1 Introduction to the Legal System

It makes no sense to dive into a particular area of law without understanding the basic structure of the legal system and its terminology. This chapter describes the primary sources of law in the United States and how to find them. It explains the structure of the federal and state court systems, the basic differences between civil and criminal law, and the role of judicial review in the United States. It can be used to establish a foundation before proceeding to other chapters and as a reference later when you need to review a particular concept.

The Meaning of Law

Before discussing how law is made, it might be helpful to define it generally. Law is a system to guide behavior, both to protect the rights of individuals and to ensure public order. Although it may have a moral component, it differs from moral systems because the penalties for its violation are carried out by the state.

Digital media law encompasses all statutes, administrative rules, and court decisions that have an impact on digital technology. Because technology is always changing, digital media law is in a state of continuous adaptation. But its basic structure and principles are still grounded in the "brick-and-mortar" legal system.

Sources of Law in the United States

All students are taught in civics class that there are three branches of government and that each serves a unique function in relation to the law. The *legislative* branch makes

Digital Media Law, Second Edition. Ashley Packard.

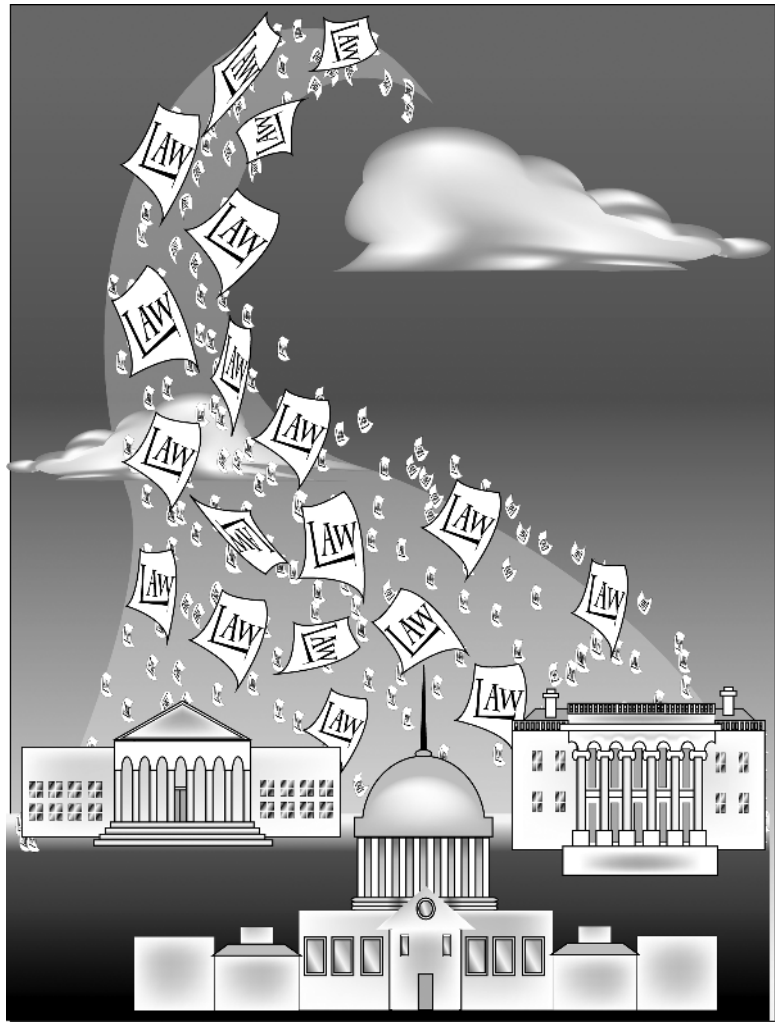

Figure 1.1 The legislative, executive and judicial branches of government make law.
Illustration: Kalan Lyra

law, the *judicial* branch interprets law, and the *executive* branch enforces law. Although this is true, it is also a little misleading because it suggests that each branch is completely compartmentalized. Actually, all three branches make law. The legislative branch produces statutory law. The executive branch issues executive orders and administrative rules. The judicial branch creates law through precedential decisions. In the United States, sources of law include constitutions, statutes, executive orders, administrative agencies, federal departments, and the common law and law of equity developed by the judiciary. The most important source of law, however, is the U.S. Constitution.

Constitutions

A political entity's constitution is the supreme law of the land because it is the foundation for government itself. The constitution specifies the organization, powers, and limits of government, as well as the rights guaranteed to citizens. Because the legislative, judicial, and executive branches of government draw their power from the U.S. Constitution, they cannot act in opposition to it. For this reason, federal courts will overturn statutes and administrative rules that exceed constitutional boundaries. They will also reverse lower courts when their decisions stray too far afield.

The U.S. Constitution declares its supremacy in Article XI: "This Constitution . . . shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Constitution Society provides links to the U.S. Constitution and all state constitutions at www.constitution.org/.

The *only* way to get around the Constitution is to alter the document. Ratification of an amendment requires approval from three-fourths of the states. Twenty-seven amendments have been ratified since the Constitution was signed. The first ten are known as the Bill of Rights.

In addition to the federal Constitution, there are 50 state constitutions. States are *sovereign* entities with the power to make their own laws. However, their laws must operate in accord with federal law. The U.S. Constitution includes a supremacy clause that requires state courts to follow federal law when conflicts arise between it and state constitutions or state law.[1] The federal constitution also requires that states give "full faith and credit" to other states' laws and judicial decisions.

Statutes

When we think about the word "law," we generally have in mind the statutes passed by our elected representatives as part of city councils, county commissions, state legislatures, and the U.S. Congress. These laws, called *ordinances* at the city level and statutes at the state and federal level, are meant to serve as guidance to people before they act. Criminal law, in particular, must give people fair warning that an act is illegal before punishing them for violating it, so it is *always* statutory.

Federal statutes are found in the United States Code, available at http://uscode.house.gov/. State codes may be found at http://www.whpgs.org/f.htm.

