"Legal Research".

In Section 1 of this course you will cover these topics:

- Introduction
- The American Criminal Court System
- Forms Of Evidence

Topic : Introduction

Topic Objective:

At the end of this topic student would be able to:

- Understand constitutional and administrative law
- Learn about basics of contract law
- Understand Equity and trust law

Definition/Overview:

Law: Law is a system of rules, usually enforced through a set of institutions. It shapes politics, economics and society in numerous ways and serves as the foremost social mediator in relations between people. Writing in 350 BC, the Greek philosopher Aristotle declared, "The rule of law is better than the rule of any individual."

Key Points:

1. Legal subject

All legal systems deal with the same basic issues, but each country categorizes and identifies its legal subjects in different ways. A common distinction is that between "public law" (a term related closely to the state, and including constitutional, administrative and criminal law), and "private law" (which covers contract, tort and property). In civil law systems, contract and tort fall under a general law of obligations, while trusts law is dealt with under statutory regimes or international conventions. International, constitutional and administrative law, criminal law, contract, tort, property law and trusts are regarded as the "traditional core subjects", although there are many further disciplines which may be of greater practical importance.

2. International law

International law can refer to three things: public international law, private international law or conflict of laws and the law of supranational organisations.

3. Public international law

Public International law concerns relationships between sovereign nations. The sources for public international law development are custom, practice and treaties between sovereign nations, such as the Geneva Conventions. Public international law can be formed by international organisations, such as the United Nations (which was established after the failure of the League of Nations to prevent the Second World War), the International Labor Organization, the World Trade Organization, or the International Monetary Fund. Public international law has a special status as law because there is no international police force, and courts (e.g. the International Court of Justice as the primary UN judicial organ) lack the capacity to penalize disobedience. However, a few bodies, such as the WTO, have effective systems of binding arbitration and dispute resolution backed up by trade sanctions.

4. Conflict of laws

Conflict of laws (or "private international law" in civil law countries) concerns which jurisdiction a legal dispute between private parties should be heard in and which jurisdiction's law should be applied. Today, businesses are increasingly capable of shifting capital and labor supply chains across borders, as well as trading with overseas businesses. Increasing numbers of businesses opt for commercial arbitration under the New York Convention 1958.

5. European Union law

European Union law is the first, and so far, only example of a supranational legal framework. Given the trend of increasing global economic integration, many regional agreementsespecially the Union of South American Nationsare on track to follow the same model. In the EU, sovereign nations have gathered their authority in a system of courts and political institutions. These institutions are allowed the ability to enforce legal norms both against or for member states and citizens in a manner which is not possible through public international law. As the European Court of Justice said in the 1960s, European Union law

constitutes "a new legal order of international law" for the mutual social and economic benefit of the member states.

6. Constitutional and administrative law

Constitutional and administrative law governs the affairs of the state. Constitutional law concerns both the relationships between the executive, legislature and judiciary and the human rights or civil liberties of individuals against the state. Most jurisdictions, like the United Statesand France, have a single codified constitution, with a Bill of Rights. A few, like the United Kingdom, have no such document. A "constitution" is simply those laws which constitute the body politic, from statute, case law and convention. A case named Entick v Carringtonillustrates a constitutional principle deriving from the common law. Mr. Entick's house was searched and ransacked by Sheriff Carrington. When Mr. Entick complained in court, Sheriff Carrington argued that a warrant from a Government minister, the Earl of Halifax, was valid authority. However, there was no written statutory provision or court authority. The leading judge, Lord Camden, stated that, "The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole ... If no excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment." The fundamental constitutional principle, inspired by John Locke, holds that the individual can do anything but that which is forbidden by law, and the state may do nothing but that which is authorized by law. Administrative law is the chief method for people to hold state bodies to account. People can apply for judicial review of actions or decisions by local councils, public services or government ministries, to ensure that they comply with the law. The first specialist administrative court was the Conseil d'tat set up in 1799, as Napoleon assumed power in France.

Topic : The American Criminal Court System

Topic Objective:

At the end of this topic the student would be able to:

- UnderstandOrganization of Federal and State Courts
- Learn about the Criminal Justice Process

- Understand the meaning of Corrections

Definition/Overview:

The American Criminal Court System: This topic highlights important information about US courts of the United States include both the United States federal courts, comprising the judicial branch of the federal government of the United States (operating under the authority of the United States Constitution and federal law) and state and territorial courts of the individual U.S. states and territories (operating under the authority of the state and territorial constitutions and state and territorial law).

In federal legislation, regulations governing the "courts of the United States" only refer to the courts of the United States government, and not the courts of the individual states. Because of the federalist underpinnings of the division between federal and state governments, the various state court systems are free to operate in ways that vary widely from those of the federal government, and from one another. In practice, however, every state has adopted a division of its judiciary into at least two levels, and almost every state has three levels, with trial courts hearing cases which may be reviewed by appellate courts, and finally by a state supreme court. A few states have two separate supreme courts, with one having authority over civil matters and the other reviewing criminal cases.

Key Points:

1. Jurisdiction, Federalism, Sovereignty

Jurisdiction, Federalism, Sovereignty in the United States is the evolving combination of relationship between U.S. state governments and the federal government of the United States. Since the founding of the country, and particularly with the end of the American Civil War, power shifted away from the states and towards the national government.

2. The Federal Courts

In the United States, the title of federal judge usually refers to a judge appointed by the President of the United Statesand confirmed by the United States Senate in accordance with Article III of the United States Constitution. In addition to the United States Supreme Court,

whose existence and some aspects of whose jurisdiction are beyond the Constitutional power of Congress to alter, acts of Congress have established 13 courts of appeals (also called "circuit courts") with appellate jurisdiction over different regions of the United States, and 94 United States district courts.

Every judge appointed to such a court falls within the category of federal judges. These include the Chief Justice and Associate Justices of the Supreme Court, Circuit Judges of the courts of appeals, and district judges of the United States district courts. In addition, judges of the Court of International Trade are appointed pursuant to Article III.

Other judges serving in the federal courts, including bankruptcy judges, are also sometimes referred to as "federal judges." However, they are not appointed pursuant to the procedures designated in Article III. The distinction is sometimes expressed by saying that they are not "Article III judges", because the power of these other kinds of federal judges does not derive from Article III of the U.S. Constitution.

3. Organization of Federal and State Courts

In the United States, a state court has jurisdiction over disputes with some connection to a U.S. state. Cases are heard before and evidence is presented in a trial court, which is usually located in a courthouse in the county seat. Territory outside of any state in the United States, such as the District of Columbia or American Samoa, often have courts established under federal or territorial law which substitute for a state court system, distinct from the ordinary federal court system. If one of the litigants is unsatisfied with the decision of the lower court, the matter may be taken up on appeal (but an acquittal in a criminal trial may not be appealed by the state due to the Fifth Amendment protection against double jeopardy). Usually, an intermediate appellate court, if there is one in that state, often called the state court of appeals, will review the decision of the trial court. If still unsatisfied, the litigant can appeal to the highest appellate court in the state, which is usually called the state supreme court. Appellate courts in the United States, unlike their civil law counterparts, are generally not permitted to correct mistakes concerning the facts of the case on appeal, only mistakes of law, or findings of fact with no support in the trial court record. Many states have courts of inferior jurisdiction, presided over by (for example) a magistrate or justice of the peace who hears criminal arraignments and tries petty offenses and small civil cases. Larger cities often have city courts which hear traffic offenses and violations of city ordinances. Other courts of

limited jurisdiction include alderman's courts, mayor's courts, recorder's courts, county courts, probate courts, municipal courts, courts of claims, courts of common pleas, family courts, small claims courts, tax courts, water courts (present in some western states such as Colorado and Montana), and workers' compensation courts.

All these courts are distinguished from courts of general jurisdiction, which are the default type of trial court that can hear any case which is not required to be first heard in a court of inferior jurisdiction. Most such cases are civil cases involving large sums of money or criminal trials arising from serious crimes like rape and murder.

A few states like Californiahave unified all courts of general and inferior jurisdiction to make the judicial process more efficient. In such judicial systems, there are still departments of limited jurisdiction within the trial courts, and often these departments occupy the exact same facilities they once occupied as independent courts of limited jurisdiction. However, as mere administrative divisions, departments can be rearranged at the discretion of each trial court's presiding judge in response to changing caseloads.

4. The Criminal Justice Process

The criminal justice system consists of three main parts: (1) law enforcement (police); (2) adjudication (courts); and (3) corrections (jails, prisons, probation and parole). Criminal justice agencies are intended to operate within the rule of law.

5. Policing

The first contact an offender has with the criminal justice system is usually with the police (orlaw enforcement) who investigate and make the arrest. Police or law enforcement agencies and officers are empowered to use force and other forms of legal coercion and legal means to effect public and social order. The term is most commonly associated with police departments of a state that are authorized to exercise the police power of that state within a defined legal or territorial area of responsibility. The word comes from the Latin politia ("civil administration"), which itself derives from the Ancient Greek πόλις, for polis ("city"). The first police force comparable to the present-day police was established in 1667 under King Louis XIV in France, although modern police usually trace their origins to the 1800 establishment of the Marine Police in London, the Glasgow Police, and the Napoleonic police of Paris.

The notion that police are primarily concerned with enforcing criminal law was popularized in the 1930s with the rise of the Federal Bureau of Investigation as the pre-eminent "law

enforcement agency" in the United States; this, however, has constituted only a small portion of policing activity. Policing has included an array of activities in different contexts, but the predominant ones are concerned with order maintenance and the provision of services.

6. Courts

The courts serve as the venue where disputes are then settled and justice is administered. With regard to criminal justice, there are a number of critical people in any court setting. These critical people are referred to as the courtroom work group and include both professional and nonprofessional individuals. These include the judge, prosecutor, and the defense attorney. The judge, or magistrate, is a person, elected or appointed, who is knowledgeable in the law, and whose function is to objectively administer the legal proceedings and offer a final decision to dispose of a case.

In the U.S.and in a growing number of nations, guilt or innocence is decided through the adversarial system. In this system, two parties will both offer their version of events and argue their case before the court (sometimes before a judge or panel of judges, sometimes before a jury). The case should be decided in favor of the party who offers the most sound and compelling arguments based on the law as applied to the facts of the case.

The prosecutor, or district attorney, is a lawyer who brings charges against a person, persons or corporate entity. It is the prosecutor's duty to explain to the court what crime was committed and to detail what evidence has been found which incriminates the accused. The prosecutor should not be confused with a plaintiff or plaintiff's counsel. Although both serve the function of bringing a complaint before the court, the prosecutor is a servant of the state who makes accusations on behalf of the state in criminal proceedings, while the plaintiff is the complaining party in civil proceedings.

A defense attorney counsels the accused on the legal process, likely outcomes for the accused and suggests strategies. The accused, not the lawyer, has the right to make final decisions regarding a number of fundamental points, including whether to testify, and to accept a plea offer or demand a jury trial in appropriate cases. It is the defense attorney's duty to represent the interests of the client, raise procedural and evidentiary issues, and hold the prosecution to its burden of proving guilt beyond a reasonable doubt. Defense counsel may challenge evidence presented by the prosecution or present exculpatory evidence and argue on behalf of their client. At trial, the defense attorney may attempt to offer a rebuttal to the prosecutor's accusations.

In the U.S., an accused person is entitled to a government-paid defense attorney if he or she is in jeopardy of losing their life and/or liberty. Those who cannot afford a private attorney may

be provided one by the state. Historically, however, the right to a defense attorney has not always been universal. For example, in Tudor England criminals accused of treason were not permitted to offer arguments in their defense. In many jurisdictions, there is no right to an appointed attorney, if the accused is not in jeopardy of losing his or her liberty.

The final determination of guilt or innocence is typically made by a third party, who is supposed to be disinterested. This function may be performed by a judge, a panel of judges, or a jury panel composed of unbiased citizens. This process varies depending on the laws of the specific jurisdiction. In some places the panel (be it judges or a jury) is required to issue a unanimous decision, while in others only a majority vote is required. In America, this process depends on the state, level of court, and even agreements between the prosecuting and defending parties. Other nations do not use juries at all, or rely on theological or military authorities to issue verdicts.

Some cases can be disposed of without the need for a trial. In fact, the vast majority are. If the accused confesses their guilt, a shorter process may be employed and a judgment may be rendered more quickly. Some nations, such as America, allow plea bargaining in which the accused pleads guilty, nolo contendre or not guilty, and may accept a diversion program or reduced punishment, where the prosecution's case is weak or in exchange for the cooperation of the accused against other people. This reduced sentence is sometimes a reward for sparing the state the expense of a formal trial. Many nations do not permit the use of plea bargaining, believing that it coerces innocent people to plead guilty in an attempt to avoid a harsh punishment.

The entire trial process, whatever the country, is fraught with problems and subject to criticism. Bias and discrimination form an ever-present threat to an objective decision. Any prejudice on the part of the lawyers, the judge, or jury members threatens to destroy the court's credibility. Some people argue that the often Byzantine rules governing courtroom conduct and processes restrict a layman's ability to participate, essentially reducing the legal process to a battle between the lawyers. In this case, the criticism is that the decision is based less on sound justice and more on the lawyer's eloquence and charisma. This is a particular problem when the lawyer performs in a substandard manner. The jury process is another area of frequent criticism, as there are few mechanisms to guard against poor judgment or incompetence on the part of the layman jurors.

7. Corrections

Offenders are then turned over to the correctional authorities, from the court system after the accused has been found guilty. Like all other aspects of criminal justice, the administration of punishment has taken many different forms throughout history. Early on, when civilizations lacked the resources necessary to construct and maintain prisons, exile and execution were the primary forms of punishment. Historically shame punishments and dismemberment have also been used as forms of censure.

The most publicly visible form of punishment in the modern era is the prison. Prisons may serve as detention centers for prisoners after trial. For containment of the accused, jails are used. Early prisons were used primarily to sequester criminals and little thought was given to living conditions within their walls. In America, the Quaker movement is commonly credited with establishing the idea that prisons should be used to reform criminals. This can also be seen as a critical moment in the debate regarding the purpose of punishment.

Punishment (in the form of prison time) may serve a variety of purposes. First, and most obviously, the incarceration of criminals removes them from the general population and inhibits their ability to perpetrate further crimes. Many societies also view prison terms as a form of revenge or retribution, and any harm or discomfort the prisoner suffers is "payback" for the harm they caused their victims. A new goal of prison punishments is to offer criminals a chance to be rehabilitated. Many modern prisons offer schooling or job training to prisoners as a chance to learn a vocation and thereby earn a legitimate living when they are returned to society. Religious institutions also have a presence in many prisons, with the goal of teaching ethics and instilling a sense of morality in the prisoners. If a prisoner is released before his time is served, he is released as a parole. This means that they are released, but the restrictions are greater than that of someone on probation.

There are numerous other forms of punishment which are commonly used in conjunction with or in place of prison terms. Monetary fines are one of the oldest forms of punishment still used today. These fines may be paid to the state or to the victims as a form of reparation. Probation and house arrest are also sanctions which seek to limit a person's mobility and their opportunities to commit crimes without actually placing them in a prison setting. Many jurisdictions may require some form of public or community service as a form of reparations for lesser offenses.

8. Differences among the states

Delaware,Mississippi, New Jersey, and Tennesseemake a distinction between a "court of law" and a "court of equity" (chancery court). For the most part in the American legal system, while the distinction between law and equity has some legal consequences, separate court systems are not maintained.

Texasand Oklahomahave separate courts of last resort for criminal cases and other cases. In all other states, there is a single court of last resort. While collateral attacks on criminal convictions, such as state level habeas corpus petitions, are usually considered to be technically civil cases, because they are not brought by a prosecutor and do not seek to convict someone of a crime, these suits are, in both states, appealed to the criminal court of last resort, rather than the civil court of last resort.

In Marylandand New York, the Court of Appeals is the highest state court, and in New Yorkthe Supreme Court, Civil Court, and Criminal Court collectively are lower.

The courts of Louisianaand the Commonwealth of Puerto Rico are organized under a civil law model with significantly different procedures from those of the courts in all other states and the District of Columbia, which are organized on an American version of the common law system established originally in England. The courts of one state are generally not required to follow the decisions of the courts of another state, but in the common law legal system it is customary for the courts of one state to look to decisions of other states as persuasive statements of what the law should be in the state making the decision, where express statutory provisions do not control.

Topic : Forms Of Evidence

Topic Objective:

At the end of this topic student would be able to:

- Learn about Relevance and social policy
- Understand the meaning of Presence or absence of a jury
- Learn about Hearsay
- Learn about Circumstantial evidence

Definition/Overview:

This chapter deals with Law of evidence. The law of evidence governs the use of testimony (e.g., oral or written statements, such as an affidavit) and exhibits (e.g., physical objects) or other documentary material which is admissible (i.e., allowed to be considered by the trier of fact, such as jury) in a judicial or administrative proceeding (e.g., a court of law).

Key Points:

1. Relevance and social policy

Legal scholars of the Anglo-American tradition, but not only that tradition, have long regarded evidence as being of central importance to the law. In every jurisdiction based on the English common law tradition, evidence must conform to a number of rules and restrictions to be admissible. Evidence must be relevant that is, it must directed at proving or disproving a legal element.

However, the relevance of evidence is ordinarily a necessary condition but not a sufficient condition for the admissibility of evidence. For example, relevant evidence may be excluded if it is unfairly prejudicial, confusing, or cumulative. Furthermore, a variety of social policies operate to exclude relevant evidence. Thus, there are limitations on the use of evidence of liability insurance, subsequent remedial measures, settlement offers, and plea negotiations, mainly because it is thought that the use of such evidence discourages parties from carrying insurance, fixing hazardous conditions, offering to settle, and pleading guilty to crimes, respectively.

The question of how the relevance or irrelevance of evidence is to be determined has been the subject of a vast amount of discussion in the last 100-200 years. There is now a consensus among legal scholars and judges in the U.S. that the relevance or irrelevance of evidence cannot be determined by syllogistic reasoning if-then logic alone. There is also general agreement that assessment of relevance or irrelevance involves or requires judgments about probabilities or uncertainties. Beyond that, there is little agreement. Many legal scholars and judges agree that ordinary reasoning, or common sense reasoning, plays an important role. There is less agreement about whether or not judgments of relevance or irrelevance are defensible only if the reasoning that supports such judgments is made fully explicit. However, most trial judges would reject any such requirement and would say that some judgments can and must rest in part on unarticulated and unarticulable hunches and intuitions. However, there is general (though implicit) agreement that the relevance of at least some

types of expert evidence particularly evidence from the hard sciences requires particularly rigorous, or in any event more arcane reasoning than is usually needed or expected. There is a general agreement that judgments of relevance are largely within the discretion of the trial court although relevance rulings that lead to the exclusion of evidence are more likely to be reversed on appeal than are relevance rulings that lead to the admission of evidence.

Under the Federal Rules of Evidence (FRE) Rule 401: "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Federal Rule 403 allows relevant evidence to be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusing or misleading the jury or waste of the court's time. California Evidence Code section 352 also allows for exclusion to avoid "substantial danger of undue prejudice." For example, evidence that the victim of a car accident was apparently a "liar, cheater, womanizer, and a man of low morals" was unduly prejudicial and irrelevant to whether he had a valid product liability claim against the manufacturer of the tires on his van (which had rolled over resulting in severe brain damage).

