THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY

STANLEY N. KATZ
EDITOR IN CHIEF

VOLUME 3

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Evidence–Labor and Employment Law

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COMMON ABBREVIATIONS USED IN THIS WORK

ABGB	Allgemeines Bürgerliches Gesetzbuch Österreich, Austrian General Civil Code
A.D.	*anno Domini,* in the year of the Lord
ADHGB	Allgemeines Deutsches Handelsgesetzbuch, General German Commercial Code
A.H.	*anno Hegirae,* in the year of the Hajj
ALR	Allgemeines Landrecht für die Preussischen Staaten, Prussian Civil Code or General Territorial Law for the Prussian States
A.M.	*Artium magister,* Master of Arts
b.	born; ibn (in Arab names)
B.C.	before Christ
B.C.E.	before the common era (= BC)
BGB	Bürgerliches Gesetzbuch, German Civil Code
c.	*circa,* about, approximately
C	Codex (of Justinian)
C.E.	common era (= AD)
cf	*confer,* compare
CIC	Codex Iuris Canonici, Code of Canon Law
CMBC	Codex Maximilianeus Bavaricus Civilis, Civil Code of Bavaria
d.	died
D	Digest (of Justinian)
diss.	dissertation
EC	European Community
ed.	editor (pl., eds), edition
EEC	European Economic Community
EU	European Union
f.	and following (pl., ff.)
fl.	*floruit,* flourished
GG	Grundgesetz, Basic Law for the Federal Republic of Germany
HRE	Holy Roman Empire
I	*Institutes* (of Justinian)
IPL	International Private Law
l	line (pl., ll.)
LL.D.	*Legum doctor,* Doctor of Laws
n.	note
NBW	Nieuw Burgerlijk Wetboek, Dutch New Civil Code
n.d.	no date
no.	number
n.p.	no place
n.s.	new series
p.	page (pl., pp.)
pt.	part
rev.	revised
ser.	series
supp.	supplement
UCC	Uniform Commercial Code
USSR	Union of Soviet Socialist Republics
vol.	volume (pl., vols.)
ZGB	Zivilgesetzbuch, Swiss Civil Code

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EVIDENCE. [*This entry contains four subentries, on evidence in ancient Athens, in English common law, in medieval and post-medieval Roman law, and in United States civil procedure. For discussion of evidence in Islamic law, see Procedure, subentry on Proof and Procedure in Islamic Law.*]

Ancient Athens

In the *Rhetoric*, Aristotle distinguishes between two different means of persuasion: artistic (*entechnoi*) proofs, which involve rhetorical arguments invented by the speaker, and artless (*atechnoi*) proofs, which are pieces of documentary evidence that exist independent of the orator's art. He lists five types of artless proofs: laws, witness testimony, contracts, evidence derived through the torture of slaves, and oaths. Aristotle's emphasis on rhetorical rather than artless proofs reflects the distinctive Athenian approach to the presentation of evidence. While most modern trials focus on the introduction of testimony and other forms of evidence, often in a highly fragmented form, Athenian litigants provided a largely uninterrupted narrative of their case, punctuated with the reading of evidence; in an Athenian court the evidence did not make the case but reinforced the claims and rhetorical arguments presented in the litigant's speech.

Each litigant was responsible for gathering any evidence he wished to present to the jury at trial. There were two major types of action: private cases, in which the injured party brought suit, and public cases, in which anyone could bring suit. In cases involving an appeal from public arbitration—that is, in most private cases in the fourth century B.C.E.—each party was limited to the documentary evidence that had been presented at the arbitration and stored in a sealed jar for trial. During the trial, litigants generally introduced evidence by calling for the clerk to read the relevant document aloud to the jury. In private cases, and perhaps also in public cases, the reading of evidence did not count against the litigant's allotted speaking time.

Laws. Laws were considered a form of evidence in Athens because litigants, rather than a court official, collected and introduced statutes into evidence as part of their presentation to the court. The laws were inscribed on large stone blocks erected in various public areas of Athens; beginning at the end of the fifth century B.C.E., copies were kept in a public archive. Each party was responsible for finding any law helpful to his case and for writing out a copy of the statute or the relevant portion of the statute, to be read aloud by the clerk in the course of the litigant's speech. The penalty for citing a nonexistent law was death, though we know of no case where this punishment was exacted. The possibility of heckling from knowledgeable jurors and spectators also may have served as a deterrent to presenting false or misleading quotations from the laws.

There was no obligation to explain the relevant laws, and in fact some speeches do not cite any laws at all. Speakers at times refer to laws unrelated to the legal charge in the case, to create the impression that many statutes support their position or to buttress a rhetorical argument tangential to the issue in dispute. Scholars dispute whether jurors were bound to apply the law governing the legal charge strictly, or whether statutes had persuasive but not binding force in Athenian courts.

Witnesses. Except in homicide cases, witnesses were not required to swear an oath, though they could do so voluntarily or in response to a challenge by one of the litigants. Before about 380 B.C.E., witness testimony was delivered orally. Litigants had the opportunity to cross-examine witnesses, but it seems that they rarely did. After 380, litigants prepared a written affidavit for each witness, which was read out by the clerk and merely confirmed by the witness. If the witness was not present in court to affirm his statement because of illness or travel, other witnesses could be introduced to prove that he had previously affirmed it. The reason for the switch from oral to written testimony in the early fourth century is unclear; suggestions include creating a record of testimony for use in any future suit for false witness, speeding up the trial process by making the presentation of testimony more efficient, and accommodating the increased emphasis on the use of writing in law and business in the fourth century.

Adult male citizens, resident aliens, and foreigners were allowed to serve as witnesses. The testimony of slaves was permitted only if it was extracted through torture. Women could not testify, though they could provide evidence to the court by swearing an oath in response to a challenge by one of the litigants. It has been suggested that slaves and women could serve as witnesses for the prosecution in homicide cases, but most scholars now view this as doubtful. Parties to a lawsuit were also barred from testifying on their own behalf. Hearsay evidence was not

permitted, except to introduce statements made by a person who had since died.

