6th Edition

# Understanding the Law

Donald L. Carper

John A. McKinsey

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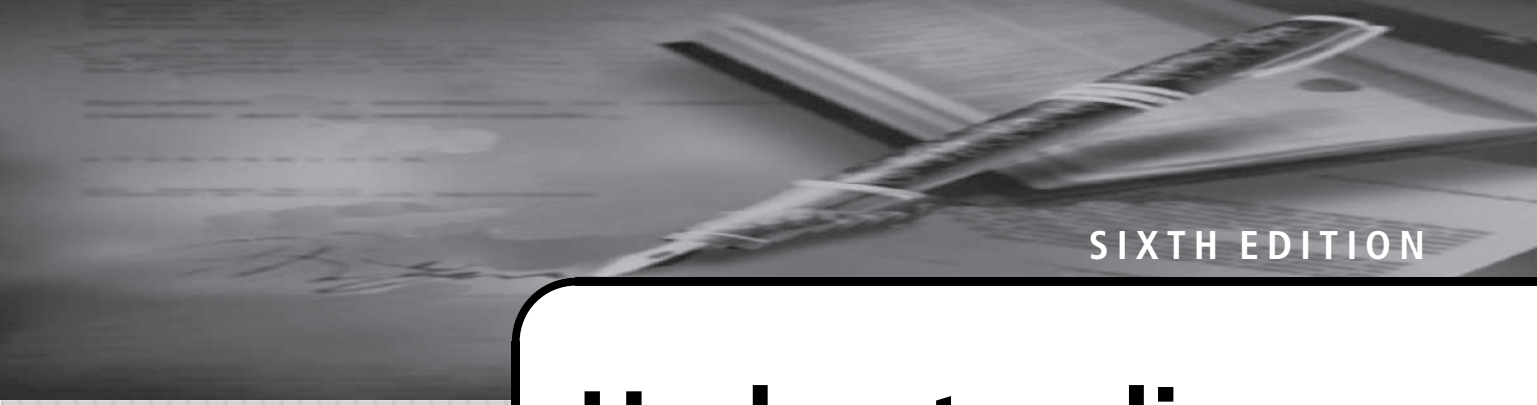

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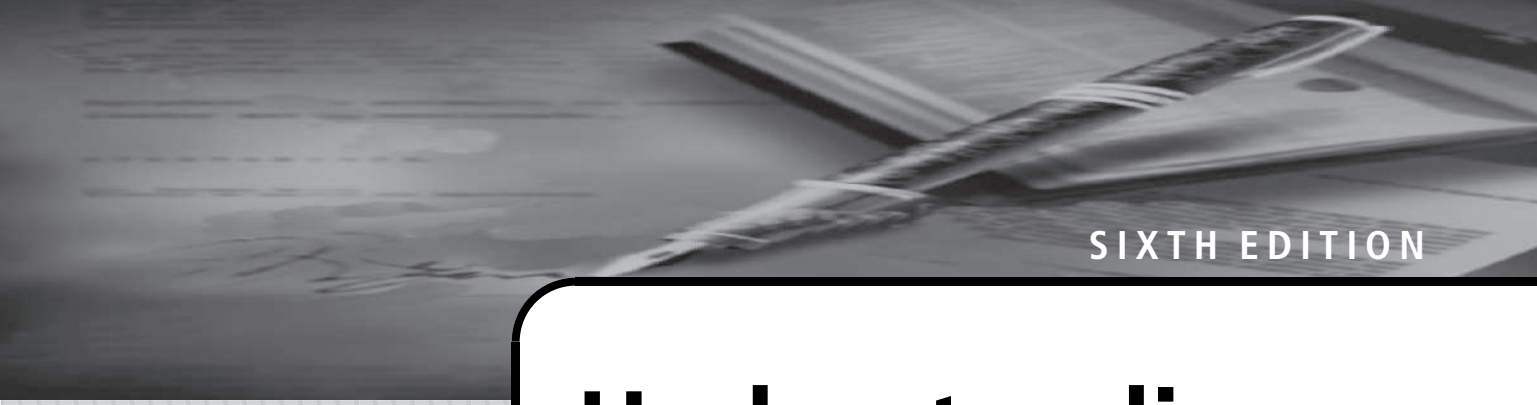

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# Understanding the Law

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# Preface

In the sixth edition of *Understanding the Law*, we continue to provide a text that can be used in many different law courses. We still presume that the student lacks a prior law course and that this text is their first instruction specifically related to law. Our focus has been to make the text timely and current. Our goal has always been to provide a textbook that is interesting, and even fun, as well as scholarly. Most drama is about conflict, and nothing is more dramatic than law, the rationale and rules devised to address conflict.

We have kept the feature we added in the fifth edition, Law around the World, though we have reduced this to one feature per chapter. In this edition, we have added another new feature, Morals and Ethics. In each chapter, we provide one or more examples of applications of moral and ethical principles to the issues and law raised in that chapter. Connected with the primer on ethical perspectives contained in Chapter 1, these features allow students using this book to maintain a connection to the moral views on issues that are inherent in law.

We continue to use the Legal Focus feature, which provides background, examples, cases, and problems to break up long textbook discussion of topics that become dry if not considered with the human condition. Each Legal Focus is clearly identified in the textbook. Some problems are also actually cases, and the case classification is used when there is an available appellate court citation. Many Legal Focuses present issues that are unresolved, hopefully prompting reasoned class discussion and continued attention to the resolution of important legal issues. The use of Chapter Objectives at the beginning of each chapter in the fourth edition was well received and is continued. A detailed glossary has been a feature of this text, and terms are also provided in the text margin when first introduced. The appendix on how to brief a case has been retained to assist those using case summaries as a critical thinking writing exercise.

## SUPPLEMENTS

### Instructor's Resource CD-ROM

This CD-ROM includes the Word files for the Instructor's Manual and the Test Bank. It also includes selected exhibits from the text.

### Electronic Instructor's Manual/Test Bank

The Instructor's Manual/Test Bank continues to be written by author John McKinsey. Each chapter of the manual provides a chapter overview, along with teaching suggestions. The test bank has a minimum of 20 multiple-choice, 15 true/false, 10 fill-in, and three essay questions. It is available on both the Instructor's Resource CD-ROM and the text companion website, http://www.cengage.com/blaw/carper.



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# ACKNOWLEDGEMENTS


## John McKinsey

This is the first edition of this textbook that did not involve any direct work from the original authors. Donald Carper has continued to advise me and provide insights and comments and, for me, the continuation of this text is a tribute to his energy, enthusiasm and dedication to the teaching of students. I was one of those students.

Our reviewers for this edition are again an eclectic group, providing helpful comments and suggestions. They are:

Ilene Goldberg, *Rider University*
Janet W. Hagen, *University of Wisconsin, Oshkosh*
Jennifer Hammack, *Georgia College and State University*
Jacqueline Irwin, *Georgia Southern University*
Nance Kriscenski, J.D., *Manchester Community College*
James Morgan, *California State University, Chico*
Barbara A. Nagle, J.D., *Montclair State University*
Bryan Sanders, J.D., *Evangel University*
Wendy Vonnegut, Esq., *Methodist University*
Jason Wolins, *Humphreys College*
Amy Oakes Wren, J.D., *Louisiana State University, Shreveport*

We wholeheartedly accept the appropriateness of their occasional plaudits, and just as completely reject each and all of their thoughtless criticisms. In truth, we truly appreciate the hard work of the reviewers who give us helpful feedback on our scholarship and approach. We responded to the many helpful suggestions except when they were at odds with each other.

Previous reviews for West editions of the text have been:

**Fifth Edition**

Martha Broderick, *University of Maine*
Howard Cohen, *University of Buffalo*
Julie Walters, *Oakland University*

**Fourth Edition**

Judith Anshin, *Sacramento City College*
Scott A. Comparato, *Southern Illinois University, Carbondale*


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CHAPTER 1

# Introduction to Law

*"Let reverence for the laws be breathed by every American mother to the lisping babe that prattles on her lap; let it be taught in schools, in seminaries, and in colleges; let it be written in primers, spelling-books, and in almanacs; let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the political religion of the nation; and let the old and the young, the rich and the poor, the grave and the gay of all sexes and tongues and colors and conditions, sacrifice unceasingly upon its altars."*

**Abraham Lincoln, Address before the Young Men's Lyceum of Springfield, Illinois, January 1837.**

## LEARNING OBJECTIVES

**After reading and studying this chapter, you should be able to:**

- Define *law* while understanding the varied meanings that legal concepts have across society.
- Understand the origins of the English common law system and its connection to the U.S. legal system.
- Describe the important sources of U.S. law and explain how they are interrelated.
- Explain the doctrine of *stare decisis* and understand how case law is related to other sources of law.
- Classify the law in a variety of ways including federal and state law, criminal and civil law, private and public law, and procedural and substantive law.
- Be able to define *ethics* and distinguish ethics from law.
- Demonstrate familiarity with two forms of ethical reasoning and the ability to use them to consider an ethical problem.