2. Presence or absence of a jury

The United States of Americahas a very complicated system of evidentiary rules; for example, John Wigmore's celebrated treatise on it filled ten volumes. James Bradley Thayer reported in 1898 that even English lawyers were surprised by the complexity of American evidence law, such as its reliance on exceptions to preserve evidentiary objections for appeal. Some legal experts, notably Stanford legal historian Lawrence Friedman, have argued that the complexity of American evidence law arises from two factors: (1) the right of American defendants to have findings of fact made by a jury in practically all criminal cases as well as many civil cases; and (2) the widespread consensus that tight limitations on the admissibility of evidence are necessary to prevent a jury of untrained laypersons from being swayed by irrelevant distractions. In Professor Friedman's words: "A trained judge would not need all these rules; and indeed, the law of evidence in systems that lack a jury is short, sweet, and clear."

However, some respected observers disagree with the commonplace thesis that the institution of trial by jury is the main reason for the existence of rules of evidence even in countries such as the United Statesand Australia; they argue that other variables are at work.

3. Exclusion of evidence

Under English and Welsh law, evidence that would otherwise be admissible at trial may be excluded at the discretion of the trial judge if it would be unfair to the defendant to admit it. Evidence of a confession may be excluded because it was obtained by oppression or because the confession was made in consequence of anything said or done to the defendant that would be likely to make the confession unreliable. In these circumstances, it would be open to the trial judge to exclude the evidence of the confession under Section 78(1) of the Police and Criminal Evidence Act 1984 (PACE), or under Section 73 PACE, or under common law, although in practice the confession would be excluded under section 76 PACE.

Other admissible evidence may be excluded, at the discretion of the trial judge under 78 PACE, or at common law, if the judge can be persuaded that having regard to all the circumstances including how the evidence was obtained admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

4. Authentication

Certain kinds of evidence, such as documentary evidence, are subject to the requirement that the offeror provide the trial judge with a certain amount of evidence (which need not be much and it need not be very strong) suggesting that the offered item of tangible evidence (e.g., a document, a gun) is what the offeror claims it is. The authentication requirement has bite primarily in jury trials. If evidence of authenticity is lacking in a bench trial, the trial judge will simply dismiss the evidence as unpersuasive or irrelevant.

5. Witnesses

In systems of proof based on the English common law tradition, almost all evidence must be sponsored by a witness, who has sworn or solemnly affirmed to tell the truth. The bulk of the law of evidence regulates the types of evidence that may be sought from witnesses and the manner in which the interrogation of witnesses is conducted during direct examination and cross-examination of witnesses. Other types of evidentiary rules specify the standards of persuasion (e.g., proof beyond a reasonable doubt) that a trier of fact such as a jury must apply when it assesses evidence.

Today all persons are presumed to be qualified to serve as witnesses in trials and other legal proceedings, and all persons are also presumed to have a legal obligation to serve as witnesses if their testimony is sought. However, legal rules sometimes exempt people from the obligation to give evidence and legal rules disqualify people from serving as witnesses under some circumstances.

Privilege rules give the holder of the privilege a right to prevent a witness from giving testimony. These privileges are ordinarily (but not always) designed to protect socially valued types of confidential communications. Some of the privileges that are often recognized are the marital secrets privilege, the adverse spousal testimony privilege, the attorney-client privilege, the doctor-patient privilege, the psychotherapist-patient and counselor-patient privilege, the state secrets privilege and the clergy-penitent privilege. A variety of additional privileges are recognized in different jurisdictions, but the list of recognized privileges varies from jurisdiction to jurisdiction; for example, some jurisdictions recognize a social worker-client privilege and other jurisdictions do not.

Witness competence rules are legal rules that specify circumstances under which persons are ineligible to serve as witnesses. For example, neither a judge nor a juror is competent to testify in a trial in which they are serving in that capacity; and in jurisdictions with a dead man statute, a person is deemed not competent to testify as to statements of or transactions with a deceased opposing party.

6. Hearsay

Hearsay is one of the largest and most complex areas of the law of evidence in common-law jurisdictions. The default rule is that hearsay evidence is inadmissible. Hearsay is an out of court statement offered to prove the truth of the matter asserted. A party is offering a statement to prove the truth of the matter asserted if the party is trying to prove that the assertion made by the declarant (the maker of the pretrial statement) is true. For example, prior to trial Bob says, "Jane went to the store." If the party offering this statement as evidence at trial is trying to prove that Jane actually went to the store, the statement is being offered to prove the truth of the matter asserted. However, at both common law and under evidence codifications such as the Federal Rules of Evidence, there are dozens of exclusions from and exceptions to the hearsay rule.

7. Circumstantial evidence

Evidence of an indirect nature which implies the existence of the main fact in question but does not in itself prove it. That is, the existence of the main fact is deduced from the indirect or circumstantial evidence by a process of probable reasoning. The introduction of a defendants fingerprints or DNA sample is examples of circumstantial evidence. The fact that a defendant had a motive to commit a crime is circumstantial evidence.

8. Evidence that the defendant lied

Lies, on their own, are not sufficient evidence of a crime. However, lies may indicate that the defendant knows he is guilty, and the prosecution may rely on the fact that the defendant has lied alongside other evidence.

9. Burdens of proof

Different types of proceedings require parties to meet different burdens of proof, the typical examples being beyond a reasonable doubt, clear and convincing evidence, and preponderance of the evidence. Many jurisdictions have burden-shifting provisions, which require that if one party produces evidence tending to prove a certain point, the burden shifts to the other party to produce superior evidence tending to disprove it.

One special category of information in this area includes things of which the court may take judicial notice. This category covers matters that are so well known that the court may deem them proven without the introduction of any evidence. For example, if a defendant is alleged to have illegally transported goods across a state line by driving them from Boston to Los Angeles, the court may take judicial notice of the fact that it is impossible to drive from Boston to Los Angeles without crossing a number of state lines. In a civil case, where the court takes judicial notice of the fact, that fact is deemed conclusively proven. In a criminal case, however, the defense may always submit evidence to rebut a point for which judicial notice has been taken.

10. Evidentiary rules stemming from other areas of law

Some rules that affect the admissibility of evidence are nonetheless considered to belong to other areas of law. These include the exclusionary rule of criminal procedure, which prohibits the admission in a criminal trial of evidence gained by unconstitutional means, and the parol evidence rule of contract law, which prohibits the admission of extrinsic evidence of the contents of a written contract.

11. Evidence as an area of study

In countries that follow the civil law system, evidence is normally studied as a branch of procedural law. Nevertheless, because of its importance to the practice of law, all American law schools offer a course in evidence, and most require the subject either as a first year class, or as an upper-level class, or as a prerequisite to later courses. Furthermore, evidence is heavily tested on the Multistate Bar Examination ("MBE") - of the 200 multiple choice questions asked in that test, approximately one sixth will be in the area of evidence. The MBE predominantly tests evidence under the Federal Rules of Evidence, giving little attention to matters for which state law is likely to be inconsistent.

12. Real Evidence

Real Evidence is any evidence which may be perceived with one of the five senses. examples: physical items, pictures, trial exhibits, witness testimony either direct or circumstantial.

13. Direct vs. Circumstantial Evidence

- Circumstantial evidence: evidence, material, or information which requires a presumption or evidence which indirectly proves a fact.
- Direct evidence: is that information, material, or matter which proves a fact without the need for inference or presumption.
- Direct and circumstantial evidence are used to:
- demonstrate guilt.
- prove the statutory elements of a behavior in question
- prove mental state, intent, motive, etc.
- Circumstantial inferences of guilt.
- Prosecutors bear no obligation to prove, means, motive, or opportunity in a criminal case.
- However, the proof of such may strengthen the governments case immeasurably.

14. Guilty Actions

- Jurors expect to see some actions by defendant that suggest guilt, for example:
- Concealment
- Sudden Wealth
- Flight to Avoid Prosecution
- Threatening of Witnesses
- Admissions by conduct:
- adoptive admissions
- admissions by silence
- failure to call witnesses or produce evidence and refusal to submit to physical examinations.
- actions taken to obstruct justice
- plea negotiations
- payment of medical expenses

15. Guilty Mind

- Modus operandi: method of operation
- Habit: routine
- Uncharged Crimes
- Criminal Convictions
- Character: defendants character can be questioned only if defendant makes it an issue
- Prior Molestation
- Prior Abuse

16. Other Uses Circumst. Evidence

Inference of Possession: physical possession of an item has carried great weight in American courtrooms. Automobiles: most state have implied consent statutes which allow the immediate suspension of driving privileges for individuals who refuse to submit to breathalyzer or road sobriety tests. Prior False Claims: in some cases involving fraud, evidence may be submitted which demonstrates that the accused had previously filed false claims.

17. Inferences - Not Drawn

Although circumstantial evidence may be used to infer guilt in a variety of situations, it may not be used in those situations when an individual invokes a right guaranteed by the Constitution, extended by a state, or upheld by the Supreme Court:

- Refusal to Testify
- Miranda Rights
- Exercise of Right to Counsel: right to an attorney as guaranteed by the 6th Amendment

18. Substitutions for Evidence

- Stipulations: product of an agreement between opposing counsels as to specific facts of the case.
- Presumption: conclusion or deduction which is required by law.
- conclusive presumptions.
- rebuttable presumptions.

- Judicial notice: action taken by the court to make a determination of fact without the formality of examination by a jury.
    - In Section 2 of this course you will cover these topics:

Doctrine Of Justification

The Exclusion Of Evidence

Warrantless Arrests And Searches

Topic : Doctrine Of Justification

Topic Objective:

At the end of this topic student would be able to:

- Learn about Probable Cause
- Understand the meaning of Reasonable Suspicion
- Learn about the concept of Beyond a Reasonable Doubt

Definition/Overview:

This chapter deals with the Joint Declaration on the Doctrine of Justification which is a document created by and agreed to by clerical representatives of the Roman Catholic Church and the Lutheran World Federation in 1999, as a result of extensive ecumenical dialogue, apparently resolving the conflict over the nature of justification which was at the root of the Protestant Reformation. The churches acknowledged that the excommunications relating to the doctrine of justification set forth by the Roman Catholic Council of Trent do not apply to the teachings of the Lutheran churches set forth in the text; likewise, the churches acknowledged that the condemnations set forth in the Lutheran Confessions do not apply to the Catholic teachings on justification set forth in the document. Confessional Lutherans, such as the International Lutheran Council and the Confessional Evangelical Lutheran Conference, reject the Declaration.

Key Points:

1. Probable Cause

Probable cause: amount of evidence necessary to cause a reasonable officer to believe that a suspect probably committed the crime weigh difference between possibility and probability.

2. Reasonable Suspicion

Reasonable suspicion: a standard which is less than probable cause, but one which is sufficient to authorize an investigative detention.

3. Beyond a Reasonable Doubt

Highest standard of proof sometimes defined as "to a moral certainty".

4. The Expectation of Privacy

People have a right to privacy not a direct Constitutional right, but can be inferred from Constitution also based on state and federal statutes, state constitutions and case law.

5. Warrants

4th Amendment: warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized Search warrants can only be issued upon a showing of probable cause totality of the circumstances test.

6. Staleness, Particularity and Vicinage

Other important issues in issuance of search warrant: Staleness: cannot be too much time between application for warrant and factors that lead to desire for warrant Particularity: all warrants are required to identify with specificity and particularity the place to be searched, the items to be seized, and the criminal behavior in question Vicinage: warrants may only be issued by judicial officials bearing authority over the location in question.

7. Types of Warrants

Anticipatory search warrants: extremely unique in that they are issued prior to the arrival of the evidence in a particular location often used in narcotics cases.
Sneak-and-peak warrants: issued in situations in which law enforcement officers gain urreptitious entry into areas where a reasonable expectation of privacy exists (e.g. residences, offices).No-knock warrant: requires demonstration of the potential for of circumvention of justice or threat to human lifeNighttime search warrants: most warrants are executed during daylight areas for a variety of reasons, but nighttime warrants are allowable.

8. Concept of justice

Justiceconcerns the proper ordering of things and persons within a society. As a concept it has been subject to philosophical, legal, and theological reflection and debate throughout history. A number of important questions surrounding justice have been fiercely debated over the course of western history: What is justice? What does it demand of individuals and societies? What is the proper distribution of wealth and resources in society: equal, meritocratic, according to status, or some other arrangement? There is a myriad of possible answers to these questions from divergent perspectives on the political and philosophical spectrum.

9. Variations of justice

Utilitarianism is a form of consequentialism, where punishment is forward-looking. Justified by the ability to achieve future social benefits resulting in crime reduction, the moral worth of an action is determined by its outcome.

Retributive justice regulates proportionate response to crime proven by lawful evidence, so that punishment is justly imposed and considered as morally-correct and fully deserved. The law of retaliation (lex battalions) is a military theory of retributive justice, which says that reciprocity should be equal to the wrong suffered; "life for life, wound for wound, stripe for stripe."

Restorative justice is concerned not so much with retribution and punishment as with (a) making the victim whole and (b) reintegrating the offender into society. This approach frequently brings an offender and a victim together, so that the offender can better understand the effect his/her offense had on the victim.

Distributive justice is directed at the proper allocation of things - wealth, power, reward, respect - between different people.

Oppressive Law exercises an authoritarian approach to legislation which is "totally unrelated to justice", a tyrannical interpretation of law is one in which the population lives under restriction from unlawful legislation.

10. Kinds of justice

11. Justice as harmony

In his dialogue Republic, Plato uses Socrates to argue for justice which covers both the just person and the just City State. Justice is a proper, harmonious relationship between the warring parts of the person or city. Hence Plato's definition of justice is that justice is the having and doing of what is one's own. A just man is a man in just the right place, doing his best and giving the precise equivalent of what he has received. This applies both at the individual level and at the universal level. A persons soul has three parts reason, spirit and desire. Similarly, a city has three parts Socrates uses the parable of the chariot to illustrate his point: a chariot works as a whole because the two horses power is directed by the charioteer. Lovers of wisdom philosophers, in one sense of the term should rule because only they understand what is good. If one is ill, one goes to a doctor rather than a quack, because the doctor is expert in the subject of health. Similarly, one should trust ones city to an expert in the subject of the good, not to a mere politician who tries to gain power by giving people what they want, rather than whats good for them. Socrates uses the parable of the ship to illustrate this point: the unjust city is like a ship in open ocean, crewed by a powerful but drunken captain (the common people), a group of untrustworthy advisors who try to manipulate the captain into giving them power over the ships course (the politicians), and a navigator (the philosopher) who is the only one who knows how to get the ship to port. For Socrates, the only way the ship will reach its destination the good is if the navigator takes charge.

12. Justice as divine command

Justice as a divine law is commanding , and indeed the whole of morality, is the authoritative command. Killing is wrong and therefore must be punished and if not punished what should be done? There is a famous paradox called the Euthyphro dilemma which essentially asks: is something right because God commands it, or does God command it because it's right? If the former, then justice is arbitrary; if the latter, then morality exists on a higher order than God, who becomes little more than a passer-on of moral knowledge. Some Divine command

advocates respond by pointing out that the dilemma is false: goodness is the very nature of God and is necessarily expressed in His commands.

13. Justice as natural law

In contrast to the understandings canvassed so far, justice may be understood as a human creation, rather than a discoveryof harmony, divine command, or natural law. This claim can be understood in a number of ways, with the fundamental division being between those who argue that justice is the creation of somehumans, and those who argue that it is the creation of all humans.

14. Justice as authoritative command

According to thinkers including Thomas Hobbes, justice is created by public, enforceable, authoritative rules, and injustice is whatever those rules forbid, regardless of their relation to morality. Justice is created, not merely described or approximated, by the command of an absolute sovereign power. This position has some similarities with divine command theory, with the difference that the state (or other authority) replaces God.

15. Justice as trickery

In Republic, the character Thrasymachus argues that justice is the interest of the strongmerely a name for what the powerful or cunning ruler has imposed on the people. Nietzsche, in contrast, argues that justice is part of the slave-morality of the weak many, rooted in their resentment of the strong few, and intended to keep the noble man down. In Human, All Too Human he states that, "there is no eternal justice."

16. Justice as mutual agreement

According to thinkers in the social contract tradition, justice is derived from the mutual agreement of everyone concerned; or, in many versions, from what they would agree to under hypotheticalconditions including equality and absence of bias. This account is considered further below, under Justice as fairness.

17. Justice as a subordinate value

According to utilitarian thinkers including John Stuart Mill, justice is not as fundamental as we often think. Rather, it is derived from the more basic standard of rightness, consequentialism: what is right is what has the best consequences (usually measured by the total or average welfare caused). So, the proper principles of justice are those which tend to have the best consequences. These rules may turn out to be familiar ones such as keeping contracts; but equally, they may not, depending on the facts about real consequences. Either

way, what is important is those consequences, and justice is important, if at all, only as derived from that fundamental standard. Mill tries to explain our mistaken belief that justice is overwhelmingly important by arguing that it derives from two natural human tendencies: our desire to retaliate against those who hurt us, and our ability to put ourselves imaginatively in anothers place. So, when we see someone harmed, we project ourselves into her situation and feel a desire to retaliate on her behalf. If this process is the source of our feelings about justice that ought to undermine our confidence in them. Utilitarianism.

18. Theories of distributive justice

Theories of distributive justice need to answer three questions:

- What goods are to be distributed? Is it to be wealth, power, respect, some combination of these things?
- Between what entities are they to be distributed? Humans (dead, living, future), sentient beings, the members of a single society, nations?
- What is the proper distribution? Equal, meritocratic, according to social status, according to need, based on property rights and non-aggression?

Distributive justice theorists generally do not answer questions of who has the right to enforce a particular favored distribution. On the other hand, property rights theorists argue that there is no "favored distribution." Rather, distribution should be based simply on whatever distribution results from non-coerced interactions or transactions (that is, transactions not based upon force or fraud). This section describes some widely-held theories of distributive justice, and their attempts to answer these questions.

19. Egalitarianism

According to the egalitarian, goods should be distributed equally. This basic view can be elaborated in many different ways, according to what goods are to be distributedwealth, respect, opportunityand what they are to be distributed equally betweenindividuals, families, nations, races, species. Commonly-held egalitarian positions include demands for equality of opportunity and for equality of outcome.

20. Giving people what they deserve

In one sense, all theories of distributive justice claim that everyone should get what they deserve. Theories disagree on the basis for deserts. The main distinction is between theories that argue the basis of just deserts is held equally by everyone, and therefore derive

egalitarian accounts of distributive justiceand theories that argue the basis of just deserts is unequally distributed on the basis of, for instance, hard work, and therefore derive accounts of distributive justice by which some should have more than others. This section deals with some popular theories of the second type.

According to meritocratic theories, goods, especially wealth and social status, should be distributed to match individual merit, which is usually understood as some combination of talent and hard work. According to needs-based theories, goods, especially such basic goods as food, shelter and medical care, should be distributed to meet individuals' basic needs for them. Marxism can be regarded as a needs-based theory on some readings of Marx's slogan "from each according to his ability, to each according to his need." According to contribution-based theories, goods should be distributed to match an individual's contribution to the overall social good.

21. Fairness

In his A Theory of Justice, John Rawls used a social contract argument to show that justice, and especially distributive justice, is a form of fairness: an impartialdistribution of goods. Rawls asks us to imagine ourselves behind a veil of ignorance which denies us all knowledge of our personalities, social statuses, moral characters, wealth, talents and life plans, and then asks what theory of justice we would choose to govern our society when the veil is lifted, if we wanted to do the best that we could for ourselves. We dont know who in particular we are, and therefore cant bias the decision in our own favor. So, the decision-in-ignorance models fairness, because it excludes selfish bias. Rawls argues that each of us would reject the utilitarian theory of justice that we should maximize welfare (see below) because of the risk that we might turn out to be someone whose own good is sacrificed for greater benefits for others. Instead, we would endorse Rawlss two principles of justice:

- Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.
- Social and economic inequalities are to be arranged so that they are both

  To the greatest benefit of the least advantaged, consistent with the just savings principle, and

  Attached to offices and positions open to all under conditions of fair equality of opportunity.

