THIRD EDITION

Criminal Evidence
PRINCIPLES AND CASES

THOMAS J. GARDNER
TERRY ANDERSON

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Principles and Cases

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Criminal Evidence
Principles and Cases

Third Edition

To the following young boys:

Alexander and Nicholas Anderson
Brennan Collins
Eli Gardner Feldman
Brian and David Demet

In hopes they grow up in a happy,
prosperous and peaceful America.

EXPLANATORY NOTE

In this textbook, the authors present the principles of the law of evidence and the law of arrest, search and seizure used in the United States. However, a few states vary somewhat in their laws because of statutes or court decisions within that state.

For this reason, it is recommended that students and law officers consult with their legal advisers before assuming that the law applicable in other states is used in their state.

INTRODUCTION

In 1791, just four years after the writing of the U.S. Constitution, the original thirteen states ratified the first ten amendments to that Constitution. These amendments, known today as the American Bill of Rights, were two hundred years old in 1991. They represent concerns of our founding fathers that the strong, central federal government would usurp individual rights then enjoyed in the American colonies. The first American Congress had considered more than 145 proposed amendments, but sent only twelve of these to the states for ratification. The Bill of Rights has established the core of basic individual rights in the United States.

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 throughout the United States. Today, most states and the federal government use the Uniform Rules of Evidence found in Appendix B of this text. The remaining states use rules of evidence similar to the Uniform Rules of Evidence. These rules incorporate more than two hundred years of judicial and legislative debate as to what should be used in the courts of the fifty states and of the federal government. Today, as in 1791, the Bill of Rights sets the standards for rules of evidence. For this reason, this book focuses on the Bill of Rights and cases interpreting the Bill of Rights.

In criminal trials, rules of evidence have as their goal securing a defendant's constitutional right to a fair trial. What is meant by a "fair trial" can vary over many years. What was considered a fair trial in the 1692 Salem, Massachusetts, witchcraft trial is no longer a fair trial in any democratic nation in the world today. In 1692, nineteen persons were executed in Salem as witches and 150 more were jailed on evidence that would not be permitted today under the Bill of Rights.

Rules of evidence are not only important for protecting the fundamental rights of a person accused of crimes, but are also necessary in seeking to assure the interest of the American public through efficient and effective functioning of the American criminal justice system. However, a necessary tradeoff exists between the protection of individual rights and judicial efficiency. Understanding this tradeoff adds greatly to the student's appreciation of the dynamics of the criminal justice system.

Appendix A of this text contains the Bill of Rights and applicable selections of the U.S. Constitution. Appendix B presents most of the Uniform Rules of Evidence used in federal courts and in the courts of most states. Both the U.S. Constitution and the Uniform Rules of Evidence are cited frequently in this text, and thus are an integral part of the material.

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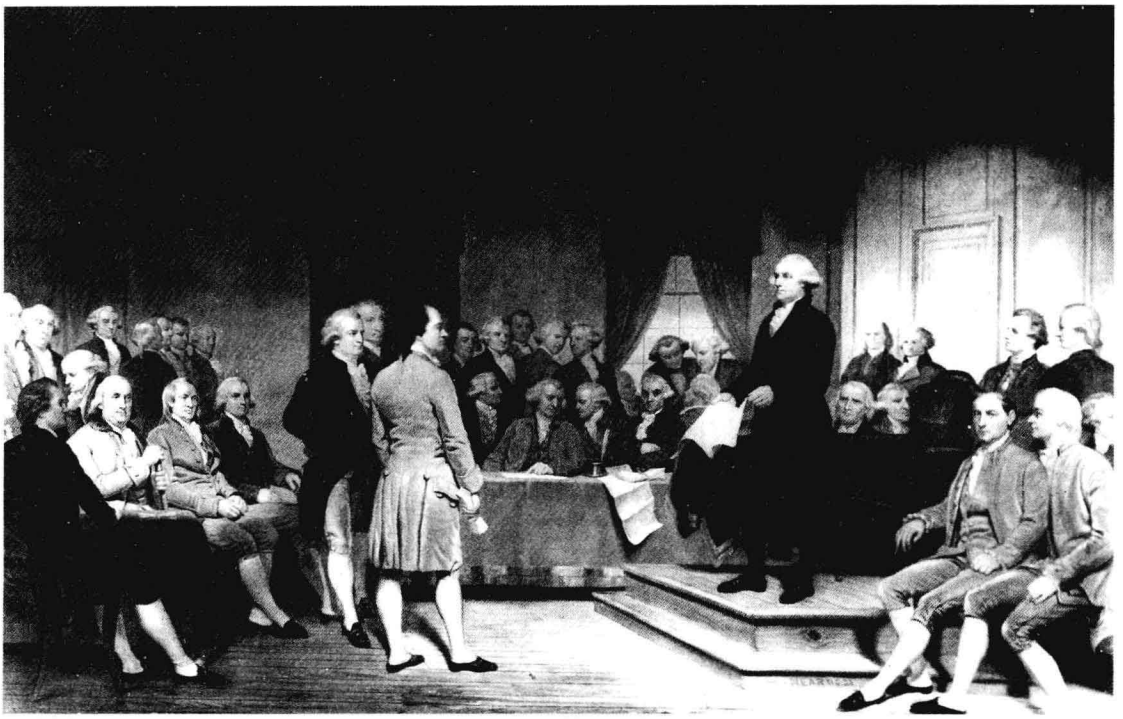


The signing of the U.S. Constitution from a painting in the Smithsonian Institute in Washington D.C.

