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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 provides a guide 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 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 common law and law of equity. In the United States, sources of law include constitutions, statutes, executive orders, administrative agencies, federal departments, and 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.[1] 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. It is only through a three-fourths vote from the states that the Constitution may be altered.

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 their own constitutions and the federal Constitution. The U.S. Constitution also requires that states give "full faith and credit" to each other's 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.

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 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 powers as states do. So it regulates illegal activity through its exclusive jurisdiction over 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*, which 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.

In other cases, executives issue orders of their own accord to promote their policies or 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 could override a presidential executive order, for example, with a two-thirds vote.

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.

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 the first to hear cases related to violations of agency rules.

Congress passed the *Administrative Procedures Act* in 1946, to specify the protocol for agency rule-making and enforcement.[2] One of the Act's purposes is to keep agency rulemaking open to provide opportunities for public participation. To that end, the law requires agencies to publish notices of proposed rulemaking, 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 rulemaking 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."[3] It is not the court's role to substitute its judgment for the agency's, 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.'"[4] A court may conclude that an agency action is arbitrary and capricious if it 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.[5]

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.

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 is the National Telecommunications and Information Administration, which acts as the administrative branch's policy advisor for telecommunication issues. It also serves as the contracting agency for the Internet Corporation for Assigned Names and Numbers (ICANN), the nonprofit corporation responsible for the management and coordination of Internet domain names and addresses. The Department of Justice, led by the Attorney General, supervises federal law enforcement. As such, it is involved in the prosecution 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 civil suits against the government. 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

In all legal systems, the role of courts is to determine whether law is applied appropriately in particular cases. But in common law legal systems, like those of England and its former colonies, courts have the power to make law. In the United States, courts have the power to strike down laws that are unconstitutional as well. Common law legal systems inherited two forms of judge-made law from England – *common law* and *law of equity*.

Common law is customary law that has evolved through the common practices of a people. In theory, judges find or discover common law, but in practice they actually make it. Its history dates back to twelfth-century England. King Henry II appointed judges who would ride out to English territories, divided into *circuits*, judging cases that had accumulated in each village or town. The judges applied laws developed through the central court, called the King's Bench. As they did so, local customs were replaced by a national common law.

Circuit judges applied the common law equally, but equal application does not always ensure a fair outcome. When the rules became too rigid, the common people appealed to the king for mercy. The king referred them to his chancellor, who opened the Court of Chancery to issue equitable relief when it seemed appropriate. The Court of Chancery became a court of equity.

Judges still have the power to grant equitable relief, although they rarely do so in separate courts anymore. Nor is the law of equity a separate legal system. Equity is a supplement to common law that provides remedies common law cannot. Common law has the power to compensate a person for harm after the fact, but no mechanism to prevent an action likely to cause harm. For example, there is no relief under common law to prevent a person who has obtained an illegal copy of a yet-to-be-released feature film from putting it on the Internet. Once it has been published on the Internet, the person who uploaded it can be sued or punished, but by that time the market value of the film may have plummeted. Equity fills the gap. Using the law of equity, a judge can impose a restraining order or injunction to prevent the thief from acting before the harm occurs.

Precedents

The decisions that judges make in common law systems form precedents that later courts follow as law. The practice of following precedents is known as *stare decisis* (pronounced stair-ee da-sy-sis), which literally means "let the decision stand." The part of the case that sets the precedent is called the *holding*. This is the court's actual decision regarding the specific facts of the case. 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 a decision from an appellate court, which involves a panel of judges, the precedent or holding comes in the part of the opinion issued by the court's majority. When judges on the panel support the conclusion rendered in the *majority opinion*, but for different reasons, they issue a *concurring opinion* that supplies an alternative analysis. Judges who disagree with the majority's conclusion issue a *dissenting opinion*. Concurring and dissenting opinions are published with the majority opinion, so someone reading the case can acquire a full understanding of the court's reasoning. Occasionally, an appellate court will release a *plurality opinion*, in which there is majority support for a conclusion but no majority support for a rationale supporting the conclusion. The plurality's opinion is the rationale that received the most support. Plurality opinions are narrowly interpreted. Only those aspects of the plurality opinion that draw support from concurring judges are binding.