This imagined choice justifies these principles as the principles of justice for us, because we would agree to them in a fair decision procedure. Rawlss theory distinguishes two kinds of goods (1) liberties and (2) social and economic goods, i.e. wealth, income and power and applies different distributions to them equality between citizens for (1), equality unless inequality improves the position of the worst off for (2).

22. Property Rights (non-coercion)/Having the right history

Robert Nozicks influential critique of Rawls argues that distributive justice is not a matter of the whole distribution matching an ideal pattern, but of each individual entitlement having the right kind of history. It is just that a person has some good (especially, some property right) if and only if they came to have it by a history made up entirely of events of two kinds:

1. Just acquisition, especially by working on unowned things; and

2. Just transfer that is free gift, sale or other agreement, but not theft (i.e. by force or fraud).

If the chain of events leading up to the person having something meets this criterion, they are entitled to it: that they possess it is just, and what anyone else does or doesn't have or need is irrelevant. On the basis of this theory of distributive justice, Nozick argues that all attempts to redistribute goods according to an ideal pattern, without the consent of their owners, are theft. In particular, redistributive taxation is theft.

Some property rights theorists also take a consequentialist view of distributive justice and argue that property rights based justice also has the effect of maximizing the overall wealth of an economic system. They explain that voluntary (non-coerced) transactions always have a property called pareto efficiency. A pareto efficient transaction is one in which at least one party ends up better off and neither party ends up worse off. The result is that the world is better off in an absolute sense and no one is worse off. Such consequentialist property rights theorists argue that respecting property rights maximizes the number of pareto efficient transactions in the world and minimized the number of non-pareto efficient transactions in the world (i.e. transactions where someone is made worse off). The result is that the world will have generated the greatest total benefit from the limited, scarce resources available in the world. Further, this will have been accomplished without taking anything away from anyone by coercion.

23. Welfare-maximization

According to the utilitarian, justice requires the maximization of the total or average welfare across all relevant individuals. This may require sacrifice of some for the good of others, so long as everyones good is taken impartially into account. Utilitarianism, in general, argues that the standard of justification for actions, institutions, or the whole world, is impartial welfare consequentialism, and only indirectly, if at all, to do with rights, property, need, or any other non-utilitarian criterion. These other criteria might be indirectly important, to the extent that human welfare involves them. But even then, such demands as human rights would only be elements in the calculation of overall welfare, not uncrossable barriers to action.

Topic : The Exclusion Of Evidence

Topic Objective:

At the end of this topic student would be able to:

- Understand the Exclusionary Rule
- Learn about Fruits of the Poisonous Tree Doctrine
- Understand Areas Protected by Exclusionary Rule

Definition/Overview:

This topic deals with the law of evidence governs the use of testimony (e.g., oral or written statements, such as an affidavit) and exhibits (e.g., physical objects) or other documentary material which is admissible (i.e., allowed to be considered by the trier of fact, such as jury) in a judicial or administrative proceeding (e.g., a court of law).

Key Points:

1. The Exclusionary Rule

The introduction of criminal evidence collected or analyzed in violation of the Constitution is forbidden Silver platter doctrine allowed state authorities to serve up illegally obtained evidence to federal agents.

2. Mapp v. Ohio

In Mapp V. Ohio Court applied the exclusionary rule to the states application of the Fourteenth Amendment ended silver platter doctrine.

3. Fruits of the Poisonous Tree Doctrine

Fruits of the Poisonous Tree Doctrine are the evidence which is derived directly or indirectly from illegal action of the police is inadmissible also called Derivative Evidence Rule applies to: additional evidence that would not have been discovered; witnesses who might have remained unknown; confessions made under the presentment of illegally obtained evidence.

4. Attenuation exception

Attenuation exception evaluates whether the causal connection between the illegal action and the seizure of evidence is sufficiently attenuated also called purged taint exception considers: (1) elapsed time between the illegal action and the acquisition of evidence; (2) presence of intervening circumstances; and, (3) purpose and flagrancy of misconduct.

5. Good Faith Exception:

Good faith exception is the evidence may be admissible if the state can demonstrate that the evidence was discovered while the officers were acting with reasonable assurance of the validity of their action.

Independent Source Exception: evidence which derives from an independent source may be admissible in court even if it had been collected on some level via illegal police actions Inevitability of Discovery Exception: evidence which would normally be suppressible due to unwarranted or unlawful government action may be introduced if the discovery of such would have occurred anyway.

6. Areas Protected by Exclusionary Rule

Searches and seizures by private people (as opposed to government affiliates) are not subject to exclusionary rule. Evidence seized in an unlawful manner may also be admissible if the defendant lacks the legal standing to move to suppress it. In Motion to Suppress, defendant must demonstrate that an illegal action was taken against him/her personally or his/her expectation of privacy was violated Civil courts traditionally have been less restrictive on the types of evidence which might be introduced Exclusion applies only to those areas where (1) an individual expects privacy; and, (2) society recognizes such expectation as reasonable no expectation of privacy for abandoned property throw-away evidence: voluntary abandonment of an item negates any expectation of privacy that an individual may claim to it in the future

Open fields doctrine: open fields are not protected with exclusionary rule However, some areas attached to a private residence (i.e. curtilage) may be afforded protection.

Topic : Warrantless Arrests And Searches

Topic Objective:

At the end of this topic student would be able to:

- Understand the core meaning of Warrant less arrests
- Learn about Investigative Detention
- Learn about Seizures and Investigative Detentions
- Learn about Automobile Searches
- Understand the meaning of Consent

Definition/Overview:

Warrant less Arrests and Searches: This chapter deals with warrant less arrests and searches. A search warrant is a court order issued by a judge or magistrate that authorizes law enforcement to conduct a search of a person or location for evidence of a criminal offense and seize such items All jurisdictions with a rule of law and a right to privacy put constraints on the powers of police investigators, and typically require search warrants, or an equivalent procedure, for searches within a criminal enquiry. There typically also exist exemptions for "hot pursuit": if a criminal flees the scene of a crime and the police officer follows him, the officer has the right to enter an edifice in which the criminal has sought shelter.

Conversely, in authoritarian regimes, the police typically have the right to search property and people without having to provide justifications, or without having to secure an authorization from the judiciary.

Key Points:

1. Investigative Detention

During Investigative stops (Terry stops): when officer has a reasonable suspicion to believe that the individual has either committed, is committing, or will commit a crime, warrant may not be necessary.

2. Seizures and Investigative Detentions

Officers may conduct protective searches of individuals during investigative detentions stop-and-frisks are for the individual safety of police officers.

3. Plain View

Evidence which was in plain view may be admissible in court if: (1) officer was in a lawful position; (2) discovery was inadvertent; (3) and evidentiary value of the item was immediately apparent.

4. Plain Feel Doctrine

Some courts have attempted to extend plain view to and plain feel, i.e. evidence discovered during pat downsUsually over-turned by appellate courts.

5. Incident to Arrest

Time period incident to arrest includes period immediately prior to the seizure of the individual in question and immediately prior to the formal arrest during this period, evidence seized may be admissible. Based on safety concerns for officers.

6. Automobile Searches

Warrantless, roadside searches of motor vehicles are permitted if there is probable cause to believe that evidence of criminal activity or criminal contraband is contained therein Inventory Searches of Automobiles: those searches which are conducted by law enforcement personnel of an individual's personal belongings generally allowable when car is impounded Closed Containers and Vehicles: Some courts have upheld searches of locked, secure containers like luggage while others courts have disallowed.

7. Consent

Consent: suspect voluntarily consents to search of seizure. Probable cause, reasonable suspicion, or an articulable justification is not required Consent must be: voluntary.

8. Inventory searches

Inventory searches may be conducted on automobiles and individuals under arrest designed to protect the owner from loss or theft while the property is under the control of law enforcement authorities in practice, however, they are often used to search for

criminal evidence or contrabandBuilding, Home and Business Inspections: Traditionally, health, wellness, and structural inspections of private residences were permitted as it was rationalized that such were necessary for the betterment of the community overturned by courts regulated business exception.

In Section 3 of this course you will cover these topics:

- Confessions And The 5th Amendment
- Witnesses Competency, Credibility And Impeachment
- Examination Of Witnesses

Topic : Confessions And The 5th Amendment

Topic Objective:

At the end of this topic student would be able to:

- Understand the Fifth Amendment
- Learn about Public Safety Exception
- Learn about Miranda rights
- Understand Sequential Interrogations

Definition/Overview:

Fifth Amendment: The Fifth Amendment of the United States Constitution, which is part of the Bill of Rights, protects against abuse of government authority in a legal procedure. Its guarantees stem from English common law which trace back to the Magna Carta in 1215. For instance, Grand Juries and the phrase "due process" both trace their origin to the Magna Carta.

Key Points:

1. The Fifth Amendment

Protections of 5th Amendment: The grand jury system: in which private citizens serve as criminal justice gatekeepers double jeopardy: prohibits trying of an individual more than once for the same crime Protections of 5th Amendment: right to due process generally protected citizens from the possibility of an oppressive federal government and the right to procedural

certainty the freedom from arbitrary seizures of personal property (impressment of personal property).

2. Self-Incrimination

The freedom from self-incrimination protects people from compulsory testimony where such testimony may be incriminating5thAmendment protection.

3. Miranda

Miranda v. Arizona (1966): no statement which stemmed from the custodial questioning of a suspect by law enforcement officials, could be introduced unless the state demonstrated that procedural safeguards to secure the 5th Amendments privilege against self-incrimination were taken. Miranda warning: Accused has the right:

- to remain silent.
- anything they say may be used against them.
- they have the right to an attorney during the interrogation process.
- an attorney will be appointed to them if they can not afford to hire one.

4. Public Safety Exception

Miranda warnings are not necessary in cases in which three characteristics are present 1) an urgent need exists in which no other possibility abounds; 2) there is a possibility to save human life; and, 3) the primary motive of the interrogator is rescue.

5. Sequential Interrogations

Just as Miranda attaches to all custodial situations in which special circumstances are not present, it also applies to all interrogations, partial or comprehensive, which are attempted during the custodial period.

6. Co-Defendants Confessions

Statements made by co-conspirators/co-defendants are permissible only when:

- corroboration; and
- s/he takes the stand during the trial

- the two parties are tried separately
- references to the defendant are omitted from the testimony; or
- the charges against the defendant are dropped
- Violations of the rule are called Bruton violations

7. Constraints on Law Enforcement

Officers in U.S. prohibited from extracting confessions through the use of physical torture.

In some cases, they are permitted to collect confessions through a variety of deceptive strategies, including the issuance of promises, threats, and lies

8. Where 5th Amendment does not apply

- Blood or field sobriety tests.
- Compulsory participation in identification procedures and videotaped booking Examinations.

9. Legal proceeding

The fifth amendment protections apply when an individual is compelled to testify at a legal proceeding. The U.S. supreme court ruled that the right against self-incrimination applies whether the witness is in a federal or state court , and whether the proceeding itself is criminal or civil The right was asserted at grand jury or congressional hearings in the 1950s, when witnesses testifying before the House Committee on Un-American Activities or the Senate Internal Security Subcommittee claimed the right in response to questions concerning their alleged membership in the Communist Party. Under the Red Scare hysteria at the time of McCarthyism, witnesses who refused to answer the questions were accused as "fifth amendment communists". They lost jobs or positions in unions and other political organizations, and suffered other repercussions after "taking the fifth."

Senator Joseph McCarthy (R-Wisc.) asked, "Are you now, or have you ever been a member of the Communist party," while he was chairman of the Senate Government Operations Committee Permanent Subcommittee on Investigations. Admitting to a previous communist party membership was not sufficient. Witnesses were also required to "name names," to implicate others they knew to be communists or who had been communists in the past. Academy Award winning director Elia Kazan testified before the House Committee on Un-American Activities that he had belonged to the communist party briefly in his youth. He also "named names," which incurred enmity of many in Hollywood. Other entertainers such as

Zero Mostel found themselves on a Hollywoodblacklist after taking the fifth, and were unable to find work for a while in the show business.

The amendment has also been used, notably, by defendants and witnesses in criminal cases involving the Mafia. The supreme court has also used the incorporation doctrine to apply the self-incrimination clause against the states under the fourteenth amendment.

The right against self-incrimination does not apply when an individual testifies before a self-regulatory organization (SRO). SROs, such as the National Association of Securities Dealers (NASD), are generally not considered as state actors subject to the restraints of the fifth amendment. Department of Enforcement, United Statesv. Solomon, 509 F. 2d 863 (2d Cir. 1975); D. L. Cromwell Invs., Inc. v. NASD Regulation, Inc., 132 F. Supp. 2d 248, 251-53 (S.D.N.Y. 2001), aff'd, 279 F.3d 155, 162 (2d Cir. 2002), cert. denied, 537 U.S. 1028 (2002); Marchiano v. NASD, 134 F. Supp. 2d 90, 95 (D.D.C. 2001). SROs also lack subpoena powers, so they rely heavily on requiring testimony from individuals while wielding the threat of a bar from the industry (permanent, if decided by the NASD) in the case of noncompliance.

10. Custodial interrogation

The Fifth Amendment limits the use of evidence obtained illegally by the law enforcement. Originally, at common law, even a confession obtained by torture was admissible. In the eighteenth century, common law in Englandprovided that coerced confessions were inadmissible. The common law rule was incorporated into American law by the courts. However, the use of brutal torture to extract confessions was routine in some rural states as late as the 1930s, and stopped only after the Supreme Court kept overruling convictions based on such confessions, in cases like Brown v. Mississippi, 297 U.S. 278 (1936).

Law enforcement responded by switching to more subtle techniques, but the courts held that such techniques, even if they do not involve physical torture, may render a confession involuntary and inadmissible. In Chambers v. Florida (1940) the Court held a confession obtained after five days of prolonged questioning, during which time the defendant was held incommunicado, to be coerced. In Ashcraft v. Tennessee(1944), the suspect had been interrogated continuously for thirty-six hours under electric lights. In Haynes v. Washington (1963) the Court held that an "unfair and inherently coercive context" including a prolonged interrogation rendered a confession inadmissible.

Miranda v. Arizona(1966) was a landmark case involving confessions. Ernesto Miranda had signed a statement confessing the crime, but the Supreme Court held that the confession was inadmissible because the defendant had not been warned of his rights.

The Court held, "the prosecution may not use statements [...] stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. Custodial interrogation is initiated by law enforcement after a person has been taken into custody or otherwise deprived of his freedom of movement.

As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." The warning to which Chief Justice Earl Warren referred is now called the Miranda warning, and it is customarily delivered by the police to an individual upon his or her arrest.

Miranda has been clarified by several further Supreme Court rulings. For the warning to be necessary, the questioning must be conducted under "custodial" circumstances. A person detained in jail or under arrest is, of course, deemed to be in police custody. Alternatively, a person who is under the reasonable beliefthat he may not freely leave from the restraint of law enforcement is also deemed to be in "custody." That determination of "reasonableness" is based on a totality of the objective circumstances. A mere presence at a police station may not be sufficient, but nor is it required. Traffic stops are not deemed custodial. Additionally, the Court ruled in Yarborough v. Alvaradothat a suspect's age and inexperience are not objective factors required to be taken into consideration when determining whether it was reasonable for the suspect to believe that he was not free to leave during the questioning.

The questioning does not have to be explicit in order to trigger Miranda rights. For example, two police officers engaging in a conversation designed to elicit an incriminating statement from a suspect would constitute questioning. A person may choose to waive his Miranda rights, but the prosecution has the burden of showing that such a waiver was actually made.

A confession not preceded by a Miranda warning where one was necessary cannot be admitted as evidence against the confessing party in a judicial proceeding. The Supreme Court, however, has held that if a defendant voluntarily testifies at the trial that he did not commit the crime, his confession may be introduced to challenge his credibility, to "impeach" the witness, even if it had been obtained without the warning.

In Hiibel v. Sixth Judicial District Court of Nevada, the Supreme Court ruled 5-4 on June 21, 2004 that the Fourth, Fifth, and Fourteenth Amendments do not give people the right to refuse to give their name when questioned by police.

11. Refusal to testify in a criminal case

The Supreme Court ruled that the government cannot punish a criminal defendant for exercising his right to silence, by allowing the prosecutor to ask the jury to draw an inference of guilt from the defendant's refusal to testify in his own defense. Griffin v. California, 380 U.S.609 (1965). In Griffin, the Court overturned as unconstitutional under the federal constitution a provision of the Californiastate constitution that explicitly granted such power to prosecutors.

Topic : Witnesses Competency, Credibility And Impeachment

Topic Objective:

At the end of this topic student would be able to:

- Understand the concept of Eyewitness testimony
- Learn about Qualifications of Witnesses
- Understand the meaning of Competency

Definition/Overview:

Overview: A witness is someone who has firsthand knowledge about a crime or dramatic event through their senses (e.g. seeing, hearing, smelling, touching), and can help certify important considerations to the crime or event. A witness who has seen the event firsthand is known as an "eye-witness". Witnesses are often called before a court of law to testify in trials.

A subpoena commands a person to appear. In many jurisdictions it is compulsory to comply, to take an oath, and tell the truth, under penalty of perjury. It is used to compel the testimony of witnesses in a trial. Usually it can be issued by a judge or by the lawyer representing the plaintiff or the defendant in a civil trial or by the prosecutor or the defense attorney in a criminal proceeding. A witness who specializes in an area of study relevant to the crime is called an expert witness. Scientists and doctors are often called to give expert witness testimony.

Key Points:

1. Eyewitness testimony

Eyewitness testimony is generally presumed to be better than circumstantial evidence. Studies have shown, however, that individual, separate witness testimony is often flawed, and parts of it can be meaningless. This can occur because of a person's faulty observation and recollection, because of a person's bias, or because the witness is lying. If several people witness a crime it is probative to look for similarities in their collective descriptions to substantiate the facts of an event, keeping in mind the contrasts of individual descriptions. One study involved an experiment in which subjects acted as jurors in a criminal case. Jurors heard a description of a robbery-murder, then a prosecution argument, then an argument for the defense. Some jurors heard only circumstantial evidence, others heard from a clerk who claimed to identify the defendant. In the first case, 18% percent found the defendant guilty, but in the second, 72% found the defendant guilty. Lineups, where the eyewitness picks out a suspect from a group of people in the police station, are often grossly suggestive, and give the false impression that the witness remembered the suspect. In another study, students watched a staged crime. An hour later they looked through photos. A week later they were asked to pick the suspect out of lineups. 8% of the people in the lineups were mistakenly identified as criminals. 20% of the innocent people whose photographs were included were mistakenly identified (University of Nebraska 1977). A weapon focus effect in which the presence of a weapon impairs memory for surrounding details is also an issue. Another study looked at sixty-five cases of "erroneous criminal convictions of innocent people." In 45% of the cases, eyewitness mistakes were responsible.

The formal study of eyewitness memory is usually undertaken within the broader category of cognitive processes the different ways in which we make sense of the world around us. We do this by employing the mental skills at our disposal such as thinking, perception, memory, awareness, reasoning and judgment. Although cognitive processes can only be inferred and cannot be seen directly, they all have very important practical implications within a legal context.