Statutes are intended to address potential social needs and problems, so they are written broadly to apply to a variety of circumstances. But their broad language sometimes creates confusion regarding the meaning of particular terms. In such cases, it falls to courts to interpret their meaning. Courts do this by looking at the statutory construction of laws, otherwise known as their *legislative history*. When laws are passed, they go through a series of committees. Each committee files a report, documenting its actions related to the law. This history of the legislative process usually includes the legislators' intent regarding the law's scope and interpretation. Judges may review the reports to find out what was discussed when legislators were hammering out the legislation and how they intended it to be applied.

As you read federal statutes, you will notice that many of them apply to activities carried out through "interstate or foreign commerce." For example, the federal stalking statute applies to anyone who uses "a facility of *interstate or foreign commerce* to engage in a course of conduct that causes substantial emotional distress." Likewise, federal law

[1] U.S. Const. art VI, § 2.

prohibits the transmission of obscene materials through *interstate and foreign commerce.* This phraseology is added to bring activities within the federal government's jurisdiction. The federal government does not have police power as states do. *Police power* – the right to legislate to protect the health, safety and welfare of citizens – is reserved for the states. So the federal government regulates activity related to these issues through its exclusive jurisdiction over interstate commerce. Article 1, Section 8 of the U.S. Constitution gives Congress the power "To regulate Commerce with foreign Nations, and among the several States . . . " Application of the term "commerce" does not mean that money must change hands. When the Constitution was written, commerce was also used in a non-economic context to refer to conduct. Congress applies the term loosely to conduct that crosses state and national borders. Activities carried on within a single state must be regulated under state law.

Executive orders

Within the executive branch of government, mayors, governors, and presidents have the power to issue *executive orders* that are legally binding. Some executive orders are issued to fill in the details of legislation passed by the legislative branch. For example, if Congress passes a bill requiring action on the part of federal agencies without providing sufficient information about how its mandate is to be implemented, the president may issue an executive order specifying procedure.

Executive orders may be found through the National Archives website at http://www.archives.gov/federal-register/executive-orders/.

In other cases, executives issue orders of their own accord to promote their policies. By directing federal agencies and officials to enforce their orders, presidents have created national parks, integrated the armed services, desegregated schools, funded and defunded stem cell research, and prohibited financial transactions with countries known for terrorism. Executive orders are also frequently used to regain order in the event of a threat to security. Following a natural disaster like a hurricane, for example, a governor may issue a state of emergency, which would empower him or her to make binding rules for a certain period of time.

Executive orders are passed without the legislature's consent, but the legislature may override them with enough votes. Congress can override a presidential executive order by passing legislation that contradicts it. If the president vetoes the legislation, Congress can override the veto with a two-thirds vote. Executive orders also may be challenged in court if they exceed the president's constitutional authority. For example, Harry Truman tried to avert a national strike of steel mill workers during the Korean War by issuing an executive order to the Commerce Department to seize control of private steel mills. The Supreme Court held the action unconstitutional.[2]

Administrative agencies and federal departments

Also within the executive branch, independent administrative agencies and federal departments are empowered to make *administrative rules* that carry the force of law.

[2]Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

Independent administrative agencies

Independent administrative agencies are so named because, although they are part of the executive branch of government, they carry out the mandates of the legislative branch in specific government-regulated industries. Agencies monitor technical areas of law thought to be better handled by specialists than members of Congress. Not only do they have the power to make rules and enforce them with fines and other retaliatory measures, but federal agencies also serve a quasi-judicial function. Their administrative courts are usually the first to hear cases related to violations of agency rules.

Congress provided the protocol for agency rule making and enforcement in the Administrative Procedures Act.[3] One of the Act's purposes is to keep agency rule making open to provide opportunities for public participation. To that end, the law requires agencies to publish notices of proposed rule making, opinions, and statements of policy in the *Federal Register*. Administrative rules are later codified in the *Code of Federal Regulations*.

Another purpose of the Administrative Procedures Act is to keep the process for rule making and adjudication across agencies relatively consistent by prescribing uniform standards and a mechanism for judicial oversight. A federal court may set aside an agency decision if the rule is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law."[4] It is not the court's role to substitute its judgment for that of the agency, but to ensure that when an agency creates a new rule or modifies established policy that it articulates "a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[5] A court may conclude that an agency action is arbitrary and capricious if the agency has:

- relied on factors Congress did not intend it to consider;
- failed to consider an important aspect of the problem;
- offered an explanation for its decision that contradicts evidence before the agency; or
- is too implausible to be ascribed to a difference in view or agency expertise.[6]

Independent agencies most likely to be involved with digital media law are the Federal Communications Commission and Federal Trade Commission. The Federal Communications Commission regulates interstate and international communication emanating from the United States. The Federal Trade Commission enforces fair advertising, consumer protection, and antitrust rules.

The Federal Register is a daily digest of proposed and final administrative regulations issued by federal executive departments and agencies in the United States. It is available online at http://www.gpo.gov/fdsys/.

After their initial publication in the Federal Register, U.S. agency and department rules are codified in the Code of Federal Regulations, available online at http://www.gpo.gov/fdsys/.

[3] 5 U.S.C. § 551 et seq. (2011).
[4] 5 U.S.C. § 706(2)(A) (2011).
[5] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citing Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).
[6] *Id.*

Federal departments

Federal departments also make administrative rules, but do not act independently of the executive branch of government. Their leaders are appointed by the president and make up the president's cabinet.

The federal departments most likely to be involved with digital media law are the Departments of Commerce and Justice. The Department of Commerce fosters economic development and technological advancement. Among its many bureaus, the National Telecommunications and Information Administration, or NTIA, acts as the administrative branch's policy advisor for telecommunication issues. The Department of Justice, led by the Attorney General, supervises federal law enforcement. As such, it is involved in the prosecutions of crimes, such as incitement to violence, fraud, threats, and distribution of obscenity, that may be carried out through digital media. The Justice Department also represents the United States in suits against the government through the Office of the Solicitor General. Cases challenging U.S. law before the Supreme Court frequently include the Attorney General's name as one of the parties.