Court precedents are either binding or persuasive. A *binding precedent* is one that a court must follow. A *persuasive precedent* is one that a court may use as guidance but also has the prerogative to reject. Whether a precedent is binding depends on the court's jurisdiction and hierarchy. *Jurisdiction* refers to the forum in which the case will be decided. There are two separate systems of jurisdiction – the federal system and the state system. A decision from a higher court always binds a lower court in the same jurisdiction.

Modifying, distinguishing, and overruling precedents

The concept of stare decisis may lead one to assume that common law 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.[6] The Court reversed its opinion in 1952, deciding that films, like other media, are a form of protected expression.[7]

The Difference Between Common and Civil Law Legal Systems

Common law legal systems are unique to England 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.[8] 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."[9] 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.[10]

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.'"[11]

The Structure of Court Systems

A court's jurisdiction and hierarchy within the system determines whether the decision it renders will be a binding precedent. So a basic knowledge of the structure of court systems is essential before reading particular cases. In the United States there are two court systems: the federal system and the state system. Whether a case enters the federal or state system depends on the issue and parties involved.

The federal court system

Federal courts address cases that involve constitutional questions, federal statutes, and treaties. They also hear bankruptcy cases and diversity cases, which involve parties from different states, if the amounts in controversy exceed $75,000.

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.

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 Texas, may include as many as four districts located in different parts of the state.

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.

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	Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, N. Mariana Islands, Oregon, Washington
Tenth Circuit	Colorado, Kansas, New Mexico, Utah, Oklahoma, Wyoming
Eleventh Circuit	Alabama, Florida, Georgia

The other two federal circuits, which are located in Washington, D.C., are related to specific topics. The U.S. Court of Appeals for the District of Columbia Circuit

hears appeals from administrative agencies. The U.S. Court of Appeals for the Federal Circuit hears appeals in 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. The Supreme Court hears very few cases comparatively, usually between 80 and 100 a year. When it agrees to hear a case, it grants a *writ of certiorari*.[12] The Court grants certiorari only to those cases that pose a significant legal issue. 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 Chief Justice John Roberts and Justices Ruth Bader Ginsburg, Sonia Sotomayor, Clarence Thomas, Stephen Breyer, Antonin Scalia, John Paul Stevens, Anthony Kennedy, and Samuel Alito. 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.

The state court system

As sovereign entities, states constitute jurisdictions of their own. Although a lower court is bound by the decisions of a higher court within its own state, it is not required to follow the decisions of courts in other states. If, however, a court is dealing with an issue on which there is no case law in its state, the court will examine the way other states have addressed the issue and potentially adopt another state court's approach if it is persuasive.

At the state level, cases enter trial courts of limited or general jurisdiction. *Courts of limited jurisdiction*, which account for 90 percent of all courts in the United States, handle small cases involving misdemeanor behavior in criminal matters and sums under $10,000 in civil matters. Most common are justice of the peace courts,

magistrate courts, municipal courts, city courts, county courts, juvenile courts, and domestic relations courts.[13] More serious criminal and civil cases are tried in *courts of general jurisdiction*. These courts are usually divided into districts or circuits based on existing political boundaries for counties or groups of counties. They are commonly called district, circuit, or superior courts.

The decisions of lower 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. These courts, which usually have three to nine judges sitting en banc, 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.[14] 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 used in the United States. Within the United States, the term civil law more commonly characterizes law that regulates relationships between private parties. 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 by 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 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 jury, which determines 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 jury is convinced there is probable cause to warrant a trial, it will issue a formal accusation of a felony, 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."[15]

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. At the state level only 10 percent of cases actually 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 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 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.[16] 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 12 members who reach a unanimous decision. At the state level, a jury may be smaller and a slight variation in votes is acceptable. 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.[17] 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 involves disagreements between people or organizations in which the court's role is to help settle the dispute. This may involve the issuance of an injunction that requires someone to do something or prohibits someone from doing something, or the imposition of a fine. It does 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 cases are more common than criminal cases.[18] They generally involve disputes over contracts, the ownership or use of property, inheritance, domestic relations (involving marriage, divorce, child custody), and torts. A tort is a civil wrong resulting from conduct that causes injury. Torts associated with digital media law include defamation, invasion of privacy, and infringement of intellectual property, among others.