It was standard practice to bring witnesses along to any event or business transaction of legal significance, and, in the case of an unexpected occurrence that might lead to litigation, such as an act of violence, to line up potential witnesses immediately from among the bystanders. Despite careful planning, it sometimes happened that an unwilling witness held information useful to a litigant's case. Qualified witnesses were legally obliged to testify, though there seems to have been no mechanism to force a witness to appear in court. A litigant could bring a private suit (*dikē lipomartyriou*) against a witness who failed to attend, though it is possible that this procedure was only available if the witness had originally agreed to testify but did not appear at the trial. If the recalcitrant witness was present in court during the trial, the litigant's leverage against him was considerably greater: The witness was faced with a choice between affirming a statement written by the litigant, taking an oath that he had not been present at the event or transaction in dispute, or was ignorant of the facts in the deposition (which in practice may also have been used if the witness was familiar with the events in question but disagreed with statements in the deposition), or paying a 1000-drachma fine. Witnesses who testified in court (though not, it seems, those who took an oath of denial) were liable to prosecution for false testimony. After two such convictions, a potential witness was no longer legally obliged to testify, for after a third conviction he forfeited his citizenship rights.

Some scholars have suggested that the role played by witnesses in Athenian courts extended beyond simply testifying about disputed questions of fact. Sally Humphreys argues that the substance of witness testimony was often far less important than the information that a witness's presence provided about the social milieu of the litigant and whether he was supported by kin, neighbors, and "respectable" members of the community. Stephen Todd, taking a more moderate view, contends that Athenian witnesses served two functions, one of which corresponds to that of modern witnesses, while the other involved publicly demonstrating their support for the litigant by taking on the risk of being prosecuted for false testimony.

Contracts and Wills. Litigants often had contracts and wills read into evidence, though written documents did not hold the same significance in an Athenian court that they do today. There was no requirement that wills or large transactions be recorded in writing, and although references to written documents became more frequent over the course of the fourth century, oral agreements continued to be used and enforced throughout the classical period. There was no equivalent of a written receipt; when paying off a debt one brought along witnesses who could later testify in court if necessary. There is one exception to the general interchangeability of oral and written forms of proof in Athenian courts: beginning in the middle of the fourth century, a special expedited procedure was introduced for commercial shipping cases, which appears to have been available only in suits involving a written contract.

In the absence of signatures, it was often difficult to convincingly authenticate a written document, and charges of forgery were common. Witnesses were generally required to establish the validity of a document in court. A notable exception is bankers' records, which may have been accepted without witness testimony because the public's trust was thought to be too important to a banker's business for him to risk forging documents.

Torture, Oaths, and Challenges. A slave's testimony could only be admitted if it was obtained through torture. The consent of both parties was required. Typically, a litigant issued a challenge (*proklēsis*) to the opposing party that proposed to have a slave belonging to the challenger, to his opponent, or to a third party interrogated under torture, and specified the questions to be asked, the method of torture, and the interrogator. Although there are over forty examples of such challenges in surviving forensic speeches, there is not one known case of a slave being interrogated through torture. A rejected challenge was itself useful to the challenger as an indication of his opponent's bad faith, however, and could be introduced into evidence. The rationale for the torture rule and the explanation for its apparent use only in the form of unaccepted challenges are not entirely clear. A litigant could also challenge his opponent to take an oath or to accept an oath from the challenger or from a third party attesting to a fact in dispute. Such evidentiary oaths could be sworn by individuals not permitted to testify as witnesses, such as a party in the case or a woman. As with slave torture, the consent of both parties was required to use evidence obtained in this way in court, but a challenge that was refused could be entered into evidence.

Physical Evidence. By modern standards, the Athenians appear to have put surprisingly little emphasis on the use of real objects as evidence, perhaps in part because there was often little physical evidence available in the absence of police and forensic science. There are, however, a few cases in which a litigant presented a person in court as evidence. Most colorfully, a defendant on trial for killing a slave woman belonging to his enemies proved his innocence by producing the woman, alive, in court.

Relevance. There appears to have been no rule setting forth the range and types of information and argument considered relevant in Athenian popular court trials. The *Constitution of the Athenians*, a fourth-century text ascribed by some to Aristotle or to students working under his direction, states that litigants in private cases took an oath to speak to the point; but this oath is never mentioned

in surviving court speeches and appears to have had no effect on litigants' arguments, which often include material that would be considered legally irrelevant in a modern courtroom. Several sources report that trials for homicide differed from ordinary court cases by prohibiting speakers from discussing matters "outside the issue" (*exō tou pragmatos*), though it is unclear whether, by what means, or how stringently this relevancy rule was enforced.

The absence of a restriction on relevance in the popular courts gave rise to some of the most distinctive features of Athenian trial speeches. Litigants regularly appeal to the emotion of the jurors, at times displaying their weeping children in court in a bid for the jurors' pity. Speakers also boast of their own (and their ancestors') good character and public services, and engage in stinging character attacks on their opponents. Scholars disagree about the relative importance of such evidence. Some view the use of such nonlegal argumentation as a byproduct of the amateurism of the Athenian system, in which litigants made their own presentations without the intervention of a judge expert in the law, and where the absence of forensic science and techniques of investigation sometimes left litigants and jurors with little to rely on aside from arguments based on character. Others have suggested that questions of the relative character and worth of the parties were central to the litigants' presentations and the jury's verdict, perhaps even more important than proof of the formal legal charge.

The Evaluation of Evidence. There were no rules that assigned the burden of proof to one of the parties, set forth the standard of proof, or provided guidance on the weight to be accorded to particular pieces of evidence. Jurors were permitted to evaluate freely the evidence put before them; the absence of provision for appeal further insulated their decision. The jurors' oath did, however, offer them some instruction: according to the standard reconstruction, it stated in part, "I shall vote according to the laws and decrees of the Athenian people and the Council of the Five Hundred, but concerning things about which there are no laws, I shall decide to the best of my judgment, neither with favor nor enmity." While some scholars have interpreted this to mean that the jury was limited to strictly applying the laws in all but the unusual case where there was no controlling statute, others have argued that the jurors' "best . . . judgment" often played a major role in reaching a verdict, and could be applied whenever a vague or ambiguous law required interpretation, or even when the letter of the law conflicted with jurors' notions of fairness.

[*See also* Contract, *subentry on* Ancient Greek Law; Oaths in Ancient Athens; Torture, *subentry on* Ancient Athens; *and* Witnesses in Ancient Athens.]

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ADRIAAN LANNI

English Common Law

The history of evidence in the English common law is fundamentally connected with the history of common-law procedure.