Common Law and Law of Equity

The role of courts in all legal systems is to determine whether law is applied appropriately in particular cases. But in common law legal systems – like those of the United Kingdom and its former colonies, such as the United States – courts also have the power to make law. There are two types of judge-made law: *common law* and *law of equity*.

There are a variety of sources for locating caselaw. A useful free resource is FindLaw, at www.findlaw.com/casecode. Additional sources are described in the Legal Research Appendix.

Common law, also known as caselaw, is a body of legal precedent established through prior court decisions. Judges create common law when no statutory law covers the issue before them. Later judges rely on those precedents for guidance in future legal disputes based on similar circumstances.

The use of common law dates back to twelfth-century England. In order to wrest power for legal decision-making from local officials, King Henry II dispatched judges to travel in circuits around the country dispensing justice in the king's name. Because the king's judges had no knowledge of events that had taken place prior to their arrival, they assembled juries of local men to aid them in their decision-making. Jurors determined the facts of the case, while the judge determined the applicable law – a practice that is still in use today. These circuit judges adopted the customary rules they considered most appropriate and shared their decisions with each other. Their precedents eventually crystallized into a national common law dispensed by the Courts of the King's Bench, Common Pleas, and Exchequer – collectively known as the Common Law Courts.[7]

In a modern context, most common law is created in the areas of tort and contract law. *Torts* are civil wrongs that result in harm or injury and which act as grounds for lawsuits. *Contracts* are agreements between two or more parties that are enforceable by law. Within the context of digital media, for example, common law applies to such torts

[7] William Searle Holdsworth, A History of English Law 204–31 (Little, Brown & Co. 1922) (1903).

as libel, invasion of privacy, intentional infliction of emotional distress and misappropriation of trade secrets, and to "click to sign" contracts connected with Internet and software use.

These types of cases are normally litigated at the state level, where most common law is made. At the federal level, common law has largely been supplanted by statute. However, federal courts still use it to delineate the boundaries of statutory and constitutional law. We see this occur when courts look back to previous decisions to determine the meaning of a particular term or phrase used in a statute in an effort to interpret the law.

When one party harms another through a practice prohibited by law, the wounded party can turn to the courts for redress. Under common law, a court can provide damages to compensate for that harm. However, this is not always what is needed to remedy a situation. Sometimes, what a plaintiff needs is for a court to act *before* the harm occurs, in order to prevent irreparable harm. Common law does not apply before the fact. However, law of equity, which serves as a supplement to common law, provides a mechanism for this.

Using law of equity, which also dates back to twelfth-century England, judges can create more flexible remedies for plaintiffs than those available under common law. Take, for example, a situation in which Apple learns that a disgruntled employee has stolen plans for its yet-to-be-released iMind – a device that transmits data directly into the human brain – and is threatening to upload them to the Internet. Once the plans have been published online, Apple will be able to sue the employee for misappropriation of it trade secrets under common law. It may even be able to collect a small portion of its damages. But, by that time, Apple's competitors will have access to its new product plans, and the potential damages incurred will far outweigh any damages the employee could repay. Equity fills the gap. Using the law of equity, a judge can issue a restraining order or injunction to prevent the thief from acting before the harm occurs.

Within the media context, equitable relief most often takes the form of *injunctions*, which are court orders that require someone to do something or not to do something. But courts grant other forms of equitable relief as well. Parties in doubt of their rights with regard to a particular legal issue may request a *declaratory judgment* from a court as a precursor to further legal action. This legally binding opinion sets out the rights and obligations of parties within a legal controversy. A party threatened with a lawsuit for engaging in a particular behavior, for example, might seek a declaratory judgment to assess his or her rights before acting.

Understanding precedents

The practice of following precedents under common law is known as *stare decisis* (pronounced "stair-ee da-sy-sis"), which literally means "to stand by that which is decided." The part of the case that sets the precedent is called the *holding*. This is the court's decision regarding the legal question presented. In some cases, a court will be very helpful by saying, "We hold that . . . ," but other times you have to sift though a lot of text to find the golden nugget.

Collateral statements made by judges are referred to as *obiter dictum* or "dicta." This is all the rest of the text in a judicial opinion. Dicta (which often encompass a lot of analogies, opinions, and explanation) can be interesting, but are not legally binding. Dicta may be used to understand a court's reasoning and provide an indication of how it might rule in the future.

In appellate court cases, a panel of judges – usually three, but sometimes as many as eleven – renders the decision. The opinion may be unanimous, but more commonly it is subdivided into a majority opinion with concurring and dissenting opinions. The *majority opinion*, so named because it is issued by a majority of the judges on the panel, includes the holding and the legal rationale to support it. To the extent that the opinion answers a new legal question or offers a new legal interpretation, it carries precedential value.

Judges who support the majority's conclusion based on an alternative rationale issue a *concurring opinion*, explaining the legal rule they would prefer to use. Judges who disagree with the majority's conclusion issue a *dissenting opinion*, explaining why they think the majority has misinterpreted the law. Concurring and dissenting opinions are published with the majority opinion, so someone reading the case can acquire a full understanding of the court's position on an issue.

In a small percentage of appellate cases, a majority of judges will reach consensus on a conclusion, without agreeing on a rationale or legal rule to support it. In these cases, the rationale that receives the most support is called the *plurality opinion*. Decisions in these cases are reached by combining coalitions of judges, citing different legal rules. A plurality decision in the Supreme Court, for example, might draw four justices supporting a conclusion with one rationale, two concurring with the decision, based on a different rationale, and three justices dissenting. In the end, the case will be resolved because six justices agree on a desired outcome, but its precedential value will be limited because no majority supported a legal rule to justify the outcome. Consequently, plurality opinions are narrowly interpreted. Only those aspects of the plurality opinion that draw support from concurring judges are binding.