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.[19] When juries are used, they are normally smaller than those used in criminal trials.

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.[20] 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.[21]

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.[22] 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. 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.[23] 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 nonmoving party.

Remedies If a case involves an issue of equity, 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 an injunction to a plaintiff, 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.[24] If a full trial justifies the preliminary injunction, the court will replace it with a *permanent injunction*.

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 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 are employed by a company, your company may also be liable for your actions if you violate the law. 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, the losing party may petition 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*.

The significance of judicial review

The power of judicial review refers to a courts' authority to review the decisions of other branches of government. Judicial review is the power of a court 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).[25] The case involved a judicial appointment that President Adams made before leaving office following his loss to Thomas Jefferson. Several of Adams' judicial appointees were confirmed by the Senate, 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.[26]

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.

How to Find the Law

To be confident of your knowledge of the law, you need to know how to find it. Fortunately, most legal resources are now available through computerized databases and the Internet. Below are the primary sources of law and directions to read citations used with them.

Constitutions Constitutions are the ultimate source of law for a political body. The U.S. Constitution can be found online through the Government Printing Office website at http://www.gpoaccess.gov/constitution/index.html. State constitutions can be found online at http://www.constitution.org/cons/usstcons.htm. Citations indicate the applicable jurisdiction in abbreviated form, article, section (indicated by §) and clause:

Jurisdiction	Article	Section	Clause
U.S. Const.	art. III	§ 2	cl. 2
N.Y. Const.	art. I	§ 9	cl. 2

Federal and state codes Federal, state, and municipal laws are arranged topically in codes. Federal statutes are amassed in the United States Code (U.S.C.), which is divided into 50 titles, categorized by subject. Title 17, for example, contains copyright law. Citations indicate the title of the U.S. Code, the section number, and the date of the compilation:

Title	Code	Section	Date
17	U.S.C.	§ 106	(2000)

The U.S. Code is published every six years. In between editions, the government releases annual supplements. The official version is available through the Government Printing Office website at http://www.gpoaccess.gov/USCODE/index.html. Annotated versions of the U.S. Code, such as the U.S. Code Annotated (U.S.C.A.) and the U.S. Code Service (U.S.C.S.), are available through commercial databases like Westlaw and Lexis-Nexis. The citations are similar, but the publisher is often included with the compilation date:

Title	Code	Section	Publisher and Date
17	U.S.C.A.	§ 106	(Thomson/West 2000)
17	U.S.C.S.	§ 106	(LexisNexis 2000)

State codes also come in official and commercial annotated versions, e.g. the Iowa Code and the Iowa Code Annotated. Citations to state codes include the name of the code, the section number and the date of the compilation:

Iowa Code § 321 (2005)
Iowa Code Ann. § 321 (Thomson/West 2005)

State statutes can be found easily through commercial databases like Lexis or Westlaw, but are also available on the Internet though Cornell's Legal Information Institute at http://www.law.cornell.edu/statutes.html.

Administrative regulations and executive orders Federal agency rules, proposed rules, and notices, as well as executive orders and other presidential documents, are

published daily in the Federal Register (abbreviated as either FR or Fed. Reg.), which can be found at http://www.gpoaccess.gov/fr/. Citations to agency notices include the volume number, abbreviation for Federal Register, page number, and publication date:

Vol.	Publication	Page	Date
73	FR	143	(June 30, 2008)

Citations to executive orders include the same information preceded by the executive order number:

Exec. Order No. 13,462, 73 FR 11805 (March 4, 2008)

Federal department and agency rules published in the Federal Register are eventually codified in the Code of Federal Regulations (C.F.R.), located at http://www.gpoaccess.gov/CFR/. The C.F.R. is divided into 50 titles related to specific subject areas. Citations include the title, abbreviation for Code of Federal Regulations, section number, and date.