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Welcome to the study of law. *Understanding the Law* is designed to help you recognize opportunities and overcome obstacles in reaching your goals. When you leave college you will find that the laws of society play an ever-increasing role in your life. As an educated member of the community, you will apply your understanding of our legal system in voting and in actively participating in local, state, and federal issues and affairs. From a more practical standpoint, your understanding of our legal system will help guide you toward a happier and more financially successful life.

Family members engage with a myriad of businesses, and with government, as consumers, as employees, and as active members of communities. Community leaders deal with difficult problems such as energy and resources, neighborhood crime, traffic, homelessness, and environmental protection. Already, you have learned something about the law, simply by experiencing life. For example, you know that stealing, damaging someone else's property, or intentionally injuring another person is unlawful. You know that in an automobile collision, the careless driver is held responsible, and when both drivers are careless, they share the blame. You know that divorce creates issues of alimony, division of family property, and financial support for children and changes in their parental custody. You know that employers are expected to provide safe working conditions for their employees. You know that you must conform to rules in registering for admission to college, in driving on public highways, and in obtaining certain medicines.

From these experiences, you can probably write a reasonable definition of the law. Perhaps you would correctly conclude that laws are rules that must be obeyed to avoid the imposition of sanctions (legal penalties). More precisely, the dictionary declares **law** to be a body of rules of conduct prescribed by controlling authority and having binding legal force.[1] But this traditional definition of law emphasizes the static perspective of law. Law is actually much more dynamic.

**law**
A body of rules of conduct prescribed by controlling authority and having binding legal force.

Consider law as continually changing, always responding to society's need for solutions to new and evolving issues. There are many specific, written rules, such as speed limits. But conflicts and questions arise when those static rules get applied to unique circumstances and evolving societal values. We often explain that legal rules follow rather than lead. For example, consider the Internet, which is challenging and changing traditional laws of privacy, free speech, and crime, as well as many rules of commerce, consumerism, and international law.

It is perfectly logical for laws to change continually in response to the evolving characteristics of, and the issues within, our society. That is, law changes as we change. Still, there is a fairly firm foundation behind all law in our society: the Constitution. All law must conform to the immutable principles of our Constitution or ultimately be discarded. Thus, the laws of our society are both dynamic and predicated upon immutable principles memorialized in our Constitution. Even within the Constitution, however, not all principles are expressed; many are implied. For example, the much-publicized "right of privacy," upon which issues like abortion and interracial marriage have been decided, does not actually appear as express words in the Constitution. The roles of the Constitution and the U.S. Supreme Court in defining the law of American society is more fully explored in Chapter 2.

Does society change the law, or does the law change society? This "Which comes first, the chicken or the egg?" variety of question is unanswerable. Consider that in most states today the law requires that motorcycle riders wear helmets. This was not always true. Did this requirement change society? Or did society recognize a need (through its representative officials) and require a change in the law? The answer to both questions is "yes." What is important is that, either way, our legal system and laws are dynamic and respond to the legal issues that arise within our changing society. In a

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nutshell, the study of law is the study of a moving target. Some changes are quite immediate, as when legislatures respond to popular demands. In contrast, courts are structured to accommodate change more slowly, at a more reflective pace.

Major societal shifts have triggered significant evolutions in the law. When William McKinley was elected president in 1897, a great industrial revolution was well under way in this country. Railroads were spreading from the east to the great cities in the west. Coal was fueling the furnaces used in making steel, which in turn was used to manufacture train rails. Following the invention of the gasoline engine, automobiles soon would be mass-produced, changing the face of our nation forever. During that same period numerous new laws and legal doctrines were passed or established to deal with the issues the Industrial Revolution brought upon society.

In the twenty-first century, we are experiencing another magnificent technological revolution, one focused on digital electronics, communication, and microtechnology. In this modern, yet still embryonic revolution, the demands upon the legal system already are reaching new heights of complexity. For example:

- The Internet is causing a reexamination of the principles of free speech, security, and privacy. The Internet has forced the government of the United States as well as its citizens and businesses to consider the laws of other countries and international law on regular basis.
- Biotechnology is presenting our society and its legal system with momentous social and legal issues such as genetic alteration of plant and animal life and human cloning. The unique products of human intervention into the natural processes of animal and plant life can be and often are patented, thereby creating monopolization concerns about some aspects of creation.

In addition to the technology revolution, natural forces are also creating today's issues. Consider the following:

- Population continues to increase, causing a multitude of social issues, and the problem is growing exponentially. Consider, for example, the intense debate over health care, immigration policy, and energy. Additionally, our population is aging, setting the stage for fierce competition between workers and retirees for the nation's wealth and benefits. "This is a revolution in waiting that will redefine society in the twenty-first century just as baby boomers shaped social, political and economic changes in the last half of the twentieth century."[2]
- Environmental issues abound, many driven by increasing competition for a worldwide increasing thirst for and consumption of resources such as water, trees, and fossil fuels. From global warming and energy reliability to air and water pollution, society is facing problems it has yet to solve. Increasingly, most solutions seem to reach beyond the boundaries of the United States as well as the North American continent.
- The terrorist attacks of September 11, 2001, have, so far, set a tone for this century that is security- and threat-focused. A multitude of social concerns, all with legal consequences, have leaped to the forefront of American political debate and action. From heightened security precautions that reduce privacy at airports, buildings, and sporting events to the rights and treatment of citizens and noncitizens who are suspected to be "terrorists," Americans are showing that they care deeply about these and other terrorist-related issues.

Historically, our legal system has resolved many issues presented by changing lifestyles, attitudes, and mores. But the speed at which it has done so sometimes appears

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to be glacial to those caught up in the middle of those issues. Although technically resolved by law, volatile and contentious issues such as abortion, flag burning, prayer in schools, and affirmative action are not yet fully resolved by society, which means that legal resolution may also shift further before these issues are fully resolved.

Historical perspective sharpens our understanding of the outlook for our laws and legal system in the early twenty-first century. It is said that if we ignore history we are destined to repeat it. Here we are not studying history, but we must take history into consideration in contemplating the role of law and our legal system in the early years of the twenty-first century.

## THE AMERICAN LEGAL SYSTEM IN THE TWENTY-FIRST CENTURY

Despite the powerful issues and questions that face us in the twenty-first century, the current political and legal environment is not unprecedented. As America was entering the twentieth century, the Industrial Revolution, technology, and population growth were placing tremendous strain on American society and its legal system. With the advantage of hindsight, we now can understand the problems our legal system faced then, as well as their solutions. Thus, with some foresight, we hope to paint a picture for you of our legal system today.

What was our society like at the beginning of the twentieth century? Then, as now, people necessarily relied upon the ability of their laws to respond to their needs—and upon their legal system to oversee the process. Consider the following example of the U.S. Supreme Court in action in the early twentieth century:

**LEGAL FOCUS—CASE**

Minnesota law provided that "All labor on Sunday is prohibited, excepting the works of necessity or charity. . . ." Barber Petit was arrested, tried, and convicted of cutting hair and shaving beards in his barbershop on Sundays. He appealed all the way to the U.S. Supreme Court on the grounds that cutting hair and shaving beards was a work of necessity. What do you suppose was the result 100 years ago?

*Petit v. Minnesota*, 177 U.S. 164, 20 S.Ct. 666 (1900).

The Court recognized the Sunday law of relaxation as "essential to the physical and moral well-being of society." The Court relied upon several previous court decisions to conclude that shaving on Sunday was not a work of necessity. Barber Petit lost his appeal. Most cases before the U.S. Supreme Court, then as now, were far more complex than Petit's case, involving commerce, taxation, admiralty, commercial transactions, water rights, and so on. But Petit's case tells you much about the attention given to moral issues that, at the time, seemed tremendously important.

The primary role of women in the United States in the early 1900s was housework and child rearing. Perhaps 20 percent of women were in the paid labor force.[3] Of those women employed outside the home, the vast majority were farmhands or domestics. Other than in the states of Utah and Colorado, women did not have the right to vote. The Klondike Gold Rush had fueled a "Gilded Age" as the twentieth century began, with affluence spreading throughout many American cities. Women in the upper classes became more athletic and "outdoorsy" than before. Although still corseted, the modern

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woman wore only one petticoat instead of the five previously worn. People purchased bread in shops, freeing women from the chore of baking. Nevertheless, women as a class were, for the most part, second class in their protection by the law. For example, upon marriage a woman's legal rights to property disappeared, property ownership being vested solely in her husband.

