Twentieth Edition

MASS MEDIA LAW

Clay Calvert | Dan V. Kozlowski | Derigan Silver

Mc Graw Hill Education

Mass Media Law

20th Edition

Clay Calvert
University of Florida

Dan V. Kozlowski
Saint Louis University

Derigan Silver
University of Denver

MASS MEDIA LAW, TWENTIETH EDITION

Published by McGraw-Hill Education, 2 Penn Plaza, New York, NY 10121.

1 2 3 4 5 6 7 8 9 LCR 21 20 19 18 17

ISBN 978-1-259-91390-7
MHID 1-259-91390-2

Portfolio Manager: *Jamie Laferrera*
Product Developer: *Alexander Preiss*
Senior Marketing Manager: *Laura Young*
Content Project Managers: *Ryan Warczynski, Samantha Donisi-Hamm, Sandra Schnee*
Senior Buyer: *Sandy Ludovissy*
Lead Content Licensing Specialist: *Carrie Burger*
Cover Image: ©*wellphoto/Shutterstock RF*
Compositor: *MPS Limited*

mheducation.com/highered

CONTENTS

PREFACE

Today, perhaps more than ever, it is vital for college students in the United States to understand the principles of media law and the First Amendment freedoms of speech, press and assembly. Shortly before this preface was drafted, the nation's president labeled journalists at ABC, CBS, NBC, CNN and *The New York Times* "the enemy of the American people." What's more, terms such as "fake news" and "alternative facts" were taking on controversial lives of their own. And at least 15 states had bills pending in their legislatures in 2017 that threatened to reduce the ability of citizens to engage in protests, thus not only jeopardizing free speech but also "the right of the people peaceably to assemble."

It thus is fitting that the 20th edition of this textbook sees two new co-authors who bring fresh perspectives, renewed energy and scholarly expertise to the topics spanning all 16 chapters. It simply wouldn't be possible for any one person alone to replace outgoing author Don Pember. This edition thus brings with it both Dan Kozlowski of Saint Louis University and Derigan Silver of the University of Denver. They have extensive backgrounds in teaching and writing about a wide range of media law topics. Their new voices, coupled with the continuing guidance and authorship of Clay Calvert, hopefully make the 20th edition of *Mass Media Law* timely, relevant and helpful to undergraduates across the communication fields of advertising, journalism, media studies, public relations and telecommunications.

Although updating this edition began as an attempt to keep real-life examples fresh and lively, it quickly became apparent that so much had happened in media law (and continues to happen) that a more thorough rewrite was needed. First, the text changes its approach to Internet and new(er) communication law. Rather than continually devoting separate sections to address media law and the Internet, chapters now generally integrate discussions of how the law applies to the Internet throughout the book. So much of media law today involves the Web—meaning that so much of each chapter in this book now necessarily involves the Web.

In addition, the 20th edition has updated information, examples and cases in every chapter. The last few years of media law have been very

active, with courts regularly facing new cases and issues. In addition to a wide number of new examples, such as the recent privacy case involving Hulk Hogan and the defamation suit against *Rolling Stone* magazine filed by a dean at the University of Virginia, the book features new material on the right to record police officers in public settings, on net neutrality, on the FCC's regulation of indecency, on laws concerning information gathering with drones, a new section on Internet defamation by anonymous third-party posters, updates on recent changes to the Freedom of Information Act (FOIA) and new information about trademark law in our chapter on intellectual property, among other updates.

In light of the lack of recent obscenity prosecutions in the United States, as well as comments from some reviewers and users of the book that they don't cover obscenity during class and to reduce pages where possible, we have significantly streamlined

Chapter 13. The key rules and tests regarding obscenity, child pornography and the zoning of sexually oriented businesses, however, remain and have been updated where needed.

The 20th edition of *Mass Media Law* is now available online with Connect, McGraw-Hill Education's integrated assignment and assessment platform. Connect also offers SmartBook for the new edition, which is the first adaptive reading experience proven to improve grades and help students study more effectively. All of the title's Web site and ancillary content is also available through Connect, including:

- A full Test Bank of multiple-choice questions that test students on central concepts and ideas in each chapter.
- An Instructor's Manual for each chapter with full chapter outlines, sample test questions and discussion topics.
- Lecture Slides for instructor use in class and downloadable RAP forms.

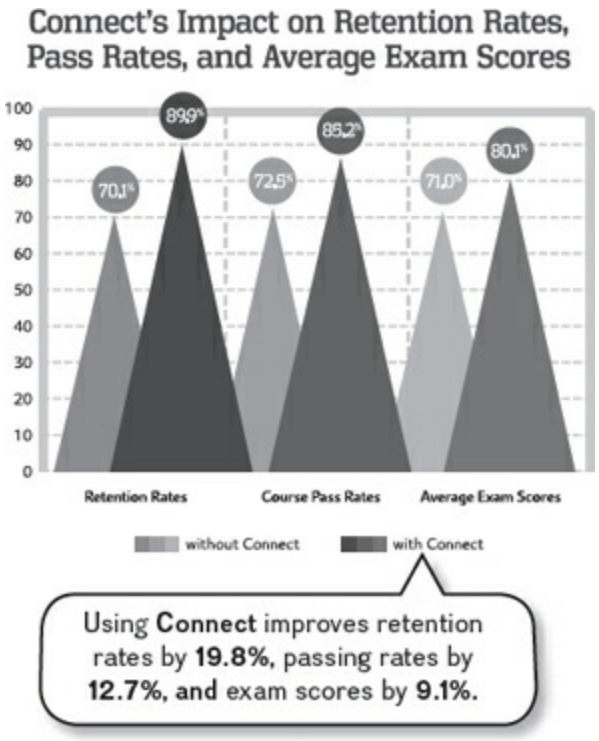
McGraw-Hill Connect® is a highly reliable, easy-to-use homework and learning management solution that utilizes learning science and award-winning adaptive tools to improve student results.

Homework and Adaptive Learning

- Connect's assignments help students contextualize what they've learned through application, so they can better understand the material and think critically.
- Connect will create a personalized study path customized to individual student needs through SmartBook®.
- SmartBook helps students study more efficiently by delivering an interactive reading experience through adaptive highlighting and review.

Over **7 billion questions** have been answered, making McGraw-Hill Education products more intelligent, reliable, and precise.

73% of instructors who use **Connect** require it; instructor satisfaction **increases** by 28% when **Connect** is required.



Quality Content and Learning Resources

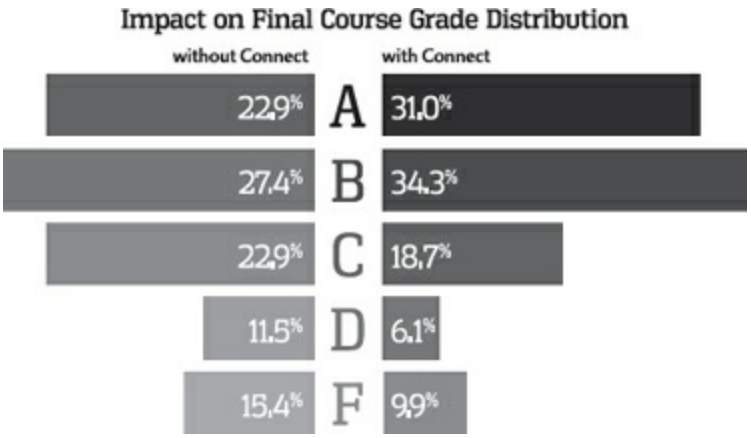
- Connect content is authored by the world's best subject matter experts, and is available to your class through a simple and intuitive interface.
- The Connect eBook makes it easy for students to access their reading material on smartphones and tablets. They can study on the go and don't need Internet access to use the eBook as a reference, with full functionality.
- Multimedia content such as videos, simulations, and games drive student engagement and critical thinking skills.

Robust Analytics and Reporting

- Connect Insight® generates easy-to-read reports on individual students, the class as a whole, and on specific assignments.
- The Connect Insight dashboard delivers data on performance, study behavior, and effort. Instructors can quickly identify students who struggle and focus on material that the class has yet to master.
- Connect automatically grades assignments and quizzes, providing easy-to-read reports on individual and class performance.

©Hero Images/Getty Images

More students earn **As** and **Bs** when they use **Connect**.



Trusted Service and Support

- Connect integrates with your LMS to provide single sign-on and automatic syncing of grades. Integration with Blackboard®, D2L®, and Canvas also provides automatic syncing of the course calendar and assignment-level linking.
- Connect offers comprehensive service, support, and training throughout every phase of your implementation.
- If you're looking for some guidance on how to use Connect, or want to learn tips and tricks from super users, you can find tutorials as you work. Our Digital Faculty Consultants and Student Ambassadors offer insight into how to achieve the results you want with Connect.

www.mheducation.com/connect

ACKNOWLEDGMENTS

Clay Calvert thanks both Dan Kozlowski and Derigan Silver for enthusiastically and energetically taking on the massive endeavor that it is co-authoring a textbook. He also thanks his undergraduates in the College of Journalism and Communications at the University of Florida for their feedback on the book. Finally, Clay Calvert thanks Berl Brechner for his continuing support of the Marion B. Brechner First Amendment Project and other initiatives in the College of Journalism and Communications.

Dan Kozlowski is grateful that Clay Calvert invited him to join the book as a co-author. Clay is a giant in the field of media law, and Dan appreciates the guidance Clay has provided both throughout the writing of this edition and also throughout Dan's academic career in general. Dan also thanks Derigan Silver for his feedback and his sense of humor as they worked together on this project. And Dan thanks his wife and two daughters for being awesome and for helping to keep him level-headed.

Derigan Silver thanks Clay Calvert for inviting him to be a co-author of the book and for providing mentorship and advice for a number of years. He also thanks Dan for his feedback and inspiration throughout this project. He would also like to thank his students at the University of Denver for their interesting and engaging questions, comments and concerns. Finally, he thanks his wife, Alison, for putting up with him.

We would also like to thank those instructors who reviewed our book and gave us their valuable input. It is much appreciated. They are: Betsy Emmons, Samford University; Dr. Felisa B. Kaplan, NY Institute of Technology; and David Shipley, Samford University.

Finally, all three authors greatly appreciate the support of McGraw-Hill and the multiple individuals there who assisted with the publishing of this book.

IMPORTANT NEW, EXPANDED OR UPDATED MATERIAL

Chapter 1

- New examples of equity law, including a restraining order against a South Carolina reporter and an injunction barring speakers from repeating defamatory comments
- New case illustrating the void for vagueness doctrine
- Discussion of a 2016 North Carolina Supreme Court decision striking down a cyberbullying statute as overbroad

Chapter 2

- New examples of self-censorship, including major U.S. news outlets not publishing cartoons depicting the Prophet Muhammad in 2015 and ESPN's firing of Curt Schilling in 2016
- New discussion about Milo Yiannopoulos' college campus visits and community censorship

Chapter 3

- Multiple new examples of high school censorship involving newspapers, T-shirts and Confederate flag imagery
- New discussion of the 2015 case *Bell* v. *Itawamba County School Board* involving punishment of a student for posting a profanity-laced rap recording online
- New examples of efforts to ban books in public schools and libraries
- New discussion of a 2016 appellate court case striking down a state law banning "ballot selfies" because the law failed intermediate scrutiny
- New content on the U.S. Supreme Court's *McCullen* v. *Coakley* decision regarding abortion protests
- New discussion of the U.S. Supreme Court's *Elonis* v. *United States* decision regarding social media, rap music and true threats
- New section on net neutrality, with a particular focus on the FCC's 2015 Open Internet Order

Chapter 4

- New discussion of Communications Decency Act Section 230 and libel by anonymous third-party posters
- New section about defamation on social media sites such as Twitter and Facebook

Chapter 5

- New section on “involuntary limited-purpose public figures”
- New material on the Consumer Review Fairness Act affecting “gag clauses” in contracts

Chapter 6

- New material on the “self-defense privilege”
- New discussion of criminal libel

Chapter 7

- New discussion of Lindsay Lohan’s lawsuit against Rockstar Games and Take Two Interactive over a character in “Grand Theft Auto V”
- New section on intrusion by drones
- New section on an appropriation case involving the videogame “Madden NFL”

Chapter 8

- Discussion of *The New York Times’* publication of part of Donald Trump’s 1995 income tax returns
- Discussion of *Hulk Hogan* v. *Gawker*
- New material on secret-recording cases

Chapter 9

- Updates on media access to executions and information about execution drugs
- New section on journalists arrested for covering Dakota Access Pipeline protests and the inauguration of President Donald Trump
- New section on government officials using private text messages and e-mail accounts

Chapter 10

- New discussion of the appellate court decision in *U.S.* v. *Sterling*
- Updated discussion of *Convertino* v. *U.S. Department of Justice*, where an appellate court ruling seemed to give journalists another weapon to protect source confidentiality
- New section addressing the Department of Justice’s revised guidelines for when and how a federal prosecuting attorney can

subpoena a reporter

Chapter 11

- New discussion of the U.S. Supreme Court's decision in *U.S.* v. *Skilling* and when a change of venue is appropriate
- New discussion about importance of news media intervening when judges close courtrooms

Chapter 12

- New section on social media use by lawyers, reporters, jurors and others
- Updates on state and federal rules dealing with microblogging from courtrooms
- New material about the U.S. Judicial Conference's pilot project evaluating effects of cameras in trial courtrooms

Chapter 13

- New examples of convictions for distributing and possessing child pornography via the Internet and smartphones
- New content on the U.S. Supreme Court's 2017 *Packingham* v. *North Carolina* decision regarding the online speech rights of sex offenders

Chapter 14

- Expanded discussion of trademark law
- New content on the Trademark Dilution Revision Act of 2006
- New section on the U.S. Supreme Court case *Lee* v. *Tam* dealing with disparaging trademarks
- New section on the copyright case of *Star Athletica* v. *Varsity Brands*
- New material on parody, satire and trademark law focusing on *Cariou* v. *Prince*

Chapter 15

- New discussion of the FTC's antitrust case against the Staples, Inc., and Office Depot merger

- New discussion of the U.S. Supreme Court's *Lexmark International, Inc.* v. *Static Control Components* decision regarding

standing to file Lanham Act claims

- New content on the Lanham Act case between Dannon and General Mills against Chobani involving an injunction over Chobani's ads for Greek yogurt
- Updated material on controversies involving Backpage.com, including whether the site should have immunity under the Communications Decency Act Section 230

Chapter 16

- New discussion of the 2016 appellate court ruling in *Prometheus Radio Project* v. *FCC* regarding ownership restrictions
- New content regarding the U.S. Supreme Court's ruling against Aereo in *ABC, Inc.* v. *Aereo*
- Updated discussion of the FCC's regulation of broadcast indecency, including its $325,000 fine against a Virginia TV station in 2015

CHAPTER 1

The American Legal System

©McGraw-Hill Education/Jill Braaten

Before studying media law, one needs a general background in law and the judicial system. In the United States, as in most societies, law is a basic part of existence, as necessary for the survival of civilization as are economic and political systems, the mass media, cultural achievement and the family.