Title	Code	Section	Date
16	C.F.R.	§ 255.1	(2008)

Court opinions Court decisions are initially released as slip opinions, published on court websites, arranged by date or docket number. Eventually, these decisions are collected in bound volumes called case reporters that are paginated, annotated, and accompanied by topical digests. The commercial services that produce case reporters sell access to the same information through Westlaw and Lexis-Nexis. These searchable, full-text databases are expensive, but often available to college students free through their university libraries. Findlaw.com offers searchable versions of slip opinions for free.

Supreme Court decisions are published in United States Reports (U.S.), the official case reporter for Supreme Court decisions, and the commercial reporters Supreme Court Reporter (S.Ct.), U.S. Law Week (USLW), and United States Supreme Court Reports, Lawyers' Edition (L.Ed. or L.Ed.2d). Oral arguments can be heard online through the Oyez Project at http://www.oyez.org.

Citations to Supreme Court cases provide the case name, volume, abbreviated name of the reporter, beginning page of the case, and date the case was decided. It is sufficient to reference a case by its official citation, but some authors and courts supply parallel citations to make a case easier to find:

Case name	Vol.	Reporter	Page	Year
ACLU v. Reno,	521	U.S.	844	(1997)
ACLU v. Reno,	117	S.Ct.	2329	(1997)

U.S. Court of Appeals opinions are reported in the Federal Reporter (F., F.2d, F.3d). Volumes for 1950–93 are online at http://bulk.resource.org/courts.gov/c/F2/. Citations include the case name, volume, abbreviated name of the reporter, beginning page of the case and, in parentheses, the circuit in which the case was decided and date:

Case name	Vol.	Reporter	Page	Circuit and Year
Taubman Co. v. Webfeats,	244	F.3d	572	(7th Cir. 2001)

Selected U.S. District Court opinions appear in the Federal Supplement (F. Supp.). Citations include the case name, volume, abbreviated name of the reporter, beginning page of the case and, in parentheses, the district in which the case was decided and date:

Case name	Vol.	Reporter	Page	District and Year
Doe v. MySpace,	474	F.Supp.2d	843	(W.D. Tex. 2007)

State court opinions appear in regional reporters that collect opinions from several states. These include West's Atlantic Reporter, North Eastern Reporter, North Western Reporter, Pacific Reporter, South Eastern Reporter, South Western Reporter, and Southern Reporter. The citation 807 A.2d 847 (Pa. 2002), for example, indicates that the opinion appears in volume 807 of the Atlantic Reporter, 2nd series, on page 847, and that the case was decided by the Pennsylvania Supreme Court in 2002. Some states also have their own reporters.

Secondary sources Secondary sources of information, such as law review and journal articles, can provide helpful background and analysis to understand a legal issue. Digital versions of law reviews are available by subscription through Westlaw, Lexis-Nexis and Hein Online. Findlaw.com compiles some full text versions of law reviews at http://stu.findlaw.com/journals/general.html.

A law review citation includes the author's name, article title, journal volume, abbreviated journal name, page on which the article begins, and date of publication. A second page number refers to a specific citation in the text:

Dan Hunter, Cyberspace as Place and the Tragedy of the Digital Anticommons, 91 Cal. L. Rev. 439, 491 (2003)

This citation indicates that the article "Cyberspace as Place and the Tragedy of the Digital Anticommons" written by Dan Hunter, appears in volume 91 of the California Law Review, printed in 2003, beginning on page 439, with a particular reference on 491.

Some helpful sites with government information

Library of Congress, http://www.loc.gov, for copyright information.

Library of Congress Thomas, http://thomas.loc.gov/home/thomas.ht, for pending bills and legislative history.

U.S. Patent and Trademark Office, http://www.uspto.gov, for trademarks and software patents.

U.S. Federal Communications Commission, http://www.fcc.gov, for telecommunications regulations.

U.S. Federal Trade Commission, http://www.ftc.gov/, for advertising and antitrust rules.

U.S. Department of Justice, http://www.usdoj.gov, and the *Federal Bureau of Investigation*, www.fbi.gov, for information on computer and other federal crimes.

Questions for Discussion

1. What are the four 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. What is the significance of judicial review and how does it make the U.S. legal system different from other common law legal systems?