A *binding precedent* is one that a court must follow. Whether a *precedent* is binding depends on the court's hierarchy and jurisdiction. Courts must follow decisions rendered by higher courts in their own jurisdictions. But even if a precedent is not binding, it still might be persuasive. A *persuasive precedent* is one that a court may use as guidance but also has the prerogative to reject. For example, a Georgia court is not bound by the decisions of other states. However, if the Georgia court is facing a new legal issue, with no precedent to follow from its own state, it will look to other states for guidance. If it finds that a Florida court has issued a well-reasoned opinion on the issue, the Georgia court may elect to adopt it as its own.

Modifying, distinguishing, and overruling precedents

The concept of stare decisis may lead to the assumption that courts are always bound by earlier precedents. In fact, they are not. The law is a lot like a coral reef. Precedents build upon one another in some areas, while in other areas they remain relatively consistent or may even be torn down.

Courts have the option of modifying, distinguishing, or overruling precedents.

Courts *modify* a precedent when they adapt it to fit a new situation. For example, courts had to modify "print-based" precedents to fit the first copyright cases related to the Internet. Courts *distinguish* a precedent when they determine that it does not fit the particular case or situation under analysis. For example, when the Supreme Court reviewed the Communications Decency Act, a law intended to control indecency on the Internet, the government tried to persuade the Court that the Act's restrictions on Internet speech were analogous to restrictions imposed on "dial-a-porn" that had already been upheld. The Court distinguished the dial-a-porn precedent from the Internet case because they dealt with different media. Courts *overrule* precedents when they decide that the precedents are no longer good law. For example, the Supreme Court decided in 1915 that films were public spectacles unworthy of First Amendment protection.[8] The Court reversed its opinion in 1952, deciding that films, like other media, are a form of protected expression.[9]

The Difference Between Common and Civil Law Legal Systems

Common law legal systems are unique to the United Kingdom and her former colonies. Civil law systems are actually more common. Civil law is used in most of Europe, all of Central and South America, parts of Asia and Africa, and in some states within common law countries, such as Louisiana in the United States and Quebec in Canada.[10] Judges do not make law in civil law systems. They rely exclusively on statutory law, usually set down in codes that are cohesively structured. Civil law is based on deductive logic. There is one rule of law and decisions for cases are drawn from the rule. In contrast, common law relies on inductive logic. The rule is based on a general conclusion from a number of cases.

Not only is civil law the dominant legal system, it is also the oldest. Its heritage can be traced back to the early Roman Empire. In the sixth century, the Emperor Justinian amassed all law into a unified code called the *Corpus Juris Civilis*. More commonly known as the Justinian code, it included a dictate that rejected precedent. It stated that "decisions should be rendered in accordance, not with examples, but with the law."[11] This policy can be traced back to Roman tradition, in which judges were appointed on a case-by-case basis and magistrates were appointed for no more than one year. As such, their individual decisions were not accorded much weight.[12]

As an alternative to stare decisis, civil law judges follow the doctrine of *jurisprudence constante*. The doctrine of jurisprudence constante does not require judges to follow earlier precedents; nevertheless, judicial deference to earlier decisions is commonplace. "Under civil law tradition, while a single decision is not binding on courts, when a series of decisions form a 'constant stream of uniform and homogenous rulings having the same reasoning,' jurisprudence constante applies and operates with 'considerable persuasive authority.' "[13]

[8] Mutual Film Corp. v. Industrial Comm'n of Ohio, 236 U.S. 230 (1915).

[9] Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

[10] James G. Apple and Robert P. Deyling, A Primer on the Civil Law System 1 (Federal Judicial Center, 1995), *available at* www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf.

[11] *Id.* (citing John P. Dawson, Oracles of the Law 103, 123 (1968)).

[12] *Id.* at 5.

[13] Doerr v. Mobile Oil Co., 774 So.2d 119 (La. 2000) (citing Dennis, J. L., *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 La. L. Rev. 1, 15 (1993)).

The Structure of Court Systems

A court's jurisdiction and hierarchy determines whether the decision it renders will be a binding precedent. So a basic knowledge of the structure of court systems, along with their powers and limitations, is essential before reading particular cases. In the United States there are two court systems: the federal system and the state system.

In order for a court to consider a case, three conditions must apply:

- there must be a legitimate controversy that is ripe for review;
- the parties in the case must have standing, which is a direct interest in the case; and
- the case must fall within the court's jurisdiction or sphere of influence.

There are two types of jurisdiction, personal jurisdiction and subject matter jurisdiction. *Personal jurisdiction*, which is covered in greater detail in Chapter 5, refers to the court's right to exercise its control over the parties involved in a case, based on their residence in or contacts with a particular area. *Subject matter jurisdiction* refers to the particular issues that a court is empowered to decide.

The federal court system

The subject matter jurisdiction of federal courts is limited to actions described in Article III, Section II of the Constitution and federal statutes passed by Congress. Federal courts may consider:

- controversies arising under the Constitution, laws of the United States, and treaties;
- cases in which the United States is a party;
- cases between a state or its citizens and foreign states or their citizens;
- cases involving ambassadors and representatives from foreign states as parties;
- cases based on admiralty law (the law of the seas);
- copyright and patent cases;
- bankruptcy proceedings;
- lawsuits involving the military; and
- diversity cases, involving claims exceeding $75,000.

Diversity cases involve civil actions between citizens of different states.[14] For example, in 2011, actress Lindsay Lohan sued rapper Pitbull for defamation, intentional infliction

[14] 28 U.S.C. § 1332 (2010).

of emotional distress and the use of her name for commercial benefit, in a New York State court, for including the lyric "I got it locked up like Lindsay Lohan" in his popular song "Give Me Everything." The case was transferred to a federal court with diversity jurisdiction because Lohan was a resident of California, Pitbull was a resident of Florida, and the other defendants in the suit were residents of Georgia, New York, and the Netherlands.[15]

A federal court also may assume jurisdiction over a case that began in a state court if a constitutional or federal right is threatened during the course of litigation. For example, a federal court may prevent a state court from enforcing an unconstitutional state statute.