Civil Evidence and the Original Writs. Civil litigation at common law typically originated when the plaintiff—sometimes

known as the "demandant"—purchased an original writ from the royal chancery. The original writ determined the procedure, including the methods of proof, to be used in resolving the dispute.

Among the earliest original writs were the praecipe writs, identifiable by their starting with the Latin word *praecipe*, meaning "command." The praecipe form was largely settled by 1150. One type of praecipe writ, probably the model for the others, was the "writ of right," which ordered the local sheriff to command the defendant to render to the demandant the land that the demandant claimed. Other examples of praecipe writs include the writs of entry (for land) and the writs commencing the actions that came to be known as covenant, debt, detinue, and account.

The praecipe writs, having developed early in the history of the common law, typically used early evidentiary procedures—namely, procedures that invoked the judgment of God, *judicium Dei*. In the writ of right, trial was originally by battle. In debt and detinue, and originally in covenant and account, trial was by a procedure that came to be called "wager of law," in which the defendant swore to the truth of his case and his oath was supported by people—typically eleven of them—known as "oath helpers," who swore that they believed that the defendant had sworn truthfully. Dissatisfaction with the evidentiary procedures in praecipe writs led to some modifications. In 1179 Henry II introduced, as an alternative to trial by battle on a writ of right, a procedure known as the "grand assize": four knights from the neighborhood of the land in question would elect from the same neighborhood twelve knights, who would then declare on oath which party had the better right to the land. In the action of covenant one can find instances of trial by jury, rather than wager of law, by the end of the thirteenth century. In the action of account it became settled by the early fourteenth century that wager of law could not be used in the frequent fact pattern in which the defendant had received money from a third party to the plaintiff's use.

The point to emphasize is that the type of civil action determined the method of proof. This fundamental point can also be seen in civil litigation commenced by original writs other than the praecipe writs. Two categories of these should be mentioned. The first, available from the late twelfth century, concerned the petty assizes of novel disseisin and mort d'ancestor, which were procedures created by Henry II to resolve disputes about land. These petty assizes used a writ that commanded the sheriff to employ a specific method of proof: he was to summon twelve free men from the neighborhood to speak on oath about the relevant facts.

A second alternative to the praecipe writs were the *ostensurus quare* writs, so named from the Latin phrase with which the writ began, meaning "to show why." The most frequent *ostensurus quare* writs were the writs of trespass, which developed by the middle of the thirteenth century. Being newer than the praecipe writs, the trespass writs used the newer procedure of trial by jury for the finding of facts.

One of the central themes in the history of English civil litigation is the decline of the praecipe writs—in part because of their archaic procedures of proof—and the rise of the trespass writs enabling litigation to be resolved by jury trial.

Criminal Evidence and the Early Procedures. In the early common law, the guilt or innocence of a person accused of a criminal offense was determined by one of three forms of *judicium Dei*: oaths, ordeal, or battle. The use of oaths in criminal proceedings disappeared in the late twelfth century as a result of the procedural reforms announced by Henry II in the Assizes of Clarendon of 1166. Trial by battle was considered appropriate only in some instances of the private accusation of serious crime known as "appeal of felony." Ordeals were used in all other cases.

Ordeals required the participation of the clergy. In 1215, however, clerical participation in ordeals was forbidden by the Fourth Lateran Council of the Christian church (Lateran IV). This effectively ended the use of the ordeal in the English common law. After some experimentation, the king's justices began to use juries from the locality of the alleged offense to determine the accused person's innocence or guilt. Within a century after Lateran IV, trial by jury became the standard method of criminal trial in England.

The Early Jury Trial. Jurors (in Latin, *juratores*) were persons sworn to give a true answer (in Latin, *veredictum*). As seen, jurors were used in the grand assize, in the petty assizes, in the trespass writs, and in most criminal trials after Lateran IV. The use of juries rose in the thirteenth and fourteenth centuries, replacing older methods of proof. Litigants and judges grew increasingly uncomfortable with the use of trial by battle to resolve civil or criminal disputes, and plaintiffs in civil litigation endeavored to use trespass writs rather than praecipe writs, thereby denying the defendant wager of law.

The long-standing conventional wisdom has been that the early jury, composed of men from the vicinity of the dispute, was substantially self-informing: verdicts were based primarily on information obtained by the jurors before the trial, either from their personal knowledge or by investigation. In Langbein's felicitous phrase, the early jury "came to court more to speak than to listen" (*Prosecuting Crime*, p. 125). Some scholars, such as Powell, have questioned this account, doubting whether the jury was ever self-informing. The more recent work of Klerman provides strong support for the conventional wisdom, at least through the thirteenth century.

Another feature of early trial by jury must be mentioned: the jury's verdict was almost never subject to review by the central royal courts at Westminster. Verdicts could be quashed for juror misconduct, but this was rare. In most instances the judgment of the people (*judicium populi*) was as final as the judgment of God (*judicium Dei*).

The Transformation of Jury Trial. By the end of the seventeenth century, and probably earlier, jury trial was transformed. Most of the details are unknown, but the result is well agreed: the jury had ceased to be self-informing. Verdicts were based not on juror knowledge or investigation but instead on the presentation of evidence at trial. This principle is shown in the words of Chief Justice Robert Raymond of the Court of King's Bench in the case of *Constable v. Nichols* (1726): "if a jury man knows anything of his own knowledge he ought not to acquaint his fellows with it privately, but must be sworn in open court, for he is a witness."

A further aspect of the transformation must be noted. In contrast to medieval practice, early modern jury verdicts were more readily reviewed in the central royal courts at Westminster, which increasingly entertained posttrial motions. These motions enabled the party losing at trial to raise questions of law for discussion at Westminster. For discussion of points of evidence, the relevant motion was that for a new trial. By the end of the seventeenth century, it seems to have been settled that the motion for a new trial could be granted if the trial judge erred in ruling on the admissibility of evidence. By bringing the question of admissibility to Westminster, counsel helped to facilitate the growth of the law of evidence. An aphorism of Milsom is appropriate here: "Legal development consists in the increasingly detailed consideration of facts" (p. 1).

Seventeenth- and Eighteenth-Century Treatises on Evidence. Some insight into the rules governing evidence at common law in the late seventeenth and early eighteenth centuries can be obtained by examining contemporary treatises, including Giles Duncombe's *Tryals per Pais* (first published in 1665), William Nelson's *Law of Evidence* (first published in 1717), and Geoffrey Gilbert's *Law of Evidence* (written in the early 1700s and published posthumously in 1754).