But our law and legal system had been conceived by its founders as dynamic and, as it turned out, up to the task of coping with the dramatic changes in the twentieth century. The rights of women to vote and to own property independently were created under law, as were many other rights to the extent that few gender distinctions exist in the law today.

Consider some changes in our society during the twentieth century, changes that placed extraordinary demands upon our legal system. Few people lived in the seven territories (Alaska, Arizona, District of Columbia, Hawaii, New Mexico, Oklahoma, and the Indian territories) in 1900, and most conveniences were found in or near the great cities. Although on the eve of an industrial revolution and as an emerging world power, in the early 1900s, the United States had no airplanes, no spaceships, no satellites, no television sets—let alone HDTV sets—no video cameras, no computers, no iPods, no Internet, no color or sound movies, no suburban malls, no cellular or cordless telephones, no microwave ovens, no automatic dishwashers, no electric stoves, no trash compactors or disposals, no air conditioning, and no credit or debit cards. As for the implements of war, there were neither nuclear weapons nor submarines with intercontinental missiles to deliver them. On the other hand, Thomas Edison had harnessed electricity, with the result that the phonograph (but not stereo) and household lighting were widely available in cities. Individual transportation was by foot, horse or horse-drawn buggy, public transportation (rail and electric trolleys), and bicycle. There were only 13,824 motorcars in a country of 76 million people with a total of only 144 miles of paved roads in the entire United States. Mass production of automobiles was soon to follow the turn of the century, creating a love affair between the public and its cars that has left a most significant impact upon the entire century, including its laws. The growth of the automobile and electricity in the twentieth century foretold the current issues surrounding the provision of a sustainable and reliable supply of energy.

Obviously, most of today's necessities and conveniences were not available to our society at the beginning of the twentieth century. But neither were there federal laws prohibiting discrimination on the basis of race, religion, or gender in the workplace. Racial discrimination was alive and well at the beginning of the twentieth century. Because poll taxes and literacy tests were preconditions to voting in many states, black Americans were segregated and powerless under the law to do much about it. The constitutionality of the principle of "separate but equal" facilities based on race was well established. More than half of the century had elapsed before that doctrine was overruled in 1954 when the U.S. Supreme Court declared that segregation was inherently unequal. Although black Americans could not legally be excluded from juries by the turn of the century, many states relied upon racially selective jury selection practices. The infamous "Scottsboro Boys" case probably marks the beginning of serious changes in the law to guarantee full participation by blacks on juries. In that 1931 case, the convictions and death penalties of nine young black men for the rape of two white women by an all-white jury were overruled because of discrimination in jury selection.[4]

From the time that our Constitution was established, our legal system has steadily accepted responsibility (jurisdiction) over an increasing variety of issues. There is a rationale that elected officials choose to avoid the tough and controversial issues that cost them votes and leave these "no win" issues to the legal system, where the judges are

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brave, if for no other reason than because the electorate participates less in their tenure. Abortion is one example where only the courts could resolve the issue, even though no express constitutional provision could be identified to support the selected result. Even the U.S. Supreme Court could muster only a 5–4 decision, demonstrating that an issue so controversial could be decided by only a single vote.[5]

In short, it is becoming increasingly important for well-informed citizens to be educated about our legal system, including the role of its judges and lawyers. Otherwise, citizens risk submission through ignorance and complacency to the latest sound bite or "spin" that seeks voter approval. Your understanding of the increasingly important legal system is critical over the long run, which is precisely why it is presented here.

Americans are increasingly turning to the courts to solve their problems—both public *and* private. This produces a great strain upon our legal system, as evidenced by the growth of alternative forums for dispute resolution (discussed in Chapter 4). The point here is that the future portends significant legal costs of doing business and of protecting consumers. These costs are indirectly reflected in the prices of products as well as in taxes used to support courts, judges, and governmental offices charged with providing public/legal services.

There is no reason to suspect that the demand for attorneys (that is, legal solutions) will lessen or that their services will cost less in the twenty-first century. Lawyers enjoy an oligarchy with the power (and willingness) to match their fees with the capabilities of their clients to pay. Increasing demand is producing more lawyers, who participate in an ever-wider scope of increasingly specialized tasks.

This is not to suggest that our dependence upon law, courts, and lawyers is either good or bad. It is merely a well-understood phenomenon. Educators often speak of the legal system as being composed of laws and courts. The logic is that laws are the rules of our society, and courts ensure their enforcement. But what of attorneys? In reality, a person cannot hope to resolve a substantial conflict or commercial transaction without an attorney's professional help. Although citizens are entitled under law to self-representation, the reality is that to do so is ill advised for many obvious reasons. Thus, the attorney is the first person to become involved when legal issues and many business opportunities arise. Attorneys give advice, most of which is followed. They also perform other services as described in Chapter 4. The point is, attorneys must be acknowledged as an integral part of the legal system because laws and judges are powerless until attorneys bring matters into court.

The adaptability of the Constitution, the courts, and lawyers to meet an ever-growing demand for services will likely continue. But at its roots, our American legal system still reflects its English origins.

## THE ENGLISH SOURCE OF U.S. LAW

To understand American law, you must understand its origin, English law. Over hundreds of years, the law of England evolved into a framework of principles, found in both customs and statutes that were brought to the New World by the early colonial settlers. This body of law was called the common law. When the United States broke away from England after the Revolutionary War, it adopted the entire body of English common law as it existed in the eighteenth century—at least to the extent it did not conflict with U.S. federal and state law. That is still the situation today: principles of the English common law are in effect throughout the country. Only Louisiana, purchased in 1803 from Napoleon, is different, retaining a variation of the Roman civil law that was then

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used in France. This California statute is representative of the continuing presence of English legal doctrine and process in the courts of the United States:

> *The Common Law of England so far as it is not repugnant to or inconsistent with the Constitution of the United States or the Constitution or laws of this state, is the rule of decision in all the courts of this state.*
>
> (California Civil Code, §22.2.)

So what is English common law? It arises from experience and custom and from the tacit consent of the people as evidenced from its development over a thousand years. The purpose of primitive English law was to keep the peace, and fact-finding processes were likely to provoke the population rather than calm it. So authorities avoided investigation and substituted mechanical tests that were believed to obtain the judgment of God. Among the favored tests were various ordeals an accused must suffer, including cold water, hot water, hot iron, and the morsel.[6] Imagination probably suffices to picture all but the morsel ordeal so we offer this quote from the Domesday Book of the County of Norfolk, England, describing an ordeal by morsel.

**LEGAL FOCUS—EXAMPLE**

"May this morsel which is given him in order to bring the truth to light, stick in his throat and find no passage; may his face turn pale and his limbs be convulsed; and an horrible alteration appear in his whole body; if he is guilty. But if innocent of the crime laid to his charge, may he easily swallow it, consecrated in Thy Name, to the end that all may know."

Before the eleventh century, England was an Anglo-Saxon society of unified and relatively prosperous people living mostly in villages. The economy was agricultural and the people were self-sufficient, growing grain, spinning wool, and even brewing beer for home consumption. Their kings headed powerful and wealthy aristocracies. Wealth was primarily tied to the landholding feudal system. Serfdom, in which people were born into vassalage and were required to work the aristocratic lords' hereditary lands, was widespread. Throughout the Saxon period, law was essentially a matter of local customs, and it changed very slowly.

**common law: as a system of law**
The total system of law that originated in medieval England and was adopted by the United States at the time of the American Revolution. Expressed originally in opinions and judgments of the courts, it is judge-made law that reflects the customs and usages of the people. Contrasted to Roman civil law, it is found throughout the English-speaking world. Common law is sometimes called unwritten law.

In 1066, William, Duke of Normandy, led five thousand men and twenty-five hundred cavalry across the English Channel to defeat the Saxons in the Battle of Hastings. The Duke became known as William the Conqueror. The invasion was followed by decades of regional uprisings and resistance characterized by extensive murder, oppression, famine, and fear, despite William's zeal for law, order, and justice. The Normans (Vikings who originally came from Scandinavia via northern France) were French in viewpoint and culture. Their system of law was based on the ancient Roman civil law, which was expressed mostly in detailed codes (systematic collections of rules) imposed by the ruler from above, in contrast to the Saxon practice of developing rules from below, based on customs of the people.