Chapter One

INTRODUCTION TO THE LAW OF CRIMINAL EVIDENCE

A. History of the Rules of Evidence

More than nine hundred years ago, beginning with William of Normandy's conquest of England in 1066, English courts began developing rules of evidence as part of the English system of justice. Rules of evidence are rules which determine the use and admissibility of information in court trials. Admissible evidence is information which is permitted to be used in a trial, while inadmissible evidence is information which cannot be used.

Most of the early rules of evidence were made by English courts, and 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 law 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 in safeguarding the rights of accused persons to a fair trial, but also in seeking to assure 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 these rules should be, and what would best serve the overall needs of society.

Medieval Methods of Determining Guilt or Innocence

In a perfect world, rules of evidence would exist to ensure fairness and accuracy in determining truth. In early English law, however, barbaric and superstitious practices were used to supply the evidence that would determine guilt or innocence in criminal trials. As a result, the rules of evidence often actually prevented fair trials.

At the time of the Norman Conquest it was a common practice to determine guilt or innocence by the use of procedures known as "ordeals." A person of noble birth or who was titled could demand trial by battle to determine his guilt or innocence. Winning a sword fight would prove innocence, while losing would show guilt. As the loser would often be 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 would be determined by other types of ordeals. The nineteenth-century English judge, Sir James Stephens, described these ordeals in his *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, 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]

Witchcraft and practicing witchcraft were crimes in Europe and the English-speaking world from the days of the old Roman Empire. Over the centuries, thousands of innocent people were executed on accusations and evidence that would not be tolerated today. For example, Joan of Arc was charged and convicted of being a witch in 1431. She was burned at a stake in France after being tried before an English court. Prosecution for witchcraft reached a high in the American colonies in Salem, Massachusetts in 1692. Nineteen people were executed after the famous Salem witchcraft trials, and 150 were sent to prison. Today, the evidence used in the Salem trials would not be allowed under the U.S. Constitution, which was ratified ninety-nine years later.

In the Middle Ages, animals were held criminally responsible for harm they had done. Dogs, horses, bears, rats, and other animals were tried before human courts for such crimes as murder, battery, and destruction of crops. This practice, like that of ordeals, was discontinued in the years before the American Revolution. As late as 1712, however, a dog was sentenced by an Austrian court for biting a man on the leg. Today, all democracies recognize that animals do not have the mental capacity to commit crimes, and therefore are not criminally responsible for their acts. Animals can be destroyed if they become dangerous. Criminal liability, if any, could attach not to the vicious animal, but to its owner.

B. Magna Carta and Habeas Corpus

In twelfth-century England, people lived under a system in which they could be jailed 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 any person who dared criticize the Crown or the government. Absolute loyalty was compelled by the arrest of anyone suspected of antigovernment sentiments or statements.

Because of these abuses by English kings, important English barons 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 toward 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, or 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.

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 "you have the body." This writ, when signed by a judge, is served upon the governmental official who has custody of a person and orders that official to appear before the court and show cause for holding the person. Magna Carta and habeas corpus are not only very important legal concepts in the English speaking world, but they also have had an important impact in other parts of the world. Magna Carta began the concept that a person cannot 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 being held without just cause and legal authority, the judge presiding at the habeas corpus hearing must then order his or her release.

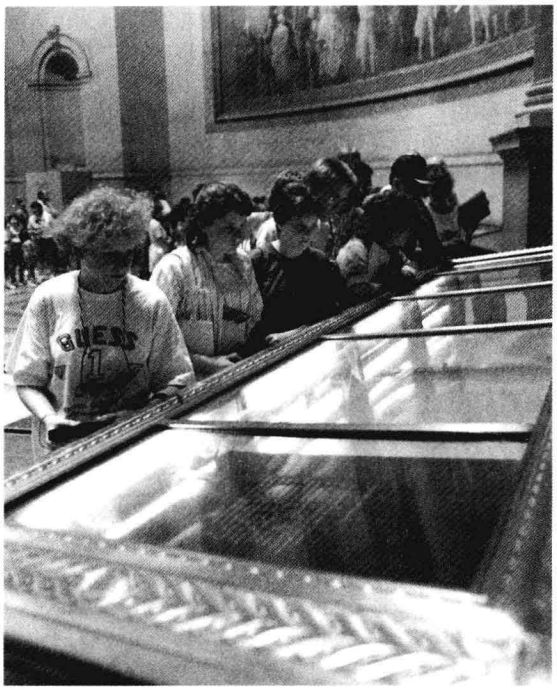
The American Founding Fathers and all of the original thirteen states placed guarantees of the right of habeas corpus in the U.S. Constitution and in the constitutions of all thirteen states. Article I, Section 9, of the U.S. Constitution provides that "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

Some states strengthen 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 6 months imprisonment), "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."