Three general observations can be made. First, the law of evidence in this period focused heavily on documents and their probative force. Gilbert, for instance, devoted considerable space in his treatise to ranking the credibility of different kinds of written instruments, ranging from public records such as acts of Parliament to private writings such as bills of exchange and wills. Second, to the extent that there were rules governing oral evidence, the rules concerned the competence of witnesses to testify. For example, persons "interested" in the case—including the parties—were prohibited from testifying. Third, there was comparatively scant treatment of any rules excluding portions of the testimony of competent witnesses. The rule against hearsay, which occupies so much of the modern Anglo-American law of evidence, received little discussion.

Recent studies—such as Langbein's "Historical Foundations of the Law of Evidence" and Gallanis's "Rise of Modern Evidence Law"—indicate that Gilbert's treatise is largely consistent with the case law of the middle of the eighteenth century. His emphasis on written evidence reflected much of the practice in civil litigation, where documentary proof was often required and debated. Moreover, in civil and criminal trials potential witnesses were frequently, though not always, excluded for lack of competence; once a witness was permitted to speak, however, the testimony went largely unregulated.

During this period, common-law lawyers viewed the law of evidence as a system of rules about the admissibility of documents, the competence of witnesses, and the weight of proof. When Gilbert wrote that hearsay was "no evidence," he described its probative force, not its admissibility.

The Late-Eighteenth-Century Transformation. By the first quarter of the nineteenth century the common law of evidence had undergone a transformation. Thomas Starkie's 1824 *Practical Treatise of the Law of Evidence* emphasized the importance of oral proof as being "more proximate to the fact," hence more reliable, than writings. The treatise also contained a lengthy discussion of restrictions on the admissibility of testimony, particularly the rule against hearsay and its exceptions.

Understanding this transformation has required a fresh look at the conventional wisdom on the history of evidence law. The working assumption of historians had been that rules on the admissibility of oral evidence at common law were developed in civil litigation in the seventeenth and eighteenth centuries, then migrated into criminal cases in the late eighteenth century when lawyers increasingly appeared in the ordinary criminal trial. Recent research (Gallanis, "Rise of Modern Evidence Law") suggests a different account. The routine use of the objection to oral evidence in civil cases developed after lawyers had begun to appear regularly in criminal trials. The limited role of counsel unable, for example, to speak directly to the jury in the criminal trial prompted the aggressive use of the objection to block potentially damaging testimony, and this aggressive approach to oral evidence migrated into civil litigation as lawyers familiar with criminal practice began to work in civil cases.

A more recognizably modern evidence law is shown in nineteenth-century treatises such as Starkie's: a law consisting of fixed and detailed rules governing the admissibility of testimonial proof. Wigmore, the great scholar of evidence law whose historical account is still the starting point for modern research, believed, as did Thayer, that the

exclusionary rules of evidence developed in order to protect jurors, who were no longer self-informing, from being misled by potentially unreliable proof. Dissenting from this view was Morgan, who emphasized the historical role of the adversary system, particularly in connection with the development of the rule against hearsay. The recent research of Langbein and Gallanis gives some additional force to Morgan's dissent. After jurors became dependent on the testimony of others, there were still very few rules blocking specified kinds of testimony from reaching their ears. However, when a new spirit of adversarialism appeared in criminal and then civil trials, the exclusionary rules and their consistent application began to mature.

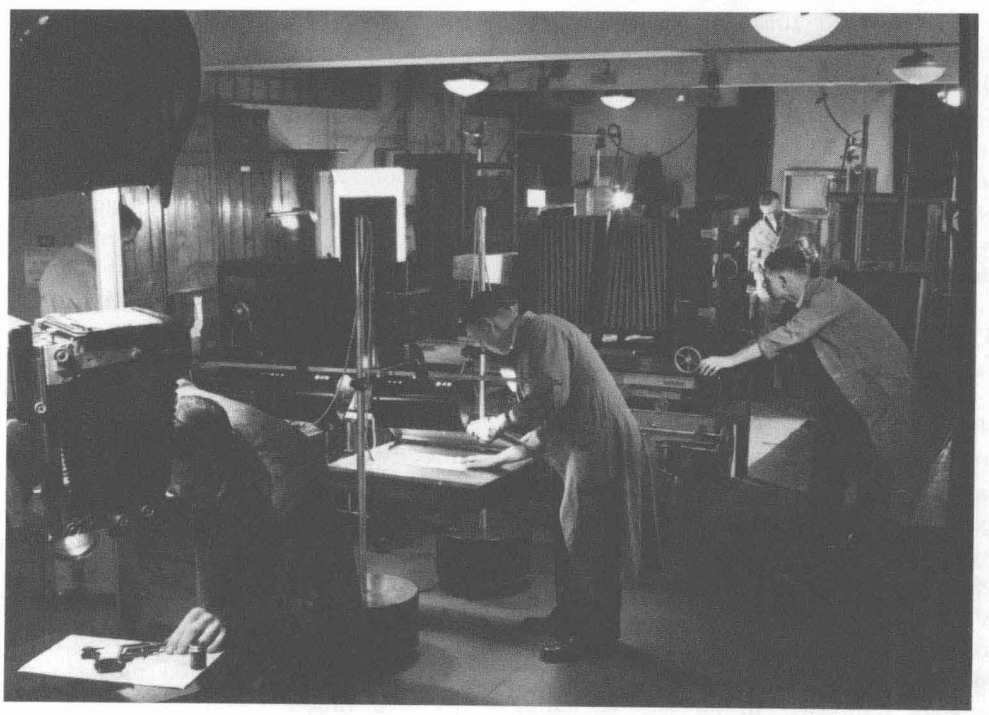
Courts outside the Common Law. Historians have debated the extent to which the common law of evidence during the early modern period was influenced by courts outside the common law. In the church courts of England and to a significant extent in the English courts of equity such as the Court of Chancery, the prevailing system of evidence in this period was the Roman-canon law of proof. In the Roman-canon system the judge—for there were no juries in these courts—resolved disputes on the basis of fixed rules of evidence. These rules governed the competence and credibility of witnesses, the compulsion and examination of witnesses, the types of admissible documents, and the use of circumstantial evidence and presumptions.