The federal court system includes the U.S. Supreme Court, U.S. Courts of Appeals, U.S. District Courts and bankruptcy courts. Congress has also created legislative courts with reduced powers. These include the U.S. Court of Military Appeals, U.S. Tax Court and U.S. Court of Veterans Appeals.

Federal court hierarchy

The point of entry for a case in the federal system is the *district court*. This is the trial level (that comes closest to television depictions of trials), where one judge sits on the bench, witnesses take the stand, and a jury examines the evidence to determine the facts of the case. The federal system is divided into 94 judicial districts, each staffed with multiple judges. Each state, along with the District of Columbia and U.S. territories, includes at least one district. Larger states, like California and Texas, include as many as four districts located in different parts of the state.

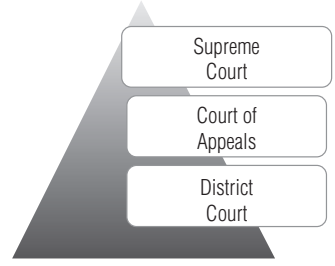

Figure 1.2

Above the trial level is the appellate level. Courts of appeals review lower court decisions to make sure the law was applied correctly. A panel of judges – usually three – examines the case to make sure judicial rules were followed, that proper witnesses were allowed, and that juries received correct instructions. A court of appeals normally does not re-examine the facts of a case. If, in the course of its review, an appellate court finds that a fact is still in dispute that could materially affect the outcome of the trial, it will send the case back (called *remanding* it) for a retrial to resolve the issue. Because there are no witnesses at the appellate level – only transcripts, lawyers, and judges – courtroom drama is considerably diminished.

Federal courts of appeals are divided into autonomous circuits. A decision from an appellate court is binding within its own circuit, but it does not bind courts in other circuits. There are 13 federal circuits within the United States. Eleven of them are drawn from clusters of states and U.S. territories.

[15]Lohan v. Perez, a/k/a Pitbull (filed Nov. 4, 2011, E.D.N.Y.) Notice of removal.

First Circuit	Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island
Second Circuit	Connecticut, New York, Vermont
Third Circuit	Delaware, New Jersey, Pennsylvania, Virgin Islands
Fourth Circuit	Maryland, North Carolina, South Carolina, Virginia, West Virginia
Fifth Circuit	Louisiana, Mississippi, Texas
Sixth Circuit	Kentucky, Michigan, Ohio, Tennessee
Seventh Circuit	Illinois, Indiana, Wisconsin
Eighth Circuit	Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota
Ninth Circuit	Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, N. Mariana Islands, Oregon, Washington
Tenth Circuit	Colorado, Kansas, New Mexico, Utah, Oklahoma, Wyoming
Eleventh Circuit	Alabama, Florida, Georgia

The other two U.S. Courts of Appeals are located in Washington, D.C. The U.S. Court of Appeals for the District of Columbia Circuit hears appeals from administrative agencies in the nation's capital. The U.S. Court of Appeals for the Federal Circuit has nationwide jurisdiction for specialized cases. These include cases on patent law or cases that come from the Court of International Trade and the Court of Federal Claims.

In exceptional cases, the judges sitting on a circuit court of appeals may, at the request of one of the litigants or a circuit judge, vote to vacate a three-judge panel's decision and review the case *en banc*. In an en banc hearing, the full court sits to rehear and decide the case. Such reviews are rarely granted unless the panel's judgment was out of sync with the court's earlier decisions or the case involves a legal question of particular importance.

Decisions rendered by federal circuit courts may be appealed to the U.S. Supreme Court, which binds every lower court on constitutional and federal law. When the Supreme Court agrees to hear a case, it grants a *writ of certiorari***.** The Court grants certiorari only to those cases that pose a significant legal issue. Of the approximately 10,000 petitions it receives each year, the Court reviews only 75–100 cases.[16]

The Supreme Court issues a writ of certiorari when it accepts a case. The order requires a lower court to deliver its records of the case to the higher court for review. In Latin *certiorari* means "to be more fully informed."

If you aren't sure how to pronounce it, you are in good company. Justices on the Supreme Court all pronounce it differently, as "ser-shah-rair-eye," "ser-she-or-ary," and "ser-shah-rahr-ee."

The Supreme Court has original jurisdiction (the right to be the first to hear a case) in two types of cases: those involving ambassadors and those in which the United States is a party. In all other cases, it has appellate jurisdiction. As with courts of appeals, cases involve written briefs and oral arguments presented by attorneys, but no witnesses or juries. Court justices issue written opinions, explaining their decisions, months after hearing the case.

The Supreme Court has nine members – eight justices and a chief justice. They are, in order of seniority, Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, Ruth Bader Ginsburg, Stephen Breyer, John Roberts, Samuel Alito, Sonia Sotomayor, and

[16] Supreme Court of the United States, Frequently Asked Questions, http://www.supremecourt.gov/faq.aspx.

Elena Kagan. John Roberts is chief justice. Occasionally, one of the justices will have a conflict of interest that makes it inappropriate to hear the case. For example, he or she may have a prior relationship with one of the parties. In such a case, the justice will voluntarily remove him or herself from the case, a process known as *recusal*. This would leave eight justices to decide the case. In the event of a tie, the lower court's decision would stand but would carry no precedential value beyond its own circuit.

The state court system

Although federal courts have produced more influential opinions regarding digital media law, most litigation takes place in state courts. In fact, 95 percent of all cases are filed there.[17] As sovereign entities, states courts are independent of the federal court system and independent of other states. They are the ultimate decision makers regarding their own laws and constitutions, even binding federal courts on interpretations of state law.