This chapter has two purposes: to acquaint you with the law and to outline the legal system in the United States. While not designed to be a comprehensive course in law and the judicial system, it provides a sufficient introduction to understand the next 15 chapters.

The chapter opens with a discussion of the law, considering the most important sources of the law in the United States, and it moves on to the judicial system, including both the federal and state court systems. A summary of judicial review and a brief outline of how both criminal and civil lawsuits start and proceed through the courts are included in the discussion of the judicial system.

2

FIVE SOURCES OF LAW

1. Common law
2. Equity law

3. Statutory law
4. Constitutional law (federal and state)
5. Executive orders and administrative rules

SOURCES OF THE LAW

There are many definitions of law. Some say law is any social norm or any organized method of settling disputes. Most writers insist it is more complex, that some system of sanctions and remedies is required for a genuine legal system. John Austin, a 19th-century English jurist, defined law as definite rules of human conduct with appropriate sanctions for their enforcement. He added that both the rules and the sanctions must be prescribed by duly constituted human authority.[1] Roscoe Pound, an American legal scholar, suggested that law is social engineering—the attempt to order the way people behave. For the purposes of this book, it is helpful to consider law to be a set of rules that attempt to guide human conduct and a set of formal, governmental sanctions that are applied when those rules are violated.

What is the source of American law? There are several major sources of the law in the United States: the U.S. Constitution and state constitutions; common law; the law of equity; statutory law; and the rulings of various executives, such as the president and mayors and governors, and administrative bodies and agencies. Historically, we trace American law to Great Britain. As colonizers of much of the North American continent, the British supplied Americans with an outline for both a legal system and a judicial system. In fact, because of the many similarities between British and American law, many people consider the Anglo-American legal system to be a single entity. Today, our federal Constitution is the supreme law of the land. Yet when each of these sources of law is considered separately, it is more useful to begin with the earliest source of Anglo-American law, the common law.

COMMON LAW

Common law,* which developed in England during the 200 years after the Norman Conquest in the 11th century, is one of the great legacies of the British people to colonial America. During those two centuries, the crude mosaic of Anglo-Saxon customs was replaced by a single system of law

worked out by jurists and judges. The system of law became common throughout England; it became common law. It was also called common

3

law to distinguish it from the ecclesiastical (church) law prevalent at the time. Initially, the customs of the people were used by the king's courts as the foundation of the law, disputes were resolved according to community custom, and governmental sanction was applied to enforce the resolution. As such, common law was, and still is, considered "discovered law."

As legal problems became more complex and as the law began to be professionally administered (the first lawyers appeared during this era, and eventually professional judges), it became clear that common law reflected not so much the custom of the land as the custom of the court—or more properly, the custom of judges. While judges continued to look to the past to discover how other courts decided a case when given similar facts (precedent is discussed in a moment), many times judges were forced to create the law themselves. Common law thus sometimes is known as judge-made law.

Common law thus sometimes is known as judge-made law.

Common law is an inductive system in which a legal rule and legal standards are arrived at after consideration of many cases involving similar facts. In contrast, in a deductive system of law, which is common in many other nations, the rules are expounded first and then the court decides the legal situation under the existing rule. The ability of common law to adapt to change is directly responsible for its longevity.

Stare decisis is the key phrase: Let the decision stand.

Fundamental to common law is the concept that judges should look to the past and follow court precedents.* The Latin expression for the concept is this: "Stare decisis et non quieta movere" (to stand by past decisions and not disturb things at rest). **Stare decisis** is the key phrase: Let the decision stand. A judge should resolve current problems in the same manner as similar problems were resolved in the past. Put differently, a judge will look to a prior case opinion to guide his or her analysis and decision in a current case. Following precedent is beneficial as it builds predictability and consistency into the law—which in turn fosters judicial legitimacy. Courts may be perceived as more legitimate in the public's eye if they are predictable and consistent in their decision-making process.

The Role of Precedent

At first glance one would think that the law never changes in a system that continually looks to the past. Suppose that the first few rulings in a line of cases were bad decisions. Are courts saddled with bad law forever? The answer is no. While following **precedent** is desired (many people say that certainty in the law is more important than justice), it is not always the proper way to proceed. To protect the integrity of common law, judges developed means of coping with bad law and new situations in which the application of old law would result in injustice.

Imagine that the newspaper in your hometown publishes a picture and story about a 12-year-old girl who gave birth to a 7-pound son in a local hospital. The mother and father do not like the publicity and sue the newspaper for invasion of privacy. The attorney for the parents finds a precedent, *Barber* v. *Time*,[2] in which a Missouri court ruled that to photograph a patient in a hospital room against her will and then to publish that picture in a newsmagazine is an **invasion of privacy.**

4

FOUR OPTIONS FOR HANDLING PRECEDENT

1. Accept/Follow
2. Modify/Update
3. Distinguish
4. Overrule

Does the existence of this precedent mean that the young couple will automatically win this lawsuit? Must the court follow and adopt the *Barber* decision? The answer to both questions is no. For one thing, there may be other cases in which courts have ruled that publishing such a picture is not an invasion of privacy. In fact, in 1956 in the case of *Meetze* v. *AP*[3] a South Carolina court made such a ruling. But for the moment assume that *Barber* v. *Time* is the only precedent. Is the court bound by this precedent? No. The court has several options concerning the 1942 decision.

First, it can *accept* the precedent as law and rule that the newspaper has

invaded the privacy of the couple by publishing the picture and story about the birth of their child. When a court accepts a prior court ruling as precedent, it is adopting it and following it for guidance. Second, the court can *modify,* or change, the 1942 precedent by arguing that *Barber* v. *Time* was decided more than 75 years ago when people were more sensitive about going to a hospital, since a stay there was often considered to reflect badly on a patient. Today hospitalization is no longer a sensitive matter to most people. Therefore, a rule of law restricting the publication of a picture of a hospital patient is unrealistic, unless the picture is in bad taste or needlessly embarrasses the patient. Then the publication may be an invasion of privacy. In our imaginary case, then, the decision turns on what kind of picture and story the newspaper published: a pleasant picture that flattered the couple or one that mocked and embarrassed them? If the court rules in this manner, it *modifies* the 1942 precedent, making it correspond to what the judge perceives to be contemporary sensibilities and circumstances.

As a third option the court can decide that *Barber* v. *Time* provides an important precedent for a plaintiff hospitalized because of an unusual disease—as Dorothy Barber's was—but that in the case before the court, the plaintiff was hospitalized to give birth to a baby, a different situation: Giving birth is a voluntary status; catching a disease is not. Because the two cases present different problems, they are really different cases. Hence, the *Barber* v. *Time* precedent does not apply. This practice is called *distinguishing the precedent from the current case,* a very common action. In brief, a court can distinguish a prior case (and therefore choose not to accept it and not to follow it) because it involves either different facts or different issues from the current case.

Finally, the court can *overrule* the precedent. When a court overrules precedent, it declares the prior decision wrong and thus no longer the law. Courts generally overrule prior opinions as bad law only when there are changes in:

1. factual knowledge and circumstances;
2. social mores and values; and/or
3. judges/justices on the court.

For instance, in 2003 the U.S. Supreme Court in *Lawrence* v. *Texas*[4] overruled its 1986 opinion called *Bowers* v. *Hardwick*[5] that had upheld a

Georgia anti-sodomy statute prohibiting certain sexual acts between consenting gay adults. By 2003, American society increasingly accepted homosexuality (evidenced then by both the dwindling number of states that prohibited the conduct referenced in *Bowers* and by at least two Supreme Court rulings subsequent to *Bowers* but before *Lawrence* that were favorable to gay rights and thus eroded *Bowers'* strength). There also was growing recognition that consenting adults, regardless of sexual orientation, should possess the constitutional, personal liberty to engage in private sexual conduct of their choosing. Furthermore, six of the nine justices on the Supreme Court had changed from 1986 to 2003. Thus, 17 years after *Bowers* was decided, there were changes in social values, legal sentiment and the court's composition. The Supreme Court in *Lawrence* therefore struck down a Texas anti-sodomy statute similar to the Georgia one it had upheld in *Bowers*. It thus overruled *Bowers*. Justice Anthony Kennedy noted that although "the doctrine of stare decisis is essential to the respect accorded to the judgments of the court and to the stability of the law," it "is not, however, an inexorable command." In the hypothetical case involving the 12-year-old girl who gave birth, the only courts that can overrule the Missouri Supreme Court's opinion in *Barber* v. *Time* are the Missouri Supreme Court and the U.S. Supreme Court.

In 2010, a closely divided Supreme Court in *Citizens United* v. *Federal Elections Commission* overruled a 1990 opinion called *Austin* v. *Michigan State Chamber of Commerce*. The Court in *Austin* had upheld a Michigan law banning corporations from spending money from their own treasury funds in order to create their own ads in support of, or in opposition to, any candidate in elections for state office. By 2010, the composition of the Court had shifted over 20 years and the five conservative-leaning justices (Kennedy, John Roberts, Antonin Scalia, Samuel Alito and Clarence Thomas) in *Citizens United* voted to overrule *Austin* in the process of declaring unconstitutional a federal law that prohibited corporations and unions from using their general treasury funds to make independent expenditures for speech expressly advocating for the election or defeat of a candidate for public office. In reaching this conclusion, Justice Kennedy wrote for the majority about the importance of protecting political speech, regardless of who the speaker is (a corporation, a union or the common citizen), and he concluded "that stare decisis does not compel the continued acceptance of *Austin*. The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether."

Obviously, the preceding discussion oversimplifies the judicial process. Rarely is a court confronted with only a single precedent. Indeed, as attorneys would put it, there may be several prior cases that are "on point" or may apply as precedent. And whether or not precedent is binding on a court is often an issue. For example, decisions by the

6

Supreme Court of the United States regarding the U.S. Constitution and federal laws are binding on all federal and state courts. Decisions by the U.S. Court of Appeals on federal matters are binding only on other lower federal and state courts in that circuit or region. (See pages 27–29 for a discussion of the circuits.) The supreme court of any state is the final authority on the meaning of the constitution and laws of that state, and its rulings on these matters are binding on all state and *federal* courts in that state. Matters are more complicated when federal courts interpret state laws. State courts can accept or reject these interpretations in most instances. Because mass media law is so heavily affected by the First Amendment, state judges frequently look outside their borders to precedents developed by the federal courts. A state court ruling on a question involving the First Amendment guarantees of free speech and press will be substantially guided by federal court precedents on the same subject.

Lawyers and law professors often debate how important precedent really is when a court makes a decision. Some have suggested a "hunch theory" of jurisprudence: A judge decides a case based on a gut feeling of what is right and wrong and then seeks out precedents to support the decision.

Finding Common-Law Cases

Common law is not specifically written down someplace for all to see and use. It is instead contained in hundreds of thousands of decisions handed down by courts over the centuries. Many attempts have been made to summarize the law. Sir Edward Coke compiled and analyzed the precedents of common law in the early 17th century. Sir William Blackstone later expanded Coke's work in the monumental *Commentaries on the Law of England*. More recently, in such works as the massive *Restatement of the Law, Second, of Torts,* the task was again undertaken, but on a narrower scale.

Courts began to record their decisions centuries ago. These decisions are called "opinions" in legal parlance. The modern concept of fully

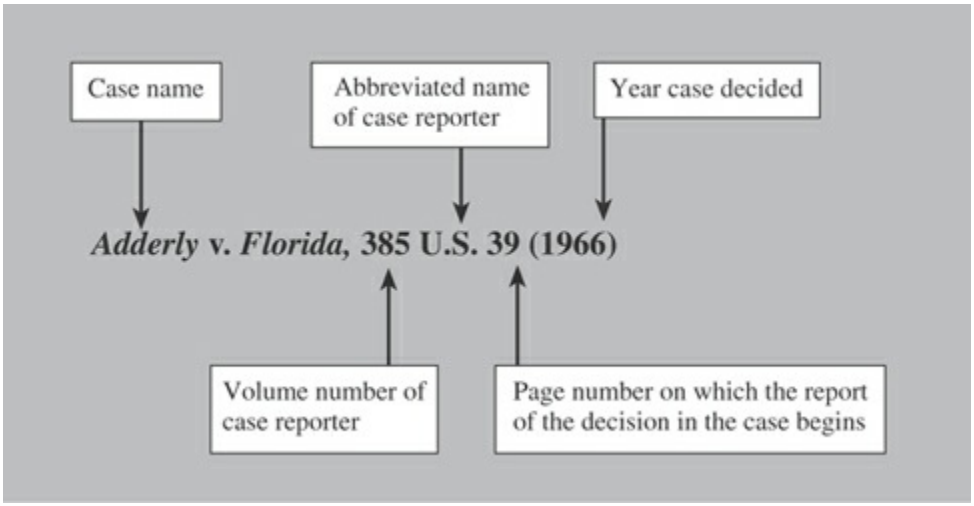
reporting written decisions of all courts probably began in 1785 with the publication of the first British Term Reports.