C. 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



Tourists viewing the U.S. Constitution and Declaration of Independence in the National Archives Building in Washington D.C. The documents are displayed in hermetically sealed display cases that can descend into a steel vault in the event of an emergency.

those days came from the ruler. This was known as the "divine right of kings." The doctrine was generally accepted and promoted throughout the world in the Middle Ages, and 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. This theory was actively promoted by those in power, as it helped them 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" commences by discussing the "free fruition of such liberties, Immunities and privileges . . . as due every man."[4] The 1765 Declaration of Rights speaks of "inherent rights and liberties," "freedom of a people," and "the undoubted rights of Englishmen."[5]

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, the Declaration states "that all Men are created equal" and that they "are endowed by their Creator with certain unalienable rights." Among these are the rights of "Life, Liberty and the Pursuit of Happiness."

Every Fourth of July, we celebrate the signing of the document which established the following propositions:

- That the United States was independent from Great Britain, detailing 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."

D. 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 would create a workable, practical government to serve the people. They stated their goals in the preface 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 Constitution sought to protect the privilege of habeas corpus, and also prohibited such abuses as the passing of bills of attainder and ex post facto laws. The right of trial by jury was protected, while "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" (Article II, Section 4).

When the Constitution was presented to the states for ratification, it was criticized as not going far enough in protecting the people from possible abuses by the new federal government. The people understood their state governments and believed they could control them, but they were suspicious of the new central government. As a result, prior to ratification of the new Constitution it was agreed that additional protections would immediately be added to the Constitution. The U.S. Constitution was ratified in 1787 and ten amendments, now known as the Bill of Rights, were added in 1791.

In a 1991 U.S. Supreme Court opinion, Justice Scalia pointed out that "most of the procedural protections of the federal Bill of Rights simply codified traditional common law privileges (that) had been widely adopted by the states." Justice Scalia used the following quote from 1878, which stated that "the law is perfectly well settled that the first ten amendments to the Constitution . . . were not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors."[6]

The Bill of Rights (the first ten amendments are found in Appendix A of this text) originally applied only to the federal government. In 1961, the Bill of Rights

Historic Wrongs the U.S. Constitution Protects Against

The practice of arresting and jailing persons without cause	Abuses by English kings caused the English civil war, which ended in 1215 with the signing of Magna Carta. Magna Carta led to the development of the writ of habeas corpus and the concept of probable cause in the years that followed. The requirement of probable cause and the guarantee of habeas corpus were made part of the U.S. Constitution.
Use of torture and coercion to obtain confessions	Torture, terror and coercion were used throughout Europe to force confessions for many centuries. The due process clause and Fifth Amendment privilege against self-incrimination protects against such abuses.
General warrants which permitted searches at the pleasure of British officers	This British practice in the American colonies was the "most prominent event" which led to the Declaration of Independence and the American Revolution. The Fourth Amendment requires probable cause and search warrants for such searches.
Criminal convictions upon only hearsay and accusations by unknown persons	This practice was used to "frame" Sir Walter Raleigh in 1603 and send him to prison for treason. The Sixth Amendment requires that "the accused shall enjoy the right . . . to be confronted with the witnesses against him."
Charging a person with a trumped up criminal charge and pressuring the jury to convict the person	William Penn was charged in this manner in 1670. When the English jury would not convict him, they were held for two days without food or water and then fined for their conduct. The requirements of "an impartial jury" (Sixth Amendment) and "due process of law" (fundamental fairness requirement of the Fourteenth Amendment) protect against such abuses.

The U.S. Constitution also forbids ex post facto and corruption of blood laws, and bills of attainder (Art.I, Sec.8 and Sec.10); quartering soldiers in homes in time of peace (Third Amendment); unreasonable searches and seizures (Fourth Amendment); violations of double jeopardy (Fifth Amendment); depriving persons of life, liberty, or property without due process of law (Fifth Amendment); excessive bail and excessive fines (Eighth Amendment); cruel and unusual punishment (Eighth Amendment); slavery and involuntary servitude (Thirteenth Amendment); and denial of the right to vote on account of sex (Nineteenth Amendment).

Persons accused of crimes enjoy the right "to a speedy and public trial, by an impartial jury . . . to be informed of the nature and cause of the accusation; . . . to have compulsory process for obtaining witnesses . . . and to have the Assistance of Counsel." (Sixth Amendment).