The Normans mostly retained the English common law of unwritten customs. England gradually underwent positive changes. A sense of national unity ensued, leading to a national system of law derived from both Anglo-Saxon and Norman influences. The conquest led to the introduction of elements of Roman civil law. As before, local justice continued to be the concern of local sheriffs, and the **common law** (law applied uniformly throughout the country) was characterized even then by equality before the law

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(the law applied the same to every person), respect for established rights, and impartial administration of justice.

The king's courts dealt with civil and criminal legal matters, and new church courts dealt with canon law (ecclesiastical law governing internal relations of the Roman Catholic Church) and all aspects of marriage and succession. Disputes between common and canon law existed in some areas, such as legitimization of illegitimate children, which was not possible under canon law. Under common law, legitimization was accomplished by subsequent marriage of the parents. This was an important matter because it affected rights of inheritance and succession to land, the foundation of wealth and power in England.

By the twelfth century, judges, who periodically visited places in the country to dispense justice, were displacing sheriffs. These "circuits" were precursors of the present U.S. circuit and district courts. The itinerant judges dealt with crimes such as murder, robbery, forgery, and arson. One judge, Glanvill, is credited with writing *Treatise on the Laws and Customs of the Kingdom of England*, the first serious book on the evolving common law. In 1215, King John was forced to accept the Magna Carta (Latin: "Great Charter"), the basis of modern English constitutional liberty, commanding free elections and reform of the courts and barring imprisonment without a trial by a jury of peers. Trial by jury had evolved into permanency by way of the Magna Carta, and ultimately was incorporated into the U.S. Constitution. The Magna Carta essentially decreed supremacy of law over personal authority of the king and his aides. It was a precursor of our constitutional democracy.

For several hundred years, the English system of courts evolved, influenced by conflicts and political interventions. Over time, judges required formalities to be met before a matter could be brought to court. When these requirements were not met, courts were simply unavailable to a party. When the king's courts were unable or unwilling to provide a just solution to a legal problem, and a citizen (initially citizens of high status) appealed to the king, the matter would be referred to the lord chancellor for possible intervention. The lord chancellor served as the king's chief administrative officer, and the position was initially staffed by high churchmen. As a man committed to justice and fairness, the chancellor was authorized to decide the cases without the assistance of a jury. This alternative court became known as a *court of equity*. An example of an **action in equity** would be a dispute over the sale of a parcel of land in which the seller refused to transfer the title. The king's courts, by tradition, could do no more than award monetary damages. The chancellor (and, later, when the administration of these hearings was delegated to junior staff, courts of equity) could and would order the seller to relinquish possession. Ultimately, jurisdictional conflicts refined the fundamental distinction between courts at law and courts in equity. This distinction endures in the United States today and determines important questions. However, unlike in England, where courts at law and in equity were physically separated, modern U.S. courts are empowered to render either equitable or legal relief. Equity is explained further in Chapter 3.

**action in equity**
A civil trial held without a jury when relief sought by the plaintiff is equitable in nature, such as an injunction, or a divorce or dissolution of a marriage.

## Modern Common Law and *Stare Decisis*

**common law: as a type of law**
That law which comes from the common courts as opposed to a legislature or court of equity.

The term **common law** might already be confusing to you because, like many English language terms, it is used in different ways to describe different things. For example, we have been using the term to describe law common to all of England. But we have also used the term to describe a legal system derived from English legal method, to describe law formulated by courts rather than legislatures, and to describe common law as distinguished from an action in equity. All the different meanings of the term *common law* are

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related. The use of the term to describe a type of legal system derives from a description of the unique nature of that legal system, the formulation of law by the courts. The distinction of law and equity derives from a historical accident within this lawmaking system. The uniqueness of the **common law**, or law developed by the courts, is what is usually meant when someone uses the term *common law*. In no other legal system do independent courts have the power to contribute to the law as they do in the common law system.

When considering U.S. court-made or case law, it is important to note the important relationship between federal and state law. Our form of government is one of shared and often overlapping power referred to as **federalism** (a union of states under a central federal government). The court systems include both federal and state courts, which function as either trial courts or appellate courts. Trial courts accept testimony and other evidence to determine guilt or innocence or to place financial responsibility. Appellate courts, on the other hand, review trial court procedures to ensure that correct laws were applied during trial. These appellate reviews, or written decisions, form the body of law also called the common law, or case law.

**federalism**
A government consisting of a union of more or less self-governing states under an umbrella of federal government.

Both federal and state appellate courts review cases based upon the constantly evolving principles of the common law that are expressed in the written decisions of courts. Who reads these written decisions? Members of the public often learn about new, unfolding laws from television, the Internet, newspapers, and news magazines (but hopefully not from tabloids). Lawyers and scholars read and study court decisions as part of their professional responsibilities. Of course, judges read and study prior court decisions upon which they may decide the trials or cases before them.

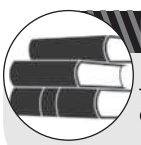
Some principles of law derived through the common law apply to both state and federal court systems. For example, the doctrine of **stare decisis** (Latin: "to stand by things that have been settled") mandates that once a rule of law is determined to be applicable to a particular set of facts involved in a case, it will be applied to all future cases that have similar facts. This doctrine binds courts of equal or junior rank to follow the senior court that first applied the rule or principle. Essentially, lower state courts are bound to the principles established by higher appellate courts within the same state; lower federal courts are bound to the principles established by higher appellate courts within their respective jurisdictions. (The hierarchy of courts is outlined in Chapter 3.)

***stare decisis***
The common law doctrine that binds an inferior (subordinate) court to follow and apply decisions and interpretations of higher courts when similar cases arise. Also called the *doctrine of precedents*.

This important doctrine of *stare decisis* leads to stability and predictability in the law. For example, if a high court establishes the principle that a promise to marry is not enforceable in court nor are damages allowed if broken, then routine legal research will alert all attorneys to the existence of that **precedent**. If a similar case arises, they will not waste time and money litigating the question; they know their court will be bound by the same earlier outcome under the doctrine of *stare decisis*. This doctrine is also commonly called the doctrine of precedents. Once a common law rule or principle is applied in a case, it becomes a precedent and is binding on other courts in similar future cases. The appellate court's decision thus has become a part of the common law of that particular state.

**precedent**
A court decision on a question of law that gives authority or direction on a similar question of law in a later case with similar facts. See also *stare decisis*.

Judges do not have the personal choice to disregard a binding precedent in the common law. Judges take oaths of office and are sworn "to comply with or be faithful to" the law.



## LEGAL FOCUS—PROBLEM

J. Anthony Kline, a justice of a state appellate court, wrote a dissenting opinion in which, as a "matter of conscience," he refused to vote consistently with a state supreme court precedent. Does such a declaration violate the doctrine of *stare decisis*?[7]

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Although the action of refusing to comply with a precedent flies in the face of the doctrine of *stare decisis*, it may be characterized as a "highly irregular and never to be lightly undertaken" exception based upon the conscience of the justice.

*Stare decisis* is not a straitjacket, however. If a principle has outlived its usefulness or has grown inapplicable because of changing social standards and circumstances, it may be overruled by a high court. Often, a current case is not controlled by a principle previously applied in an earlier case simply because the two cases are distinguishable on their facts. An example of an unenforceable and uncompensable promise to marry would be distinguishable from a case where one of the prospective spouses had incurred considerable related expenses before the promise was broken. The earlier principle, therefore, would not apply to or bind the court's decision. Though the court, obviously, would not compel the parties to marry, it might establish a new principle in authorizing recovery of damages (an award of monetary compensation).

The common law of today is the body of rules derived from fundamental usages and customs of antiquity, particularly as they appeared in medieval England, and from modern judgments of appellate courts recognizing and applying those customs in specific cases. Because thousands of appellate cases are decided each year, the body of common law is enormous, even though most of these cases define no new principles. In preparing current cases, lawyers spend much time and effort searching earlier case records for principles of the common law that might be applicable. Thanks to modern information technology, the task is less physically laborious today, but the information at the attorney's fingertips is nonetheless overwhelming in volume, let alone complexity. Before they can draft formal opinions or business documents or perform advocacy, lawyers must perform legal research of the applicable common, statutory, and regulatory (administrative agency) law. Lawyers, thus, are responsible to their clients more for researching than for knowing the law. For those of you who are interested in learning more about, or in practicing, legal research, we have included a summary of basic steps in Appendix D.