While scholars and lawyers still uncover common law using the case-by-case method, it is fairly easy today to locate the appropriate cases through a simple system of citation. The cases of a single court (such as the U.S. Supreme Court or the federal district courts) are collected in a single **case reporter** (such as the "United States Reports" or the "Federal Supplement"). The cases are collected chronologically and fill many volumes. Each case collected has its individual **citation,** or identification number, which reflects the name of the reporter in which the case can be found, the volume of that reporter, and the page on which the case begins (Figure 1.1). For example, the citation for the decision in *Adderly* v. *Florida* (a freedom-of-speech case) is 385 U.S. 39 (1966). The letters in the middle (U.S.) indicate that the case is in the "United States Reports," the official government reporter for cases decided by the Supreme Court of the United States. The number 385 refers to the specific volume of the "United States Reports" in which the case is found. The second number (39) gives the page on which the case appears. Finally, 1966 provides the year in which the case was decided. So, *Adderly* v. *Florida* can be found on page 39 of volume 385 of the "United States Reports."

7

FIGURE 1.1

Reading a case citation.



Computers affected the legal community in many ways. Court opinions are now available via a variety of online services. For instance, two legal databases attorneys often use and that frequently are available free to

students at colleges and universities are LexisNexis and Westlaw. These databases provide access to court opinions, statutory law (see pages 9–11) and law journal articles. In most jurisdictions, lawyers may file documents electronically with the court.

If you have the correct citation, you can easily find any case you seek. Locating all citations of the cases apropos to a particular problem—such as a libel suit—is a different matter and is a technique taught in law schools. A great many legal encyclopedias, digests, compilations of common law, books and articles are used by lawyers to track down the names and citations of the appropriate cases.

TYPICAL REMEDIES IN EQUITY LAW

1. Temporary restraining order (TRO)
2. Preliminary injunction
3. Permanent injunction

EQUITY LAW

Equity is another kind of judge-made law. The distinction today between common law and equity law has blurred. The cases are heard by the same judges in the same courtrooms. Differences in procedures and remedies are all that is left to distinguish these two categories of the law. Separate consideration of common law and equity leads to a better understanding of both, however. Equity was originally a supplement to the common law and developed side by side with common law.

The rules and procedures under equity are far more flexible than those under common law. Equity really begins where common law leaves off. Equity suits are never tried

8

before a jury. Rulings come in the form of **judicial decrees,** not in judgments of yes or no. Decisions in equity are (and were) discretionary on the part of judges. And despite the fact that precedents are also relied upon in the law of equity, judges are free to do what they think is right and fair in a specific case.

Equity provides another advantage for troubled litigants—the

restraining order. While the typical remedy in a civil lawsuit in common law is **damages** (money), equity allows a judge to issue orders that can either be preventive (prohibiting a party from engaging in a potential behavior it is considering) or remedial (compelling a party to stop doing something it currently is doing). Individuals who can demonstrate that they are in peril or are about to suffer a serious irremediable wrong can usually gain a legal writ such as an injunction or a restraining order to stop someone from doing something. Generally, a court issues a temporary restraining order or preliminary injunction until it can hear arguments from both parties in the dispute and decide whether an injunction should be made permanent.

For instance, in January 2015 a South Carolina judge issued a temporary restraining order (TRO) preventing a small-town newspaper reporter in that state from publishing the contents of a diary belonging to the widow of James Brown, the famous singer known as the "Godfather of Soul." In the midst of an ongoing legal battle over Brown's estate, the reporter received an anonymous package containing the diary of Brown's widow. The diary, which had been sealed by a court, contained entries that seemed to suggest that the widow might not have actually been legally married to Brown. The reporter posted some passages from the diary to Facebook, but the widow then went to court and persuaded a lower-court judge that she "may suffer irreparable harm" if the reporter was not restrained from publishing any more of the diary's contents. Such injunctions—even TROs, which are brief in time, as the word "temporary" suggests—stopping the dissemination of truthful speech about a newsworthy matter presumptively violate the First Amendment (see Chapter 2 regarding prior restraints). The reporter's lawyers thus appealed the order, and the South Carolina Supreme Court vacated the TRO, ruling that it "clearly violates" the First Amendment and "will not be upheld by this Court."

On the other hand, equitable remedies in the form of injunctions are more likely to be granted in copyright cases where the plaintiff can demonstrate the defendant is selling copyrighted material owned by the plaintiff (see Chapter 14 regarding copyright). Universal Studios, which owns the movie rights to the "Fifty Shades of Grey" book series, sought an injunction in 2013 against an adult-movie company called Smash Pictures to stop the distribution of a movie called "Fifty Shades of Grey: A XXX Adaptation." While parodies that make fun of or comment on the original work often are protected against copyright claims, this porn parody copied

many lines from the book nearly verbatim and simply claimed to be a hard-core version of the book. The case ultimately settled, with Smash Pictures consenting to a permanent injunction prohibiting the distribution of its parody.

Ultimately, a party seeks an equitable remedy (a restraining order or injunction) if there is a real threat of a direct, immediate and irreparable injury for which monetary damages won't provide sufficient compensation.

9

YOU CAN'T SAY THAT AGAIN!: ENJOINING DEFAMATION

As discussed in Chapters 4, 5 and 6, when a speaker publishes something defamatory about another person—a false statement of fact that damages that person's reputation—the traditional legal recourse in the United States is a lawsuit for defamation, with the defamed party receiving monetary damages from the defendant. But as Professor David Ardia has argued, over the past decade, the Internet has brought increased attention to the adequacy of monetary damages as the only remedy for defamation. Today, defamation cases are increasingly arising from online speech, with plaintiffs claiming speech published by bloggers or users of social media defames them. Rather than seek monetary damages to compensate themselves or to punish the defendants, some of the plaintiffs in these cases have instead sought to have the speech stopped altogether using injunctions. Alarmingly, some courts have been increasingly willing to grant injunctions that bar—or forbid—speakers from repeating their defamatory comments.

For instance, a district court in Indiana issued a permanent injunction that would have prevented an Indiana man and a former religious sister from repeating blog comments they had made in what amounted to an online smear campaign. The blog comments came in the midst of a dispute over who was entitled to the documents and artifacts of a religious sister who had experienced a series of apparitions of the Virgin Mary. The particulars of the case were messy, but, ultimately, the district court permanently enjoined the defendants from repeating several specific comments—even though the jury had not ruled that those specific comments were defamatory—as well as "any similar statements that contain the same sort of allegations or inferences, in any manner or forum."

On appeal, the Seventh Circuit U.S. Court of Appeals struck down the

injunction as unconstitutional in December 2015. In *McCarthy* v. *Fuller*, the Seventh Circuit said the injunction was a "patent violation of the First Amendment" because it was "so broad and vague" that it threatened to silence the defendants completely. Although this particular injunction was poorly crafted and thus problematic, the court left open the question of whether defamation could *ever* be enjoined. More cases like this will likely appear in the near future.

STATUTORY LAW

While common law sometimes is referred to as discovered or judge-made law, the third great source of laws in the United States today is created by elected legislative bodies at the local, state and federal levels and is known as statutory law.

Several important characteristics of statutory law are best understood by contrasting them with common law. First, **statutes** tend to deal with problems affecting society

10

or large groups of people, in contrast to common law, which usually deals with smaller, individual problems. (Some common-law rulings affect large groups of people, but this occurrence is rare.) It should also be noted in this connection the importance of not confusing common law with constitutional law. Certainly when judges interpret a constitution, they make policy that affects us all. However, it should be kept in mind that a constitution is a legislative document voted on by the people and is not discovered law or judge-made law.

Second, statutory law can anticipate problems, and common law cannot. For example, a state legislature can pass a statute that prohibits publication of the school records of a student without prior consent of the student. Under common law the problem cannot be resolved until a student's record has been published in a newspaper or transmitted over the Internet and the student brings action against the publisher to recover damages for the injury incurred.

Third, the criminal laws in the United States are all statutory laws—common-law crimes no longer exist in this country and have not since 1812. Common-law rules are not precise enough to provide the kind of notice needed to protect a criminal defendant's right to due process of law.

The criminal laws in the United States are all statutory laws.

Fourth, statutory law is collected in codes and law books, instead of in reports as is common law. When a bill is adopted by the legislative branch and approved by the executive branch, it becomes law and is integrated into the proper section of a municipal code, a state code or whatever. However, this does not mean that some very important statutory law cannot be found in the case reporters.

Passage of a law is rarely the final word. Courts become involved in determining what that law means. Although a properly constructed statute sometimes needs little interpretation by the courts, judges are frequently called upon to rule on the exact meaning of ambiguous phrases and words. The resulting process of judicial interpretation is called **statutory construction** and is very important. Even the simplest kind of statement often needs interpretation. For example, a statute that declares "*it is illegal to distribute a violent video game to minors*" is fraught with ambiguities that a court must construe and resolve in order to determine if it violates the First Amendment speech rights of video game creators and players (see pages 68–74 regarding regulation of video games). What type of content, for instance, falls within the meaning of the word "violent" as it is used in this statute? How young must a person be in order to be considered a "minor" under the law? Does the term "distribute" mean to sell a video game, to rent a video game or to give it away for free? Finally, because games are played in arcades, on computers and via consoles, just what precisely is a "video" game under the statute?

Usually a legislature leaves a trail to help a judge find out what the law means. When judges rule on the meaning of a statute, they are supposed to determine what the legislature meant when it passed the law (the legislative intent), not what they think the law should mean. Minutes of committee hearings in which the law was discussed, legislative staff reports and reports of debate on the floor can all be used to determine legislative intent. Therefore, when lawyers deal with statutes, they frequently search the case reporters to find out how the courts interpreted a law in which they are interested.

11

ATTACKING THE CONSTITUTIONALITY OF STATUTES: FACIAL CHALLENGES VERSUS AS-APPLIED CHALLENGES

There are two primary ways to argue that a statute violates the First Amendment right of free speech: (1) by attacking problems with its wording, terms and language (known as a facial attack); or (2) by attacking problems with its actual application to a particular factual scenario (known as an as-applied attack). A facial attack tests a law's constitutionality based on its text (its words and language), but does not consider the facts or circumstances of a particular case. For instance, a challenge to a statute based on the ground that it is either overbroad or unduly vague in its use of language (both the overbreadth doctrine and the void for vagueness doctrine are described in the next few pages of this chapter) are examples of facial challenges. In contrast, an as-applied attack does not contend that a law is unconstitutional because of how it is written, but because of how it actually applies to a particular person or particular group of people under specific factual circumstances that allegedly deprive the person of a First Amendment right. In general, as-applied challenges are the preferred method for attacking a statute. As Justice Samuel Alito wrote in 2010 in *United States* v. *Stevens*,[6] "the 'strong medicine' of overbreadth invalidation need not and generally should not be administered when the statute under attack is unconstitutional as applied to the challenger before the court." Ultimately, however, as Justice Anthony Kennedy wrote in 2010 in *Citizens United* v. *Federal Elections Commission*[7] (see pages 136–139 describing this case in the unit "The First Amendment and Election Campaigns"), "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge."

CONSTITUTIONAL LAW

Great Britain lacks a written **constitution.** The United States, in contrast, has a written constitution, and it is an important source of our law. In fact, there are many constitutions in this country: the federal Constitution, state constitutions, city charters and so forth. All these documents accomplish the same ends. First, they provide the plan for the establishment and organization of the government. Next, they outline the duties, responsibilities and powers of the various elements of government. Finally, they usually guarantee certain basic rights to the people, such as freedom of speech and freedom to peaceably assemble.

Legislative bodies may enact statutes rather easily by a majority vote. It is far more difficult to adopt or change a constitution. State constitutions are approved or changed by a direct vote of the people. It is even more

difficult to change the federal Constitution. An amendment may be proposed by a vote of two-thirds of the members of both the U.S. House of Representatives and the Senate. Alternatively, two-thirds of the state

12

legislatures can call for a constitutional convention for proposing amendments. Once proposed, amendments must be approved either by three-fourths of the state legislatures or by three-fourths of the constitutional conventions called in all the states. Congress decides which method of ratification or approval is to be used. Because the people have an unusually direct voice in the approval and change of a constitution, constitutions are considered the most important source of U.S. law.

The U.S. Constitution is the supreme law of the land.

One Supreme Court justice described a constitution as a kind of yardstick against which all the other actions of government must be measured to determine whether the actions are permissible. The U.S. Constitution is the supreme law of the land. Any law or other constitution that conflicts with the U.S. Constitution is unenforceable. A state constitution plays the same role for a state: A statute passed by the Michigan legislature and signed by the governor of that state is clearly unenforceable if it conflicts with the Michigan Constitution. And so it goes for all levels of constitutions.

Constitutions tend to be short and, at the federal level and in most states, infrequently amended. Consequently, changes in the language of a constitution are uncommon. But a considerable amount of constitutional law is nevertheless developed by the courts, which are asked to determine the meaning of provisions in the documents and to decide whether other laws or government actions violate constitutional provisions. Hence, the case reporters are repositories for the constitutional law that governs the nation.

Twenty-seven amendments are appended to the U.S. Constitution. The first 10 are known as the Bill of Rights and guarantee certain basic human rights to all citizens. Included in the First Amendment to the U.S. Constitution are freedom of speech and press, rights you will understand more fully in future chapters.

The federal Constitution and the 50 state constitutions are very important when considering media law problems. All 51 of these charters contain provisions, in one form or another, that guarantee freedom of speech and freedom of the press.

The scope of protection for speech and press afforded by any given state constitution thus may be broader than that bestowed by the First Amendment.