Some historians, such as Wigmore in his *Treatise* and Thayer, have rejected the idea of significant Roman-canon influence on the common law of evidence. Still, particular points of influence have been identified: see Helmholz on the privilege against self-incrimination and Shapiro on standards of proof.

Macnair's study focusing on the law of proof in the early modern English courts of equity, which used procedures drawn heavily but not exclusively from Roman-canon law, suggests that some principles of evidence law—for example, on the competence of witnesses or the preference for documents—emerged in equity before appearing at common law. The same study also demonstrates, however, that many evidence rules at common law were not borrowed from equity and that the late-eighteenth-century transformation, emphasizing the exclusion of oral proof from witnesses competent to testify, was independent of influence from equity or from the Roman-canon system.

Reform in the Nineteenth Century. Victorian England saw sweeping reforms, primarily by statute, of court structure and procedural law. The superior courts of common law and Chancery were combined, with others, into the Supreme Court of Judicature. This was accompanied by the fusion of law and equity, which permitted the procedural advantages of equity to be available at law, and vice versa. The use of juries declined as parties were permitted to waive jury trial in favor of a determination of facts by a judge.

The procedural reforms included reforms of the law of evidence. Most notably the rules of evidence were broadened to accept the testimony of persons "interested" in the



Photographing Evidence. Police photographers at work in New Scotland Yard, about mid-twentieth century. MARY EVANS PICTURE LIBRARY

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case. These included the parties or, in a criminal proceeding, the accused. Other grounds of incompetence to testify were also removed, such as prior conviction of a criminal offense. Moreover Quakers and others who for reasons of religious belief (or lack thereof) could not speak on oath were permitted instead to speak on affirmation.

In explaining the Victorian reforms of evidence law, Wigmore, Holdsworth, and Landsman emphasized the role of Jeremy Bentham, who was highly critical of much of common-law procedure. Research by Allen demonstrates, however, that Bentham's influence was limited: the reform of evidence law was not stimulated by any one jurist but rather was "a part of the Victorian world to which it belonged—influenced by a variety of social, political, and intellectual pressures" (p. 186).

[*See also* Courts, English; Jury, *subentry on* English Common Law; Ordeal in English Common Law; Pleading; Torture, *subentry on* English Common Law; *and* Trial by Battle.]

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THOMAS P. GALLANIS

Medieval and Post-Medieval Roman Law

The Roman trial placed the duty to present evidence on the parties. This was important because the *Corpus Iuris Civilis* continued to be embraced well into the modern era.

Ancient Traditions. The judges were responsible for deciding when the evidence sufficed for a conviction. The crime was evidenced (*manifestum*) when the judge was convinced according to the antique argumentation (*fides facere*). If he was unsure, he could consult the emperor through *relatio* or *consultation ante sententiam*. With an *ampliatio* or a *comperendinatio*, he could ask for a further clarification of the case. Finally, if he remained unconvinced, he could suspend his decision through a *non-liquet* judgment. It was better to let a guilty man go free than to convict an innocent one (Ulpian, D. 48.19.5 pr. 2).

Roman judges were also free to decide when evidence sufficed to reach a conviction. An exception to this rule were confessions, which were automatically seen as sufficient ("Confessus pro iudicato habetur," Paulus, D. 42.2.1 and 42.2.3; Gaius, Inst. 4.24; Ulpian, D. 42.2.6 pr. 2; C. 7.59 Antoninus, a. 212). The procedure was therefore much shorter when the accused was caught in flagrante (C. 9.13.1.1 [Justinian, a. 533]; C. 1.3.53.1 [Justinian, a. 533]). Many questions of evidence could be clarified through the register and land register of the Roman administration.

Germanic Tradition. Germanic law took on the Roman evidence rules, as well as the culture of written evidence. In Rome, torture was certified and regulated. It was only practiced when the situation permitted and not when it might cause conflict with the Francs or the Goths. However, there is hardly any proof of torture after the ninth century.

The integration of ordeals was no Germanic invention; such practices already existed in the Roman Empire, where gods of justice were venerated for example in

sources. But with the omnipresent God the procedure could be used everywhere. The glowing-iron and the boiler-catch practices were particularly widespread: the suspect or a representative had to touch a piece of glowing iron or retrieve something from boiling water or hot oil. If he was innocent, his skin would heal quickly or remain uninjured. The cold-water test involved throwing the accused into a river or lake and trusting that the pure elements in water would not accept the guilty. The "two-tongued" judgment meant that the court left the outcome of a case to be decided by ordeal. This was mentioned in all Germanic laws and went against the Roman principle that the conflict should be solved through law without violence.

The court would decide on the focus of the trial, for which the parties must bring their evidence. This meant the submitted indications and the integrity of the parties played a central role. Germanic law developed a preference for clear evidence and gave the parties obligations to clarify their case. The accused should call on his neighbors (*Gerüfte*) as witnesses for the deed committed in his house. Another example of this was in cases of theft in which the victim could follow a suspect for a certain period of time (*anefang*). If he found the goods within this time, he could take them to hand over to the justice authorities. These cases therefore combined proprietary and criminal legal consequences.

Christian Tradition. In an attempt to ensure consistency in procedures and judgments, the church thought it necessary to give judges general evidence rules. By 382 (shortly after Christianity became the state religion), the emperors agreed that punishment should only take place when there were no indications of doubt (*indiciis indubitatis*) and the evidence for condemnation should be brighter than the light (CTh. 9.37.3 S.2 = C. 4.19.25). Augustin excluded pure suspicion as grounds for condemnation. The maxim of Pope Gregory the Great was often cited: that is, that it was improper to give a judgment when the case facts were doubtful.

The aim was no longer that the judge be personally convinced of guilt or innocence, but to ensure that the rules of evidence had been followed and the minimum evidential requirements had been met. The judge decided according to the facts and his private conscience became insignificant.

In the ninth century, the church strove for generally applicable evidence rules. In a letter to the king of Bulgaria, Pope Nicolaus I disapproved of confessions that had been extorted through torture and duels. Archbishop Agobard of Lyon rejected the ordeals which led to the wrongful capitulation of Benedictus Levita, and Ansegis summarized rules on the necessary number of witnesses, as well as the increased requirements for reliable witnesses, including their ability to perceive, their social rank, and so on. Rules regarding the relative value of types of evidence were introduced, which meant that certain evidence was considered stronger than other types.