If one were to accept that the way we think, perceive, reason and judge is not always perfect, then it becomes easier to understand why cognitive processes and the factors influencing these processes are studied by psychologists in matters of law; not least because of the grave implications that this imperfection can have within the criminal justice system.

The study of witness memory has dominated this realm of investigation and for a very good reason because as Huff and Rattner note: the single most important factor contributing to wrongful conviction is eyewitness misidentification.

2. Qualifications of Witnesses

Witness must demonstrate that s/he has some personal knowledge of the matter at issue in

Court

Subpoenas

Must issue oath or affirmation

typically swear on the Bible

Witness must be competent

3. Competency

Competency can be gauged by: ability to independently recollect and communicate the events in question. Ability to determine fact from fiction appreciation of and adherence to the veracity requirement safeguarded by the nature of the U.S. Constitution structure of the American judicial system. Like any witness, a child must have the capacity to observe, remember, and narrate the events at issue. In addition, the child must comprehend the duty to tell the truthVoir dire: pretrial questioning of child by judge6th Amendment gives defendant the right to face accuser Courts often allow closed circuit TV when witness is a child. In recent years, hypnosis has been employed to heighten witnesss memory

3.1 6th Amendment

o Accused has right to face witnesses and to cross examine

o Accused has right to compel testimony of witnesses that help his/her case

o Subpoena: formal directive from a court which requires an individual to appear at a particular place and time to provide testimony or evidence

o All defendants have the right to testify in their own behalf

o Defendants do not have the right to introduce perjured or false testimony

3.2 Witness Credibility

Some provisions that encourage witness to tell the truth:

mandatory oaths or affirmations

cross examination of testimony

legal ramifications for dishonesty

mandatory compulsion of personal appearance at trial

Defendants the right to confront their accusers, including witnesses demeanor

Jurors independently evaluate the witness perception of the events in question

3.3 Witness Impeachment

Opposing counsel may also introduce evidence to contradict the sworn testimony; designed to discredit a witness

3.4 Methods of Impeachment

Non-specific methods of impeachment include:

bias/prejudice/motivation

sensory and mental capacity

truth and veracity challenges

Specific methods of impeachment include:

prior inconsistent statements

contradictions

Topic : Examination Of Witnesses

Topic Objective:

At the end of this topic student would be able to:

- Understand the Types of Witnesses
- Learn about Examination of Witnesses
- Learn about Corroboration
- Learn about Exonerations

Definition/Overview:

As with all evidence, witness testimony must be competent, relevant, and material to the issue at hand Competency: ability to independently recollect and communicate the events in question ability to determine fact from fiction appreciation of and adherence to the veracity requirement safeguarded by the nature of the U.S. Constitution and the structure of the American judicial system relevant evidence has tendency to make the existence of a fact in question more or less probable than without the introduction of such evidence Material evidence has an affect on the trial.

Key Points:

1. Types of Witnesses

- Lay Witnesses: individuals privy to an event relevant to the issue at hand testimony is generally limited to real evidence (i.e. something observed or experienced through one of the five sense) involving the facts of the case some opinion evidence is admissible.
- Expert witnesses: those individuals called to testify about a relevant event based on his/her special knowledge or training allowed when evidence is beyond the understanding of the average juror must be competent.

Standard for the introduction of scientific or technical evidence stems from two primary sources: case and statutory law.

- Factors in considering the standard.
- Whether the scientific theory or technique can be and has been tested.
- Whether it has been subject to publication and/or peer review.
- The known or potential rate of error;
- The existence and maintenance of standards controlling the technique's operation.
- General acceptance in the scientific community.

Experts are examined to ensure:

- Their testimony is necessary for clarification.
- They possess the requisite credentials and qualifications.

- The scope of their testimony is within the parameters of that which the court is willing to accept as scientifically or technologically sound

2. Examination of Witnesses

- Direct examination of a witness occurs when a witness is questioned by the side which called them to testify.
- Cross examination is conducted by opposing counsel at the conclusion of direct examination.
- usually limited to leading questions.
- The demonstration of the veracity of a particular witness (i.e. rehabilitation) is often attempted immediately after cross-examination during a period known as redirect.
- Recross-examination immediately follows redirect, and is limited to those areas addressed therein.

3. Objections related to witness 3 general types of objections:

- Substantive objections to questions posed.
- Substantive objections to the questions form.
- Substantive objections to the answer offered.

4. Competency, Relevancy and Materiality

As with all evidence, witness testimony must be competent, relevant, and material to the issue at hand Competency: ability to independently recollect and communicate the events in question ability to determine fact from fictionappreciation of and adherence to the veracity requirement safeguarded by the nature of the U.S. Constitution and the structure of the American judicial system relevant evidence has tendency to make the existence of a fact in question more or less probable than without the introduction of such evidenceMaterial evidence has an affect on the trial.

5. Corroboration

Corroborating evidence refers to supplementary of supporting evidence which tends to strengthen or confirm extant evidence.

6. Known Cases of Eyewitness Error

The Innocence Project has facilitated the exoneration of 214 men who were convicted of crimes they did not commit, as a result of faulty eyewitness evidence. A number of these cases have received substantial attention from the media.

Jennifer Thompson's case is one example: She was a college student in North Carolina in 1984, when a man broke into her apartment, put a knife to her throat, and raped her. According to her own account, Ms. Thompson studied her rapist throughout the incident with great determination to memorize his face. "I studied every single detail on the rapist's face. I looked at his hairline; I looked for scars, for tattoos, for anything that would help me identify him. When and if I survived the attack, I was going to make sure that he was put in prison and he was going to rot."

7. Exonerations

Ms. Thompson went to the police station later that same day to work up a [composite sketch] of her attacker, relying on what she believed was her detailed memory. Several days later, the police constructed a photographic lineup, and she selected Ronald Junior Cotton from the lineup. She later testified against him at trial. She was positive it was him, without any doubt in her mind. "I was sure. I knew it. I had picked the right guy, and he was going to go to jail. If there was the possibility of a death sentence, I wanted him to die. I wanted to flip the switch."

But she was wrong, as DNA results eventually showed. It turns out she was even presented with her actual attacker during a second trial proceeding a year after the attack, but swore she'd never seen the man before in her life. She remained convinced that Ronald Cotton was her attacker, and it was not until much later, after Mr.. Cotton had served 11 years in prison for a crime he did not commit, that she realized that she had made a grave mistake.

Jennifer Thompson's memory had failed her, resulting in a substantial injustice. It took definitive DNA testing to shake her confidence, but she now knows that despite her confidence in her identification, it was wrong. Cases like Ms. Thompson's, including a long history of eyewitness errors traceable back to Biblical times, prompted the emergence of a field within the social sciences dedicated to the study of eyewitness memory and the causes underlying its frequently recurring failures.

8. Causes of Eyewitness Error

One of the primary reasons that eyewitnesses to crimes have been shown to make mistakes in their recollection of perpetrator identities, is the police procedures used to collect eyewitness evidence. Various factors have been discovered to make police identification procedures more or less reliable as a test of eyewitness memory, and these procedural mechanisms have been termed "system variables" by social scientists researching this systemic problem. "System variables are those that affect the accuracy of eyewitness identifications and over which the criminal justice system has (or can have) control."

Acknowledging the importance of these procedural precautions recommended by leading eyewitness researchers, the Department of Justice published a set of best practices for conducting police lineups in 1999.

9. Culprit-Present Versus Culprit-Absent Lineups

One of the most obvious causes of inaccurate identifications resulting from police lineups is the use of a lineup that does not include the actual perpetrator of the crime. In other words, police suspect one person of having committed a crime, when in fact it was committed by an unknown other person who does not appear in the lineup. When the actual perpetrator is not included in the lineup, research has shown that the police suspect faces a significantly heightened risk of being incorrectly identified as the culprit.

According to eyewitness researchers, the most likely cause of this increased occurrence of misidentification is what is termed the "relative judgment" process. That is, when viewing a group of photos or individuals, a witness tends to select the person who looks "most like" the perpetrator. When the actual perpetrator is not present in the lineup, the police suspect is often the person who best fits the description, hence his or her selection for the lineup.

Given the common, good faith occurrence of police lineups that do not include the actual perpetrator of a crime, it becomes particularly critical that other procedural measures are undertaken to minimize the likelihood of an inaccurate identification.

10. Pre-Lineup Instructions

Following this finding that eyewitnesses are prone to making "relative judgments" when faced with a lineup that does not contain the actual perpetrator, researchers hypothesized that instructing the witness prior to the lineup might serve to mitigate the occurrence of error. In fact, studies have shown that simply instructing a witness that the perpetrator "may or may not be present" in the lineup can dramatically reduce the likelihood that a witness will identify an innocent person.

11."Blind" Lineup Administration

Eyewitness researchers know that the police lineup is, at center, a psychological experiment designed to test the ability of a witness to recall the identity of the perpetrator of a crime. As such, it is recommended that police lineups be conducted in double-blind fashion, like any scientific experiment, in order to avert the possibility that inadvertent cues from the lineup administrator will suggest the "correct" answer and thereby subvert the independent memory of the witness. The occurrence of "experimenter bias" is well-documented across the sciences, and as such, researchers recommend that police lineups be conducted by someone not connected to the case and unaware of the identity of the suspect. Once police have identified a suspect, they will typically place that individual into either a live or photo lineup, along with a set of "fillers." Researchers and the DOJ guidelines recommend, as a preliminary matter, that the fillers be "known innocent" non-suspects. This way, if a witness selects someone other than the suspect, the unreliability of that witness's memory is revealed. In that respect, the lineup procedure serves as a test of the witness's memory, with clear "wrong" answers. If more than one suspect is included in the lineup as in the 2006 Duke Universitylacrosse case, for example then the lineup becomes tantamount to a multiple choice test with no wrong answer.

12. Filler Characteristics

These "known innocent" fillers should be selected to match the original description provided by the witness. If a neutral observer is able to select the suspect from the lineup based on the recorded description by the witness that is, if the suspect is the only one present who clearly fits the description then the procedure cannot be relied upon as a test of the witness's memory of the actual perpetrator. Researchers have noted that this rule is particularly important when the witness's description includes unique features, such as tattoos, scars, unusual hairstyles, etc.

13. Simultaneous vs. Sequential Presentation

Researchers have also suggested that the manner in which photos or individuals chosen for a lineup are presented can also be key to the reliability of identification. Specifically, leading researchers suggest that lineups should be conducted sequentially, rather than simultaneously. In other words, each member of a given lineup should be presented to a witness by himself, rather than showing a group of photos or individuals to a witness together. According to social scientists, use of this procedure will minimize the effects of the "relative judgment" process discussed above, by encouraging witnesses to compare each person individually to

his or her independent memory of the identity of the perpetrator. According to researchers, use of a simultaneous procedure makes it more likely that witnesses will pick the person who merely looks the most like the perpetrator from the group, which introduces an acute danger when the actual perpetrator is not present in the lineup. A pilot study was conducted in Minnesotain 2006 to test this hypothesis, and the results show the sequential procedure to be superior as a means of improving identification accuracy and reducing the occurrence of false identifications.

14. The "Illinois Report" Controversy

In 2005, the Illinois state legislature commissioned a pilot project to test reform measures recommended by social scientists to increase the accuracy and reliability of police identification procedures. The study was conducted by the Chicago police department, and an initial report purported to show that the status quo was superior to procedures recommended by researchers in reducing false identifications, in reliance on their decades of scientific research. The mainstream media spotlighted the report, including a front-page article in the New York Times, suggesting that three decades' worth of otherwise uncontroverted social science had been called into question.

Criticism of the report and its underlying methodology surfaced shortly after its release. One critic averred that "the design of the [Illinois pilot] project contained so many fundamental flaws that it is fair to wonder whether its sole purpose was to inject confusion into the debate about the efficacy of sequential double-blind procedures and to thereby prevent adoption of the reforms." Seeking information on the data and methodology underlying the report, the National Association of Criminal Defense Lawyers (NACDL) filed a lawsuit under the Freedom of Information Act seeking the unreleased information. That suit remains pending.

In July 2007, a "blue ribbon" panel of eminent psychologists, including one Nobel Laureate, released a report examining the methodology and claims of the Illinois Report, which appears to have confirmed the suspicions of earlier critics. Researchers from Harvard, Princeton, Carnegie Mellon, and other academic institutions examined the study and reported that the study was infected with a fundamental flaw that had "devastating consequences" to its scientific merit, and which "guaranteed that most outcomes would be difficult or impossible to interpret." Their primary critique was an observed "confounding" of variables, rendering it impossible to draw meaningful comparisons between the methods tested.

The confound that the critics of the Illinois study criticized was the following: the Illinoisstudy compared the traditional simultaneous method of lineup presentation with the

sequential double-blind method recommended by academics like Gary Wells. The traditional method is not conducted double-blind (meaning that the person presenting the lineup does not know which person or photo is the suspect). The critics claim that the results cannot be compared because one method was not double-blind while the other was double-blind. This criticism ignores the fact that the mandate of the Illinoislegislature was to compare the traditional method with the academic method. More significantly, as an experiment to determine whether or not sequential double-blind administration would be superior to the simultaneous methods used by most police departments, the Illinois study provides an abundance of useful data which, at this point, seems to show that neither of the methods used in that experiment is superior to the other. What it does not provide is a clear reason why, because the effect of "double-blind" was not tested for the simultaneous lineups. Three large police departments are now working with the Innocence Project on real world studies to compare simultaneous double-blind photo lineups (called photo arrays) with sequential double-blind photo lineups. These studies are likely to shed further light on the controversy concerning Simultaneous vs. Sequential presentation, and the role that double-blind administration plays in each.

15. Post-Lineup Feedback and Confidence Statements

Any feedback from the lineup administrator following an identification can have a dramatic effect on a witness's sense of his or her own accuracy. A highly tentative "maybe" can be artificially transformed into "100% confident" with a simple comment such as "Good, you identified the actual suspect." Mere preparation for cross-examination, including simply thinking about how to answer questions regarding the identification, has also been shown to artificially inflate an eyewitness's sense of her own level of certainty; the same is true when a witness simply learns that another witness identified the same person. This malleability of eyewitness confidence has been shown to be far more pronounced in cases where the witness turns out to be wrong.

When there is a positive correlation between eyewitness confidence and accuracy, it tends to occur when a witness's confidence is measured immediately following the identification, and prior to any confirming feedback. In keeping with this finding, researchers suggest that a statement of a witness's confidence, in her own words, be taken immediately following identification. Any future statement of confidence or certainty is widely regarded as unreliable, given the host of intervening factors that have been shown to distort it as time passes.

16. "Estimator Variables" (Circumstantial Factors)

Social scientists have also identified a set of "estimator variables" that is, factors connected to the witness herself or to the circumstances surrounding her observation of the individual she would later attempt to identify that research has shown to make an identification more or less reliable.

17. Cross-Racial Identifications

One of the most-studied topics in this area is the cross-racial identification, namely when the witness and the perpetrator are of different races. A recent meta-analysis of 25 years of research shows a definitive, statistically significant "cross-race impairment," where members of any one race have a clear deficiency for accurately identifying members of another race. The effect appears to be true regardless of the races in question. Various hypotheses have been tested to explain this deficiency in identification accuracy, including any racial animosity on the part of the viewer, and exposure level to the other race in question. Racist attitudes have not been observed to have any effect on the impairment; exposure level has been observed to have a minute effect in some studies, yet the cross-race impairment itself has been observed to substantially overshadow all other variables, even when testing people who have been surrounded by members of the other race for their entire lives.

18. Stress

The effect of stress on eyewitness recall is one of the most widely misunderstood of the factors commonly at play in a crime witness scenario. Studies have consistently shown that the presence of stress has a dramatically negative impact on the accuracy of eyewitness memory, a phenomenon which is often not appreciated by witnesses themselves. In a seminal study on this topic, Yale psychiatrist Charles Morgan and a team of researchers tested the ability of trained, military survival school students to identify their interrogators following low- and high-stress scenarios. In each condition, subjects were face-to-face with an interrogator for 40 minutes in a well-lit room. The following day, each participant was asked to select his or her interrogator out of either a live or photo lineup. In the case of the photo spread the most common form of police lineup in the U.S. those subjected to the high-stress scenario falsely identified someone other than the interrogator in 68% of cases, compared to only 12% from the low-stress scenario.

19. Presence of a Weapon

The presence of a weapon has also been shown to diminish the accuracy of eyewitness recall, often referred to as the "weapon-focus effect". This phenomenon has been studied at length by eyewitness researchers, and the findings have consistently demonstrated that eyewitnesses recall the identity of a perpetrator less accurately when a weapon was present during the incident. Eminent psychologist Elizabeth Loftus used eye-tracking technology to monitor this effect, and found that the presence of a weapon draws a witness's visual focus away from other things, such as the perpetrator's face.

20. Rapid Decline of Eyewitness Memory

It is thought that memory degrades over time, some researchers state that the rate at which eyewitness memory declines is swift, and the drop-off is sharp, in contrast to the more common view that memory degrades slowly and consistently as time passes. The "forgetting curve" of eyewitness memory has been shown to be "Ebbinghausian" in nature: it begins to drop off sharply within 20 minutes following the initial encoding, and continues to do so exponentially until it begins to level off around the second day at a dramatically reduced level of accuracy.. And as noted above, eyewitness memory is increasingly susceptible to contamination as time passes.

21. Other Circumstantial Factors

A variety of other factors have been observed to affect the reliability of eyewitness identification. The elderly and young children tend to recall faces less accurately, as compared to young adults. Intelligence, education, gender, and race, on the other hand, appear to have no effect (with the exception of the cross-race effect, as above).

The opportunity that a witness has to view the perpetrator and the level of attention paid has also been shown to affect the reliability of identification. Attention paid, however, appears to play a more substantial role than other factors like lighting, distance, or duration. For example, when witnesses observe the theft of an item known to be of high value, studies have shown that their higher degree of attention can result in a higher level of identification accuracy (assuming the absence of contravening factors, such as the presence of a weapon, stress, etc.).

22. The Law of Eyewitness Identification Evidence in Criminal Trials U.S.

The legal standards addressing the treatment of eyewitness testimony as evidence in criminal trials vary widely across the United States on issues ranging from the admissibility of eyewitness testimony as evidence, the admissibility and scope of expert testimony on the factors affecting its reliability, and the propriety of jury instructions on the same factors.The federal due process standard governing the admissibility of eyewitness evidence is set forth in the U.S. Supreme Court case of Manson v. Brathwaite. Under the federal standard, if an identification procedure is shown to be unnecessarily suggestive, the court must consider whether certain independent indicia of reliability are present, and if so, weigh those factors against the corrupting effect of the flawed police procedure. Within that framework, the court should determine whether, under the totality of the circumstances, the identification appears to be reliable. If not, the identification evidence must be excluded from evidence under controlling federal precedent.

Certain criticisms have been waged against the Mansonstandard, however. According to legal scholars, "the rule of decision set out in Manson has failed to meet the Court's objective of furthering fairness and reliability." For example, the Court requires that the confidence of the witness be considered as an indicator of the reliability of the identification evidence. As noted above, however, extensive studies in the social sciences have shown that confidence is unreliable as a predictor of accuracy. Social scientists and legal scholars have also expressed concern that "the [Manson] list as a whole is substantially incomplete," thereby opening the courthouse doors to the admission of unreliable evidence.