Like their federal counterparts, state courts are limited by personal and subject matter jurisdiction. There must be a connection between the litigants and the state to establish personal jurisdiction. A Florida court could not, for example, hear a case involving two residents of Mississippi about a matter that had nothing to do with Florida. State courts are also limited to particular subject areas. These include matters that involve state statutes, state constitutions or state common law. State courts handle most criminal cases, probate (wills and estates), contracts, torts (personal injuries), family law (marriages, divorce and adoptions) and juvenile justice.

Most states have two levels of trial courts: courts of limited jurisdiction or courts of general jurisdiction. *Courts of limited jurisdiction* handle cases involving misdemeanor behavior in criminal matters and sums under $10,000 in civil matters. Examples include municipal, justice of the peace, probate, family, juvenile and small claims courts.[18] More serious criminal and civil cases are tried in *courts of general jurisdiction*. These are commonly called district, circuit, or superior courts.

State court hierarchy

The decisions of these lower state courts may be appealed to intermediate appellate courts, usually called courts of appeals. Most states have one appellate court, but larger states like California have regional appellate courts. Because it is assumed that all cases deserve at least one appeal, intermediate appellate courts have little discretion over whether to accept cases from the trial level.

Each state also has a court of last resort, usually called its supreme court. However, in New York and Maryland, the highest courts are called court of appeals. These courts,

[17] National Center for State Courts, Examining the Work of State Courts, 2010, http://www.courtstatistics.org/.
[18] Robert A. Carp and Ronald Stidham, Judicial Process in America 67 (4th ed. 1998).

which range in size from three to nine judges (but most commonly have seven), are the final arbiters on state law. Most courts of last resort sit in states with intermediate appellate courts and therefore have the power to exercise discretion over the cases they choose to hear.[19] Like the U.S. Supreme Court, they generally elect to review only those cases that involve important policy issues.

Types of Law

Within the common law system, there are two different types of law: criminal law and civil law. The term civil law can be confusing because it has two meanings. As discussed earlier, civil law refers to a type of legal system that is distinct from the common law system. Within the United States, the term civil law more commonly refers to the body of law used to resolve disputes between private parties or organizations. In other areas of the world it is called private law, while its counterpart, criminal law, is called public law. Criminal law, prosecuted by the government, is probably more familiar to you because it is more commonly depicted in books, movies, and television. Unfortunately, these dramatic representations tend to gloss over the specifics.

Criminal law

Criminal law addresses violations against the state (government) that, even if directed toward an individual, are considered an offense to society as a whole. It may include the commission of an illegal act (like computer fraud or cyberstalking) or the omission of a duty (through negligent conduct, for example) that causes public harm. A state may sanction the violation of a criminal law using fines or imprisonment, as long as the punishment, like the crime, was clearly outlined in a statute passed by a legislative body before the act occurred.

Grand juries and preliminary hearings

Grand juries are distinct from trial juries. Grand juries determine whether there is enough evidence to charge a person with a crime. Trial juries determine whether a person has committed a crime.

The Fifth Amendment guarantees a *grand jury* hearing to anyone accused of a federal crime. Most grand juries consist of 16 to 23 citizens pulled from voter registration lists, who are empanelled for a period ranging from one month to one year. The federal prosecutor submits his or her evidence to the grand jurors, who determine whether there is probable cause to believe the accused committed a federal crime. The accused is not present at the time. If, after hearing the evidence, the grand jury is convinced there is probable cause to warrant a trial, it will issue a formal accusation of a felony,

[19] *Id.* at 71.

called an *indictment*, against the accused. Grand jury hearings and records are closed to the public. The Supreme Court has provided three justifications for this secrecy:

> (1) disclosure of pre-indictment proceedings would make many prospective witnesses "hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony"; (2) witnesses who did appear "would be less likely to testify fully and frankly as they would be open to retribution as well as inducements"; and (3) there "would be the risk that those about to be indicted would flee or would try to influence individual grand jurors to vote against indictment."[20]

States have the option of using *preliminary hearings* led by a judge as an alternative to a grand jury hearing. The accused may be present at a preliminary hearing and may even present evidence in his or her favor, although most elect not to at that time. Preliminary hearings are also open to the public.

Arraignments

Once a grand jury or judge has determined there is probable cause for a trial, the accused goes before a judge, where he or she is read the formal charge and issues a plea in a proceeding called an *arraignment*. It is important to understand the distinction between an arrest and an arraignment to avoid publishing inaccurate information that could lead to a defamation suit. Only after an arraignment is it correct to publish that someone was "charged" with a crime. If the defendant's plea is "guilty," the judge may issue a sentence. If the plea is "not guilty," a trial date is set. Typically fewer than 10 percent of criminal cases make it to trial. Most are *plea-bargained* before trial, meaning the prosecutor and defendant agree to a deal that usually involves some form of leniency in exchange for a guilty plea.

The Sixth Amendment to the Constitution guarantees "a speedy and public trial" by an impartial jury in all criminal prosecutions. In the Speedy Trial Act of 1974, Congress interpreted the term "speedy" to mean that a trial must ensue within 100 days after criminal charges are filed or the case must be dismissed. States have enacted similar measures.

The jury

Potential trial jurors are subjected to a process called *voir dire* (pronounced "vwahr deer") to assess their suitability for jury service. During this period, the prosecution and defense ask potential jurors questions regarding their knowledge and attitudes about the case, as well as any relevant personal experiences or connections that might influence their decision. A common misperception is that potential jurors must not have heard anything about the case to be selected. That is not a requirement. It is only

[20] *In re* North (Omnibus Order), 16 F.3d 1234, 1242 (D.C. Cir. Spec. Div., 1994) (quoting Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218–19 (1979)).

necessary that potential jurors believe themselves to be capable of impartiality. During the selection process, each side is given a number of peremptory challenges, which are opportunities to strike a person from the jury pool for no specific reason. These are useful when a potential juror displays no overt biases, but the attorney still has a bad feeling about the person. Peremptory challenges may not, however, be used to strike a juror on the basis of race or gender.[21] Strikes for cause are unlimited. Attorneys do not have to use one of their peremptory strikes to exclude a juror who displays an obvious bias regarding the case.