Importantly, state constitutions can give more and greater rights to their citizens than are provided under the U.S. Constitution; they cannot, however, reduce or roll back rights given by the federal Constitution. The scope of protection for speech and press afforded by any given state constitution thus may be broader than that bestowed by the First Amendment to the U.S. Constitution. For instance, whereas obscene speech is not protected by the First Amendment (see Chapter 13), the Oregon Supreme Court held in 1987 that obscene expression is protected in that state under Article I, Section 8 of the Oregon Constitution.[8] A lawyer challenging a state statute that allegedly restricts any form of speech therefore is wise to argue before a court that the statute in question violates either or both the First Amendment and the relevant state's constitutional provision protecting expression. Consequently, any government action that affects in any way the freedom of individuals or mass media to speak or publish or broadcast must be measured against the constitutional guarantees of freedom of expression.

13

There are several reasons why a law limiting speaking or publishing might be declared unconstitutional. The law might be a direct restriction on speech or press that is protected by the First Amendment. For example, an order by a Nebraska judge that prohibited the press from publishing certain information about a pending murder trial was considered a direct restriction on freedom of the press (see *Nebraska Press Association* v. *Stuart*,[9] Chapter 11).

A criminal obscenity statute or another kind of criminal law might be declared unconstitutional because it is too vague. Under the **void for vagueness doctrine,** a law will be declared unconstitutional and struck down if a person of reasonable and ordinary intelligence would not be able to tell, from looking at its terms, what speech is allowed and what speech is prohibited. Put differently, people of ordinary intelligence should not have to guess at a statute's meaning. As the U.S. Supreme Court wrote in 2012 in a broadcast indecency case called *FCC* v. *Fox Television Stations, Inc.* (see Chapter 16 for more on both broadcast indecency and this case), "a fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or

required." The Court added that "this requirement of clarity in regulation . . . requires the invalidation of laws that are impermissibly vague." Vague laws are problematic because they

- don't provide fair notice of what speech is permitted; and
- can be enforced unfairly and discriminatorily because they give too much discretion (due to the vague terms) to those who enforce them (police and judges).

For instance, in September 2016 a district court judge in Florida blocked enforcement of a Florida law that required convicted sex offenders in the state to register all of their "internet identifiers." Failing to register their "internet identifiers" amounted to a crime. The plaintiffs challenging the law said that they were confused about what counted as an "internet identifier" and that they would forgo speech on the Internet if the law took effect rather than risk being punished. In *Doe* v. *Swearingen*, Judge Robert Hinkle agreed and said the definition of "internet identifier" in the law was "hopelessly vague" and "chills speech protected by the First Amendment." The judge said the law's definition of the term, arguably already broader than ordinary usage of "internet identifier" to begin with, started by "saying what the term 'includes, but is not limited to.'" That phrasing in effect gave the term "internet identifier" an "unlimited description," the judge wrote, leaving sex offenders "guessing at what must be disclosed."

A statute might also be declared unconstitutional because it violates what is known as the **overbreadth doctrine.** A law is overbroad if it does not aim only at problems within the allowable area of legitimate government control but also sweeps within its ambit or scope other activities that constitute an exercise of protected expression. For instance, in 2010 the U.S. Supreme Court in *United States* v. *Stevens*[10] declared as unconstitutionally overbroad a federal statute that criminalized the commercial creation, sale or possession of certain depictions of animal cruelty. The statute defined a depiction of

14

animal cruelty as one "in which a living animal is intentionally maimed, mutilated, tortured, wounded or killed," provided that such conduct is illegal under a federal or state law where the creation, sale or possession of the depiction occurs. In holding the law overbroad, Chief Justice John Roberts wrote that it "create[s] a criminal prohibition of alarming breadth. To begin with, the text of the statute's ban on a 'depiction of animal

cruelty' nowhere requires that the depicted conduct be cruel. That text applies to 'any . . . depiction' in which 'a living animal is intentionally maimed, mutilated, tortured, wounded, or killed.' . . . [M]aimed, mutilated, [and] tortured' convey cruelty, but 'wounded' or 'killed' do not suggest any such limitation."

The overbreadth doctrine was used in 2016 by the North Carolina Supreme Court to declare unconstitutional a cyberbullying law that made it a crime "for any person to use a computer or computer network to . . . [p]ost or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor" "[w]ith the intent to intimidate or torment a minor." In *State of North Carolina* v. *Bishop*, the state Supreme Court said that it was "undisputed" that protecting children from online bullying was a compelling governmental interest. But the law swept up far more protected speech than was necessary to serve that interest, the court ruled. For instance, the law criminalized posting "personal" information, and the state suggested personal meant "[o]f or relating to a particular person," a definition the court called "especially sweeping." As the court wrote, "Such an interpretation would essentially criminalize posting *any* information about *any* specific minor if done with the requisite intent."

HONK IF YOU LOVE FREE SPEECH AND HATE OVERBROAD LAWS

In 2011, the Supreme Court of Washington state declared unconstitutionally overbroad a Snohomish County ordinance that prohibited honking a car horn for a purpose other than public safety or originating from an officially sanctioned parade or public event. The case of *Washington* v. *Immelt*[11] involved Helen Immelt, who intentionally sounded a car horn at length in front of a neighbor's house in the early morning hours because she was mad at the neighbor. Does honking a horn constitute speech? The Supreme Court of Washington invoked the symbolic speech doctrine (see pages 48–49) and found that "conduct such as horn honking may rise to the level of speech when the actor intends to communicate a message and the message can be understood in context." Examples of horn honking as speech, the court wrote, include "a driver of a carpool vehicle who toots a horn to let a coworker know it is time to go, a driver who enthusiastically responds to a sign that says 'honk if you support our troops,' wedding guests who celebrate nuptials by sounding their horns, and a motorist who honks a horn in support of an individual

picketing on a street corner."

In striking down the ordinance, the court wrote that "a law is overbroad if it 'sweeps within its prohibitions' a substantial amount of constitutionally

15

protected conduct." Although emphasizing that "local governments maintain a legitimate interest in protecting residents from excessive and unwelcome noise," the Snohomish ordinance simply went too far because it "prohibits a wide swath of expressive conduct in order to protect against a narrow category of public disturbances," such as all of the examples noted earlier. The court suggested that a better and more narrowly written ordinance—one confined, perhaps, to horn honking intended to annoy or harass—might be constitutional.

EXECUTIVE ORDERS AND ADMINISTRATIVE RULES

The final source of American law has two streams. First are orders issued by elected officers of government, often called executive orders. Second are rules generated by the administrative agencies of government, at the federal, state and local levels.

Government executives—the U.S. president, governors, mayors, county executives, village presidents—all have more or less power to issue rules of law, sometimes referred to as executive orders or declarations. This power is normally defined by the constitution or the charter that establishes the office, and it varies widely from city to city or state to state. In some instances the individual has fairly broad powers; in others the power is sharply confined. For instance, in 2016 former President Barack Obama issued an executive order establishing the Federal Privacy Council to serve as "the principal interagency forum to improve the government privacy practices of agencies and entities acting on their behalf." Such declarations are possible so long as they are properly within the delegated powers held by the executive. An order from an executive who exceeds his or her power can be overturned by the legislature (the mayor's order can be changed or vacated by the city council, for example) or by a court. Such overstepping by a president would violate the separation of powers among the legislative, judicial and executive branches of government.

A more substantial part of U.S. law is generated by myriad administrative agencies that exist in the nation today, agencies that first began to develop in the latter part of the 19th century. By that time in the country's history, Congress was being asked to resolve questions going far

beyond such matters as budgets, wars, treaties and the like. Technology created new kinds of problems for Congress to resolve. Many such issues were complex and required specialized knowledge and expertise that the representatives and senators lacked and could not easily acquire, had they wanted to. Specialized federal administrative agencies were therefore created to deal with these problems.

Hundreds of such agencies now exist at both federal and state levels. Each agency undertakes to deal with a specific set of problems too technical or too large for the legislative branch to handle. Perhaps the most relevant **administrative agency** for purposes of media law, along with the Federal Trade Commission (FTC; see Chapter 15), is the Federal Communications Commission (FCC), created by Congress in 1934. It regulates broadcasting and other telecommunication in the United States, a job that Congress has attempted only sporadically. Its members must be citizens of the United States and are appointed by the president. The single stipulation is that at any one time no more than three of the five individuals on the commission can be from the same political party. The Senate must confirm the appointments.

16

Congress has sketched the framework for the regulation of broadcasting in the Federal Communications Act of 1934 and subsequent amendments to this statute. This legislation is used by the FCC as its basic regulatory guidelines. But the agency generates much law on its own as it interprets the congressional mandates, and uses its considerable authority to generate rules and regulations. Today, the FCC is involved with issues ranging from net neutrality (see Chapter 3) to indecency on broadcast television (see Chapter 16).

People dissatisfied with an action by an agency can attempt to have it modified by asking the legislative body that created and funds the agency —Congress, for example, when considering the FCC—to change or overturn the action. In the 1980s when the FTC made several aggressive pro-consumer rulings, Congress voided these actions because members disagreed with the extent of the rulings. More commonly the actions of an agency will be challenged in the courts. But courts have limited power to review decisions made by administrative agencies and can overturn such a ruling in only these limited circumstances:

But courts have limited power to review decisions made by administrative agencies.

1. If the original act that established the commission or agency is unconstitutional.
2. If the commission or agency exceeds its authority.
3. If the commission or agency violates its own rules.
4. If there is no evidentiary basis whatsoever to support the ruling.

The reason for these limitations is simple: These agencies were created to bring expert knowledge to bear on complex problems, and the entire purpose for their creation would be defeated if judges with no special expertise in a given area could reverse an agency ruling merely because they had a different solution to a problem.

The case reporters contain some law created by the administrative agencies, but the reports that these agencies themselves publish contain much more such law. Today, you can look up recent opinions and rulings of both the FCC and FTC at their respective Web sites, located at http://www.fcc.gov and http://www.ftc.gov.

There are other sources of American law, but the sources just discussed —common law, law of equity, statutory law, constitutional law, executive orders and rules and regulations by administrative agencies—are the most important and are of most concern in this book. First Amendment problems fall under the purview of constitutional law. Libel and invasion of privacy are matters generally dealt with by common law and equity law. Obscenity laws in this country are statutory provisions (although this fact is frequently obscured by the hundreds of court cases in which judges attempt to define the meaning of obscenity). And of course the regulation of broadcasting and advertising falls primarily under the jurisdiction of administrative agencies.

SUMMARY

There are several important sources of American law. Common law is the oldest source of our law, having developed in England more than 700 years ago. Fundamental to common law is the concept that judges should look to the

past and follow earlier court rulings, called precedents. Stare decisis (let the decision stand) is a key concept. But judges have developed the means to change or adapt common law by modifying, distinguishing or

17

overruling precedent case law. Common law, a type of judge-made law, is not written in a law book but is collected in volumes of case reporters that contain the decisions, known as opinions, handed down by courts. Each case is given its own legal identity through a system of numbered citations.

Equity law is the second source of American law. The rules and procedures of equity are far more flexible than those of common law and permit a judge (equity cases are never heard before a jury) to fashion a solution to unique or unusual problems. A court is permitted under equity law to restrain an individual or a corporation or even a government from taking an action by issuing a judicial decree such as an injunction. Under common law a court can attempt to compensate the injured party only for the damage that results from the action.

A great volume of law is generated by legislative bodies. This legislation, called statutory law, is the third important source of American law. All criminal laws are statutes. Statutes usually deal with problems that affect great numbers of people, and statutes can anticipate problems, whereas common law cannot. Statutes are collected in codes or statute books. Courts become involved when they are called on to interpret the meaning of the words and phrases contained in a statute, a process known as statutory construction.

Constitutions, the fourth source of law, take precedence over all other American law. The U.S. Constitution is the supreme law of the land. A state constitution actually can provide more rights to citizens of a state than the U.S. Constitution, but it cannot reduce or limit U.S. constitutional rights. Other laws, whether they spring from common law, equity, legislative bodies or administrative agencies, cannot conflict with the provisions of the Constitution. Courts interpret the meaning of the provisions of our constitutions (one federal and 50 state constitutions) and through this process often make these seemingly rigid legal prescriptions

adaptable to contemporary problems.

Executives (presidents and governors) can issue orders that carry the force of law. And there are thousands of administrative agencies, boards and commissions in the nation that produce rules and regulations. This administrative law usually deals with technical and complicated matters requiring levels of expertise that members of traditional legislative bodies do not normally possess. Members of these agencies and commissions are usually appointed by presidents or by governors or mayors, and the agencies are supervised and funded by legislative bodies. Their tasks are narrowly defined, and their rulings, while they carry the force of law, can always be appealed.

THE JUDICIAL SYSTEM

This section introduces the court system in the United States. Since the judicial branch of our three-part government is the field on which most of the battles involving communications law are fought, an understanding of the judicial system is essential.

It is technically improper to talk about the American judicial system. There are 52 different judicial systems in the United States, one for the federal government and one for each of the 50 states, plus the District of Columbia. While each system is somewhat

different from the others, the similarities among the 52 systems are much more important than the differences. Each of the systems is divided into two distinct sets of courts—trial courts and appellate courts. Each judicial system is established by a constitution, federal or state. In each system the courts act as the third branch of a triumvirate of government: a legislative branch, which makes the law; an executive branch, which enforces the law; and a judicial branch, which interprets the law.

FACTS VERSUS THE LAW

Common to all judicial systems is the distinction between trial courts and appellate courts. Each level of court has its own function: Basically, **trial**

courts are fact-finding courts and **appellate courts** are law-reviewing courts. Trial courts are the courts of first instance, the place where nearly all cases begin. Juries sometimes sit in trial courts (a trial held before a judge and without a jury is known as a bench trial) but never in appellate courts. Trial courts are empowered to consider both the facts and the law in a case. Appellate courts normally consider only the law. The difference between facts and law is significant. The facts are what happened. The law is what should be done because of the facts.

The facts are what happened. The law is what should be done because of the facts.