23. Expert Testimony

Expert testimony on the factors affecting the reliability of eyewitness evidence is allowed in some U.S.jurisdictions, and not in others. In most states, it is left to the discretion of the trial court judge. States generally allowing it include California, Arizona, Colorado, Hawaii, Tennessee (by a 2007 state Supreme Court decision), Ohio, and Kentucky. States generally prohibiting it include Pennsylvaniaand Missouri. Many states have less clear guidelines under appellate court precedent, such asMississippi, New York,New Hampshire, and New Jersey. It is often difficult to tell whether expert testimony has been allowed in a given state, since if the trial court lets the expert testify, there is generally no record created. On the other hand, if the expert is not allowed, that becomes a ground of appeal if the defendant is convicted. That means that most cases that generate appellate records are cases only in which the expert was disallowed (and the defendant was convicted).

In those states where expert testimony on eyewitness reliability is not allowed, it is typically on grounds that the various factors are within the common sense of the average juror, and thus not the proper topic of expert testimony. Polling data and other surveys of juror knowledge appear to contradict this proposition, however, revealing substantial misconceptions on a number of discrete topics that have been the subject of significant study by social scientists.

24. Jury instructions

Criminal defense lawyers often propose detailed jury instructions as a mechanism to offset undue reliance on eyewitness testimony, when factors shown to undermine its reliability are present in a given case. Many state courts prohibit instructions detailing specific eyewitness reliability factors but will allow a generic instruction, while others find detailed instructions on specific factors to be critical to a fair trial. Californiaallows instructions when police procedures are in conflict with established best practices, for example, and New Jersey mandates an instruction on the cross-race effect when the identification is central to the case and uncorroborated by other evidence.

25. EnglandPACE Code D

Most identification procedures are regulated by Police and Criminal Evidence Act 1984 Code D.

Where there is a particular suspect - In cases where identification may be an issue, a record must be made of the description of the suspect first given by a witness. This should be disclosed to the suspect or his solicitor. If the ability of a suspect to make a positive visual identification is likely to be an issue, one of the formal identification procedures in Pace Code D, para 3.5-3.10 should be used, unless it would serve no useful purpose (e.g. because the suspect was known to the witnesses or if there was no reasonable possibility that a witness could make an identification at all).

The formal identification procedures are:

- Video identification
- Identification parade If it is more practicable and suitable than video identification, an identification parade may be used.
- Group identification If it is more suitable than video identification or an identification parade, the witness may be asked to pick a person out after observing a group.

- Confrontation If the other methods are unsuitable, the witness may be asked whether a certain person is the person they saw.

26. Where there is no particular suspect

If there is no particular suspect, a witness may be shown photographs or be taken to a neighborhoods in the hope that he recognizes the perpetrator. Photographs should be shown to potential witnesses individually (to prevent collusion) and once a positive identification has been made, no other witnesses should be shown the photograph of the suspect.

27. Breaches of Pace Code D

Under s. 78 of the Police and Criminal Evidence Act 1984, the trial judge may exclude evidence if it would have an adverse effect on the fairness of the proceedings if it were admitted. Breach of Code D does notautomatically mean that the evidence will be excluded, but the judge should consider whether a breach has occurred and what the effect of the breach was on the defendant. If a judge decides to admit evidence where there has been a breach, he should give reasons. and in a jury trial, the jury should normally be told "that an identification procedure enables suspects to put the reliability of an eye-witnesss identification to the test, that the suspect has lost the benefit of that safeguard, and that they should take account of that fact in their assessment of the whole case, giving it such weight as they think fit".

28. Turnbull directions

Where the identification of the defendant is in issue (not merely the honesty of the identifier or the fact that the defendant matched a particular description), and the prosecution relies substantially or wholly on the correctness of one or more identifications of the defendant, the judge should give a direction to the jury:

- The judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken.
- The judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made and remind the jury of any specific weaknesses in the identification evidence. If the witnesses recognized a known defendant, the

judge should remind the jury that mistakes even in the recognition of relatives or close friends are sometimes made.

- When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the judge should withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification.
- The trial judge should identify to the jury the evidence which he adjudges is capable of supporting the evidence of identification. If there is any evidence or circumstances which the jury might think was supporting when it did not have this quality, the judge should say so.

29. Reform EffortsU.S.

Largely in response to the mounting list of wrongful convictions discovered to have resulted from faulty eyewitness evidence, an effort is gaining momentum in the United Statesto reform police procedures and the various legal rules addressing the treatment of eyewitness evidence in criminal trials. Social scientists are committing more resources to studying and understanding the mechanisms of human memory in the eyewitness context, and lawyers, scholars, and legislators are devoting increasing attention to the fact that faulty eyewitness evidence remains the leading cause of wrongful conviction in the United States.
Reform measures mandating that police use established best practices when collecting eyewitness evidence have been implemented in New Jersey, Wisconsin, West Virginia, and Minnesota. Bills on the same topic have been proposed in Georgia,New Mexico, California,Maine, Maryland,Massachusetts, New York, Vermont, and others.

- Department of Justice Guidelines for Conducting Lineup Procedures
- NLADA resource on Eyewitness ID Issues
- Website of eyewitness researcher Dr. Gary Wells
- Dr. Steven Penrod's website, with links to substantial eyewitness ID research
- Dr. Nancy Steblay's website, with links to substantial eyewitness ID research
- NACDL's Eyewitness ID Resource page
- Dr. Roy Malpass's Eyewitness ID Research Laboratory Website
- Dr. Solomon Fulero's website, with links to relevant documents
- American Psychology-Law Society's page on eyewitness ID publications
    - In Section 4 of this course you will cover these topics:

Hearsay

Privileged Communications

Topic : Hearsay

Topic Objective:

At the end of this topic student would be able to:

- Understand The Hearsay Rule
- Learn about Federal Rules of Evidence
- Learn about Common misconceptions about evidence
- Understand the Non-Hearsay under the Federal Rules
- Learn about Prior statement by a witness

Definition/Overview:

This topic highlights the concept of Hearsay comprehensively. Hearsay: Hearsay is the legal term that describes statements made outside of court or other judicial proceedings. Unless one of about thirty exceptions applies, hearsay is not allowed as evidence in the United States. The Hearsay Rule is an analytic rule of evidence that defines hearsay and provides for both exceptions and exemptions from that rule. There is no all-encompassing definition of hearsay in the United States.

Key Points:

1. Theory of the Hearsay Rule

The theory of the rule excluding hearsay is that assertions made by human beings are often unreliable; such statements are often insincere, subject to flaws in memory and perception, or infected with errors in narration at the time they are given. The law therefore finds it necessary to subject this form of evidence to scrutiny or analysis calculated to discover and expose in detail its possible weaknesses, and thus to enable the tribunal (judge or jury) to estimate it at no more than its actual value.

Three tests are calculated to expose possible weaknesses in a statement:

- Assertions must be taken under oath
- Assertions must be made in front of the tribunal (judge or jury)

- Assertions must be subject to cross-examination.

Assertions not subject to these three tests are (with some exceptions) prohibited insofar as they are offered testimonially (for the truth of what they assert).

2. Federal Rules of Evidence

The Federal Rules of Evidence (Article VIII) provide a general definition of hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Subject to two classes of "exemptions," this definition classifies a statement as hearsay if the statement meets two requirements: (1) the statement must be extra-judicial (i.e. not made by this witness in this proceeding). (2) The statement must be offered to prove the truth of what the statement asserts if anything.

However, as noted below, the Federal Rules of Evidence also provide two specific categories of exemptions of certain kinds of statements from this rule; statements in these categories are defined as "Non-hearsay." Typically, one can classify a statement as hearsay under the Federal Rules of Evidence using a three-step analysis. A statement will be considered hearsay if it is:

- An assertive statement
- Made by an out-of-court declarant
- Is being offered to prove the truth of the matter asserted therein.

An "assertive statement" is generally defined as the intentional communication of fact. Under the Federal Rules of Evidence, an assertive statement can be oral, written, or non-verbal conduct if it was intended to be an assertion. However, any verbal or non-verbal conduct that was not intended to communicate a fact will not be considered an assertive statement.

In order for the statement to satisfy the "out-of-court declarant" element of hearsay, very simply stated, the statement must have been made outside of the courtroom that the present proceeding is taking place in -- meaning that if the statement was made in another courtroom, it is still made by an "out-of-court" declarant.

Lastly, if a statement is being offered for its truth -- meaning that its relevance depends upon the jury believing the substance of the statement -- then it is being offered to prove the truth of the matter asserted therein. If a statement is relevant for any other purpose other than proving the truth of the matter asserted therein, then the statement will not be considered hearsay under the Federal Rules of Evidence.

3. Application

Generally in common law courts the "hearsay rule" applies, which says that a trier of fact (judge or jury) cannot be informed of a hearsay statement unless it meets certain strict requirements. However, the rules for admissibility are more relaxed in court systems based on the civil law system. In the civil law system, the courts, whether consisting only of judges or featuring a jury, have wide latitude to appreciate the evidence brought before them. [Note: Louisiana, a civil-law jurisdiction, does not share the above referenced feature generally found in civil-law jurisdictions. With few exceptions, Louisiana follows rules predicated upon the Federal Rules of Evidence.]

Furthermore, even in common-law systems, the hearsay rule only applies to actual trials. Hearsay is admissible as evidence in many other judicial proceedings, such as grand jury deliberations, probation hearings, parole revocation hearings, and proceedings before administrative bodies.

In criminal law, Crawford v. Washington, 541 U.S. 36 (2004), reformulated the standard for determining when the admission of hearsay statements in criminal cases is permitted under the Confrontation Clause of the Sixth Amendment to the Constitution. Crawfordgives enhanced protection to defendants when the hearsay offered against them is testimonial in nature. When a statement is deliberately accusatory, or when the declarant knows that the statement is likely to be used in the prosecution of the defendant for a crime, the need for face-to-face confrontation is at its highest. When statements are directly accusatory, the defense needs an opportunity to explore the accusers motives. Where statements are the product of police interrogation, there is a need to ensure that the testimony is not the product of improper coercion or intimidation.

Ohio v. Roberts, 448 U.S. 56 (1980), set forth a two-pronged test in order for hearsay to be admissible against a criminal defendant: (1) the declarant generally must be shown to be unavailable; and (2) the statement must have been made under circumstances providing sufficient indicia of reliability. With respect to the second prong, a reliability determination may assume that hearsay is sufficiently reliable for constitutional purposes if it satisfies a firmly rooted hearsay exception. In practice this means that lower courts need to make reliability determinations only for hearsay that is offered under a catchall exception, such as Federal Rule of Evidence Rule 807, or under new or non-traditional hearsay exceptions that are not firmly rooted.However, Crawford v. Washington overuled Ohio v. Roberts.

4. Common misconceptions

One major misconception about the hearsay rule is that hearsay is never admissible in court. While the general rule is that such evidence is inadmissible, there are many exceptions.

There are two other common misconceptions concerning the hearsay rule. The first is that hearsay applies only to oral statements. The hearsay rule applies to all out-of-court statements whether oral, written or otherwise. The Federal Rules of Evidence defines a statement as an oral or written assertion or nonverbal conduct of a person, if the conduct is intended by the person as an assertion. Even written documents made under oath, such as affidavits or notarized statements, are subject to the 'hearsay rule'.

The second common misconception is that all out-of-court statements are hearsay. This is not the case. An out of court statement may or may not be hearsay depending on the purpose for which it is offered. If the statement is being offered to prove the truth of what it asserts, then it becomes hearsay. When offered for any other purpose the statement is not hearsay. For example: Witness testifies that yesterday he spoke to Jim (who was in Vermont) on the phone and that Jim made the following statement, "It's raining in Vermont!" If the attorney is seeking to use this statement to prove that it was in fact raining in Vermont, then it is hearsay. But, if the attorney is seeking to use the statement to prove that the phone lines were working that day, or that Jim had not lost the power of speech, or for any other purpose, then the statement is not being offered to prove the truth of the matter asserted, and therefore it is not hearsay.

5. Non-Hearsay under the Federal Rules

Under the Federal Rules of Evidence, two broad categories of statements are exempt from the rule's general definition. An admission by a party-opponent is a statement offered against another party that meets one of five criteria:

- The party against whom the statement is being offered is also the declarant of that statement either personally or in a representative capacity.
- The party against whom the statement is being offered manifested an adoption or belief in the statement's truth.
- The party against whom the statement is being offered authorized the declarant to make the statement.

- The statement is made by an agent of the party against whom it is being offered and concerns a matter within the scope of the employment and is made during the course of that employment.
- The declarant was a co-conspirator of the party against whom the statement is being offered and the statement is in furtherance of their conspiracy.

The theory underlying this exemption is derived from the nature of the hearsay rule itself. The hearsay rule operates to exclude extra-judicial assertions as untrustworthy because they cannot be tested by cross-examination. When an assertion is offered into evidence against the defendant and the defendant objects, hearsay, the defendant is in essence saying I object to this statement as untrustworthy because I am not afforded an opportunity to cross-examine the person who made it. How can we trust what he said? But what if the defendant is the person who made the statement that is now being offered against him? To object, hearsay in this circumstance would be as absurd as to argue, This statement is unreliable because Icannot cross-examine myself; therefore, how can I trust what I said? In this situation the objection of the Hearsay rule falls away, because the very basis of the rule is lacking, viz. the need and prudence of affording an opportunity of cross-examination. Another way of looking at it is that a defendant who faces his own statement being used against him has an opportunity to cross-examine himself he can take the witness stand and explain his prior assertion, so the rule is satisfied.

6. Prior statement by a witness

A prior statement is not hearsay if the person who made the statement (the "declarant") testifies at the trial or hearing subject to cross-examination, and (A) the prior statement is inconsistentwith the declarant's testimony at the trial, etc., and the prior statement was given under oath at a trial, hearing, deposition, or other proceeding, or (B) the prior statement is consistentwith the declarant's testimony, and is offered to rebut a charge that the declarant has made a recent fabrication, or a charge of the declarant's improper influence or motive, or (C) the prior statement was an identification of a person made after perceiving that person.

7. Hearsay exceptions

Some statements are defined as hearsay, but may nevertheless be admissible as evidence in court. These statements relate to exceptionsto the general rule on hearsay. Some (but not all) exceptions to the hearsay rule apply only when the declarant is unavailable for testimony at the trial or hearing.

Many of the exceptions listed below are treated more extensively in individual articles.

8. Hearsay exceptions that apply even where the declarant is available

- **Excited utterances**: statements relating to startling events or condition made while the declarant was under the stress of excitement caused by the event or condition. This is the exception that may apply to the 'police officer' scenario listed above. The victim's cries of help were made under the stress of a startling event, and the victim is still under the stress of the event, as is evidenced by the victim's crying and visible shaking. An excited utterance does not have to be made at the same time of the startling event. A statement made minutes, hours or even days after the startling event can be excited utterances, so long as the declarant is still under the stress of the startling event. However, the more time that elapses between a startling event and the declarant's statement, the more the statements will be looked upon with disfavor.
- **Present sense impressions**: A statement expressing the declarant's impression of a condition existing at the time the statement was made, such as "it's hot in here", or "we're going really fast". Unlike an excited utterance, it need not be made in response to a startling event. Instead, it is admissible because it is a condition that the witness would likely have been experiencing at the same time as the declarant, and would instantly be able to corroborate.
- **Declarations of present state of mind**: Much like a present-sense impression describes the outside world, declarant's statement to the effect of "I am angry!" or "I am Napoleon!" will be admissible to prove that the declarant was indeed angry, or did indeed believe himself to be Napoleon at that time. Used in cases where the declarant's mental state is at issue. Present-state-of-mind statements are also used as circumstantial evidence of subsequent acts committed by the declarant, like his saying, "I'm going to go buy some groceries and get the oil changed in my car on my way home from work." Another exception is statements made in the course of medical treatment, i.e., statements made by a patient to a medical professional to help in diagnosis and treatment. Any statements contained therein that attribute fault or causation to an individual will generally NOT be admissible under this exception, unless it involves a small child. (The Tender Years Doctrine).

- **The business records exception**: business records created during the ordinary course of business are considered reliable and can usually be brought in under this exception if the proper foundation is laid when the records are introduced into evidence. Depending on which jurisdiction the case is in, either the records custodian or someone with knowledge of the records must lay a foundation for the records, however. The use of police records, especially

as substantive evidence against the accused in a criminal trial, is severely restricted under the Business Records exception. Typically, only generalized evidence about police procedure is admissible under this exception, and not facts about a specific case. For example, John is stopped for speeding 70 miles per hour in a 50 mile per hour zone. The officer, who determined John's speed with radar, records the speed in an incident report. He also calibrates and runs a diagnostic on his radar every day prior to beginning his shift. He records this in a log. At trial, the report itself would not be admissible as it pertained to the facts of the case. However, the officer's daily log in which he records his calibration and the daily diagnostics of his radar unit would be admissible under the business records exception. Because the Federal Rules of Evidence do not apply in the military tribunals in Guantanamo Bay, the hearsay rule also does not apply. How, if at all, this affects prisoner's Confrontation Clause rights, if any, is an interesting question.

- **Other exceptions, declarant's availability immaterial**: In the United States Federal Rules of Evidence, separate exceptions are made for **public records**, **family records**, and records in **ancient documents** of established authenticity. When regular or public records are kept, the absence of such records may also be used as admissible hearsay evidence.

9. Hearsay exceptions that apply only where the declarant is unavailable

- **dying declarations** and other **statements under belief of impending death**: often depicted in movies; the police officer asks the person on his deathbed, "Who attacked you?" and the victim replies, "The butler did it." However, case law has ruled out this exception in criminal law, because the witness should always be cross examined in court.
- **declarations against interest**: A statement that would incriminate or expose the declarant to liability to such an extent that it can be assumed he would only make such a statement if it were true. It would be assumed that one would lie to further one's interests, so a statement against his interests (such as exposing oneself to criminal or civil liability) likely would not be made unless it were true.

- **prior testimony**: if the testimony was given under oath and the party against whom the testimony is being proffered was present and had the opportunity to cross examine the witness at that time. Often used to enter depositions into the court record at trial.

- **admission of guilt**: if you make a statement, verbal or otherwise, as an admission of guilt of the matter at hand, that statement would not be regarded as hearsay. In other words, self-incriminating statements (confessions) are not hearsay.

- **forfeiture by wrongdoing**: the party against whom the statement is now offered (1) intentionally made the declarant unavailable; (2) with intent to prevent declarant's testimony; (3) by wrongdoing. In plain English, if you get rid of a witness, statements they made can be used against you.

10. Theories supporting hearsay exceptions

In some jurisdictions, such as Canada, the limited exceptions format to the rule have been replaced by a more general theory of exceptions to the hearsay rule that allows courts to decide when documents, testimony or other evidentiary proof can be used that might not otherwise be considered. The underlying rationale for many of the hearsay exceptions is that the circumstances of a particular statement make them reliable enough to be heard by a trier of fact. Statements made during the course of medical treatment, for example, are considered reliable because patients typically have little reason to lie to a doctor while they are being treated, and will generally be accurate in describing their ailments. This, of course, is not always true. Patients do sometimes lie to their doctors (to get painkillers to which they are not entitled, for example). Hearsay exceptions do not mandate that a trier of fact (the jury or, in non-jury trials, the judge) accept the hearsay statement as being true. Hearsay exceptions mean only that the trier of fact will be informed of the hearsay statement and will be allowed to consider it when deciding on a verdict in the case. The jury is free to disregard a hearsay statement if the jury does not believe it. The hearsay rule controls only what out-of-court statements a trier of fact gets to consider in deciding a case, not how they consider the out-of-court statements.