**unwritten law**
A historically based reference to court- or judge-made law.

Originally, the common law of England was called **unwritten law**, because it evolved from judicial decisions that were based on the unwritten customs and usages of the people. Moreover, the decisions and opinions of the judges were not recorded or printed in books; often, judges talked with one another, exchanging their rulings through conversation. In contrast, codes and statutes (enacted by the king or a legislative body) were usually written (printed). Today, of course, most additions to the common law, made in appellate court decisions, are published chronologically in books, called **reporters**, and made available on the Internet. Such works are referred to as **case law**. If case law were not reported, both attorneys and the public would be unaware of decisions that had been made and of the appellate courts' rationale for those decisions. After centuries of relying on books, many lawyers and others are no longer using books as the primary way of finding information about cases. Instead, Internet-based databases and websites provide much of the recorded case information. The two most important legal database services providing recorded case law are Westlaw® and LexisNexis®.

**reporter**
A set of books that contains the written opinions of justices of specified appellate courts. These volumes contain the decisional, or unwritten, law. Volumes in the reporters and the cases they contain are arranged in chronological order and accessible by case name or subject matter index.

**case law**
All reported judicial decisions; the law that comes from judges' opinions in lawsuits. Also referred to as court law, judge law, and sometimes common law.

The application of the doctrine of *stare decisis* is a challenging process. For example, is a new fact situation the same as the suggested precedent, is it similar, or is it different? The adversary system allows each side a representative who argues what events occurred, what precedent should apply, and how it should apply. And what about the situation where the facts are clear, the law is clear, and the result is absurd? What precedents apply? Is the court bound to come to an unjust decision, or is a decision based on settled law ever unjust?

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In the search for precedent, the following possibilities exist:

1. The new case is identical or virtually identical to a case previously decided by a high court in the same court system. Result: Follow old decision. This is seen as binding precedent.
2. The new case is somewhat different from a case previously decided by a high court in the same court system, but the underlying policy and rationale for the old case also applies to the new one. Result: Reason from the old case and extend the previous holding to the new facts. This is known as using precedent to extend the rule of law to new situations.
3. The new case, although having some similarity to a case previously decided by a high court in the same court system, is not the same and the underlying rationale does not make sense in this case. Result: Distinguish the new case from the old case and limit the rule from the old case. This is known as using cases to limit the application of judicial doctrine.
4. The new case is identical or virtually identical to a case previously decided by a high court in the same court system but the underlying rule no longer makes sense. Result: Overrule previous precedent when strong reasons exist for doing so. This is not done often, but it is consistent with the doctrine of *stare decisis*.

**LEGAL FOCUS—EXAMPLE**

In 1954, the U.S. Supreme Court decided, in *Brown v. Board of Education*, that maintaining separate schools for black and white schoolchildren was unconstitutional.[8] Fifty-eight years earlier, the U.S. Supreme Court had reached just the opposite conclusion in *Plessy v. Ferguson*.[9] No laws had changed in the interim time between the two cases and both decisions evaluated the same Equal Protection Clause of the Fourteenth Amendment to the Constitution.

In overruling *Plessy v. Ferguson*, the Supreme Court determined that the previous reasoning that separate facilities were equal no longer made sense.

5. The new case presents problems that are not covered by an existing rule from a high court in the same court system. Possible Results: (a) The case will be dismissed and facts not considered because there is not a remedy in law for every perceived wrong; (b) The case will be heard and decided based upon extensions of doctrines of justice and fairness, and new law and rule will be developed. The deciding court may consider precedent from other states, the federal system, or even other countries when seeking guidance as to an appropriate rule to resolve the controversy.

## MODERN SOURCES OF U.S. LAW

Ours is a constitutional form of government. In one sense, our Constitution is the ultimate source of our laws because it contains principles by which our nation is governed. Here we are concerned with those institutions of government that create the laws of our land.

Most educated adults are familiar with the basic structure of our federal government, divided by our Constitution into the legislative, executive, and judicial branches. Knowledge of this structure facilitates an understanding of how and where our laws are

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made and of how they are classified for clarity and comprehensibility. State and local governments also are structured into these three branches, and they operate in a manner similar to the federal system. We explore government and these branches in greater detail in Chapters 2 and 5. Here we briefly consider the sources of our laws.

## Lawmaking by Legislators

**statutes**
Laws enacted by Congress or by state legislatures.

**ordinance**
A written law enacted by a city or county (parish). An example is a zoning ordinance that governs the use of land.

**written law**
An old fashioned reference to the statutes and ordinances of federal, state, and local governments, and the published rules of administrative agencies.

**codes**
Compilations of statutes that are grouped together by subject matter, for example, a vehicle code.

**doctrine of supremacy**
The constitutional doctrine that applies whenever the United States and a state or local government enact conflicting laws on the same subject. Under this constitutional doctrine, the federal law prevails.

Legislators, both state and federal, enact laws called **statutes**.* Local legislative bodies (for example, for cities and counties) enact laws called **ordinances**. Collectively, these statutes and ordinances are called the **written law**, as contrasted to case law (unwritten law). Compilations of statutes by topic are called **codes**. For example, a state legislature may enact a statute lengthening the previous jail sentence for the crime of making an obscene telephone call. This statute will be compiled with, be indexed to, and become a part of the state's "criminal" or "penal" code. Numerous specialized codes in the states group together statutes pertaining to particular subjects, such as the Vehicle Code, Health and Welfare Code, Corporations Code, and Business and Professions Code. These codes (often with slightly different titles) are generally available in any public law library, usually located in county courthouses.

Statutory law covers a staggering number of subjects, such as crimes, civil rights, housing, health, and indeed all matters upon which the legislative branch has the constitutional power to legislate. But it is important to understand that federal statutory law is limited to matters of federal jurisdiction. The term *jurisdiction* refers to the power or authority the federal government is given to enact statutes under the U.S. Constitution. State statutory law is limited to matters of statewide authority; a similar limitation is true for local ordinances. For example, Congress has jurisdiction to regulate the transportation of goods in interstate commerce; state legislatures do not. Court jurisdiction is explained fully in Chapter 3.

Some difficult conflicts over jurisdiction have occurred. The language in which Article I, Section 8 of the U.S. Constitution enumerates the federal government's areas of jurisdiction is open to interpretation. Some believe that the courts have interpreted it too expansively, letting the federal government intrude on states' rights. Others argue that the federal reach should be extended even further, perhaps into such matters as shelter for the homeless. (We consider constitutional law in greater detail in Chapter 2.) When conflicts arise between federal and state jurisdictions, the U.S. Supreme Court makes the ultimate judicial decision through its interpretation and application of the Constitution.

Similar jurisdictional conflicts exist between state and local governments. For example, local governments usually exercise exclusive jurisdiction over the zoning of real estate. Zoning laws restrict how land may be used. What if a state enacted a statute that authorized state officials to rezone real estate, regardless of local government rules? Does that differ from the common practice whereby state laws require suburban communities to accept construction of prisons and of treatment centers for drug addicts? Local ordinances may reflect NIMBY ("not in my backyard") attitudes of neighborhoods, but just as state law yields to federal law, local law yields to state law.

Although proposed statutes are studied before their enactment, and although the end sought is usually desirable and even necessary in the minds of proponents, the validity of a statute or ordinance still remains in doubt until it is challenged by some injured party and an appropriate court determines its validity. There is a presumption that a

*Often, statutes are assigned titles, such as the Federal Racketeer Influence and Corrupt Organizations Act, commonly called RICO.

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**case or controversy**
A requirement that courts may decide only cases in which an actual conflict between persons exists.

enacted statute or ordinance is constitutional, and courts hold few invalid. Nonetheless, a person could be sentenced to jail for violation of a statute that later is determined to be unconstitutional and therefore void. Even long-standing statutes or ordinances can be overturned by a person defying the law. Once the legislative branch enacts a law, uncertainty technically remains until the law is applied, then challenged in a trial, and finally judicially approved as constitutional. A court will not rule on the constitutionality of a statute or ordinance unless someone affected by its application files suit, because courts do not render decisions based on hypothetical conflicts. There must be a **case** or **controversy**, properly presented to a court, before judicial action will be taken.[10]

**LEGAL FOCUS—EXAMPLE**

In 1955, Rosa Parks, an African-American woman, refused to give up her seat in the front of a public bus in Montgomery, Alabama, to a white man. She was sitting in an area of the bus designated for white people only. She was violating a law by doing so and was arrested. She lost her job but was eventually vindicated as such "Jim Crow" laws were overthrown as being unconstitutional.

Rosa Parks's action, though clearly a violation of law, is a modernly applauded event and such conduct is often referred to, nobly, as "civil disobedience." Without such cases or controversies before courts, no law, no matter how unconstitutional, can be overturned.