The confusion over the empirical and papal powers came to an abrupt end in the late ninth century. At the time of the papal reempowerment in the second half of the eleventh century, the precedence of moral theology over rules had been generally accepted. This was further developed in jurisprudence up to the *Summa theologiae* by Thomas Aquinas.

The church particularly objected to duals and ordeals. This was not just because of the uncertain outcome but, rather, because of theological reasons. Whoever saw God as bound to cooperate in these procedures had misunderstood the almighty power of God. During the Fourth Lateran, the church confirmed its earlier ban of duels and forbade all clergy from participating in specific ordeals. However, many further forms of ordeal could not be forbidden because there was no common generic term. Lawyers of the common law did not accept a comprehensive prohibition, because the *Libri feudorum* contained several different emperors' laws in the twelfth century in which ordeals were described. The church only managed to implement a comprehensive prohibition through the Council of Trent.

As an alternative to the conventional means and in order to cleanse the parties (*purgatio vulgaris*), the church strengthened the "canonical oath" (*purgatio canonica*). The party had to swear his or her innocence and accept that in the case of perjury, they would be condemned. To strengthen their reliability, the party could also vow to find people who could testify to their honesty. Nobles often used several witnesses to strengthen their cases.

Developing *Ius Commune*. The Roman-Canonical trial law placed new emphasis on the law of evidence. These rules are often, but inaccurately called the "statutory theory of evidence." Only from the thirteenth century onward did the church and secular legislators issue laws concerning the law of procedure; many of these remained valid up to the start of the nineteenth century. They dealt less with clear, outlined rules and left plenty of room for judicial discretion within their application. The difference between the *probatio plena* (full proof) and *probatio semiplena* (incomplete proof) cannot be viewed as mathematical. The *semiplena* were only meant for use with "less than full" evidence; two *probationes semiplenae* did not suffice as full evidence.

The ideal evidence was the confession, if one could be sure of its reliability. A confession meant that a case became notorious (*notorium iuris*) and the possibility to appeal could be refused. The confession must also be voluntary, but this did not exclude the possibility of torture and its use became frequently documented in the twelfth century. After the eleventh century, a confession could be taken at

least three days after the torture and it would be deemed voluntary (*ratification*). The torture could be repeated if the confession indicated circumstances that justified it. An interlocutory judgment was required for its use and it had to be done in the presence of a judge and, if necessary, a scribe. It began with a warning (*territio*), in which the torture tools would be shown and tested. The task of the judge was to decide when the accused began to tell the truth or whether he was just looking to end the pain. Torture was also allowed in litigation for damages. There were some personal exemptions from torture, but they did not apply in cases of high treason and heresy. It could be used as well as a punishment (*question préalable*).

The law regulating witness evidence was already so extensive by the end of the fourteenth century that it had to be written in many volumes of special monographs. Witnesses could be judged on their reliability by examining their social position, and class differences were made very clear. It was generally accepted that two reliable witnesses was sufficient evidence. A document, or better still two documents, could result in full evidence, but it remained disputed whether documents or witnesses should be seen as better evidence.

All other evidence was secondary, especially circumstantial evidence, which in principle was not trusted by the common law. The thirteenth-century author Thomas de Piperata (d. 1288) proposed that certain pieces of circumstantial evidence could suffice, for example, if the suspect who was known to have had a conflict with the victim was caught trying to escape the room where the victim was found with a bloody sword. Nicolaus de Mattarellis (1240–1310?), whom Baldus referred to as the most important evidence lawyer, formulated a similar view. Officially, circumstantial evidence could only be used to justify a condemnation if there were no other grounds for conviction. As statutory presumptions (*praesumptiones iuris et de iure*), they could turn a state of affairs into a legal fiction. According to X 2.23.12, sexual intercourse could be presumed when a man and a woman were found in bed together, but hardly any author endorsed a criminal conviction in such a case.

The extensive influence of the judge remained hidden behind these apparently rigid rules. He still had to decide if a confession was convincing or if the witnesses were believable. Throughout the course of the century, the rules were changed so that the resolution of the disputed points was still left to judicial discretion (*arbitrium iudicis*). *Arbitrium iudicis* became more widely accepted as the appreciation of the judiciary as experts grew.

Furthermore, the judge could avoid giving a final judgment when the evidence was unclear by giving acquittal only of the instance (*alsolutio ab instantia*). With this, he suspended the trial, which could be continued again at any time. Modern French law allowed an acquittal only when the innocence of the accused had been proven. Therefore, the suspect was obligated to provide evidence that would prove his or her innocence. The *absolutio ab instantia* could be combined in every country with milder sentences in cases based on suspicion. It was only in French law that there was a possibility of "civilization," by which a "criminal" trial could become a "civil" case, so an inquisition procedure was replaced with a trial by accusation. This was only possible if there was a willing prosecutor with sufficient evidence.

Despite this high standard of proof, there was also the possibility for returning a conviction without sufficient evidence. This type of case was placed in the category of *poena extraordinaria,* to which only the German language gives a specific legal term (*Verdachtsstrafe*). This exception was for the most serious crimes, where the divine or global majesty was in some way harmed, for example, in cases of high treason and heresy. Here the conviction could be reached with imperfect evidence. A prince was allowed to condemn of his own free will without the full amount of evidence. An important characteristic of this exception was the permission to hand down a lighter sentence. In the context of the Inquisitions that began around 1200, Vincentius Hispanus suggested around 1215 that a milder punishment in the case of vehement assumption (*praesumptio vehementer*) be handed down. Pope Innocent IV encouraged this idea in his commentary on Liber Extra. Although academics refer to it as a small exception, in practice it was well used.

Modern Changes and Criticism. Changes in the law of evidence during the modern era are the subject of ever more extensive literature. Notoriety gradually faded out as judges focused more on the knowledge of specialists than of the people. Although duels had already disappeared by the sixteenth century, some ordeals experienced a revival of popularity, for example, the water test in witch trials. Even these had all but disappeared by the end of the seventeenth century (with a few exceptions).

The general criticism of procedural law focused on the torture that existed at the heart of the law of evidence. Juan Luis Vives, in his 1522 commentary on Augustine's *De civitate Dei,* was the first to express the opinion that torture was an unchristian and inhuman practice, and that its results were unusable. This argument was later made popular by Michel de Montaigne. The push for torture to be abolished became more and more frequent and its continued use made the monarchy look cruel.