The difference between facts and law can be emphasized by looking at an imaginary libel suit that might result if the *River City Sentinel* published a story about costs at the Sandridge Hospital, a privately owned medical facility.

Ineffective Medications Given to Ill, Injured

SANDRIDGE HOSPITAL OVERCHARGING PATIENTS ON PHARMACY COSTS

Scores of patients at the Sandridge Hospital have been given ineffective medications, a three-week investigation at the hospital has revealed. In addition, many of those patients were overcharged for the medicine they received.

The *Sentinel* has learned that many of the prescription drugs sold to patients at the hospital had been kept beyond the manufacturer's recommended storage period.

Many drugs stored in the pharmacy (as late as Friday) had expiration dates as old as six months ago. Drug manufacturers have told the *Sentinel* that medication used beyond the expiration date, which is stamped clearly on most packages, may not have the potency or curative effects that fresher pharmaceuticals have.

Hospital representatives deny giving patients any of the expired drugs, but sources at the hospital say it is impossible for administrators to guarantee that none of the dated drugs were sold to patients.

In addition, the investigation by the *Sentinel* revealed that patients who were sold medications manufactured by Chaos Pharmaceuticals were charged on the basis of 2017 price lists despite the fact that the company

lowered prices significantly in 2018.

19

The Sandridge Hospital sues the newspaper for libel. When the case gets to court, the first thing that must be done is to establish what the facts are—what happened. The hospital and the newspaper each will present evidence, witnesses and arguments to support its version of the facts. Several issues have to be resolved. In addition to the general questions of whether the story has been published and whether the hospital has been identified in the story, the hospital will have to supply evidence that its reputation has been injured, that the story is false and that the newspaper staff has been extremely careless or negligent in the publication of the report. The newspaper will seek to defend itself by attempting to document the story or raise the defense that the report was privileged in some way. Or the newspaper may argue that even if the story is mistaken, it was the result of an innocent error; the newspaper staff was not negligent when it wrote and published the story.

All this testimony and evidence establishes the factual record—what actually took place at the hospital and in preparation of the story. When there is conflicting evidence, the jury decides whom to believe (in the absence of a jury, the judge makes the decision). Suppose the hospital is able to prove by documents that pharmacists in fact had removed the dated medicine from their shelves and stored it to return to the manufacturers. Further, the hospital can show that while it did accidentally overcharge some patients for Chaos products, it quickly refunded the excess charge to these patients. Finally, attorneys for the hospital demonstrate that the story was prepared by an untrained stringer for the newspaper who used but a single source—a pharmacist who had been fired by Sandridge for using drugs while on the job—to prepare the story and failed to relate to readers the substance of the evidence (which the reporter had when the story was published) presented by the hospital in court. In such a case, a court would likely rule that the hospital had carried its burden of proof and that no legitimate defense exists for the newspaper. Therefore, the hospital wins the suit. If the newspaper is unhappy with the verdict, it can appeal.

The appellate court does not establish a new factual record. No more testimony is taken.

In an appeal, the appellate court does not establish a new factual

record. No more testimony is taken. No more witnesses are called. The factual record established by the jury or judge at the trial stands. The appellate court has the power in some kinds of cases (libel suits that involve constitutional issues, for example) to examine whether the trial court properly considered the facts in the case. But normally it is the task of the appellate court to determine whether the law has been applied properly in light of the facts established at the trial. Perhaps the appellate court might rule that even with the documentary evidence the hospital presented in court, this evidence failed to prove that the news story was false. Perhaps the judge erred in allowing certain testimony into evidence or refused to allow a certain witness to testify. Or maybe the trial court judge gave the jury the wrong set of instructions for libel. That would be a clear error of law. Nevertheless, in reaching an opinion the appellate court considers only the law; the factual record established at the trial stands.

What if new evidence is found or a previously unknown witness comes forth to testify? If the appellate court believes that the new evidence is important, it can order a new trial. However, the court itself does not hear the evidence. These facts are developed at a new trial.

There are other differences between the roles and procedures of trial and appellate courts. Juries are never used by appellate courts; a jury may be used in a trial court

proceeding. The judge normally sits alone at a trial; appeals are heard by a panel of judges, usually three or more. Cases always begin at the trial level and then proceed to the appellate level. Although the appellate courts appear to have the last word in a legal dispute, that is not always the case. Usually cases are returned to the trial court for resolution with instructions from the appeals court to the trial judge to decide the case, keeping this or that factor in mind. This is called remanding the case to the trial court. In such a case the trial judge can often do what he or she wants.

In the discussion that follows, the federal court system and its methods of operating are considered first, and then some general observations about state court systems are given, based on the discussion of the federal system.

THE FEDERAL COURT SYSTEM

Congress has the authority to abolish every federal court in the land, save the Supreme Court of the United States. The U.S. Constitution calls for but a single federal court, the Supreme Court. Article III, Section 1 states:

"The judicial power of the United States shall be vested in one Supreme Court." The Constitution also gives Congress the right to establish inferior courts if it deems these courts to be necessary. And Congress has, of course, established a fairly complex system of courts to complement the Supreme Court.

The jurisdiction of the federal courts is also outlined in Article III of the Constitution. The jurisdiction of a court is its legal right to exercise its authority. Briefly, federal courts can hear the following cases:

1. Cases that arise under the U.S. Constitution, U.S. law and U.S. treaties
2. Cases that involve ambassadors and ministers, duly accredited, of foreign countries
3. Cases that involve admiralty and maritime law
4. Cases that involve controversies when the United States is a party to the suit
5. Cases that involve controversies between two or more states
6. Cases that involve controversies between a state and a citizen of another state (the 11th Amendment to the Constitution requires that a state give its permission before it can be sued)
7. Cases that involve controversies between citizens of different states

While special federal courts have jurisdiction that goes beyond this broad outline, these are the circumstances in which a federal court may normally exercise its authority. Of the seven categories, Categories 1 (known as federal question jurisdiction) and 7 (known as diversity jurisdiction) account for most of the cases tried in federal court. For example, disputes that involve violations of the myriad federal laws and disputes that involve constitutional rights such as the First Amendment are heard in federal courts under federal question jurisdiction. Disputes between citizens of different states—a diversity of citizenship matter—are heard in federal courts provided that the amount at stake is more than $75,000. It is very common, for example, for libel suits and invasion-of-privacy suits against publishing companies to start in federal courts rather than in state courts. If a citizen of Arizona is libeled by the *Los Angeles Times*, the case will very

likely be tried in a federal court in the state of Arizona rather than in a state court in either Arizona or California. Arizona law will be applied. The case will most often be heard where the legal wrong, in this case the injury to reputation by libel, occurs.

The Supreme Court

The Supreme Court of the United States is the oldest federal court, having operated since 1789. The Constitution does not establish the number of justices who sit on the high court. That task is left to Congress. Since 1869 the Supreme Court has comprised the chief justice of the United States and eight associate justices. (Note the title: not chief justice of the Supreme Court, but chief justice of the United States.) In 2017, the chief justice was John Roberts, who was nominated by former President George W. Bush and became just the 17th chief justice in the court's history in 2005. The first Hispanic to take the oath of office as an associate justice was Sonia Sotomayor in 2009; it also marked the first time that an oath-taking ceremony at the Supreme Court was open to broadcast coverage.

Since 1869, the Supreme Court has comprised the chief justice of the United States and eight associate justices.

Shortly after taking office in 2017, President Donald Trump nominated Neil Gorsuch to the U.S. Supreme Court to fill the position vacated by the death of conservative-leaning Justice Antonin Scalia in February 2016. This put the nomination in the hands of the U.S. Senate, which must give its "advice and consent" on any Supreme Court nominee. Gorsuch had been serving as a federal judge on the 10th U.S. Circuit Court of Appeals. The Republican-controlled Senate ultimately confirmed Gorsuch's nomination later in 2017 by a vote of 54–45 that closely divided along party lines. Gorsuch, who was only 49 years old at the time of his confirmation, could serve on the court for decades.

The Supreme Court exercises both original and appellate jurisdictions. Under its **original jurisdiction,** which is established in the Constitution, the Supreme Court is the first court to hear a case and acts much like a trial court. The Supreme Court has original jurisdiction in disputes between two or more states, with these scenarios typically involving battles over land or water rights. In brief, original jurisdiction is for the resolution of claims between and among the states, not claims by private entities within states. Sometimes the justices will hold a hearing to ascertain the facts; more

commonly they will appoint what is called a special master to discern the facts and make recommendations. For example, in 2016 the Supreme Court declined to exercise its original jurisdiction authority over a proposed lawsuit by the states of Nebraska and Oklahoma against their neighboring state of Colorado. Nebraska and Oklahoma alleged that a 2012 amendment to the Colorado constitution that legalized the recreational use of marijuana in the Centennial State violated federal anti-drug laws and resulted in increased drug trafficking and transportation in their own states. By refusing to exercise original jurisdiction over the dispute, the Supreme Court essentially rejected the claims of Nebraska and Oklahoma.

The primary task of the Supreme Court is as an appellate tribunal, hearing cases already decided by lower federal and state courts of last resort. The appellate jurisdiction of the Supreme Court is established by Congress, not by the Constitution. A case will come before the Supreme Court of the United States for review in one of two principal ways: on a direct appeal or by way of a writ of certiorari. The certification process is a third way for a case to get to the high court, but this process is rarely used today.

22

In some instances a litigant has an apparent right, guaranteed by federal statute, to appeal a case to the Supreme Court. This is called **direct appeal.** For example, if a federal appeals court declares that a state statute violates the U.S. Constitution or conflicts with a federal law, the state has a right to appeal this decision to the Supreme Court. But this is only an apparent right, because since 1928 the Supreme Court has had the right to reject such an appeal "for want of a substantial federal question." This is another way of the court saying, "We think this is a trivial matter." Almost 90 percent of all appeals that come to the Supreme Court via the direct appeal process are rejected.

The much more common way for a case to reach the nation's high court is via a **writ of certiorari.** No one has the right to such a writ. It is a discretionary order issued by the court when it feels that an important legal question has been raised. Litigants using both the federal court system and the various state court systems can seek a writ of certiorari. The most important requirement that must be met before the court will even consider issuing a writ is that a petitioner first exhaust all other legal remedies. Although there are a few exceptions, this generally means that if a case begins in a federal district court (the trial-level court), the **petitioner** must

first seek a review by a U.S. Court of Appeals before bidding for a writ of certiorari. The writ can be sought if the Court of Appeals refuses to hear the case or sustains the verdict against the petitioner. All other legal remedies have then been exhausted. In state court systems every legal appeal possible must be made within the state before seeking a review by the U.S. Supreme Court. This usually means going through a trial court, an intermediate appeals court and finally the state supreme court.

When the Supreme Court grants a writ of certiorari, it is ordering the lower court to send the records to the high court for review. Any litigant can petition the court to grant a writ, and the high court receives more than 7,500 petitions each year (a year for the Supreme Court is known as a term, with a new term starting on the first Monday in October and lasting usually through late June of the following year). Each request is considered by the entire nine-member court. If four justices think the petition has merit, the writ will be granted. This is called the **rule of four.** But the court rejects the vast majority of petitions it receives. Recently only 75 to 80 cases a year are accepted. Workload is the key factor. Certain important issues must be decided each term, and the justices do not have the time to consider thoroughly most cases for which an appeal is sought.

During the Supreme Court's 2015 term, which ran from October 2015 though June 2016, the Court considered only 63 cases that were fully briefed and argued before it. That is the lowest number in many decades, due in part to the death of Justice Antonin Scalia in February 2016 that left the Court rendering several four-to-four tied decisions. Such four-to-four rulings simply affirm the lower-court ruling below rather than break new ground. As legal scholar Erwin Chemerinsky wrote in the *ABA Journal*, it "was the year that the law did not change. It is hard to remember a Supreme Court term where the decisions did less to change the law."

The Supreme Court is more likely to hear a case if there is a **split of authority** (a disagreement among the lower courts) on a particular issue. In other words, if one federal appellate court concludes that Law A is not constitutional, but a different federal appellate court finds that Law A is constitutional, that would be a split of authority, and the high court might take the case so as to provide uniformity across the nation on Law A.

23

One final point: The Supreme Court of the United States is not as interested in making certain that justice has been served as it is in making certain that the law is developing properly. A petitioner seeking redress

through the high court may have a completely valid argument that a lower court has ignored an important precedent in ruling against him or her. But if the law on this point has been established, the Supreme Court is very likely to reject the petition and instead use this time to examine and decide a new or emerging legal issue.

LEARNING MORE ABOUT THE U.S. SUPREME COURT

To find out more about the U.S. Supreme Court, ranging from its history to biographies of the nine current justices to its docket and recent opinions, you can visit the high court's official Web site at http://www.supremecourt.gov and peruse its many links. In addition, the Legal Information Institute at Cornell University Law School has an excellent online database at https://www.law.cornell.edu/supct/supremes.htm that features a wealth of information about the high court, its justices and its decisions.

Hearing a Case The operation of the Supreme Court is unique in many ways, but by gaining an understanding of how the high court does its business, a reader will also gain an understanding of how most appellate courts function.

Once the Supreme Court agrees to hear a case, the heaviest burden falls upon the attorneys for the competing parties. The oral argument—the presentation made by the attorneys to the members of the court—will be scheduled. The parties (their attorneys) are expected to submit what are called **legal briefs**—their written legal arguments—for the members of the court to study before the oral hearing. The party that has taken the appeal to the Supreme Court—the **appellant**—must provide the high court with a complete record of the lower-court proceedings: the transcripts from the trial, the rulings by the lower courts and other relevant material.

Arguing a matter all the way to the Supreme Court takes a long time, often as long as five years (sometimes longer) from initiation of the suit until the court gives its ruling. James Hill brought suit in New York in 1953 against Time, Inc., for invasion of privacy. The U.S. Supreme Court made the final ruling in the case in 1967 (*Time, Inc.* v. *Hill*).[12] Even at that the matter would not have ended had Hill decided to go back to trial, which the Supreme Court said he must do if he wanted to collect damages.