Topic : Privileged Communications

Topic Objective:

At the end of this topic student would be able to:

- Learn about Basis of Hearsay
- Develop learning regarding Attorney-Client in Hearsay
- Understand Spousal Privileges
- Comprehend Miscellaneous Privileges

Definition/Overview:

This topic comprehensively explores the term Privileged Communications. Under common law, privilege is a term describing a number of rules excluding evidence that would be adverse to a fundamental principle or relationship if it were disclosed.

The most common form is solicitor-client privilege (attorney-client privilege under US law and legal professional privilege in Australia). This protects confidential communications between a client and his legal adviser for the dominant purpose of legal advice. The rationale is that clients ought to be able to communicate freely with their lawyers, in order to facilitate the proper functioning of the legal system. Other common forms include privilege against self-incrimination (in other proceedings), without prejudice privilege (protecting communications made in the course of negotiations to settle a legal dispute), public interest privilege (formerly Crown privilege, protecting documents necessary for the proper functioning of government), marital privilege, medical professional privilege, and priest-penitent privilege.

The effect of the privilege is usually a right on the part of a party to a case, allowing them to prevent evidence from being introduced in the form of testimony from the person to whom the privilege runs. For example, a person can generally prevent his attorney from testifying about their legal relationship, even if the attorney were willing to do so. In a few instances, such as the marital privilege, the privilege is a right held by the potential witness. Thus, if a wife wishes to testify against her husband, she may do so even if he opposes this testimony; however, the wife has the privilege of refusing to testify even if the husband wishes her to do so.

Key Points:

1. Basis of Hearsay

- Historically, certain privileged against testifying have developed. typically involve:
- requisite relationship: relationship is present and relationship was entered in a manner not suggestive of intentional fraud or attempt to pervert the criminal justice system.
- confidentiality: communications were intended to be confidential.

2. Attorney-Client in Hearsay

Oldest recognized privilege

Requirements and Limitations of the Attorney-Client Privilege:

- client sought out services of individual reasonably believed to be licensed to practice law; intention of establishing an attorney-client relationship.
- the communication in question was undertaken in a manner designed to ensure confidentiality.
- Attorney-client privilege does not preclude the introduction of all other attorney-client communications e.g. intent to commit of future crimes situations where the services were retained to enable commission of crime.
- identity of client and fee.
- The Work-Product Doctrine & the Attorney-Client Privilege: counsel may formally request documents and other evidence from the adverse party; may include any evidence which is relevant to the matter at hand except that which is considered privileged.
- Rationale for privilege can be found in both 5th and 6th Amendments.

3. Spousal Privileges

Marital communications privilege: protects those spousal communications made in confidence. Spousal testimonial privilege: gives witnesses the right to refuse to testify against their spouses; orfor the accused to prevent testimony by that spouse; or automatically render the witness incompetent.

4. Parameters & Limitations

Does not to communications involving criminal activities in which spouses are conspirators.

Does not apply in cases involving crimes committed against those in the family unit.

The privilege is usually limited to criminal cases.

5. Physician-Patient

- 40 states have adopted a general physical-patient privilege statute
- No similar federal law

- Privilege rests solely with the patient

6. Parameters & Limitations

Professional relationship between the parties is necessary casual conversations not protected.

Legally ordered medical examinations not privileged.

State has other limitations including such matters as gun shot wounds and spousal abuse.

7. Psychotherapist-Patient Privilege

Based on the concept of psycho-analysis which requires complete disclosure for effective treatment. The mere possibility of disclosure would all but guarantee the collapse of an effective treatment strategy.

8. Parameters & Limitations

- Does not cover the planning, commission, or concealment of criminal activity.
- Does not cover allegations of child sexual abuse.
- Does not cover when the patient poses a threat of serious harm to themselves or others.

9. Clergy/Communicant

Protection originally based on sanctity of confession.

10. Parameters & Limitations

Only those conversations which are designed to be confidential enjoy the protections afforded under the statutory privilege:

- Need relationship.
- Privilege includes all levels of clergy.
- Ownership of the clergy-communicant privilege belongs to both parties.

11. Media/Source Privilege

31 states and the District of Columbiahave recognized limited protections afforded to journalists known as shield laws.

12. Government Privileges

Protection from disclosure of information contained within the confines of those relations extends only when the preservation of confidentiality outweighs the necessity for disclosure in the interest of justice:

- Police-Informant privilege.
- Privileged Information Regarding Military, Diplomatic, or National Security Secrets.
- Presidential Privilege.

13. Miscellaneous Privileges

- Interpreters-deaf.
- Sexual assault counselor victim.
- Parent-child privilege.
- Accountant-client privilege.
    - In Section 5 of this course you will cover these topics:

Documentary And Scientific Evidence

Cyber-Evidence Demonstrative Evidence

Topic : Documentary And Scientific Evidence

Topic Objective:

At the end of this topic student would be able to:

- Learn about Exclusion of Evidence
- Understand Proffering of Physical Evidence
- Learn about Documentary Evidence
- Understand Parol Evidence
- Learn about Authentication and Evidence
- Understand Scientific Evidence

- Learn about Physical Evidence
- Understand Frye test
- Learn about Daubert test
- Understand Reporting witness
- Learn about Interpreting witness

Definition/Overview:

This topic gives complete knowledge about documentary and Scientific Evidence. Documentary and Scientific Evidence: is defined as the application of forensic science and technology to identify specific objects from the trace evidence they leave, often at a crime scene or the scene of an accident. Forensic means "for the courts can be identified by their fingerprints. This assertion is supported by the philosophy of friction ridge identification, which states that "Friction ridge identification is established through the agreement of friction ridge formations, in sequence, having sufficient uniqueness to individualize".

Key Points:

1. Exclusion of Evidence

- Motions: formal requests submitted to the court for a specific order.
- Motion to exclude.
- Motion to strike.
- Objections: may be extended for a variety of reasons including, but not limited to: irrelevance of material, improper question, speculative, answer calls for hearsay, lack of response, etc.
- Evidence must be:
- Material: will affect the outcome of the legal proceeding at hand.
- Competent: appears truthful and reliable.
- Relevancy: has probative value.
- Relevant evidence may be excluded if its probative value is substantially outweighed by the potential for unfair prejudice.
-

2. Proffering of Physical Evidence

- First step in the introduction of evidence is marking by the clerk.
- Then presented to the witness for identification and authentication.
- Chain of custody must be established.
- Exceptions.

3. Documentary Evidence

Documentary evidence includes a variety of communications, and includes any medium in which data is collected or information stored. Generally speaking, there are four areas of interest distinct to considerations of documentary evidence.

- Parol evidence.
- best evidence.
- Authentication.
- Hearsay.

4. Parol Evidence

Parol evidence rule hinges upon the assumption that a written agreement is the final expression of that agreement. Best evidence rule provides that secondary evidence, such as copies or facsimiles, are not admissible if the original is available The best evidence or original document rule is codified under the Federal Rules of Evidence.

5. Authentication and Evidence

Authentication takes a variety of forms depending on the nature of the proposed document:

- Testimony of witness with knowledge.
- Non-expert opinion on handwriting.
- Comparison by trier or expert witness.
- Distinctive characteristics.
- Voice identification.
- Telephone conversations.
- Public records or reports.
- Ancient documents.

- Process or system.
- Self-authenticating documents.
- Certified copies of public records.
- Official publications of government agencies.
- Newspaper articles or periodicals.
- Trade inscriptions.
- Business records.
- Acknowledged documents.
- Commercial paper.

6. Scientific Evidence

Scientific evidence: physical evidence which involves theories, processes, experiments, empirical analysis and/or results of same which requires the utilization of expert testimony.

7. Physical Evidence

Questioned documents: require corroboration to demonstrate the genuineness or authenticity of the questioned item.

Includes:

- Handwriting and signature comparisons.
- Typewriting, printer, and ink analysis.
- Indentations, altered, and charred documents.
- Computer documents and expert testimony.
- Fingerprints.
- Voice Recognition: traditionally, testimony involving this was limited to lay witnesses and their opinions.
- Firearms.
- Striations.
- ballistics.
- trace evidence.
- DNA.
-

8. Role

The educating witness teaches the fact-finder (jury or, in a bench trial, judge) about the underlying scientific theory and instrument implementing theory. This witness is an expert witness, called to elicit opinions that a theory is valid and the instruments involved are reliable. The witness must be accredited as an expert witness, which may require academic qualifications or specific training.

- Judicial Notice: may moot the need for this witness.
- Qualifications: Relative experience based on complexity and subtlety of the subject-matter. This witness is on high plane of abstraction about the validity and reliability.
- Validity of Theory: Most jurisdictions require the theory used by an expert witness to meet certain qualifications before being used in court. The two most common are the Daubert and Frye tests.

9. Frye test

The Frye test, coming from the case Frye v. United States(1923), said that admissible scientific evidence must be a result of a theory that had "general acceptance" in scientific community. This test results in uniform decisions regarding admissibility. In particular, the judges in Frye ruled that:

Just when a scientific principle or discovery crosses the line between experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

This test has been criticized as misunderstanding the scientific process and being based on the assumption that a jury is unable to evaluate scientific testimony. The goals of the test were to avoid evidence from overly questionable or controversial scientific theories to be used; it was used to exclude lie-detector results employed by the defense in the original case.

10. Daubert test

The Daubert test arose out of the United States Supreme Court case Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993). It requires four things to be shown:

- (1) That the theory is testable (has it been tested?)
- (2) That the theory has been peer reviewed, (Peer reviewing usually reduces the chances of error in the theory)
- (3) The reliability and error rate (100% reliability and zero error are not required, but the rates must be reported)
- (4) The extent of general acceptance by the scientific community

11. Reporting witness

Reporting witness: Called after teaching witness leaves stand. Usually the laboratory technician who personally conducted the test. Witness will describe both the test and the results. When describing test, will venture opinions that proper test procedures were used and that equipment was in good working order.

- Whether witness is qualified to conduct test. Could qualify as expert by virtue of "skill" gained through "experience & training" (FRE 702)usually experiential, on-the-job training.
- Whether the witness received the correct object to be tested. (Chain of Custody satisfying FRE 104(b)).
- Whether the instrument(s) involved were in proper working order.
- Proof-test procedures were used. This split the courts, but under CL, most Jx require foundational proof that the witness used proper testing procedures on the occasion in question.
- Statement of test result: witness says what the results were. (This provides an excellent place to place physical evidence.) Remember, validating scientific evidence raises a logical relevance issue, as does the authentication (e.g. with enlarged photo).

12. Interpreting witness

Interpreting (Evaluating) Witness: Sometimes not needed 1) when test result is self-explanatory or pass-fail, or 2) when there is a statutory presumption obviating the need (e.g. drunk driving statutes and a test showing raised blood alcohol levels). Otherwise, this witness

needed to complete the foundation. Syllogistic in nature: 1) states the interpretive standard (Rule or Major Premise), applies the standard to the test result (minor premise) and derives a conclusion.

- Qualifications: a hybrid with both academic and experiential qualifications.
- Will base finding on the Reporting witness. [Experts may base opinion on 1) what personally observed, 2) facts that are the type of data customarily considered by practitioners of the specially and 3) hypothetically assumed facts.] Ideal if present when Reporter conducted test, but may be permitted in some jurisdictions.
- Some jurisdictions won't accept opinion unless it is a "reasonable scientific opinion." Otherwise, need to consider if the witness can couch the opinion in terms of statistical probably.
- For example, in the casebook case of People v. Collins, 438 P.2d 33 (Cal. 1968), an elderly lady was knocked down and robbed by a blond who escaped in yellow car with bearded black man. Defendants met that rough description but could not be conclusively identified. Prosecutor used a mathematics professor to discuss the probability that this couple could be the guilty party. Lower court overruled Defendants' objection. Court held that 1) there was no foundational establishment of the underlying probabilities and 2) the fact that the Defendants' fit a probability model was irrelevant because it doesn't prove they did it.

Topic : Cyber-Evidence Demonstrative Evidence

Topic Objective:

At the end of this topic student would be able to:

- Understand Cyber Evidence
- Learn about Proliferation of federal statutes in recent years
- Understand Demonstrative Evidence

Definition/Overview:

This topic helps in understanding the concept of Cyber-Evidence & Demonstrative Evidence Cyber evidence is any probative information stored or transmitted in digital form that a party to a court case may use at trial. The use of digital evidence has increased in the past few decades as courts have allowed the use of e-mails, digital photographs, ATM transaction logs,

word processing documents, instant message histories, files saved from accounting programs, spreadsheets, internet browser histories, databases, the contents of computer memory, computer backups, computer printouts, Global Positioning System tracks, logs from a hotels electronic door locks, and digital video or audio files. While many courts in the United Stateshave applied the Federal Rules of Evidence to digital evidence in the same way as more traditional documents, courts have noted very important differences. As compared to the more traditional evidence, courts have noted that digital evidence tends to be more voluminous, more difficult to destroy, easily modified, easily duplicated, potentially more expressive, and more readily available. As such, some courts have sometimes treated digital evidence differently for purposes of authentication, hearsay, the best evidence rule, and privilege.

Key Points:

1. Cyber Evidence

Globalization of commerce and accessibility of knowledge has resulted in new forms of deviance and an emergence of a more sophisticated criminal class E.g. fraud, theft, and misappropriation of funds via computer. Problems associated with the prosecution of computer crime:

- inadequate resources
- lack of reporting
- stereotypes of perpetrators and perceived insignificance
- dearth of legislation and criminal statutes
- intangibility and volatility of evidence
- prosecutorial reluctance and judicial ignorance
- jurisprudential inconsistency

2. Proliferation of federal statutes in recent years

Most of these specifically address the manner in which electronic surveillance of computer systems can be monitored and provides for the prosecution of hackers.

- U.S. Patriot Act.
- The most common judicial challenges confronting the prosecution of computer crime. involve the 1st and the 4th Amendments.
- Child pornography is particular concern.

3. Warrantless Searches

- Consent.
- Plain View.
- Exigent Circumstances and Emergencies.

4. Demonstrative Evidence

Visual or aural aids which are created for the purpose of illustration and clarification of oral testimony or which are designed to recreate or re-enact a tangible object, event, or experiment Admissibility contingent upon:

- Need for illustration of tangible evidence which has met the legal requirement for introduction.
- Satisfaction of the foundational requirements.
- A demonstration of relevancy, materiality, and competency.
- A demonstration that the item is more probative than prejudicial.
- Experiments: experts called to testify regarding a particular matter will often conduct out-of-court experiments to validate and illustrate a point.

Photographs used when:

- Reasonable tendency to prove some material fact at issue.
- courtroom actor could have viewed or examined the subject of the pictures at the time they were taken.
- it assists a courtroom actor in understanding case.
- it corroborates other evidence.
- It tends to disprove the testimony of a witness (i.e. impeachment).
- it helps a witness in illustrating or explaining his/her testimony.
-

5. Special issues or challenges to photographic evidence:

- Undue prejudice.
- Automatic photographs.
- Digital photography.
- Videotapes.

For admissibility, for the most part, computer graphics/animation has been treated in much the same manner as photographs.

[Fig 2: The French Declaration of the Rights of Man and of the Citizen, whose principles still have constitutional value.]

7. Law and Social Activities

Law governs a wide variety of social activities. Contract law regulates everything from buying a bus ticket to trading on derivatives markets. Property law defines rights and obligations related to the transfer and title of personal and real property. Trust law applies to assets held for investment and financial security, while tort law allows claims for compensation if a person's rights or property are harmed. If the harm is criminalized in penal code, criminal law offers means by which the state can prosecute the perpetrator. Constitutional law provides a framework for the creation of law, the protection of human rights and the election of political representatives. Administrative law is used to review the decisions of government agencies, while international law governs affairs between sovereign nation states in activities ranging from trade to environmental regulation or military action. Legal systems elaborate rights and responsibilities in a variety of ways. A basic distinction is generally made between civil law jurisdictions and systems using common law. In some countries, religion informs the law. Scholars investigate the nature of law through many perspectives, including legal history and philosophy, or social sciences such as economics and sociology. The study of law raises important and complex issues concerning equality, fairness, liberty and justice. "In its majestic equality", said the author Anatole France in 1894, "the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread." The central institutions for interpreting and creating law are the three main

branches of government, namely an impartial judiciary, a democratic legislature, and an accountable executive. To implement and enforce the law and provide services to the public, a government's bureaucracy, the military and police are vital. While all these organs of the state are creatures created and bound by law, an independent legal profession and a vibrant civil society inform and support their progress. legal systems deal with the same basic issues, but each country categorizes and identifies its legal subjects in different ways. A common distinction is that between "public law" (a term related closely to the state, and including constitutional, administrative and criminal law), and "private law" (which covers contract, tort and property). In civil law systems, contract and tort fall under a general law of obligations, while trusts law is dealt with under statutory regimes or international conventions. International, constitutional and administrative law, criminal law, contract, tort, property law and trusts are regarded as the "traditional core subjects", although there are many further disciplines which may be of greater practical importance.

8. Criminal law

Criminal law (also known as penal law) pertains to crimes and punishment. It thus regulates the definition of and penalties for offences found to have a sufficiently deleterious social impact. Investigating, apprehending, charging, and trying suspected offenders are regulated by the law of criminal procedure. The paradigm case of a crime lies in the proof, in the concept of beyond reasonable doubt, the judgment that a person is guilty of two things. First, the accused must commit an act which is deemed by society to be criminal, or actus reus(guilty act). Second, the accused must have the requisite malicious intent to do a criminal act, or mens rea(guilty mind). However for so called "strict liability" crimes, an actus reusis enough. Criminal systems of the civil law tradition distinguish between intention in the broad sense (dolus directus and dolus eventualis), and negligence. Negligence does not carry criminal responsibility unless a particular crime provides for its punishment.

[Fig 3: A depiction of a 1600s criminal trial, for witchcraft in Salem]

Acts of crime include murder, assault, fraud and theft. In exceptional circumstances defences can apply to specific acts, such as killing in self defence, or pleading insanity. Another example is in the 19th century English case of R v Dudleyand Stephens, which tested a defence of "necessity". The Mignotte, sailing from Southampton toSydney, sank. Three crew members and a cabin boy were stranded on a raft. They were starving and the cabin boy was close to death. Driven to extreme hunger, the crew killed and ate the cabin boy. The crew survived and were rescued, but put on trial for murder. They argued it was necessary to kill the cabin boy to preserve their own lives. Lord Coleridge, expressing immense disapproval, ruled, "to preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it." The men were sentenced to hang, but public opinion was overwhelmingly supportive of the crew's right to preserve their own lives. In the end, the Crown commuted their sentences to six months in jail.

Criminal law offences are viewed as offences against not just individual victims, but the community as well. The state, usually with the help of police, takes the lead in prosecution, which is why in common law countries cases are cited as "The People v " or "R (for Rex or Regina) v " Also, lay juries are often used to determine the guilt of defendants on points of fact: juries cannot change legal rules. Some developed countries still condone capital punishment for criminal activity, but the normal punishment for a crime will be imprisonment, fines, state supervision (such as probation), or community service. Modern criminal law has been affected considerably by the social sciences, especially with respect to sentencing, legal research, legislation, and rehabilitation. On the international field, 108 are members of the International Criminal Court, which was established to try people for crimes against humanity.

9. Contract law

[Fig 4: The famous Carbolic Smoke Ball advertisement to cure influenza was held to be a unilateral contract.]