In a federal criminal trial, a jury must have twelve members who reach a unanimous decision. Most states also use twelve-member juries in criminal trials, but are permitted to use as few as six. A slight variation in votes is also permitted at the state level. The Supreme Court has held that a guilty verdict from nine members of a twelve-member jury is constitutionally permissible in state trials. However, a jury with only six members must be unanimous. Oregon and Louisiana are the only states that still permit nonunanimous juries in felony cases.

It is the jury's job to decide the facts of the case and render a verdict. It is the judge's job to make sure proper procedure is followed during the trial and to instruct the jurors about the meaning of the law and how it is to be applied. In most states, and at the federal level, the judge imposes the sentence.[22] However, some states place this responsibility on the jury.

Grounds for appeal

Approximately one-third of criminal verdicts are appealed. The appeal must be based on the contention that the law was misapplied, not that the facts were misinterpreted. Acceptable reasons might be that inadmissible evidence was allowed, jury selection was flawed, or the judge's instructions were incorrect. A successful appeal usually results in a new trial.

Civil law

Civil law seeks to resolve non-criminal disputes. These typically involve conflicts over contracts, the ownership or use of property, inheritance, domestic relations (involving marriage, divorce, child custody), and torts. These conflicts, between private people or organizations, emerge when one party alleges that the other has violated a civil statute or common law.

Civil cases are more common than criminal cases.[23] In civil trials, the court's role is to help settle the dispute. The proscribed remedy may be an injunction that requires someone to do something or prohibits someone from doing something, or the imposi-

[21] *See* Edmondson v. Leesville Concrete Co., 500 U.S. 614 (1991) and J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994).

[22] Daniel E. Hall, Criminal Law and Procedure 490 (5th ed. 2009).

[23] *Id.* at 184.

tion of a fine. Civil penalties do not involve imprisonment. On rare occasions, a state may be a party to a civil suit, but this is the exception rather than the rule.

Civil procedure

Civil procedure differs from criminal procedure in a number of respects. First, there is no prosecutor in civil cases. One party (the *plaintiff*) brings a suit against another party (the *defendant* or *respondent*). The plaintiff must have *standing* – a personal stake in the outcome of the case – in order to initiate the suit. Without standing, there is no real controversy between the parties for a court to settle. Second, the standard of proof required to win a civil case is less stringent than in criminal cases. It is usually sufficient for a plaintiff to show that the "preponderance of evidence" demonstrates the defendant's guilt. Plaintiffs are not required to demonstrate guilt beyond a reasonable doubt, the standard used in criminal trials. Third, due process protections are weaker in civil trials. The court is not required to provide an attorney for a defendant who cannot afford one, for example. Also, although the Seventh Amendment guarantees the right to a jury in a civil trial, the litigants have the right to waive that option in favor of a bench trial, in which the judge determines the facts of the case in addition to deciding questions of law.[24] When juries are used, they are frequently smaller than those used in criminal trials. Fewer than half the states require twelve-person juries, and about half permit nonunanimous verdicts.

To initiate a suit, the plaintiff or the plaintiff's attorney files a petition, called a *complaint*, outlining the circumstances that led to the dispute, the damages alleged and the compensation expected. After receiving a summons announcing the suit, the defendant or defendant's attorney may file a *motion* with the court to strike parts of the suit that are improper or irrelevant or to dismiss it entirely because it was improperly filed or because there is no sound basis for the suit.[25] If the court rejects the defendant's motions, the defendant will have to respond to the suit. The response, called the defendant's *answer*, may contain an admission, denial, defense, or counterclaim.[26]

At that point, the trial will enter a *discovery* phase in which the litigants gather and share information related to the dispute. Although surprises make good drama in television courtrooms, they are not appreciated in real trials. Opposing parties are obligated to disclose their evidence to each other before the trial. Pre-trial discovery, which is used in civil and criminal trials, gives each side the opportunity to search for new information to explain or rebut the opposing party's evidence, and minimizes opportunities to falsify evidence.[27] In civil trials, putting all of the evidence out on the table also encourages settlements before the case can go to trial. Litigants use a variety of tools for discovery.

[24] The Seventh Amendment is not deemed sufficiently fundamental to apply at the state level through the Fourteenth Amendment's due process clause. Thus defendants do not have a constitutional right to a jury in a state civil trial. *See* Curtis v. Loether, 415 U.S. 189, 198 (1974) and Dairy Queen v. Wood, 369 U.S. 469, 471–2 (1962).

[25] Curtis v. Loether, 415 U.S. 189, 196 (1974).

[26] *Id.*

[27] Comment, *Pre-Trial Disclosure in Criminal Cases*, 60 Yale L.J. 626–46 (1951).

One of the most common is the *deposition*. In a deposition, potential witnesses describe what they know, under oath, before the trial begins. Depositions normally occur in one of the attorney's offices. All parties are notified in advance so they can be present to hear the witness's testimony. The counsel for both the plaintiff and the defendant may question the witness during a deposition. Information is also gathered through *interrogatives*, which are questionnaires that the opposing party answers under oath. Each party is also entitled to request the opposition's list of witnesses to be called at trial, a summary of anticipated expert testimony, and any documents that may be used in the case as evidence.

Summary judgment

Either party in the trial may motion for a summary judgment in his or her favor. A *summary judgment* is a ruling that all factual issues have been discovered and the case can be decided on the facts without a trial. If, after considering the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file, the judge determines that there is no genuine issue of material fact and that as a matter of law the motioning party is entitled to a judgment, the judge may render a summary judgment in the case.[28] If the court refuses to issue a summary judgment, the case will go to trial.

If the district court issues a summary judgment and the opposing party believes material facts remain that justify a full trial, he or she may appeal the summary judgment. An appellate court may choose to review *de novo* (anew) the evidence leading to the district court's summary judgment. If it does so, it will review the evidence in the light most favorable to the party who did not request summary judgment.