He chose not to.

After the nine justices study the briefs (or at least summaries provided by their law clerks), the **oral argument** is held. Attorneys are strictly limited as to how much they may say. Each side is given a brief amount of time, usually no more than 30 minutes to an hour, to present its arguments. The attorneys often are interrupted by the justices, who ask them questions and pose hypothetical situations. One current justice, Clarence Thomas, is known for not asking questions, but most of the justices verbally

24

spar in collegial fashion with attorneys to test and challenge their arguments. There are no witnesses who testify before the Supreme Court—only the attorneys who argue the case. You can listen to oral arguments in many recent Supreme Court cases online at The Oyez Project Web site at http://www.oyez.org. In important cases, "friends of the court" (**amici curiae**) are allowed to present briefs and to participate for 30 minutes in the oral arguments. For example, the American Civil Liberties Union often seeks the friend status in important civil rights cases. Likewise, the Reporters Committee for Freedom of the Press (http://www.rcfp.org) may file a friend-of-the-court brief in cases affecting journalists' rights, even though it is not a party in the cases. In a nutshell, a friend-of-the-court is not a party to the case but holds a vested interest or concern with its outcome.

Deciding a Case After oral argument (which occurs in open court with visitors welcome), the members of the high court move behind closed doors to undertake their deliberations. No one is allowed in the discussion room except members of the court itself—no clerks, no bailiffs, no secretaries. The discussion, which often is held several days after the arguments are completed, is opened by the chief justice. Discussion time is limited, and by being the first speaker the chief justice is in a position to set the agenda, so to speak, for each case—to raise what he or she thinks are the key issues. Next to speak is the justice with the most seniority, and after him or her, the next most senior justice. The court will have many items or cases to dispose of during one conference or discussion day; consequently, brevity is valued. Each justice has just a few moments to state his or her thoughts on the matter. After discussion, a tentative vote is taken and recorded by each justice in a small, hinged, lockable docket book. In the voting procedure the junior justice votes first; the chief justice, last.

TYPES OF SUPREME COURT OPINIONS

1. Opinion of the court (majority opinion)
2. Concurring opinion
3. Dissenting opinion (minority opinion)
4. Plurality opinion
5. Per curiam opinion (unsigned opinion)
6. Memorandum order

Under the U.S. legal system, which is based so heavily on the concept of court participation in developing and interpreting the law, a simple yes-or-no answer to any legal question is hardly sufficient. More important than the vote, for the law if not for the **litigant,** are the reasons for the decision. Therefore the Supreme Court and all courts that deal with questions of law prepare what are called **opinions,** in which the reasons, or rationale, for the decision are given. One of the justices voting in the majority is asked

to write what is called the **court's opinion.** If the chief justice is in the majority, he or she selects the author of the opinion. If not, the senior associate justice in the majority makes the assignment. Self-selection is always an option.

Opinion writing is difficult. Getting five or six or seven justices to agree to yes or no is one thing; getting them to agree on why they say yes or no is something else. The opinion must therefore be carefully constructed. After it is drafted, it is circulated among all court members, who make suggestions or even draft their own opinions. The opinion writer may incorporate as many of these ideas as possible into the opinion to retain its majority backing. Although all this is done in secret, historians have learned that rarely do court opinions reflect solely the work of the writer. They are more often a brokered conglomeration of paragraphs, pages and sentences from the opinions of several justices.

A justice who writes a concurring opinion may agree with the outcome of the decision, but does so for reasons different from those expressed in the majority opinion.

A justice in agreement with the majority who cannot be convinced to join in backing the court's opinion has the option of writing what is called a **concurring opinion.** A justice who writes a concurring opinion may agree with the outcome of the decision, but does so for reasons different from those expressed in the majority opinion. Or the concurring justice may want to emphasize a specific point not addressed in the majority opinion.

Justices who disagree with the majority can also write an opinion, either individually or as a group, called a **dissenting opinion.** Dissenting opinions are very important. Sometimes, after the court has made a decision, it becomes clear that the decision was not proper. The issue thus may be litigated again by other parties who use the arguments in the dissenting opinion as the basis for a legal claim. If enough time passes, if the composition of the court changes sufficiently or if the court members change their minds, the high court can swing to the views of the original dissenters.

An opinion in which five justices cannot agree on a single majority opinion—there is no opinion of the court—but that is joined by more justices than any other opinion in the case is known as a **plurality opinion.** For instance, imagine that four justices agree with a particular outcome in a case for reason A. Two other justices may also agree with that same outcome, but for reason B, while three other justices do not agree with the outcome at all. In this split of 4-2-3 among the justices, the four-justice opinion constitutes the plurality. This was precisely the result in a 2012 U.S. Supreme Court decision called *United States* v. *Alvarez* in which the Court declared unconstitutional, in violation of the First Amendment right of free speech, the Stolen Valor Act. The Stolen Valor Act made it a crime to falsely claim to have won a Congressional Medal of Honor (see pages 66–67 discussing the Stolen Valor Act in more detail). Four of the nine justices concluded that the Stolen Valor Act violated the freedom of speech because it did not pass constitutional muster under the **strict scrutiny** standard of review (see pages 72–73 discussing strict scrutiny), while two justices declared the law violated the freedom of speech because it did not pass the **intermediate scrutiny** standard of review (see pages 114–118 discussing intermediate scrutiny). In other words, six total justices found the law was unconstitutional, but four did so for one reason and two did so for a different reason. Finally, three justices in *Alvarez* dissented because they found the Stolen Valor Act was perfectly acceptable and they would have upheld it.

Finally, it is possible for a justice to concur with the majority in part and to dissent in part as well. That is, the justice may agree with some of the things the majority says

26

but disagree with other aspects of the ruling. Such splits thwart the orderly development of the law. They often leave lawyers and other interested parties at a loss when trying to predict how the court might respond in the next similar case that comes along.

The Supreme Court can dispose of a case in two other ways. A **per curiam** (by the court) **opinion** can be prepared. This is an unsigned opinion drafted by one or more members of the majority and published as the court's opinion. Per curiam opinions are not common, but neither are they rare. For instance, the U.S. Supreme Court issued a two-paragraph per curiam opinion—such brevity is another common characteristic of per curiam opinions—in a 2012 case called *American Tradition Partnership, Inc.* v. *Bullock*.[13] In *Bullock*, the Court reversed a decision by the Montana Supreme Court that had upheld a state statute restricting corporate expenditures supporting or opposing candidates and political parties. The per curiam opinion found the Montana law violated the court's 2010 precedent on this issue from *Citizens United* v. *Federal Elections Commission* (see both earlier this chapter and pages 136–139 for more on *Citizens United*). Four justices filed a similarly short dissent. The names of the four dissenting justices (all members of the Court's so-called liberal wing) appeared on the case, however, thus indicating that the unsigned or anonymous per curiam opinion must have been written by one of the five other justices from the Court's so-called conservative wing. This is another important aspect of per curiam opinions—while per curiam decisions themselves are not attributed to any specific justice, concurring and dissenting opinions are signed by identified justices.

Finally, the high court can dispose of a case with a **memorandum order**—that is, it just announces the vote without giving an opinion. Or the order cites an earlier Supreme Court decision as the reason for affirming or reversing a lower-court ruling. In cases with little legal importance and in cases in which the issues were really resolved earlier, the court saves a good deal of time by just announcing its decision.

One final matter in regard to voting remains for consideration: What happens in case of a tie vote? When all nine members of the court are present, a tie vote is technically impossible. However, if there is a vacancy on the court, only eight justices hear a case. Even when the court is full, a

particular justice may disqualify himself or herself from hearing a case. As discussed earlier, when a vote ends in a tie, the decision of the lower court is affirmed. No opinion is written. It is as if the Supreme Court had never heard the case.

During the circulation of an opinion, justices have the opportunity to change their vote. The number and membership in the majority may shift. It is not impossible for the majority to become the minority if one of the dissenters writes a particularly powerful dissent that attracts support from members originally opposed to his or her opinion. This event is probably very rare. Nevertheless, a vote of the court is not final until it is announced on decision day, or opinion day. The authors of the various opinions—court opinions, concurrences and dissents—publicly read or summarize their views. Printed copies of these documents are handed out to the parties involved and to the press, and are quickly available online.

Courts have no real way to enforce decisions and must depend on other government agencies for enforcement of their rulings. The job normally falls to the executive

27

branch. If perchance the president decides not to enforce a Supreme Court ruling, no legal force exists to compel the president to do so.

People believe in the judicial process; they have faith that what the courts do is probably right.

At the same time, there is one force that usually works to see that court decisions are carried out: It is that vague force called public opinion or what political scientists call "legitimacy." Most people believe in the judicial process; they have faith that what the courts do is probably right. This does not mean that they always agree with court decisions, but they do agree that the proper way to settle disputes is through the judicial process. Jurists help engender this spirit or philosophy by acting in a temperate manner. The Supreme Court, for example, has developed means that permit it to avoid having to answer highly controversial questions in which an unpopular decision could weaken its perceived legitimacy. The justices might call the dispute a political question, a **nonjusticiable matter,** or they may refuse to hear a case on other grounds. When the members of the court sense that the public is ready to accept a ruling, they may take on a controversial issue. School desegregation is a good example. In 1954 the Supreme Court ruled in *Brown* v. *Board of*

Education[14] that segregated public schools violated the U.S. Constitution. The foundation for this ruling had been laid by a decade of less momentous desegregation decisions and executive actions. By 1954 the nation was prepared for the ruling, and it was generally accepted, even in many parts of the South. The legitimacy of a court's decisions, then, often rests upon prudent use of the judicial power.

Other Federal Courts

The Supreme Court of the United States is the most visible, perhaps the most glamorous (if that word is appropriate), of the federal courts. But it is not the only federal court nor even the busiest. There are two lower echelons of federal courts, plus various special courts, within the federal system. These special courts, such as the U.S. Court of Military Appeals, U.S. Tax Court and so forth, were created by Congress to handle special kinds of problems.

Most federal cases begin and end in one of the 94 U.S. District Courts located across the nation, in Puerto Rico and in various U.S. territories. In 2017, the district courts were staffed with 677 authorized judgeships (in 2017, however, there were more than 100 vacancies at the district court level), a figure that Congress can vote to increase or decrease. In addition to these authorized U.S. District Court judges (known as "Article III" judges), by 2017 there were more than 530 federal magistrate judges. Federal magistrate judges are appointed for eight-year terms by a federal district court to handle some matters (initial proceedings in criminal cases, for instance) and certain cases delegated to them by the district court judges or with the consent of the parties (magistrate judges cannot, however, preside over felony criminal trials).

District courts are the trial courts of the federal court system, hearing both civil and criminal matters. Each state has at least one federal district court, with more populous states divided into two or more districts, leading to the total of 94 U.S. judicial districts. Pennsylvania, for instance, has three districts (western, middle and eastern), as does Florida (northern, middle and southern).

28

At the intermediate appellate level in the federal judiciary there are 13 circuits of the U.S. Court of Appeals, with 179 authorized judgeships in 2017 (twenty of those appellate judgeships were vacant in 2017). These courts were created by the Federal Judiciary Act of 1789. Until 1948 these

courts were called circuit courts of appeal, a reflection of the early years of the republic when the justices of the Supreme Court "rode the circuit" and presided at the courts-of-appeal hearings. While the title circuit courts of appeal is officially gone, the nation is still divided into 11 numbered circuits, each of which is served by one court (see Figure 1.2).

The 12th and 13th circuits are unnumbered. One is the court of appeals for the District of Columbia. This is a very busy court because it hears most of the appeals from decisions made by federal administrative agencies. The 13th is the court of appeals for the Federal Circuit, a court created by Congress in 1982 to handle special kinds of appeals. This court is specially empowered to hear appeals from patent and trademark decisions of U.S. District Courts and other federal agencies such as the Board of Patent Appeals. It also hears appeals from rulings by the U.S. Claims Court, the U.S. Court of International Trade, the U.S. International Trade Commission, the Merit Systems Protection Board and from a handful of other special kinds of rulings. Congress established this court to try to develop a uniform, reliable and predictable body of law in each of these very special fields.

FIGURE 1.2

Circuits 1 through 11 comprise the 50 states and the multiple U.S. territories.

The 12 regional federal courts of appeal (the 11 numbered circuits, plus the District of Columbia circuit) hear appeals from the federal district courts located within them, as well as appeals from decisions of federal administrative agencies. The courts are the last stop for 95 percent of all

cases in the federal system. The number of appellate judges in each circuit varies, depending upon geographic size and caseload. The 9th U.S. Circuit Court of Appeals, which sweeps up nine western states as well as the Territory of Guam and the Commonwealth of the Northern Mariana Islands, is the largest and busiest circuit. There occasionally are moves to break up the 9th Circuit, which is perceived as too large (and too liberal by some conservatives). Typically, a panel of three judges will hear a case. In unusual cases, a larger panel of judges, usually 11, will hear the appeal. When this happens, the court is said to be **sitting en banc.** A litigant who loses an appeal heard by a three-judge panel can ask for a rehearing by the entire court. This request is not often granted.

The *ABA Journal* recently awarded the 6th U.S. Circuit Court of Appeals with the somewhat dubious distinction of becoming the most overruled appellate court in the country, edging out the 9th Circuit. During a seven-year stretch, the U.S. Supreme Court overruled slightly more than 81 percent of the 6th Circuit opinions that it considered. Put differently, about four out of every five of the 6th Circuit opinions that the Supreme Court considered were reversed. The 6th Circuit includes the states of Kentucky, Michigan, Ohio and Tennessee.

Federal Judges

All federal judges, other than magistrate judges, are appointed for life terms under Article III of the U.S. Constitution by the president, with the advice and consent of the Senate. The only way a federal judge can be removed is by **impeachment.** Eleven federal judges have been impeached: Seven were found guilty by the Senate, and the other four were acquitted. Impeachment and trial is a long process and one rarely undertaken.