## Lawmaking by the Executive Branch

The executive branch of government, at the federal, state, and local levels, collaborates with the legislative branch in the adoption of statutes. However, even if the president of the United States (or a state governor), as head of the executive branch, vetoes a proposed statute, the legislators have the power to override such action, usually with a two-thirds vote. This partnership in lawmaking is part of our system of checks and balances that encourages negotiation and compromise. The executive branch can also independently make certain laws. The president, state governors, and heads of local governments all have authority to issue certain directives that have the force and effect of law.*

The president is also authorized under both the Constitution and statutes of the United States to issue executive orders consistent with legal responsibilities of the office. An example is the executive order issued by President George W. Bush on October 8, 2001, establishing a new governmental agency, the Office of Homeland Security.

> *By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:*
>
> *Section 1. Establishment. I hereby establish within the Executive Office of the President an Office of Homeland Security (the "Office") to be headed by the Assistant to the President for Homeland Security.*
>
> *Sec. 2. Mission. The mission of the Office shall be to develop and coordinate the implementation of a comprehensive national strategy to secure the United States from terrorist threats or attacks. The Office shall perform the functions necessary to carry out this mission, including the functions specified in section 3 of this order.*

*For example, in 1986 then-President Ronald Reagan ordered the random drug testing of certain employees working in interstate transportation. The subject of drug testing in other workplaces, and even in competitive sporting events, continues as an important issue.

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Often having greater impact on day-to-day life is the lawmaking power of other federal, state, and local administrative agencies, which are specialized bodies created by Congress and by legislation at the state and local levels to regulate specific activities. Administrative agencies investigate problems within their respective jurisdictions (an executive function), make laws called rules and regulations (a legislative function), and conduct hearings (similar to court trials) to determine if their rules have been violated and, if so, what penalties should be imposed (a judicial function). There are many important federal administrative agencies, numerous state agencies in each state, and a lesser number of agencies within each sizable local government.

You have probably read or heard about such prominent federal administrative agencies as the Central Intelligence Agency (CIA), Drug Enforcement Administration (DEA), Environmental Protection Agency (EPA), Food and Drug Administration (FDA), and Federal Trade Commission (FTC). Thousands of federal, state, and local administrative agencies continue to make and enforce innumerable laws each year on myriad subjects. You will learn more about lawmaking by administrative agencies in Chapter 5.

## Lawmaking by Courts

As you already partly learned earlier when studying the concept of "common law," courts create law. Federal and state courts resolve controversies that are brought before them by parties to legal disputes. At the end of each case proceeding, the presiding judge issues a judgment. Most judgments are never appealed to a higher court nor written down in a comprehensive decision that later courts can review. Occasionally, however, if the case is the first of its kind in that jurisdiction, the trial judge may formulate and apply a new rule of common law. An appellate court may then review such a rule. Upon the appellate court's rendering a written opinion, all other trial courts in that jurisdiction then would follow the appellate court's decision.

**judicial activists** Judges whose judicial philosophy includes treating the law as a vibrant and active source of rules. When faced with new issues (for example, social), such judges are likely to see the Constitution as a flexible document and *stare decisis* as challengeable when they believe important social needs must be addressed.

In making rulings, appellate courts interpret and apply relevant statutory law together with appropriate rules of common law derived from prior cases under the previously discussed doctrine of *stare decisis*. If there is no controlling statute or principle of common law, which occasionally happens, the appellate court will create a new rule or extend an existing principle and apply it to the case. That new concept becomes a part of the continually evolving common law to be followed by other courts in future cases. Thus, new law is created.

Judges who purposefully expand on the law in their decisions are often referred to as **judicial activists**. Judges who narrowly interpret the law by relying heavily on the doctrine of *stare decisis* are often referred to as **strict constructionists**. Either way, the interpretations of law set forth by judges constitute "judge-made" law, or common law. Courts are reactive institutions; judges must wait for litigation to reach them before they can render a decision. Legislative bodies, on the other hand, can initiate new laws on any subject at any time they choose. Nonetheless, the judicial system has been responsible for many of the great social changes that have occurred in the United States. The following quote from political scientist Dennis D. Dorin is an enlightening remembrance that labels used by others are not necessarily subscribed to by those who are so labeled.

**strict constructionists** Judges whose reading of the law narrowly interprets legal words and who subscribe to interpreting the law consistent with the believed meaning given it by the drafters.

> *I have interviewed fourteen United States Supreme Court Justices, on a spectrum ranging from "liberal" ones like Warren, Black and Douglas to "conservative" ones like Scalia and Thomas. Not one of them, I can report, has ever told me that he or she is an "activist." Not one has ever said that he or she is willing to violate the Constitution.*[11]

Not all the language used by appellate courts in their written opinions becomes part of the common law. Much of it is explanatory, analyzing the facts of the case and

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**dicta**
Any part of a court opinion that is unnecessary to the resolution of dispute before the court. Such digression by a judge is not binding on later courts.

elaborating on various legal principles that may or may not directly apply. Legal issues addressed in the opinion that are not logically necessary to support the ruling in the case are called **dicta** (Latin: "remarks"). Being unnecessary language, *dicta* do not become part of the common law, although they may provide clues about how that judge's philosophy might be applied in future cases.

Sometimes it is quite clear which statutory language or principle of common law is applicable to a case. But the issue of how it should be applied to the specific facts may be quite complex. For example, in a murder trial there may be no disagreement about the applicability of a statute declaring that an unlawful killing with malice aforethought is murder. But the question of whether the particular defendant, who was severely impaired by illegal drugs at the time of the crime, can be legally capable of harboring "malice" (a state of mind prompting one to willfully kill the victim) may be open to argument. Following the trial (in which the trial court judge will have ruled one way or the other on the applicability of the issue), opposing appellate attorneys persuasively argue in favor of their contradictory positions when presenting their appeals to the court in written briefs and with oral arguments. Ultimately, an appellate court will decide the legal controversy and a precedent may be set.

Through this decisional process, both federal and state appellate judges are making new law on a daily basis. With judges throughout the country "making law," can we expect decisions to be consistent?

> *[C]ritical legal scholars—or simply "crits"— . . . contend that decisions conflict with one another because they are based on different, and controversial, moral and political ideals. Lawyers cannot give a simple answer to a question, the crits say, because the legal system, like our society at large, cannot reconcile the contradictory instincts people feel when they confront social problems.*[12]

Does this mean the rule of law is flexible, depending on who is declaring it? If so, does that give added significance to the political appointment process underlying the selection of judges?

To assist you in understanding the way our appellate courts make and apply the law, at least one edited appellate case is presented at the end of every chapter.

**initiative**
An electoral process for making new statutes or changing the constitution by filing appropriate formal petitions to be voted upon by the legislature (and governor) or by the people. The initiative is not available in all states.

### Lawmaking by the People

Many states have provisions in their constitutions that authorize citizens to place proposed new laws on ballots for direct vote by the people. These **initiatives** have resulted in laws approved by voters who had been disappointed by the inaction of their legislatures. To qualify proposed new initiatives for the ballot, proponents must obtain the signature of a specified number of registered voters. Many of the most widely publicized initiatives in recent times have occurred in California. Proposition 209 dismantled affirmative action programs in public employment, education, and contracting. Like statutes, initiatives must pass the test of constitutionality as determined by courts. You will learn more about the initiative process in Chapter 2.

## TYPES AND CLASSIFICATIONS OF LAW

We have briefly considered the historical sources and types of our contemporary law. We have also identified people and institutions that continually make and update our laws to help manage our highly complex modern society. We now turn to some definitions and classifications of U.S. law that will enhance your appreciation of its pervasiveness.

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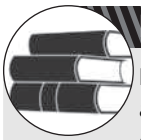
## Federal and State Law

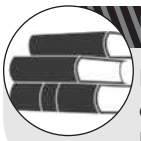
We have already distinguished between common law and statutory law. Federal law consists of the U.S. Constitution, statutes enacted by Congress, treaties and presidential orders, rules promulgated by federal agencies, and decisions of federal courts. State law consists of state constitutions, statutes enacted by state legislatures, rules promulgated by state agencies, and the decisions of state appellate courts.



**LEGAL FOCUS—PROBLEM**

In 2004, Google announced a plan to scan, index, and make available online, a searchable database of all the text of all the books contained in libraries across the world. The project soon raised the ire of authors and publishers who claimed it was a violation of their copyrights. Would this be a question of federal or state law?

The Constitution grants the federal government the responsibility to regulate copyrights. Copyright protection is granted to the authors of literary works by federal statutory law, and federal courts have interpreted it. Thus, the question must be answered by reference to federal law.* In 2009, the number of scanned books had reached 10 million.[13] Try a search on the Internet for "Google Books" to learn of the latest legal news and status of this effort.