Contract law regulates the exchange of promises between parties to perform or refrain from performing an act enforceable in a court of law. Contracts can be formed from oral or written agreements. The concept of a "contract" is based on the Latin phrase pacta sunt servanda(agreements must be kept). In common law jurisdictions, three key elements to the creation of a contract are necessary: offer and acceptance, consideration and the intention to create legal relations. In Carlill v Carbolic Smoke Ball Company a medical firm advertised that its new wonder drug, the smokeball, would cure people's flu, and if it did not, the buyers would get 100. Many people sued for their 100 when the drug did not work. Fearing bankruptcy, Carbolic argued the advert was not to be taken as a serious, legally binding offer. It was an invitation to treat, mere puff, a gimmick. But the court of appeal held that to a reasonable man Carbolic had made a serious offer. People had given good consideration for it by going to the "distinct inconvenience" of using a faulty product. "Read the advertisement how you will, and twist it about as you will", said Lord Justice Lindley, "here is a distinct promise expressed in language which is perfectly unmistakable".

"Consideration" indicates the fact that all parties to a contract have exchanged something of value. Some common law systems, including Australia, are moving away from the idea of consideration as a requirement. The idea of estoppel or culpa in contrahendo, can be used to create obligations during pre-contractual negotiations. In civil law jurisdictions, consideration is not required for a contract to be binding. In France, an ordinary contract is said to form simply on the basis of a "meeting of the minds" or a "concurrence of wills". Germany has a special approach to contracts, which ties into property law. Their 'abstraction principle'

(Abstraktionsprinzip) means that the personal obligation of contract forms separately from the title of property being conferred. When contracts are invalidated for some reason (e.g. a car buyer is so drunk that he lacks legal capacity to contract) the contractual obligation to pay can be invalidated separately from the proprietary title of the car. Unjust enrichment law, rather than contract law, is then used to restore title to the rightful owner.

10. Tort law

Torts, sometimes called delicts, are civil wrongs. To have acted tortuously, one must have breached a duty to another person, or infringed some pre-existing legal right. A simple example might be accidentally hitting someone with a cricket ball. Under negligence law, the most common form of tort, the injured party could potentially claim compensation for his injuries from the party responsible. The principles of negligence are illustrated by Donoghue v Stevenson. A friend of Mr.s Donoghue ordered an opaque bottle of ginger beer (intended for the consumption of Mr.s Donoghue) in a caf in Paisley. Having consumed half of it, Mr.s Donoghue poured the remainder into a tumbler. The decomposing remains of a snail floated out. She claimed to have suffered from shock, fell ill with gastroenteritis and sued the manufacturer for carelessly allowing the drink to be contaminated. The House of Lords decided that the manufacturer was liable for Mr.s Donoghue's illness. Lord Atkin took a distinctly moral approach, and said,

"The liability for negligence ... is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay ... The rule that you are to love your neighbor becomes in law, you must not injure your neighbor; and the lawyer's question, Who is my neighbor? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor."

This became the basis for the four principles of negligence; (1) Mr.. Stevenson owed Mr.s. Donoghue a duty of care to provide safe drinks (2) he breached his duty of care (3) the harm would not have occurred but for his breach and (4) his act was the proximate cause, or not too remote a consequence, of her harm. Another example of tort might be a neighbour making excessively loud noises with machinery on his property. Under a nuisance claim the noise could be stopped. Torts can also involve intentional acts, such as assault, battery or trespass. A better known tort is defamation, which occurs, for example, when a newspaper makes unsupportable allegations that damage a politician's reputation. More infamous are economic torts, which form the basis of labor law in some countries by making trade unions liable for strikes, when statute does not provide immunity.

[Fig 5 The "McLibel" two were involved in the longest running case in UKhistory for publishing a pamphlet criticising McDonald's restaurants.]

11. Property law

Property law governs valuable things that people call 'theirs'. Real property, sometimes called 'real estate' refers to ownership of land and things attached to it. Personal property, refers to everything else; movable objects, such as computers, cars, jewelry, and sandwiches, or intangible rights, such as stocks and shares. A right in rem is a right to a specific piece of property, contrasting to a right in personam which allows compensation for a loss, but not a particular thing back. Land law forms the basis for most kinds of property law, and is the most complex. It concerns mortgages, rental agreements, licenses, covenants, easements and the statutory systems for land registration. Regulations on the use of personal property fall under intellectual property, company law, trusts and commercial law. An example of a basic case of most property law is Armory v Delamirie. A chimney sweep's boy found a jewel encrusted with precious stones. He took it to a goldsmith to have it valued. The goldsmith's apprentice looked at it, sneakily removed the stones, told the boy it was worth three halfpence and that he would buy it. The boy said he would prefer the jewel back, so the apprentice gave it to him, but without the stones. The boy sued the goldsmith for his apprentice's attempt to cheat him. Lord Chief Justice Pratt ruled that even though the boy could not be said to own the jewel, he should be considered the rightful keeper ("finders keeper") until the original owner is found. In fact the apprentice and the boy both had a right of possession in the jewel (a technical concept, meaning evidence that something could belong to someone), but the boy's possessory interest was considered better, because it could be shown to be first in time. Physical possession is nine tenths of the law, but not all.

This case is used to support the view of property in common law jurisdictions, that the person who can show the best claim to a piece of property, against any contesting party, is the

owner. By contrast, the classic civil law approach to property, propounded by Friedrich Carl von Savigny, is that it is a right good against the world. Obligations, like contracts and torts are conceptualized as rights good between individuals. The idea of property raises many further philosophical and political issues. Locke argued that our "lives, liberties and estates" are our property because we own our bodies and mix our labor with our surroundings.

12. Equity and Trusts

[Fig 7: The Court of Chancery, London, early 19th century]

Equity is a body of rules that developed in Englandseparately from the "common law". The common law was administered by judges. The Lord Chancellor on the other hand, as the King's keeper of conscience, could overrule the judge made law if he thought it equitable to do so. This meant equity came to operate more through principles than rigid rules. For instance, whereas neither the common law nor civil law systems allow people to split the ownership from the control of one piece of property, equity allows this through an arrangement known as a 'trust'. 'Trustees' control property, whereas the 'beneficial' (or 'equitable') ownership of trust property is held by people known as 'beneficiaries'. Trustees owe duties to their beneficiaries to take good care of the entrusted property. In the early case of Keech v Sandford a child had inherited the lease on a market in Romford, London. Mr. Sandford was entrusted to look after this property until the child matured. But before then, the lease expired. The landlord had (apparently) told Mr. Sandford that he did not want the child to have the renewed lease. Yet the landlord was happy (apparently) to give Mr. Sandford the opportunity of the lease instead. Mr. Sandford took it. When the child (now Mr. Keech) grew up, he sued Mr. Sandford for the profit that he had been making by getting the market's lease. Mr. Sandford was meant to be trusted, but he put himself in a position of conflict of interest. The Lord Chancellor, Lord King, agreed and ordered Mr. Sandford should disgorge his profits. He wrote,

"I very well see, if a trustee, on the refusal to renew, might have a lease to himself few trust-estates would be renewed ... This may seem very hard, that the trustee is the only person of all mankind who might not have the lease; but it is very proper that the rule should be strictly pursued and not at all relaxed."

Of course, Lord King LC was worried that trustees might exploit opportunities to use trust property for themselves instead of looking after it. Business speculators using trusts had just recently caused a stock market crash. Strict duties for trustees made their way into company law and were applied to directors and chief executive officers. Another example of a trustee's duty might be to invest property wisely or sell it. This is especially the case for pension funds, the most important form of trust, where investors are trustees for people's savings until retirement. But trusts can also be set up for charitable purposes, famous examples being the BritishMuseum or the Rockefeller Foundation.

13. Further disciplines

Law spreads far beyond the core subjects into virtually every area of life. Three categories are presented for convenience, though the subjects intertwine and overlap.

- **Labor law** is the study of a tripartite industrial relationship between worker, employer and trade union. This involves collective bargaining regulation, and the right to strike. Individual employment law refers to workplace rights, such as health and safety or a minimum wage.
- **Human rights**, civil rights and human rights law are important fields to guarantee everyone basic freedoms and entitlements. These are laid down in codes such as the Universal Declaration of Human Rights, the European Convention on Human Rights (which founded the European Court of Human Rights) and the U.S. Bill of Rights. The Treaty of Lisbon makes the Charter of Fundamental Rights of the European Union legally binding in all member states except Poland and the United Kingdom.
- **Civil procedure** and **criminal procedure** concern the rules that courts must follow as a trial and appeals proceed. Both concern a citizen's right to a fair trial or hearing.
- **Evidence** law involves which materials are admissible in courts for a case to be built.

- **Immigration law** and **nationality law** concern the rights of foreigners to live and work in a nation-state that is not their own and to acquire or lose citizenship. Both also involve the right of asylum and the problem of stateless individuals.
- **Social security** law refers to the rights people have to social insurance, such as jobseekers' allowances or housing benefits.
- **Family law** covers marriage and divorce proceedings, the rights of children and rights to property and money in the event of separation.

14. Law and commerce

- **Company law** sprang from the law of trusts, on the principle of separating ownership of property and control. The law of the modern company began with the Joint Stock Companies Act 1856, passed in the United Kingdom, which provided investors with a simple registration procedure to gain limited liability under the separate legal personality of the corporation.
- **Commercial law** covers complex contract and property law. The law of agency, insurance law, bills of exchange, insolvency and bankruptcy law and sales law are all important, and trace back to the medival Lex Mercatoria. The UK Sale of Goods Acts and the US Uniform Commercial Code are examples of codified common law commercial principles.
- **Admiralty law** and the **Law of the Sea** lay a basic framework for free trade and commerce across the world's oceans and seas, where outside of a country's zone of control. Shipping companies operate through ordinary principles of commercial law, generalised for a global market. Admiralty law also encompasses specialised issues such as salvage, maritime liens, and injuries to passengers.
- **Intellectual property** law aims at safeguarding creators and other producers of intellectual goods and services. These are legal rights (copyrights, trademarks, patents, and related rights) which result from intellectual activity in the industrial, literary and artistic fields.
- **Restitution** deals with the recovery of someone else's gain, rather than compensation for one's own loss.
- **Unjust enrichment** is the third pillar of civil law (along with contract and tort). When someone has been unjustly enriched (or there is an "absence of basis" for a transaction) at another's expense, this event generates the right to restitution to reverse that gain.

15. Law and regulation

[Fig 8: The New YorkStock Exchange trading floor after the Wall Street Crash of 1929, before tougher banking regulation was introduced.]

- **Tax law** involves regulations that concern value added tax, corporate tax, income tax.
- **Banking law** and financial regulation set minimum standards on the amounts of capital banks must hold, and rules about best practice for investment. This is to insure against the risk of economic crises, such as the Wall Street Crash of 1929.
- **Regulation** deals with the provision of public services and utilities. **Water law** is one example. Especially since privatization became popular, private companies doing the jobs previously controlled by government have been bound by social responsibilities. Energy, gas telecomms and water are regulated industries in most OECD countries.
- **Competition law**, known in the U.S. as antitrust law, is an evolving field that traces as far back as Roman decrees against price fixing and the English restraint of trade doctrine. Modern competition law derives from the U.S. anti-cartel and anti-monopoly statutes (the Sherman Act and Clayton Act) of the turn of the 20th century. It is used to control businesses who attempt to use their economic influence to distort market prices at the expense of consumer welfare.
- **Consumer law** could include anything from regulations on unfair contractual terms and clauses to directives on airline baggage insurance.
- **Environmental law** is increasingly important, especially in light of the Kyoto Protocol and the potential danger of climate change. Environmental protection also serves to penalize polluters within domestic legal systems.

16. Legal systems

In general, legal systems can be split between civil law and common law systems. The term civil law should not be confused with civil law as a group of legal subjects, as distinct from

criminal or public law. A third type of legal systemstill accepted by some countriesis religious law, based on scriptures and interpretations thereof. The specific system that a country is ruled by is often determined by its history, connections with other countries, or its adherence to international standards. The sources that jurisdictions adopt as authoritatively binding are the defining features of any legal system. Yet classification is a matter of form rather than substance, since similar rules often prevail.

16.1. Civil law

[Fig 9: First page of the 1804 edition of the Napoleonic Code]

Civil law is the legal system used in most countries around the world today. In civil law the sources recognized as authoritative are, primarily, legislationespecially codifications in constitutions or statutes passed by governmentand custom. Codifications date back millennia, with one early example being the Babylonian Codex Hammurabi. Modern civil law systems essentially derive from the legal practice of the Roman Empire whose texts were rediscovered in medieval Europe. Roman law in the days of the RomanRepublic and Empire was heavily procedural, and lacked a professional legal class. Instead a lay person, iudex, was chosen to adjudicate. Precedents were not reported, so any case law that developed was disguised and almost unrecognized. Each case was to be decided afresh from the laws of the state, which mirrors the (theoretical) unimportance of judges' decisions for future cases in civil law systems today. During the 6th century AD in the Eastern Roman Empire, the Emperor Justinian I codified and consolidated the laws that had existed in Rome, so that what remained was one-twentieth of the mass of legal texts from before. This became known as the Corpus Juris Civilis. As one legal historian wrote, "Justinian consciously looked back to the golden age of Roman law and aimed to restore

it to the peak it had reached three centuries before." Western Europe, meanwhile, slowly slipped into the Dark Ages, and it was not until the 11th century that scholars in the University of Bologna rediscovered the texts and used them to interpret their own laws. Civil law codifications based closely on Roman law, alongside some influences from religious laws such as Canon law and Islamic law, continued to spread throughout Europe until the Enlightenment; then, in the 19th century, both France, with the Code Civil, and Germany, with the Brgerliches Gesetzbuch, modernised their legal codes. Both these codes influenced heavily not only the law systems of the countries in continental Europe (e.g. Greece), but also the Japanese and Korean legal traditions. Today countries that have civil law systems range from Russiaand China to most of Central and Latin America.

16.2 Common law and equity

[Fig 10 King John of England signs Magna Carta.]

Common law and equity are legal systems where decisions by courts are explicitly acknowledged to be legal sources. The "doctrine of precedent", or stare decisis (Latin for "to stand by decisions") means that decisions by higher courts bind lower courts. Common law systems also rely on statutes, passed by the legislature, but may make less of a systematic attempt to codify their laws than in a "civil law" system. Common law originated from England and has been inherited by almost every country once tied to the British Empire (except Malta, Scotland, the U.S.state of Louisiana and the Canadian province of Quebec). In medieval England, the Norman conquest of England led to a unification of various tribal customs and hence a law "common" to the whole country. Perhaps influenced by Islamic legal practices around the time of

the Crusades, the common law developed when the English monarchy had been weakened by the enormous cost of fighting for control over large parts of France. King John had been forced by his barons to sign a document limiting his authority to pass laws. This "great charter" or Magna Carta of 1215 also required that the King's entourage of judges hold their courts and judgments at "a certain place" rather than dispensing autocratic justice in unpredictable places about the country. A concentrated and elite group of judges acquired a dominant role in law-making under this system, and compared to its European counterparts the English judiciary became highly centralized. In 1297, for instance, while the highest court in Francehad fifty-one judges, the English Court of Common Pleas had five. This powerful and tight-knit judiciary gave rise to a rigid and inflexible system of common law. As a result, as time went on, increasing numbers of citizens petitioned the King to override the common law, and on the King's behalf the Lord Chancellor gave judgment to do what was equitable in a case. From the time of Sir Thomas More, the first lawyer to be appointed as Lord Chancellor, a systematic body of equity grew up alongside the rigid common law, and developed its own Court of Chancery. At first, equity was often criticised as erratic, that it "varies like the Chancellor's foot". But over time it developed solid principles, especially under Lord Eldon. In the 19th century the two systems were fused into one another. In developing the common law and equity, academic authors have always played an important part. William Blackstone, from around 1760, was the first scholar to describe and teach it. But merely in describing, scholars who sought explanations and underlying structures slowly changed the way the law actually worked.

16.3 Religious law

Religious law is explicitly based on religious precepts. Examples include the Jewish Halakha and Islamic Shariaboth of which translate as the "path to follow"while Christian canon law also survives in some church communities. Often the implication of religion for law is unalterability, because the word of God cannot be amended or legislated against by judges or governments. However a thorough and detailed legal system generally requires human elaboration. For instance, the Quran has some law, and it acts as a source of further law through interpretation, Qiyas (reasoning by analogy), Ijma (consensus) and precedent. This is mainly contained in a body of law and jurisprudence known as Sharia and Fiqh respectively, which at least one scholar has claimed had an influence on the early development of the common law, as well as

some influence on civil law. Another example is the Torah or Old Testament, in the Pentateuch or Five Books of Moses. This contains the basic code of Jewish law, which some Israeli communities choose to use. The Halakha is a code of Jewish law which summarizes some of the Talmud's interpretations. Nevertheless, Israeli law allows litigants to use religious laws only if they choose. Canon law is only in use by members of the clergy in the Roman Catholic Church, the Eastern Orthodox Church and the Anglican Communion.

[Fig 11: A trial in the Ottoman Empire, 1879, when religious law applied under the Mecelle.]

Until the 18th century, Sharia law was practiced throughout the Muslim world in a non-codified form, with the Ottoman Empire's Mecelle code in the 19th century being first attempt at codifying elements of Sharia law. Since the mid-1940s, efforts have been made, in country after country, to bring Sharia law more into line with modern conditions and conceptions. In modern times, the legal systems of many Muslim countries draw upon both civil and common law traditions as well as Islamic law and custom. The constitutions of certain Muslim states, such as Egypt and Afghanistan, recognize Islam as the religion of the state, obliging legislature to adhere to Sharia. Saudi Arabia recognizes Quran as its constitution, and is governed on the basis of Islamic law. Iran has also witnessed a reiteration of Islamic law into its legal system after 1979. During the last few decades, one of the fundamental features of the movement of Islamic resurgence has been the call to restore the Sharia, which has generated a vast amount of literature and affected world politics.

17. History of law

[Fig 12: King Hammurabi is revealed the code of laws by the Mesopotamian sun god Shamash, also revered as the god of justice.]

The history of law is closely connected to the development of civilization. Ancient Egyptian law, dating as far back as 3000 BC, contained a civil code that was probably broken into twelve books. It was based on the concept of Ma'at, characterized by tradition, rhetorical speech, social equality and impartiality. By the 22nd century BC, the ancient Sumerian ruler Ur-Nammu had formulated the first law code, which consisted of casuistic statements ("if ... then ..."). Around 1760 BC, King Hammurabi further developed Babylonian law, by codifying and inscribing it in stone. Hammurabi placed several copies of his law code throughout the kingdom of Babylon as stelae, for the entire public to see; this became known as the Codex Hammurabi. The most intact copy of these stelae was discovered in the 19th century by British Assyriologists, and has since been fully transliterated and translated into various languages, including English, German, and French.

The Old Testament is likely the oldest surviving body of law still relevant to modern legal systems. It dates back to 1280 BC, and takes the form of moral imperatives as recommendations for a good society. The small Greek city-state, Ancient Athens, and from about 8th century BC was the first society to be based on broad inclusion of its citizenry; excluding women and the slave class. However.Athens had no legal science, and no word for "law" as an abstract concept. Yet Ancient Greek law contained major constitutional innovations in the development of democracy. Roman law was heavily influenced by Greek philosophy, but its detailed rules were developed by professional jurists, and were highly sophisticated. Over the centuries between the rise and decline of the Roman Empire, law was adapted to cope with the changing social situations, and underwent major codification during

Justinian I. Although it declined in significance during the Dark Ages, Roman law was rediscovered around the 11th century when medieval legal scholars began to research Roman codes and adapt their concepts. In medieval England, the King's judges developed a body of precedent, which later became the common law. A Europe-wide Lex Mercatoriawas formed so that merchants could trade with common standards of practice; rather than with the many splintered facets of local laws. The Lex Mercatoria, a precursor to modern commercial law, emphasised the freedom of contract and alienability of property. As nationalism grew in the 18th and 19th centuries, Lex Mercatoria was incorporated into countries' local law under new civil codes. The French Napoleonic Code and the German became the most influential. In contrast to English common law, which consists of enormous tomes of case law, codes in small books are easy to export and easy for judges to apply. However, today there are signs that civil and common law are converging. EU law is codified in treaties, but develops through the precedent laid down by the European Court of Justice.