Political affiliation plays a distinct part in the appointment of federal judges. Democratic presidents usually appoint Democratic judges, and Republican presidents appoint Republican judges. Nevertheless, it is expected that nominees to the federal bench be competent jurists. This is especially true for appointees to the U.S. Court of Appeals and to the Supreme Court. The Senate must confirm all appointments to the federal courts, a normally perfunctory act in the case of lower-court judges. More careful scrutiny is given nominees to the appellate courts.

The appointment process now is of great public interest, as the current justices appear in many people’s eyes to be narrowly divided along ideological and political lines. Justice Anthony Kennedy today is the

pivotal swing vote on the high court that parties arguing before it hope to capture. In fact, while John Roberts is the chief justice, many people nonetheless referred in 2017 to the Supreme Court as "the Kennedy Court."

The president appoints the members of the high court with the "advice and consent" of the U.S. Senate. When the White House and the Senate are both in the hands of the same party, Republicans or Democrats, this appointment process will usually proceed smoothly. But when the White House and Senate are not controlled by the same party, bitter fights over future justices can occur, with a president sometimes struggling or even failing to gain the advice and consent of the Senate over a given appointee.

30

In addition to having replaced the seat vacated by Justice Antonin Scalia's death, President Donald Trump may well have the opportunity to nominate three more justices to the nation's high court during his first term. That's because in late 2017, Justice Ruth Bader Ginsburg was 84 years old, Justice Anthony Kennedy was 81, and Justice Stephen Breyer was 79. Given their ages, these justices might either retire or pass away while Trump is in office. Battles over confirmation are sure to be contentious, as Trump has the power to shape the direction of the court for decades to come.

Presidents and senators alike have discovered that the individual who is nominated is not always the one who spends the remainder of his or her lifetime on the court. Justices and judges appointed to the bench for life sometimes change. Perhaps they are affected by their colleagues. Or maybe it is because they are largely removed from the political and social pressures faced by others in public life. For whatever reasons, men and women appointed to the bench sometimes modify their philosophy. For instance, current Justice Kennedy was appointed by Republican President Ronald Reagan in 1988, but now has alienated cultural conservatives by writing decisions that legalized same-sex marriage and that declared unconstitutional a law against virtual child pornography (see Chapter 13).

THE STATE COURT SYSTEM

The constitution of each of the 50 states either establishes a court system in that state or authorizes the legislature to do so. The court system in each of the 50 states is somewhat different from the court system in all the other states. There are, however, more similarities than differences among the 50 states.

Trial courts are the base of each judicial system. At the lowest level are usually what are called courts of limited jurisdiction. Some of these courts have special functions, such as a traffic court, which is set up to hear cases involving violations of the motor-vehicle code. Some of these courts are limited to hearing cases of relative unimportance, such as trials of persons charged with misdemeanors, or minor crimes, or civil suits in which the damages sought fall below a small amount of money (a so-called small claims court). The court may be a municipal court set up to hear cases involving violations of the city code. Whatever the court, the judges in these courts have limited jurisdiction and deal with a limited category of problems.

31

Above the lower-level courts normally exist trial courts of general jurisdiction similar to the federal district courts. These courts are sometimes county courts and sometimes state courts, but whichever they are, they handle nearly all criminal and civil matters. They are primarily courts of original jurisdiction; that is, they are the first courts to hear a case. However, on occasion they act as a kind of appellate court when the decisions of the courts of limited jurisdiction are challenged. When that happens, the case is retried in the trial court—the court does not simply review the law. This proceeding is called hearing a case **de novo.**

A **jury** is most likely to be found in the trial court of general jurisdiction. It is also the court in which most civil suits for libel and invasion of privacy are commenced (provided the state court has jurisdiction), in which prosecution for violating state obscenity laws starts and in which many other media-related matters begin.

Above this court may be one or two levels of appellate courts. Every state has a supreme court, although some states do not call it that. In New York, for example, it is called the Court of Appeals, but it is the high court in the state, the court of last resort.* Formerly, a supreme court was the only appellate court in most states. As legal business increased and the number of appeals mounted, the need for an intermediate appellate court became evident. Therefore, in nearly all states there is an intermediate court, usually called the court of appeals. This is the court where most appeals end. In some states it is a single court with three or more judges. More often, numerous divisions within the appellate court serve various geographic regions, each division having three or more judges. Since every litigant is normally guaranteed at least one appeal, this intermediate court takes much of the pressure off the high court of the state. Rarely do

individuals appeal beyond the intermediate level.

State courts of appeals tend to operate in much the same fashion as the U.S. Court of Appeals, with cases being heard by small groups of judges, usually three at a time.

Cases not involving federal questions go no further than the high court in a state, usually called the supreme court. This court—usually a seven- or nine-member body—is the final authority regarding the construction of state laws and interpretation of the state constitution. Not even the Supreme Court of the United States can tell a state supreme court what that state's constitution means.

Not even the Supreme Court of the United States can tell a state supreme court what that state's constitution means.

State court judges are frequently elected. Normally the process is nonpartisan, but because they are elected and must stand for re-election periodically, state court judges are generally a bit more politically active than their federal counterparts. Nearly half the states in the nation use a kind of compromise system that includes both appointment and election. The compromise is designed to minimize political influence and initially select qualified candidates but still retain an element of popular control. The plans are named after the states that pioneered them, the **California Plan** and the **Missouri Plan.**

JUDICIAL REVIEW

One of the most important powers of courts (and at one time one of the most controversial) is the power of **judicial review**—that is, the right of any court to declare any law or official governmental action invalid because it violates a constitutional provision. We usually think of this right in terms of the U.S. Constitution. However, a state court can declare an act of its legislature to be invalid because the act conflicts with a provision of the state constitution. Theoretically, any court can exercise this power. The Circuit Court of Lapeer County, Mich., can rule that the Environmental Protection Act of 1972 is unconstitutional because it deprives citizens of their property without due process of law, something guaranteed by the Fifth Amendment to the federal Constitution. But this action isn't likely to happen, because a higher court would quickly overturn such a ruling. In fact, it is rather unusual for any court—even the U.S. Supreme Court—to invalidate a state or federal law on grounds that it violates the Constitution.

Judicial review is therefore not a power that the courts use excessively. A judicial maxim states: When a court has a choice of two or more ways in which to interpret a statute, the court should always interpret the statute in such a way that it is constitutional.

32

Judicial review is extremely important when matters concerning regulations of mass media are considered. Because the First Amendment prohibits laws that abridge freedom of press and speech, each new measure passed by Congress, by state legislatures and even by city councils and township boards must be measured by the yardstick of the First Amendment. Courts have the right, in fact have the duty, to nullify laws and executive actions and administrative rulings that do not meet the standards of the First Amendment. While many lawyers and legal scholars rarely consider constitutional principles in their work and rarely seek judicial review of a statute, attorneys who represent newspapers, magazines, broadcasting stations and movie theaters constantly deal with constitutional issues, primarily those of the First Amendment. The remainder of this book will illustrate the obvious fact that judicial review, a concept at the very heart of American democracy, plays an important role in maintaining the freedom of the American press, even though the power is not explicitly included in the Constitution.

SUMMARY

There are 52 different judicial systems in the nation: one federal system, one for the District of Columbia and one for each of the 50 states. Courts within each of these systems are divided into two general classes—trial courts and appellate courts. In any lawsuit both the facts and the law must be considered. The facts or the factual record is an account of what happened to prompt the dispute. The law is what should be done to resolve the dispute. Trial courts determine the facts in the case; then the judge applies the law. Appellate courts, using the factual record established by the trial court, determine whether the law was properly applied by the lower court and whether proper judicial procedures were followed.

Trial courts exercise original jurisdiction almost exclusively; that is, they are the first courts to hear a case. Trial courts have very little discretion over which cases they will and will not hear. Appellate courts exercise appellate jurisdiction almost exclusively; that is, they review the work done by the lower courts when decisions are appealed. Whereas the intermediate appellate courts (i.e., courts of appeals; the appellate division) have limited discretion in the selection of cases, the high courts (supreme courts) in the states and the nation generally have the power to select the cases they wish to review.

Federal courts include the Supreme Court of the United States, the U.S. Courts of Appeals, the U.S. District Courts and several specialized tribunals. These courts have jurisdiction in all cases that involve the U.S. Constitution, U.S. law and U.S. treaties; in disputes between citizens of different states; and in several less important instances. In each state there are trial-level courts and a court of last resort, usually called the supreme court. In about half the states there are intermediate appellate courts as well. State courts generally have jurisdiction in all disputes between citizens of their state that involve the state constitution or state law.

Judicial review is the power of a court to declare a statute, regulation or executive action to be a violation of the Constitution and thus invalid. Because the First Amendment to the U.S. Constitution guarantees the rights of freedom of speech and press, all government actions that relate to the communication of ideas and information face potential scrutiny by courts to determine their validity.

33

LAWSUITS

The final topic is lawsuits. To the layperson, the United States appears to be awash in lawsuits. This notion can probably be blamed on the increased attention the press has given legal matters. Courts are fairly easy to cover, and stories about lawsuits are commonly published and broadcast.

This is not to say that we are not a highly litigious people. Backlogs in the courts are evidence of this. Going to court today is no longer a novelty but a common business or personal practice for a growing number of Americans. And too many of these lawsuits involve silly or trivial legal claims. In the end, the public pays a substantial price for all this litigation, through higher federal and state taxes to build and maintain courthouses and money to pay the salaries of those who work in the judiciary, and through higher insurance costs on everything from automobiles to protection from libel suits.

The material that follows is a simplified description of how a lawsuit proceeds. The picture is stripped of a great deal of the procedural activity that so often lengthens the lawsuit and keeps attorneys busy.

The party who commences or brings a civil lawsuit is called the **plaintiff.** The party against whom the suit is brought is called the **defendant.** In a libel suit the person who has been libeled is the plaintiff and is the one who starts the suit against the defendant—the newspaper, television station or blog. A civil suit is usually a dispute between two private parties. The government offers its good offices—the courts—to settle the matter. A government can bring a civil suit such as an antitrust action against someone, and an individual can bring a civil action against the government. But normally a civil suit is between private parties. (In a criminal action, the government always initiates the action.)

To start a civil suit the plaintiff first picks the proper court, one that has jurisdiction in the case. Then the plaintiff typically files a **civil complaint** with the court clerk. This complaint, or **pleading,** is a statement of the allegations against the defendant and the remedy that is sought, typically money damages. The complaint will also include:

1. A statement of the relevant facts upon which the plaintiff is suing
2. The legal theory or theories (known as causes of action) upon which the plaintiff is suing (libel, for instance, is a cause of action or legal theory)
3. A request for a remedy or relief (typically, the plaintiff requests monetary damages in a civil lawsuit, although equitable relief also can be sought in some instances)

The plaintiff then serves the defendant with the complaint to answer these allegations. The plaintiff may later amend his or her pleadings in the

case. After the complaint is filed, a hearing is scheduled by the court.

If the defendant fails to answer the allegations, he or she normally loses the suit by default. Usually, however, the defendant will respond and prepare his or her own set of pleadings, which constitute an answer to the plaintiff's allegations. If there is little disagreement at this point about the facts—what happened—and that a wrong has been committed, the plaintiff and the defendant might settle their differences out of court. The defendant might say, "I guess I did libel you in this article, and I really don't have a very

good defense. You asked for $100,000 in damages; would you settle for $50,000 and keep this out of court?" The plaintiff might very well answer yes, because a court trial is costly and takes a long time, and the plaintiff can also end up losing the case. Smart lawyers try to keep their clients out of court and settle matters in somebody's office. The overwhelming majority of cases, in fact, never go to trial.

Smart lawyers try to keep their clients out of court and settle matters in somebody's office.

If there is disagreement, the case is likely to continue. One common response to a complaint is for the defendant to file in court and to serve the plaintiff with an **answer.** An answer typically denies most of the facts and all of the allegations in the complaint; it may also assert various defenses to the plaintiff's complaint. Another typical move for the defendant to make at this point is to file a motion to dismiss, or a **demurrer.** In such a motion the defendant says this to the court: "I admit that I did everything the plaintiff says I did. On June 5, 2017, I did publish an article in which she was called a socialist. But, Your Honor, it is not libelous to call someone a socialist." The plea made then is that even if everything the plaintiff asserts is true, the defendant did nothing that was legally wrong. The law cannot help the plaintiff. The court might grant the motion, in which case the plaintiff can appeal. Or the court might refuse to grant the motion, in which case the defendant can appeal. If the motion to dismiss is ultimately rejected by all the courts up and down the line, a trial is then held. It is fair play for the defendant at that time to dispute the plaintiff's statement of the facts; in other words to deny, for example, that his newspaper published the article containing the alleged libel.

Before the trial is held, the judge may schedule a conference between both parties in an effort to settle the matter or to narrow the issues so that

the trial can be shorter and less costly. If the effort to settle the dispute fails, the lawsuit goes forward. Either party could ask for a **summary judgment,** which is a way of ending a case before trial. The party moving for summary judgment is trying to avoid the cost and time of a trial by asserting that both parties agree to the facts of the case, and, based on those facts, the outcome of the trial is obvious. With no factual issues to be sorted out at trial, this makes it possible for the judge to decide the case on the basis of the law. The judge can then rule that the law dictates that one party must win and the other must lose. If the facts are disputed, though, the case can proceed and be tried before either a jury or only a judge. Note that both sides must waive the right to a jury trial. In this event, the judge becomes both the fact finder and the lawgiver, a situation known as a bench trial. Now, suppose that the case is heard by a jury. After all the testimony is given, all the evidence is presented and all the arguments are made, the judge instructs the jury in the law. Instructions are often long and complex, despite attempts by judges to simplify them. **Judicial instructions** guide the jury in determining guilt or innocence if certain facts are found to be true. The judge will say that if the jury finds that *X* is true and *Y* is true and *Z* is true, then it must find for the plaintiff, but if the jury finds that *X* is not true, but that *R* is true, then it must find for the defendant.