**LEGAL FOCUS—PROBLEM**

Richard Perkins, a firefighter, demands financial compensation from a fertility clinic for impregnating his former wife by using frozen embryos that previously had been fertilized with his sperm. What law should he consult to determine if he can recover damages for child support and emotional distress?[14]

**civil law**
The branch of law dealing with individual rights and duties and their enforcement. Civil law also refers to the total system of law, embracing civil and criminal matters, that was used in the ancient Roman Empire and copied on the continent of Europe in modern times. In ancient times, the law was defined by experts and imposed from above by the emperor. Roman civil law is contrasted to English *common law*.

Liability for wrongful birth, or negligence in handling fertilized embryos, is a subject governed by state statutory and case law. This question must be answered by reference to state law. We will further study the dichotomy between federal and state law in Chapter 2.

## Civil and Criminal Law

**Civil law** is the body of law, both federal and state, that pertains to civil or private rights enforced by civil actions. For example, the laws governing contracts are civil laws. Breach of a contract may result in a civil action for money damages to reimburse the person wronged for any financial loss suffered. **Criminal law**, in contrast to civil law, is the body of statutory law, both federal and state, that declares what conduct is criminal and prescribes penalties for its commission. For example, a statute may define murder as an unlawful killing with malice aforethought. The precise definition of "malice aforethought" changes through interpretation by courts over the years, and thus courts have the continuing task of defining what conduct is criminal.

*The Google project, now called "Google Books," has progressed.

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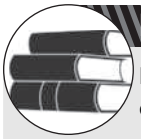


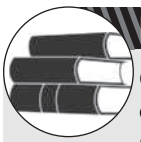
**LEGAL FOCUS—PROBLEM**

David Cash, Jr., entered a restroom in a gambling casino in Las Vegas a few minutes after his friend Jeremy Strohmeyer. Cash looked over a stall and saw Strohmeyer with his hand over a small girl's mouth. After telling Strohmeyer to let her go, Cash left and did not report the incident. Strohmeyer later pled guilty to rape and murder of the child and was sentenced to life in prison. Was Cash guilty of any civil or criminal offense?[15]

**criminal law**
The branch of law dealing with crimes and their punishment.

Like many states, Nevada did not have a statute that criminalized the failure to report a crime in progress. Thus, Cash was not guilty of any state crime. Crimes between private persons generally do not raise questions of federal law, and Cash was not guilty of any federal crime in this case. Under common law, there generally is no duty to protect strangers, and thus Cash was probably not liable for damages to the victim's parents for his conduct under the civil law of Nevada.* The law does not always criminalize immoral acts.[16]

Despite the David Cash example, it is common for one act or a series of acts by a person to result in both criminal and civil penalties.



**LEGAL FOCUS—PROBLEM**

O. J. Simpson was acquitted by a jury of the crime of murdering both his former wife Nicole and Ron Goldman, a rescuer acting as a Good Samaritan. Thereafter, Simpson was sued in a civil court for the wrongful death of the victims. In the civil proceeding, the jury found Simpson responsible for the killings and liable for monetary damages. Do all criminal acts also result in civil liability for monetary damages?

**private law**
That body of law regulating the rights and duties that exist between private persons (including private corporations). Contract law is an example of private law.

No. For example, the crime of firing a handgun into the air within city limits may not injure any human, and there would be no victim to pursue a civil case. But many crimes do create victims who then are able to pursue separate civil remedies, as in the Simpson case.

The statutory criminal law of individual states is collected in books often called Penal Codes. Civil laws, in general, are collected in books often called Civil Codes. You will learn about the important differences between civil and criminal laws and trials in several future chapters.

## Private and Public Law

**Private law** is the body of law regulating the rights and duties that exist between private persons (*persons* being a term that includes corporations). Contract law is an example of private law. **Public law**, on the other hand, includes constitutional, administrative, criminal, and international law, all of which are more directly concerned with public rights and obligations. Criminal law is of public concern because the next victim may be you or any other member of society. Administrative law, as will be seen in Chapter 5,

**public law**
That body of law directly concerned with public rights and obligations, such as constitutional, administrative, criminal, and international law.

*Many members of the public were outraged at what they believed to be a serious moral offense by David Cash. Protesters marched at the University of California, Berkeley, where Cash studied nuclear engineering, and demanded his expulsion from the public university. The University of California student senate held a hearing and voted narrowly (10–9) to condemn Cash. The student body president vetoed the measure.

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protects consumers and the public from abuses by private businesses. It also protects the environment.

## International and Domestic Law

**international law** The branch of law governing relations between and among sovereign nations.

The law of a country, from within the country's boundaries, is said to be that country's domestic law. Law that concerns relations among sovereign nations is called **international law**. Reliance upon some form of international law dates to the Roman Empire or before and is typically based on custom. The precedents relied upon in international law are the acts of independent governments in their relations with one another, including treaties. When treaties or conventions (agreements between nations, such as the Geneva Convention concerning human rights) exist, they contain a procedural machinery to enforce their terms.

### LEGAL FOCUS—EXAMPLE

A U.S. EA-6B Marine jet, practicing low-level flying, hit and severed a ski gondola cable in the Italian Alps. Twenty people were killed. The United States claimed exclusive jurisdiction of the case under the North Atlantic Treaty Organization (NATO), an international mutual defense pact. Italy, spurred by the victims' families, claimed the jet had violated NATO's mandated flight patterns and it therefore did not apply. Trial and punishment therefore should take place in Italy. However, an Italian judge threw the Italian manslaughter case out of court, ruling that there was no domestic jurisdiction because of NATO. Thus, the Marine pilot, Captain Richard J. Ashby, was returned to the United States for a military trial (called court-martial) where a jury of eight Marine officers acquitted him of all charges on March 4, 1999.[17]

Certain rules and principles are acknowledged in international relations. These understood rules pertain to such matters as territorial boundaries, use of the high seas, limitations on war, telecommunications, diplomatic and consular exchange, and the use of air space. The difficulty is that sovereign nations, by definition, exercise exclusive power or government within their boundaries and may or may not comply with these understood rules.

The United Nations (UN) is the primary mechanism that creates international law. It brings diplomacy, negotiation, and even propaganda to bear on world affairs. Through agreements, even military observers and peacekeepers can be organized. In 1995, the UN established an International War Crimes Tribunal to prosecute persons accused of war crimes in the Bosnian war. All members of the UN comply with arrest warrants issued by the Tribunal. Many accused persons have been arrested and prosecuted. Thus, criminal law also can be and is a matter of international law.

Our legal system may be expected to face global problems differently from in the past, when the disputes of nations were resolved through negotiations, the UN, or war. During World War II, Japanese-Americans were interred because of unfounded fears of espionage and disloyalty, presenting domestic constitutional issues. Presently, we are faced with the reality that the nature of war has changed. Wars may be less likely to involve countries than to involve unidentified groups of people who, through acts of terrorism, fight for the political, financial, and religious issues they support. Thus, public security measures may involve restrictions on individual liberty by construction of fences or walls with temporary or permanent exclusion of citizens from public places. Electronic eavesdropping, by court authorization, already is being dramatically increased

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because it is an effective weapon against terrorists and criminals. Airport security continues to increase—and passengers are subject to warrantless searches. Many searches are based on stereotypes of personal appearances and behavior. Freedom of speech notwithstanding, jokingly mentioning a bomb while on or near an airplane is a criminal offense. Thus, international dangers affect both international and domestic law.

## Procedural and Substantive Law

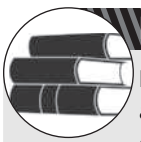
**procedural law** General principles and detailed rules that define the methods of administering substantive law.

**Procedural law** consists of all the rules or mechanisms, for processing civil, criminal, and administrative matters through the applicable federal or state system. Some cynics call it "lawyers' law" because its complexities and technicalities provide employment for attorneys.

Procedural law may dictate the dates and time limits within which papers must be filed, the size of paper to be used by attorneys, the size of print to be used, what information must be contained in legal papers, how witnesses and parties can be orally examined before trial, what evidence may be offered to the jury, what actions an agency must take before issuing a new rule or regulation, and so on.