[Fig 13: The Constitution of India is the longest written constitution for a country, containing 444 articles, 12 schedules, numerous amendments and 117,369 words.]

Islamic law and jurisprudence developed during the Middle Ages. The methodology of legal precedent and reasoning by analogy (Qiyas) used in early Islamic law was similar to that of the later English common law system. This was particularly the case for the Maliki school of Islamic law active in North Africa, Islamic Spain and the Emirate of Sicily. Between the 8th and 11th centuries, Maliki law developed several legal institutions that were parallel with later common law institutions.

Ancient India and China represent distinct traditions of law, and have historically had independent schools of legal theory and practice. The Arthashastra, probably compiled around 100 AD (although it contains older material), and the ManusMr.iti(c. 100300 AD) were foundational treatises in India, and comprise texts considered authoritative legal guidance. Manu's central philosophy was tolerance and Pluralism, and was cited across Southeast Asia. This Hindu tradition, along with Islamic law, was supplanted by the common law when Indiabecame part of the British Empire. Malaysia, Brunei,Singapore and Hong Kong also adopted the common law. The eastern Asia legal tradition reflects a unique blend of secular and religious influences. Japanwas the first country to begin modernizing its legal system along western lines, by importing bits of the French, but mostly the German Civil Code. This partly reflected Germany's status as a rising power in the late 19th century. Similarly, traditional Chinese law gave way to westernization towards the final years of the Ch'ing dynasty in the form of six private law codes based mainly on the Japanese model of German law. Today Taiwanese law retains the closest affinity to the codifications from that period, because of the split between Chiang Kai-shek's nationalists, who fled there, and Mao Zedong's communists who won control of the mainland in 1949. The current legal infrastructure in the People's Republic of Chinawas heavily influenced by Soviet Socialist law, which essentially inflates administrative law at the expense of private law rights. Due to rapid industrialization, today Chinaundergoing a process of reform, at least in terms of economic, if not social and political, rights. A new contract code in 1999 represented a move away from administrative domination. Furthermore, after negotiations lasting fifteen years, in 2001 Chinajoined the World Trade Organization.

18. Philosophy of law

The philosophy of law is commonly known as jurisprudence. Normative jurisprudence is essentially political philosophy, and asks "what should law be?", while analytic jurisprudence asks "what is law?". John Austin's utilitarian answer was that law is "commands, backed by threat of sanctions, from a sovereign, to whom people have a habit of obedience". Natural lawyers on the other side, such as Jean-Jacques Rousseau, argue that law reflects essentially moral and unchangeable laws of nature. The concept of "natural law" emerged in ancient Greek philosophy concurrently and in entanglement with the notion of justice, and re-entered the mainstream of Western culture through the writings of Thomas Aquinas and the commentaries of Islamic philosopher and jurist Averroes.

Hugo Grotius, the founder of a purely rationalistic system of natural law, argued that law arises from both a social impulseas Aristotle had indicatedand reason. Immanuel Kant

believed a moral imperative requires laws "be chosen as though they should hold as universal laws of nature". Jeremy Bentham and his student Austin, following David Hume, believed that this conflated the "is" and what "ought to be" problem. Bentham and Austin argued for law's positivism; that real law is entirely separate from "morality". Kant was also criticised by Friedrich Nietzsche, who rejected the principle of equality, and believed that law emanates from the will to power, and cannot be labeled as "moral" or "immoral".

In 1934, the Austrian philosopher Hans Kelsen continued the positivist tradition in his book the Pure Theory of Law. Kelsen believed that although law is separate from morality, it is endowed with "normativity"; meaning we ought to obey it. While laws are positive "is" statements (e.g. the fine for reversing on a highway is 500); law tells us what we "should" do. Thus, each legal system can be hypothesised to have a basic norm (Grundnorm) instructing us to obey. Kelsen's major opponent, Carl Schmitt, rejected both positivism and the idea of the rule of law because he did not accept the primacy of abstract normative principles over concrete political positions and decisions. Therefore, Schmitt advocated a jurisprudence of the exception (state of emergency), which denied that legal norms could encompass of all political experience.

[Fig 14: Bentham's utilitarian theories remained dominant in law until the 20th century.]

Later in the 20th century, H. L. A. Hart attacked Austinfor his simplifications and Kelsen for his fictions in The Concept of Law. Hart argued law is a system of rules, divided into primary (rules of conduct) and secondary ones (rules addressed to officials to administer primary rules). Secondary rules are further divided into rules of adjudication (to resolve legal disputes), rules of change (allowing laws to be varied) and the rule of recognition (allowing

laws to be identified as valid). Two of Hart's students continued the debate: In his book Law's Empire, Ronald Dworkin attacked Hart and the positivists for their refusal to treat law as a moral issue. Dworkin argues that law is an "interpretive concept", that requires judges to find the best fitting and most just solution to a legal dispute, given their constitutional traditions. Joseph Raz, on the other hand, defended the positivist outlook and criticised Hart's "soft social thesis" approach in The Authority of Law. Raz argues that law is authority, identifiable purely through social sources and without reference to moral reasoning. In his view, any categorization of rules beyond their role as authoritative instruments in mediation are best left to sociology, rather than jurisprudence.

19. Economic analysis of law

In the 18th century Adam Smith presented a philosophical foundation for explaining the relationship between law and economics. The discipline arose partly out of a critique of trade unions and U.S.antitrust law. The most influential proponents, such as Richard Posner and Oliver Williamson and the so-called ChicagoSchool of economists and lawyers including Milton Friedman and Gary Becker, are generally advocates of deregulation and privatization, and are hostile to state regulation or what they see as restrictions on the operation of free markets.

[Fig 15: Richard Posner, one of the Chicago School, runs a blog with Bank of SwedenPrize winning economist Gary Becker.]

The most prominent economic analyst of law is 1991 Nobel Prize winner Ronald Coase, whose first major article, The Nature of the Firm(1937), argued that the reason for the existence of firms (companies, partnerships, etc.) is the existence of transaction costs. Rational individuals trade through bilateral contracts on open markets until the costs of transactions mean that using corporations to produce things is more cost-effective. His second major article, The Problem of Social Cost (1960), argued that if we lived in a world without transaction costs, people would bargain with one another to create the same

allocation of resources, regardless of the way a court might rule in property disputes. Coase used the example of a nuisance case named Sturges v Bridgman, where a noisy sweet-maker and a quiet doctor were neighbors and went to court to see who should have to move. Coase said that regardless of whether the judge ruled that the sweet-maker had to stop using his machinery, or that the doctor had to put up with it, they could strike a mutually beneficial bargain about who moves house that reaches the same outcome of resource distribution. Only the existence of transaction costs may prevent this. So the law ought to pre-empt what would happen, and be guided by the most efficient solution. The idea is that law and regulation are not as important or effective at helping people as lawyers and government planners believe. Coase and others like him wanted a change of approach, to put the burden of proof for positive effects on a government that was intervening in the market, by analyzing the costs of action.

20. Sociology of law

Sociology of law is a diverse field of study that examines the interaction of law with society and overlaps with jurisprudence, economic analysis of law and more specialized subjects such as criminology. The institutions of social construction and legal frameworks are the relevant areas for the discipline's inquiry. At first, legal theorists were suspicious of the discipline. Kelsen attacked one of its founders, Eugen Ehrlich, who sought to make distinct the differences between positive law, which lawyers learn and apply, and other forms of 'law' or social norms that regulate everyday life, generally preventing conflicts from reaching lawyers and courts.

Max Weber in 1917 Weber began his career as a lawyer, and is regarded as one of the founders of sociology and sociology of law.

Around 1900 Max Weber defined his "scientific" approach to law, identifying the "legal rational form" as a type of domination, not attributable to people but to abstract norms. Legal rationalism was his term for a body of coherent and calculable law which formed a precondition for modern political developments and the modern bureaucratic state and developed in parallel with the growth of capitalism. Another sociologist, mile Durkheim, wrote in The Division of Labor in Society that as society becomes more complex, the body of civil law concerned primarily with restitution and compensation grows at the expense of criminal laws and penal sanctions. Other notable early legal sociologists included Hugo

Sinzheimer, Theodor Geiger, Georges Gurvitch and LeonPetrażycki in Europe, and William Graham Sumner in the U.S.

21. Legal institutions

Law is less a body of static rules than a "dynamic process by which rules are constantly changed, created, and molded to fit particular situations." Changes are continuously made by various institutions in a society. Law's main institutions in liberal democracies are the independent judiciaries, the justice systems, the representative legislatures or parliaments, an accountable executive, a competent and non-corrupt bureaucracy, a police force, a civilian control of the military and a robust legal profession ensuring people's access to justice and a pluralistic civil societya term used to refer to the social institutions, communities and partnerships that form law's political basis.

John Locke, in hisTwo Treatises of Government, and Baron de Montesquieu in The Spirit of the Laws, advocated for a separation of powers between the political, legislature and executive bodies. Their principle was that no person should be able to usurp all powers of the state, in contrast to the absolutist theory of Thomas Hobbes' Leviathan. Max Weber and others reshaped thinking on the extension of state. Modern military, policing and bureaucratic power over ordinary citizens' daily lives pose special problems for accountability that earlier writers such as Locke or Montesquieu could not have foreseen. Modern international organisations tend to focus on the importance of rule of law and good governance, while other authors explore the relation of rule of law and efficient governance in modern states.

22. Judiciary

A judiciary is a number of judges mediating disputes to determine outcome. Most countries have systems of appeal courts, answering up to a supreme legal authority. In the United States, this is the Supreme Court; in Australia, the High Court; in the UK, the House of Lords; in Germany, the Bundesverfassungsgericht; in France, the Cour de Cassation. For most European countries the European Court of Justice in Luxembourg can overrule national law, when EU law is relevant. The European Court of Human Rights in Strasbourg allows citizens of the Council of Europe member states to bring cases relating to human rights issues before it.

[Fig 17: The judges of the International Court of Justice in the Hague]

Some countries allow their highest judicial authority to over-rule legislation they determined as unconstitutional. In Roe v Wade, the U.S. Supreme Court overturned a Texas law which forbade the granting of assistance to women seeking abortion. The U.S.'s constitution's fourteenth amendment was interpreted to give Americans a right to privacy, and thus a woman's right to choose abortion.

A judiciary is theoretically bound by the constitution, much as legislative bodies are. In most countries judges may only interpret the constitution and all other laws. But in common law countries, where matters are not constitutional, the judiciary may also create law under the doctrine of precedent. The UK, Finlandand New Zealandassert the ideal of parliamentary sovereignty, whereby the unelected judiciary may not overturn law passed by a democratic legislature. In communist states, such as China, the courts are often regarded as parts of the executive, or subservient to the legislature; governmental institutions and actors exert thus various forms of influence on the judiciary. In Muslim countries, courts often examine whether state laws adhere to the Sharia: the Supreme Constitutional Court of Egypt may invalidate such laws, and in Iranthe Guardian Council ensures the compatibility of the legislation with the "criteria of Islam".

23. Legislature

[Fig 18: The debating chamber of the European Parliament]

Prominent examples of legislatures are the Houses of Parliament in London, the Congress in Washington D.C., the Bundestag in Berlin, the Duma in Moscow, the Parlamento Italiano in Romeand the Assemble nationale in Paris. By the principle of representative government people vote for politicians to carry out their wishes. Although countries likeIsrael, Greece, Swedenand Chinaare unicameral, most countries are bicameral, meaning they have two separately appointed legislative houses. In the 'lower house' politicians are elected to represent smaller constituencies. The 'upper house' is usually elected to represent states in a federal system (as in Australia,Germany or the United States) or different voting configuration in a unitary system (as in France). In the UKthe upper house is appointed by the government as a house of review. One criticism of bicameral systems with two elected chambers is that the upper and lower houses may simply mirror one another. The traditional justification of bicameralism is that an upper chamber acts as a house of review. This can minimize arbitrariness and injustice in governmental action.

To pass legislation, a majority of Members of Parliament must vote for a bill (proposed law) in each house. Normally there will be several readings and amendments proposed by the different political factions. If a country has an entrenched constitution, a special majority for changes to the constitution will be required, making changes to the law more difficult. A government usually leads the process, which can be formed from Members of Parliament (e.g. the UK or Germany). But in a presidential system, an executive appoints a cabinet to govern from his or her political allies whether or not they are elected (e.g. the United States or Brazil), and the legislature's role is reduced to either ratification or veto.

24. Executive

The executive in a legal system serve as a government's centre of political authority. In a parliamentary system, as with Britain,Italy, Germany, India, and Japan, the executive is known as the cabinet, and composed of members of the legislature. The executive is chosen by the Prime Minister or Chancellor, whose office holds power under the confidence of the legislature. Because popular elections appoint political parties to govern, the leader of a party can change in between elections. The head of state is apart from the executive, and he/she usually lacks formal political power yet symbolically enacts laws and acts as representative of the nation. Examples include the German president (appointed by the Parliament); the Queen of the United Kingdom (a hereditary title), and the Austrian president (elected by popular vote). The other important model is the presidential system, found in France, the U.S. and Russia. In presidential systems, the executive acts as both head of state and head of

government, and has power to appoint an unelected cabinet. Under a presidential system, the executive branch is separate from the legislature to which is not accountable.

[Fig 19: The G8 meetings are composed of representatives of each country's executive branch.]

Although the role of the executive varies from country to country, usually it will propose the majority of legislation, and propose government agenda. In presidential systems, the executive often has the power to veto legislation. Most executives in both systems are responsible for foreign relations, the military and police, and the bureaucracy. Ministers or other officials head a country's public offices, such as a foreign ministry or interior ministry. The election of a different executive is therefore capable of revolutionizing an entire country's approach to government.

25. Military and police

[Fig 20: U.S. Customs and Border Protection officers]

While military organizations have existed as long as government itself, the idea of a standing police force is relatively modern concept. Medieval England's system of traveling criminal courts, or assizes, used show trials and public executions to instill communities with fear to

maintain control. The first modern police were probably those in 17th century Paris, in the court of Louis XIV, although the Paris Prefecture of Police claim they were the world's first uniformed policemen. Weber famously argued that the state is that which controls the legitimate monopoly of the means of violence. The military and police carry out enforcement at the request of the government or the courts. The term failed state refers to states that cannot implement or enforce policies; their police and military no longer control security and order and society moves into anarchy, the absence of government.

26. Bureaucracy

The etymology of "bureaucracy" derives from the French word for "office" (bureau) and the Ancient Greek for word "power" (kratos). Like the military and police, a legal system's government servants and bodies that make up its bureaucracy carry out the directives of the executive. One of the earliest references to the concept was made by Baron de Grimm, a German author who lived in France. In 1765 he wrote,

"The real spirit of the laws in France is that bureaucracy of which the late Monsieur de Gournay used to complain so greatly; here the offices, clerks, secretaries, inspectors and intend ants are not appointed to benefit the public interest, indeed the public interest appears to have been established so that offices might exist."

Cynicism over "officialdom" is still common, and the workings of public servants are typically contrasted to private enterprise motivated by profit. In fact private companies, especially large ones, also have bureaucracies. Negative perceptions of "red tape" aside, public services such as schooling, and health care, policing or public transport are a crucial state function making public bureaucratic action the locus of government power. Writing in the early 20th century, Max Weber believed that a definitive feature of a developed state had come to be its bureaucratic support. Weber wrote that the typical characteristics of modern bureaucracy are that officials define its mission, the scope of work is bound by rules, management is composed of career experts, who manage top down, communicating through writing and binding public servants' discretion with rules.

[Fig 21: The United Nations' New York headquarters houses civil servants that serve its 192 member states.]

27. Legal profession

In civil law systems such as those of France, Germany, Italy, Spain and Greece, there is a distinct category of notary, a legally trained public official, compensated by the parties to a transaction. This is a 16th century painting of such a notary by Flemish painter Quentin Massys.

A corollary of the rule of law is the existence of a legal profession sufficiently autonomous to be able to invoke the authority of the independent judiciary; the right to assistance of an advocate in a court proceeding emanates from this corollaryin England the function of barrister or advocate is distinguished from legal counselor (solicitor). As the European Court of Human Rights has stated, the law should be adequately accessible to everyone and people should be able to foresee how the law affects them. In order to maintain professionalism, the practice of law is typically overseen by either a government or independent regulating body such as a bar association, bar council or law society. Modern lawyers achieve distinct professional identity through specified legal procedures (e.g. successfully passing a qualifying examination), are required by law to have a special qualification (a legal education earning the student a Bachelor of Laws, a Bachelor of Civil Law or a Juris Doctor degree), and are constituted in office by legal forms of appointment (being admitted to the bar). Most Muslim countries have developed similar rules about legal education and the legal profession, but some of them still allow lawyers with training in traditional Islamic law to practice law before personal status law courts. In Chinaand other developing countries there are not

enough law-trained people to staff the existing judicial systems, and, accordingly, formal standards are more relaxed.

Once accredited, a lawyer will often work in a law firm, in chambers as a sole practitioner, in a government post or in a private corporation as an internal counsel. In addition a lawyer may become a legal researcher who provides on-demand legal research through a library, a commercial service or through freelance work. Many people trained in law put their skills to use outside the legal field entirely. Significant to the practice of law in the common law tradition is the legal research to determine the current state of the law. This usually entails exploring case-law reports, legal periodicals and legislation. Law practice also involves drafting documents such as court pleadings, persuasive briefs, contracts, or wills and trusts. Negotiation and dispute resolution skills (including ADR techniques) are also important to legal practice, depending on the field.

28. Civil society

Classical republican concept of "civil society" dates back to Hobbes and Locke. Locke saw civil society as people who have "a common established law and judicature to appeal to, with authority to decide controversies between them." German philosopher Georg Wilhelm Friedrich Hegel distinguished the "state" from "civil society" (burgerliche Gesellschaft) in Elements of the Philosophy of Right. Hegel believed that civil society and the state were polar opposites, within the scheme of his dialectic theory of history. The modern dipole statecivil society was reproduced in the theories of Alexis de Tocqueville and Karl Marx. Nowadays in post-modern theory civil society is necessarily a source of law, by being the basis from which people form opinions and lobby for what they believe law should be. As Australian barrister and author Geoffrey Robertson QC wrote of international law, "one of its primary modern sources is found in the responses of ordinary men and women, and of the non-governmental organizations which many of them support, to the human rights abuses they see on the television screen in their living rooms."

Freedom of speech, freedom of association and many other individual rights allow people to gather, discuss, criticize and hold to account their governments, from which the basis of a deliberative democracy is formed. The more people are involved with, concerned by and capable of changing how political power is exercised over their lives, the more acceptable and legitimate the law becomes to the people. The most familiar institutions of civil society include economic markets, profit-oriented firms, families, trade unions, hospitals, universities, and schools, charities, debating clubs, non-governmental organizations, neighborhoods, churches and religious associations.

[Fig 22: A march in Washington D.C. during the U.S. Civil Rights Movement in 1963]

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