the consent of the governed"
- That "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness"

THE U.S. CONSTITUTION AND THE AMERICAN BILL OF RIGHTS

When the American Founding Fathers met in Philadelphia in 1787, many of the wrongs of the past had been eliminated. For example, trial for witchcraft had been abolished, and people accused of crimes no longer had to prove their innocence by ordeal or battle. The delegates set about writing a constitution for the new American democracy that would embody the spirit of the Declaration of Independence and create a workable, practical government to serve the people. They stated their goals in the preamble to the new U.S. Constitution:

> 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, do ordain and establish this Constitution for the United States of America.

The U.S. Constitution sought to protect the privilege of habeas corpus and prohibited such abuses as the passing of bills of attainder and ex post facto laws. The right of trial by jury was protected, and *corruption of blood* (punishing a family for the criminal acts of another family member) was forbidden. The drafters of the Constitution knew that such abuses had occurred in England and were determined that they would not occur in the new American nation.

As a further protection, the Constitution provided that all federal officials, including the president of the United States, could be removed upon "Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors" (ART. II, SEC. 4).

When the Constitution was presented to the states for ratification, it was criticized as not going far enough to protect the people from possible abuses by the new federal government. The people understood their state governments and believed