As an experiment, Friedrich II of Prussia secretly prohibited the use of torture in principle in 1740. In his *Dissertation sur les raisons d'établir ou d'abroger les loix*, he boasted that he had abolished torture without weakening the criminal justice system. Beccaria acknowledged this in his booklet from 1764, *Dei delitti e delle pene*, and from 1770 there was a series of abolitions throughout the whole

of Europe. These were only strengthened by the French revolution.

Some countries did not want any suspects to gain an advantage through the prohibition of torture, and so imposed punishments for lying; a suspect who did not want to confess would be sentenced to corporal punishment in order to encourage him to give a statement. This was quickly withdrawn because the prohibition aimed to create a new relationship between the state and the citizens and the state should not injure the bodily integrity of the citizens anymore.

Free Judicial Appreciation of Evidence (*Intime Conviction*). The introduction of juries following the French revolution and the break from educated judges forced a change within the common law of evidence. The judges decided based on their own deep-seated convictions (*intime conviction*). Therefore, there were no specific rules for each type of evidence anymore and certain circumstantial evidence sufficed for a conviction. As French law returned to educated judges in 1808, there were no rules regarding how to present evidence to a jury. There was no desire to reintroduce the old laws of evidence and so the judges continued to decide based on their own judicial convictions.

The introduction of a public prosecutor meant that the judge's role was limited in terms of evaluating evidence and he was no longer forced to determine evidence himself in trials by inquisition. Much like an arbitrator, he only had to decide if the evidence presented by the prosecutor sufficed for a conviction or whether it could still be disputed by the suspect. It was the general indifference regarding incomplete evidence that led to the development of the principle *in dubio pro reo*, that a judge's mistaken condemnation could lead to an acquittal.

This is correctly seen as the decisive turning point in the history of the law of evidence. However, the generalization within the common law of evidence and freedom to decide the penalty was infringed by the fact that judges had to follow statutory punishments. It became clear that the opinion of the judge and his evaluation of evidence played a substantial role within the *ius commune* and was decisive in the fixing of a penalty throughout modern law. In comparison to common and Anglo-American law, the freedom of the judiciary to assess the evidence formed the basis of *ius commune*.

Germany struggled at first with the free judicial evaluation of evidence and it was not until the Criminal Law Order of 1877 that it was introduced throughout the country. Criticism of mere circumstantial evidence was expressed again, but the forensic value of evidence rapidly developed. Studies since Franz von Liszt have shown how rapidly human thought changes, especially with regard to suggestions. Confessions and witness statements therefore lost the force of their conviction. By contrast, the value of circumstantial evidence has risen because of the ability of science to reconstruct beyond a doubt the case in hand with fingerprints or genome analysis. The general rejection of lie detectors within Europe shows a lasting mistrust of machines. To that extent, the law of evidence is never merely a question of the dogmatic but an expression of what a society finds convincing through its theological and philosophical teachings as well as technical possibilities.

[*See also* Courts, Medieval and Post-Medieval Roman Law, *subentry on* Courts and Cases; Judges, *subentry on* Judges and Juries in Medieval and Post-Medieval Roman Law; Ordeal in English Common Law; *and* Procedure, *subentries on* Civil Procedure in Medieval and Post-Medieval Roman Law *and* Criminal Procedure in Medieval and Post-Medieval Roman Law.]

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MATHIAS SCHMOECKEL

United States Procedure

Before the enactment of the Federal Rules of Evidence in 1975, national efforts at evidence reform and rule making had been largely unsuccessful. In federal court and generally in state courts, with some notable exceptions, evidence law was governed by common-law principles and a patchwork of specific legislative provisions and judicial pronouncements that varied substantially from jurisdiction to jurisdiction.

Development of a National Evidence Code. The first major effort at national evidence-law reform, which ultimately played a role in rule making, was undertaken in the 1920s under the auspices of the Commonwealth Fund, a charitable foundation interested in encouraging legal reform in the tradition of the Progressive movement. One

of its first projects was the reform of evidence law through a committee that had among its members two of the giants of evidence scholarship in the first part of the twentieth century, Professor Edmund M. Morgan of Harvard Law School, who chaired the committee, and Dean John Henry Wigmore of Northwestern Law School, who is known as the leading compiler and authority on evidence law during that period. In 1927, the Commonwealth Fund published its report advocating a set of reform measures. The report, in the Progressive tradition, claimed to be empirically based and was designed to enhance the control of trial judges and curtail the power of lawyers in what it described as a scientific search for the truth. Although its proposals were endorsed by later reform efforts, the report had little direct effect, except that it influenced the development of the modern business-records exception to the hearsay rule.

The next step in the evidence-reform process occurred in 1938, when the American Bar Association Committee on Improvements in the Law of Evidence, chaired by Dean Wigmore, issued its report, which endorsed the reform measures of the Commonwealth Fund and added to it a broader agenda of changes.

In 1939, the American Law Institute began its project to create a model code of evidence. Professor Morgan was its reporter. Dean Wigmore was not included among the advisers selected for the project but was instead given the title of chief consultant. Like the Commonwealth Fund report, this proposal, published in 1942, went almost nowhere.

One explanation for its lack of acceptance was that the proposals put too much discretion in the hands of trial judges, but the explanation for its lack of impact was chiefly the poor salesmanship of Professor Morgan, who tended to challenge and frighten the bar and bench, presenting the evidence proposal as just a part of a larger reform effort. Morgan failed to understand the relatively conservative nature of lawyers when it comes to trial procedures.

Moreover, the Model Code of Evidence faced the formidable opposition of Dean Wigmore. The reasons for his opposition are numerous, but one of the major substantive points of disagreement was about the form of the model rules. Wigmore favored what Morgan derisively termed a "catalog" of detailed restrictions rather than the more general rules of a "code" that Morgan successfully championed. Wigmore also took issue with the extensive discretion given to trial judges under the model code.

Although not directly successful, the model code did become the basis of the effort by the National Conference of Commissioners on Uniform State Laws, to whom the reform effort now passed. The membership of the Drafting Committee, which was charged with developing the evidence rules and included Charles Tilford McCormick of the University of Texas Law School, another notable compiler of American evidence law, was very different from that of the American Law Institute, with more of a "middle America" character. While the rules followed the basic outline of the model code, the drafters publicly redirected the effort toward "acceptability and uniformity" rather than reform. The Uniform Rules of Evidence, which moved in the direction of brevity, were issued in 1953. Despite the effort to achieve acceptability, the proposed rules were adopted in only three states and, as with earlier efforts, had only minimal impact.