Remedies

Civil remedies usually come in the form of injunctions and/or fines, depending on the circumstances.

If a case involves an issue of *equity* (a problem that cannot be remedied after-the-fact by issuing damages), a judge may issue a *preliminary injunction* to prevent one party from doing something that harms the other party until the case can be considered fully at trial. Before granting a plaintiff a preliminary injunction, the court must be satisfied that (1) there is a substantial likelihood that the plaintiff would win a case against the defendant if it were to go to trial; (2) that the plaintiff would suffer "irreparable harm" without the injunction; (3) that the harm the plaintiff suffers would be worse than any harm the defendant would suffer from the injunction; and (4) that the injunction would not harm the public's interest.[29] If a trial later shows that the preliminary injunction was warranted, the court will replace it with a *permanent injunction*. If not, the preliminary injunction will be lifted.

[28] Fed. R. Civ. P. 56.

[29] *See* Johnson & Johnson Vision Care v. 1–800 Contacts, Inc., 299 F.3d 1242, 1246–47 (11th Cir. 2002).

If, on the other hand, the damage is already done and the judge or jury finds that the defendant is responsible, the defendant may be punished with a monetary fine. Civil juries issue two types of damage awards: compensatory and punitive. *Compensatory damages* compensate the victim for actual loss. *Punitive damages*, which may be awarded in addition to compensatory damages, serve as punishment and to set an example for future offenders.

Doctrine of respondeat superior

The civil liability doctrine of *respondeat superior* allows plaintiffs to sue not only the person directly responsible for a tort, but also those who may be tangentially responsible. Literally it comes from the ancient idea that the master is responsible for the servant. In modern times, it means the employer is responsible for the employee. People take advantage of the doctrine of respondeat superior when they are looking for deeper pockets. This means that if you harm someone in the context of your work, your company may also be liable for your actions. If you own a company, it means that you may be liable for your employees' actions and should have a good errors and omissions insurance policy.

Appeals

If the losing party feels that the court's judgment was reached in error because the law was somehow misapplied, he or she can ask the court to set aside its verdict. If the court refuses to do so, the losing party may appeal the decision. A losing party who is legally entitled to a review will become the *appellant*, while the opposing party becomes the *appellee*. If the higher court's review is discretionary – which is the case in appellate courts of last resort, usually called supreme courts – the losing party must petition the court for a writ of certiorari, a court order granting a review. The party requesting the review will be the *petitioner*. The opposing party will be the *respondent*. Case names are likely to change on appeal. A lawsuit brought by Jones against Smith will begin life as *Jones v. Smith*. If Smith loses and initiates an appeal, the case name will switch to *Smith v. Jones*.

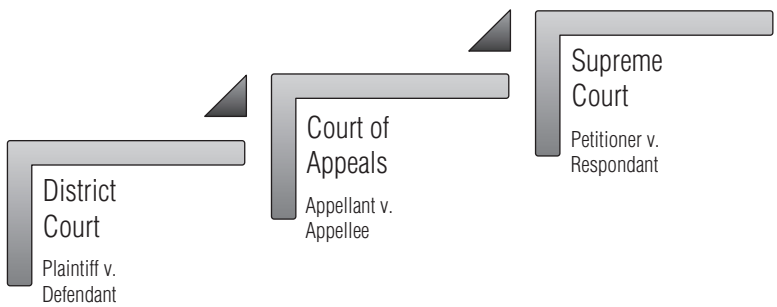

Figure 1.3 The terms used for parties in a case change as they move from one court level up to the next.

The Significance of Judicial Review

The power of *judicial review* refers to a court's authority to review the decisions of other branches of government. In the United States, judicial review gives federal courts the power to declare a law unconstitutional – in effect, to strike it down. Theoretically, any federal court in the United States has this power, but lower courts are reluctant to use it because it is guaranteed to lead to an appeal and embarrassment if the decision is overturned.

Although the framers of the Constitution never specifically granted the Supreme Court the power of judicial review, the Court nevertheless decided it must have that authority in *Marbury v. Madison* (1803).[30] The case involved a judicial appointment that President Adams made before leaving office following his loss to Thomas Jefferson. The Senate confirmed several of Adams' judicial appointees, but Adams' secretary of state did not have time to issue their commissions before leaving office. When Jefferson assumed the presidency, he asked his new secretary of state, James Madison, not to issue the commissions because he wanted to appoint his own judges to the bench.

William Marbury, who was in line for a federal judgeship, asked the Supreme Court to issue a *writ of mandamus*, a court order compelling a public official to do his duty, to force Madison to turn over the commission. Congress gave the Supreme Court the power to issue writs of mandamus in the Judiciary Act of 1789. But the Constitution does not give the Supreme Court original jurisdiction in such matters. Facing an untenable position, the Court concluded that the law must be unconstitutional and therefore invalid. In terms of constitutional law, the decision is the most important the Supreme Court has ever made. Shortly after, in *Martin v. Hunter's Lessee* (1816), the Court also held that it had the power to determine whether the decision of a state's legislature is constitutional.[31]

The Supreme Court's assertion of judicial review was controversial because it vested the one branch of government that is not democratically elected with the greatest power. However, the Court has used that power to protect minority rights that might otherwise have been trampled by the majority. Judicial review is particularly important to media law. Without it, courts would not have the power to strike down laws that impinge upon the First Amendment. Having that power over states also means that the Court can prevent 50 inconsistent laws.

Questions for Discussion

1. What are the different sources of law in the United States? Which is paramount and why?
2. How do hierarchy and jurisdiction determine whether a precedent is binding or persuasive?
3. How do common law and civil law legal systems differ?
4. How do criminal and civil law differ?
5. What is the significance of judicial review and how does it make the U.S. legal system different from other common law legal systems?

[30] 5 U.S. 137 (1803).
[31] 14 U.S. 304 (1816).