In a civil lawsuit, the burden is on the plaintiff to prove her case by a preponderance of the evidence. This simply means that it is more likely than not that the defendant should be held liable (greater than 50 percent chance that the plaintiff's argument is true). Notice here the use of the term "liable." A defendant who loses a civil case is found liable (the term "guilty" applies only in criminal cases).

After deliberation, the jury presents its **verdict,** the action by the jury. The judge then announces the **judgment of the court.** This is the decision of the court. The judge

is not always bound by the jury verdict. If he or she feels that the jury verdict is unfair or unreasonable, the judge can reverse it and rule for the other party. This rarely happens.

If either party is unhappy with the decision, an appeal can be taken. At that time the legal designations may change. The person seeking the appeal becomes the *appellant*, or petitioner. The other party becomes the **appellee,** or **respondent.** The name of the party initiating the action is usually listed first in the name of the case. For example: Smith sues Jones

for libel. The case name is *Smith* v. *Jones.* Jones loses and takes an appeal. At that point in most jurisdictions Jones becomes the party initiating the action and the case becomes *Jones* v. *Smith.* This change in designations often confuses novices in their attempt to trace a case from trial to final appeal. If Jones wins the appeal and Smith decides to appeal to a higher court, the case again becomes *Smith* v. *Jones.* In more and more jurisdictions today, however, the case name remains the same throughout the appeal process. This is an effort by the judiciary to relieve some of the confusion wrought by this constant shifting of party names within the case name. In California, for example, the case of *Smith* v. *Jones* remains *Smith* v. *Jones* through the entire life of that case.

The end result of a successful civil suit is usually the awarding of money damages. Sometimes the amount of damages is guided by the law, as in a suit for infringement of copyright in which the law provides that a losing defendant pay the plaintiff the amount of money he or she might have made if the infringement had not occurred, or at least a set number of dollars. But most of the time the damages are determined by how much the plaintiff seeks, how much the plaintiff can prove he or she lost and how much the jury thinks the plaintiff deserves. It is not a very scientific means of determining the dollar amount.

A **criminal prosecution,** or **criminal action,** is like a civil suit in many ways. The procedures are more formal, elaborate and involve the machinery of the state to a greater extent. The state brings the charges, usually through the county or state prosecutor. The defendant can be apprehended either before or after the charges are brought. In the federal system people must be **indicted** by a **grand jury,** a panel of 16 to 23 citizens, before they can be charged with a serious crime. But most states do not use grand juries in that fashion, and the law provides that it is sufficient that the prosecutor issue an **information,** a formal accusation. After being charged, the defendant is arraigned. An **arraignment** is the formal reading of the charge. It is at the arraignment that the defendant makes a formal plea of guilty or not guilty. If the plea is guilty, the judge gives the verdict of the court and passes sentence, but usually not immediately, for presentencing reports and other procedures must be undertaken. If the plea is not guilty, a trial is scheduled.

Some state judicial systems have an intermediate step called a preliminary hearing or preliminary examination. The preliminary hearing is held in a court below the trial court, such as a municipal court, and the state has the responsibility of presenting enough evidence to convince the

court—only a judge—that a crime has been committed and that there is sufficient evidence to believe that the defendant might possibly be involved. Today it is also not uncommon that **pretrial hearings** on a variety of matters precede the trial.

If a criminal case does go to trial, the burden is on the prosecution (the government) to prove its case beyond a reasonable doubt. This is a much higher burden of proof than the civil case standard of a preponderance of the evidence.

36

In both a civil suit and a criminal case, the result of the trial is not enforced until the final appeal is exhausted. That is, a money judgment is not paid in civil suits until defendants exhaust all their appeals. The same is true in a criminal case. Imprisonment or payment of a fine is not always required until the final appeal. If the defendant is dangerous or if there is some question that the defendant might not surrender when the final appeal is completed, bail can be required. Bail is money given to the court to ensure appearance in court.

SUMMARY

There are two basic kinds of lawsuits—civil suits and criminal prosecutions or actions. A civil suit is normally a dispute between two private parties in which the government offers its courts to resolve the dispute. The person who initiates the civil suit is the plaintiff; the person at whom the suit is aimed is the defendant. A plaintiff who wins a civil suit is normally awarded money damages.

A criminal case is normally an action in which the state brings charges against a private individual, who is called the defendant. A defendant who loses a criminal case can be assessed a fine, jailed or, in extreme cases, executed. A jury can be used in both civil and criminal cases. The jury becomes the fact finder and renders a verdict in a case. But the judge issues the judgment in the case. In a civil suit, a judge can reject any jury verdict and rule in exactly the opposite fashion, finding for either plaintiff or defendant if the judge feels the

jury has made a serious error in judgment. Either side can appeal the judgment of the court. In a criminal case the judge can take the case away from the jury and order a dismissal, but nothing can be done about an acquittal, even an incredible acquittal. While a guilty defendant may appeal the judgment, the state is prohibited from appealing an acquittal.

BIBLIOGRAPHY

Abraham, Henry J. *The Judicial Process.* 7th ed. New York: Oxford University Press, 1998.

Ardia, David S. "Freedom of Speech, Defamation, and Injunctions." *William & Mary Law Review* 55 (2013): 1.

Pound, Roscoe. *The Development of the Constitutional Guarantees of Liberty.* New Haven, Conn.: Yale University Press, 1957.

* Terms in boldfaced type are defined in the glossary.

1. Abraham, *Judicial Process*.

2. 159 S.W. 2d 291 (1942).

* Appellate courts (see page 18) often render decisions that decide only the particular case and do not establish binding precedent. Courts refer to these as "unpublished decisions." In some jurisdictions it is unlawful for a lawyer to cite these rulings in legal papers submitted in later cases.

3. 95 S.E. 2d 606 (1956).

4. 539 U.S. 558 (2003).

5. 478 U.S. 186 (1986).

6. 559 U.S. 460 (2010).

7. 558 U.S. 310 (2010).

8. *Oregon* v. *Henry*, 302 Ore. 510 (1987). Article I, Section 8 of the Oregon Constitution provides that "no law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." A 1996 ballot measure, drafted in part in response to the *Henry* opinion and that would have amended Article I, Section 8 so

as not to protect obscenity, narrowly failed when put before Oregon voters.

9. 427 U.S. 539 (1976).

10. 559 U.S. 460 (2010).

11. 267 P.3d 305 (Wash. 2011).

12. 385 U.S. 374 (1967).

13. 132 S. Ct. 2490 (2012).

14. 347 U.S. 483 (1954).

* To further confuse matters, the trial court of general jurisdiction in New York is called the Supreme Court. This is a fact with which avid “Law & Order” fans should already be familiar.

CHAPTER 2

The First Amendment

THE MEANING OF FREEDOM

©McGraw-Hill Education/Jill Braaten

The First Amendment is the wellspring for nearly all U.S. laws on freedom of speech and press. The amendment, adopted in 1791 as part of the Bill of Rights, is only 45 words, but court decisions during the past two-plus centuries have added substantial meaning to this basic outline. This chapter explores the evolution of freedom of expression, outlines the adoption of the First Amendment, and examines the development of some elements of the fundamental meaning of free speech and press.

38

HISTORICAL DEVELOPMENT

Free expression is not exclusively an American idea. It traces back to Socrates and Plato. The concept developed more fully during the past 400 years. The modern history of freedom of the press began in England during the 16th and 17th centuries as printing developed. Today the most

indelible embodiment of the concept is the First Amendment to the U.S. Constitution, forged in the last half of the 18th century by individuals who built upon their memory of earlier experiences and unchanged in its wording today. To understand the meaning of freedom of the press and speech, it is necessary to understand the meaning of censorship. That's because, when viewed from a negative position, freedom of expression can be simply defined as the absence of censorship or a freedom from government control.

FREEDOM OF THE PRESS IN ENGLAND

When William Caxton set up the first British printing press in 1476, his printing pursuits were restricted only by his imagination and ability. There were no laws governing what he could not print—he was completely free. For more than five centuries, the British and Americans have attempted to regain the freedom that Caxton enjoyed, for shortly after he started publishing, the British Crown began to regulate printing presses in England. Printing developed during a period of religious struggle in Europe, and it soon became an important tool in that struggle. Printing presses made communication with hundreds of people fairly easy and thus gave considerable power to small groups or individuals who owned or could use a press.

The British government realized that unrestricted publication and printing could dilute its power. Information is a potent tool in any society, and those who control the flow and content of information exercise considerable power. The printing press broke the Crown's monopoly of the flow of information, and therefore control of printing was essential.

Between 1476 and 1776 the British used several means to limit or restrict the press in England. **Seditious libel** laws were used to punish those who criticized the government or the Crown, and it did not matter whether the criticism was truthful or not. The press also suffered under **licensing** or **prior restraint** laws, which required printers to obtain prior approval from the government or the church before printing their handbills, pamphlets or newspapers. Printers were often required to deposit with the government large sums of money called **bonds.** This money was forfeited if material appeared that the government felt should not have been published. And the printer was forced to post another bond before printing could be resumed. The British also granted special patents and monopolies to certain printers in exchange for their cooperation in

printing only acceptable works and in helping the Crown ferret out other printers who broke the publication laws.

As ideas about democracy spread throughout Europe, it became harder and harder for the government to limit freedom of expression.

British control of the press during these 300 years was generally successful, but did not go unchallenged. As ideas about democracy spread throughout Europe, it became harder and harder for the government to limit freedom of expression. The power of the printing press in spreading ideas quickly to masses of people greatly helped foster the democratic spirit. Although British law regulated American printers as well during the colonial era, regulation of the press in North America was never as successful as it was in Great Britain.

39

FREEDOM OF THE PRESS IN COLONIAL AMERICA

There were laws in the United States restricting freedom of the press for almost 30 years before the first newspaper was published. As early as 1662, statutes in Massachusetts made it a crime to publish anything without first getting prior approval from the government, 28 years before Benjamin Harris published the first—and last—edition of *Publick Occurrences*. The second and all subsequent issues were banned because Harris had failed to get permission to publish the first edition, which contained material construed to be critical of British policy in the colonies, as well as a report that scandalized the Massachusetts clergy because it said the French king took immoral liberties with a married woman (not his wife).

Despite this inauspicious beginning, American colonists had a much easier time getting their views into print (and staying out of jail) than did their counterparts in England. There was censorship, but American juries were reluctant to convict printers prosecuted by the colonial authorities. The colonial governments were less efficient than the government in England.

The British attempted to use licensing, taxes and sedition laws to control American printers and publishers. Licensing, which ended in England in 1695, lasted until the mid-1720s in the American colonies. Benjamin Franklin’s older brother James was jailed in 1722 for failing to get prior government approval for publishing his *New England Courant*.

The unpopular government move failed to daunt the older Franklin, and licensing eventually ended in the colonies as well. The taxes levied against the press, most of which were genuine attempts to raise revenues, were nevertheless seen as censorship by American printers and resulted in growing hostility toward Parliament and the Crown. Most publishers refused to buy the tax stamps, and there was little retribution by the British.

The most famous case of government censorship in the American colonies was the seditious libel trial of immigrant printer John Peter Zenger.

The most famous case of government censorship in the American colonies was the seditious libel trial of immigrant printer John Peter Zenger, who found himself involved in a vicious political battle between leading colonial politicians in New York. Zenger published the *New York Weekly Journal,* a newspaper sponsored by Lewis Morris and James Alexander, political opponents of the unpopular colonial governor, William Cosby. Zenger was jailed in November 1734 after his newspaper published several stinging attacks on Cosby, who surmised that by jailing the printer—one of only two working in New York—he could silence his critics. There is little doubt that Zenger was guilty under 18th-century British sedition law. But his attorneys, including the renowned criminal lawyer Andrew Hamilton, were able to convince the jury that no man should be imprisoned or fined for publishing criticism of the government that was both truthful and fair. Jurors simply ignored the law and acquitted Zenger. It was an early example of what today is called **jury nullification**—the power of a jury in a criminal case to ignore (and thereby to "nullify") a law and to return a verdict (typically a not guilty verdict) according to its conscience. While certainly controversial and relatively rare, jury nullification can be seen as an essential part of the legislative process because a law that is repeatedly nullified by juries probably should be revised or discarded by the legislative body that created it.

The verdict in the Zenger case was a great political triumph but did nothing to change the law of seditious libel. In other words, the case did not set an important legal precedent. But the revolt of the American jurors did force colonial authorities to reconsider the use of sedition law as a means of controlling the press. Although a few sedition prosecutions were initiated after 1735, there is no record of a successful prosecution in the colonial courts after the Zenger case. The case received widespread

publicity both in North America and in England, and the outcome played an important role in galvanizing public sentiment against this kind of government censorship.

40

©Bettman/Contributor/Getty Images

The trial of John Peter Zenger in New York in 1734. The printer was defended by attorney Andrew Hamilton, and the acquittal of the printer put the British Crown on notice that American jurors were not inclined to convict those who criticized British officials.

The Zenger trial today is part of American journalism mythology, but it doesn't represent the end of British attempts to control the press in the American colonies. Rather than haul printers and editors before jurors hostile to the state, the government instead hauled them before colonial legislatures and assemblies hostile to journalists. The charge was not sedition, but breach of parliamentary privilege or contempt of the assembly. There was no distinct separation of powers then, and the legislative body could order printers to appear, question, convict and punish them. Printers and publishers were thus still being jailed and fined for publications previously considered seditious.

Despite these potent sanctions occasionally levied against publishers and printers, the press of this era was remarkably robust. Researchers who have painstakingly read the newspapers, pamphlets and handbills produced in the last half of the 18th century are struck by the seeming lack of concern for government censorship. Historian Leonard Levy notes in his