There seemed to be fatal internal conflict in the logic behind reform. If the proposed codification of evidence principles made no major changes in existing practices, the reaction was, Why adopt them? On the other hand, if they changed the existing law substantially, some group of lawyers who had an interest harmed by the proposal rose up in opposition. Intense opposition by a few to particular provisions would outweigh what might have been broad, but tepid, support for the general idea of reform. At the beginning of the twentieth century, the Progressive procedural reformers had an agenda based, inter alia, on the positions that a trial should be a scientific search for the truth rather than simply a method of resolving disputes and that the role of the trial judge, as the only neutral expert in the courtroom, should be enhanced. As that agenda fell away or encountered opposition from interests that would be harmed by a change in evidence rules, more modest goals of uniformity and often of simplicity and accessibility were advanced. However, uniformity of rules of evidence throughout the states had no strong attraction for the majority of trial lawyers. Although the need for uniform standards to facilitate commercial transactions across the nation, for example, may have motivated model rule making, the need for national evidence rules was not so obvious. Trials are local. Perhaps professors at national law schools and large law firms with multistate practices cared, but most lawyers, whose practices were largely confined to a single jurisdiction, did not. So the call to national uniformity, by itself, had little appeal. The other similarly modest claims of superiority of formalized evidence rules over those derived from appellate decisions met with equally tepid support.

In the end, the motivating force to enact rules of evidence came from the federal courts rather than a national rule-making organization. In 1963, the Judicial Conference of the United States recommended the creation of federal rules of evidence. Several years later, Chief Justice Earl Warren appointed the Advisory Committee, with Professor Edward Cleary of the University of Illinois College of Law as its reporter. The Advisory Committee was carefully balanced with representatives from a large number of different types of practices; it had special emphasis on trial lawyers and judges; and it was a generally conservative group.

A preliminary draft of the federal rules was created over the course of the next four years, with the bulk of the work performed by Professor Cleary. This effort had the modest goal of authoritatively compiling evidence law from the existing case law. Nevertheless, when the preliminary draft was made public in 1969, it produced a raft of suggestions for change, and a revised daft was published the next year. When the Supreme Court received these revised rules from the Judicial Conference a year later, rather than sending them directly to Congress under the Rules Enabling Act, it sent them back to the Judicial Conference to be published so that further comment could be received before enactment. This move drew the attention of Congress, produced objections from a group of senators, and brought about the incorporation of a number of changes proposed by the Justice Department. The proposed rules were finally transmitted to Congress in 1972.

The proposed rules on privilege drew a particularly negative reaction. With the Watergate scandal unfolding, provisions that expanded governmental privileges to withhold information were not well received. The negative reaction was exacerbated by the perception of excessive deference to proposed modification from the Justice Department, which had been tarnished by the scandal. Finally, some opponents of the privilege rules believed that the federal privilege rules had a substantive effect that inappropriately altered state privilege law in cases based on state-law claims that were tried in federal court because of the diversity of citizenship of the parties. The upshot was that in 1973 Congress passed a law that the rules of evidence could not take effect until expressly approved by Congress.

During the legislative process, the detailed set of privilege provisions in the proposed evidence rules, which covered a number of specific privileges and procedural questions, were dropped in favor of a single skeletal rule (Rule 501). That rule leaves privileges in federal-question litigation to the common law as developed by the federal courts, and it requires the application of state privilege rules in cases involving state-law claims tried in federal court. Basically, the judgment of the supporters of the rules was that either rules of evidence that did not contain privilege rules could be enacted, or no rules would be enacted at all. (Privilege rules were left untouched in the federal rules until 2007, when a single rule regarding waiver was proposed to Congress for its enactment.)

In January 1975, Congress enacted the Federal Rules of Evidence. One feature of the rules distinguishes them from similar codes in other Western countries: America's evidence rules apply to both civil and criminal cases alike. Although some of the specific provisions apply only to either criminal or civil cases, or are applied differently in criminal and civil cases, there is no general separation into two codes. Moreover, the majority of the rules do not even suggest a different treatment.

By 2007, forty-two states had adopted rules of evidence based generally on the federal rules and the Uniform Rules of Evidence, which have largely tracked the federal rules since 1969, when they were initially made public. What seems to have been persuasive in this broad adoption by the states is that, although most lawyers do not have multistate practices and so care little about cross-state uniformity, they do care about, and oppose, having to master different sets of rules for state and federal courts within the same state. Perhaps even more important was that the federal rules were successful in codifying in a usable form largely familiar doctrines developed under the common law, such as the general reticence to admit character evidence, because of its potential to be overvalued and prejudicial, while welcoming admission of evidence of habit because it is generally more probative and less associated with moral overtones. The federal rules take progressive positions on some provisions. Codification of evidence principles into a formal body of rules appeared helpful in making the rules accessible and did not appear either overly threatening or too difficult to learn and use. As more states adopted the rules, the basic federal model developed momentum as the national standard.

Having enacted the rules, Congress has largely left them alone, with the notable exception of rules involving sex crimes. In 1978, Congress adopted Rule 412, the rape shield law, which in rape cases excludes evidence of past sexual activity of the alleged victim, except under very narrow circumstances. Somewhat surprisingly, this provision was not part of the original rules but had developed in the states and had become part of evidence rules in many states before Congress acted. In 1995, over the objection of the Judicial Conference and the Evidence Advisory Committee, Congress also enacted Rules 413 through 415, which admit evidence of past criminal sexual acts by the defendant as evidence of the defendant's propensity to commit a sexual offense, despite the historical resistance to such character evidence when offered by the government to prove guilt. Although some states have enacted similar rules admitting the defendant's past sexual offenses, the majority of states have not done so.

A number of minor alterations and additions have been made to the federal rules in response to specific events of national note, such as the finding that John Hinckley was not guilty, on the ground of insanity, of the attempted assassination of President Reagan, or Supreme Court rulings, such as the decisions in the *Daubert* trilogy (discussed below) regarding the standard for receiving expert testimony. However, in the main, the rules have remained largely stable and further systemic reform has not occurred, although cumulatively a substantial number of amendments have been made over the years.

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