It is noteworthy that a separate body of procedural law governs the mechanics of processing appeals, that procedural law for civil cases differs from that for criminal cases and that administrative agencies can each have their own procedural law. In short, the procedural law is as complex as it is vast, and cases that might have been won on their merits have been lost because of bad decisions regarding the applicable procedural law. A frequent type of attorney malpractice (professional negligence) involves procedural law mistakes, such as missing a critical deadline. If an attorney fails to comply with the civil procedural law, the court may, as a penalty, dismiss the case, with the result that the attorney's client loses. If a prosecutor fails to comply with the criminal procedural law, the court may dismiss the case and set the defendant free. Some of you may already have experienced this happy event when you went to court to challenge a citation for a traffic infraction. Because the citing officer was too busy with other duties and did not appear to testify, your case was dismissed.

Procedural law is so important that it receives basic constitutional protection in the Sixth Amendment to the U.S. Constitution (made applicable to the states by the Fourteenth Amendment, as explained in Chapter 2). The Sixth Amendment, as interpreted by the U.S. Supreme Court, requires that the government provide each citizen with procedural due process in criminal proceedings, including the right to have the advice of an attorney even if the accused is indigent, the right to confront accusers in a speedy and public trial by an impartial jury, and the right to be heard and to present a defense.



### LEGAL FOCUS—PROBLEM

In 1985, Charles Ng was charged with torturing and murdering a dozen people in a California cabin where they had been kept as sex slaves. Ng fled to Canada, where he was arrested. But Canada refused to return him to California because California has a death penalty. After six years, the Canadian Supreme Court ruled that Ng must be extradited to the United States to stand trial. Meanwhile, the police had inadvertently destroyed some bullets and blood samples needed in the case. One key witness had died. Ng continued to use the procedural laws to challenge every attorney appointed for him and every judge assigned to preside over the trial. The files in the case were reported to weigh about six tons—which hopefully is an exaggeration. On February 24, 1999, he was found guilty of 11 murders and sentenced to death, marking with that date commencement of the appeals process. The exhaustion of appeals takes several more years. Was Ng deprived of his right to a speedy trial?[18]

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No. Charles Ng waived his right to a speedy trial, believing, no doubt, that the passage of time was in his best interest. The public has no constitutional right to a speedy trial of criminal defendants. This case symbolizes a low point in the history of the procedural law.

**substantive law** General principles and detailed rules that define legal rights and duties.

**Substantive law**, in contrast to procedural law, defines duties, establishes rights, and prohibits wrongs. Substantive law prohibits murder, requires a real estate agent to be licensed, and imposes speed limits and registration requirements on automobile drivers. Earlier, it was observed that in 1998 Nevada had no law criminalizing inaction, and therefore David Cash, Jr., was not guilty of a crime for failing to render assistance to the young girl murdered by Jeremy Strohmeyer. Such conduct is a crime in some states under their criminal substantive laws. The issue of which state's law should apply to Cash, a California resident, and the time limits within which he must be prosecuted, are questions of the procedural law.

**LAW AROUND THE WORLD**

### Hammurabi Was in Iraq before Saddam

Located in the area often referred to as the cradle of civilization, Babylon existed from the eighteenth century B.C. until the sixth century B.C. (The city of Babylon ruins exist today 90 kilometers south of Baghdad.) King Hammurabi, who ruled from 1795 to 1750 B.C., prepared a code of laws that still influences legal thought today. The historical consensus is that it was not the first law code but it is the earliest code of which we have a clear and viable record. The Code of Hammurabi consists of 282 surviving rules. The punishment for violation of most rules was harsh. A few examples of the Code of Hammurabi are as follows:

**3.** If any one bring an accusation of any crime before the elders, and does not prove what he has charged, he shall, if it be a capital offense charged, be put to death.

**8.** If any one steal cattle or sheep, or an ass, or a pig or a goat, if it belong to a god or to the court, the thief shall pay thirtyfold therefor; if they belonged to a freed man of the king he shall pay tenfold; if the thief has nothing with which to pay he shall be put to death.

**12.** If the witnesses be not at hand, then shall the judge set a limit, at the expiration of six months. If his witnesses have not appeared within the six months, he is an evil-doer, and shall bear the fine of the pending case.

**21.** If any one break a hole into a house (break in to steal), he shall be put to death before that hole and be buried.

**30.** If a chieftain or a man leave his house, garden, and field and hires it out, and some one else takes possession of his house, garden, and field and uses it for three years: if the first owner return and claims his house, garden, and field, it shall not be given to him, but he who has taken possession of it and used it shall continue to use it.

Today, the surviving codes inscribed on rock steles can be viewed at the Louvre Museum in Paris, France.[19]

## Subject Matter Classification

Law also is often classified on the basis of subject matter. Consider these representative distinct categories of law: corporate, admiralty, business, real estate, intellectual property, family, environmental, constitutional, labor, probate, corporate securities, and immigration. There are dozens of other legal specialties, and the list keeps growing. For example, a recent addition is elder law, pertaining to unique rights and duties of senior citizens.

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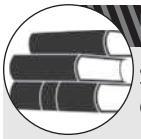

**LEGAL FOCUS—PROBLEM**

Sam Kroger, 75 years of age and a resident of Sun City, Arizona, uses his golf cart for trips to the store and a recreation center. Most residents of this retirement community also rely on golf carts for transportation. But cars also use the roads and accidents happen. Should Kroger be required by law to equip his golf cart with seat belts, turn signals, a windshield, and mirrors?[20]

Under federal law, Sam Kroger is required to equip his golf cart as indicated. The National Highway Traffic Safety Administration (an administrative agency) has adopted rules to that effect, which some compare to similar state laws requiring motorcycle riders to wear helmets. Is it sufficient that a proposed law will, in all likelihood, protect family members from some perceived harm? Or should the potential good of a proposed law be balanced against its potential intrusiveness? But good, bad, or indifferent, golf carts are motor vehicles and, when on public streets, are subject to regulation like other vehicles.

## THE RELATIONSHIP BETWEEN LAW AND ETHICS

To state the obvious, this textbook is about the law and that is an ambitious undertaking. It is ambitious because law is about almost everything. Most of all, the law is about people and the limitations and protections on and of their choices. But the law is not the sole source of community standards or even consequences regarding these choices. It is inevitable that the study of law raise questions about the fairness of a rule of law or the lack of a rule in situations where you believe there should be a law. These questions often rise from the differences between law and your moral beliefs. Although those who create law strive for fairness and justice, it is not surprising that the goal is not always met. It is thus important to be aware of ethics and morals as a separate but related topic when considering guidelines and restraints upon behavior.

We also hope that your study of law will aid you in decision making. Is an action legal? What are the legal consequences of stated behaviors? What should you do? Concern about whether a decision is morally or ethically correct should also be an important part of decision making. Is an action ethically correct? Which choice is the morally correct choice? We thus believe a brief discussion of ethics is worthwhile to aid in developing your decision-making ability. As an educated person you should be prepared to make, articulate, and defend the moral correctness of your decisions. Stating that an action is legally correct is usually not enough. Thus, it is helpful to define some terms and provide a few examples of ethical decision-making approaches used to assist people in choosing a correct or right action.

Part of one chapter in a book cannot teach a person to be ethical, but a conversation about ethics can

- Identify the nature of ethics.
- Provide some useful theories and tools for personal ethical decision making.
- Provide a framework for solving inevitable conflict that results from differing moral standards and application abilities.
- Provide information to help one evaluate the professional integrity of advisors and service providers (this discussion is part of Chapter 4).

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## What Are Ethics?

**ethics**
Standards of fair and honest conduct applied to social behavior.

The term **ethics** has several common meanings. The first is "the study of the general nature of morals and of the specific moral choices to be made by the individual in relationships with others; the philosophy of morals." This is also called "moral philosophy." A second meaning is "the rules or standards governing the conduct of the member of a profession, for example, the legal profession."[21] Ethics is about doing the right thing when there is a sacrifice to be made. What we mean by sacrifice is that ethical behavior often entails overriding our self-interest in favor of preserving order in our society.

## Why Study Ethics?

**morals**
Values concerning right and wrong.

**moral problem solving**
Conflict-resolution process aimed at solving conflicts involving moral dilemmas through communication, education, and negotiation. The broad term describes interrelational rather than individual processes.

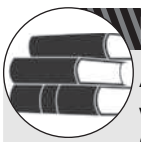
**code of ethics**
A systematic statement of agreed-upon moral rules for a profession, business, or group.

Moral issues feature again and again in the complex problems that we face in the world today. In a global economy with limited resources and unlimited consumer needs, we must grapple with issues of equitable distribution of products and services. As the use of e-communications has become ubiquitous, we are now faced with the challenge of frequently interacting with people far removed from our culture, experience, and accessibility.

There are many obstacles to making sound ethical decisions. Faulty reasoning, false premises, hidden values, unexamined beliefs, and double standards threaten the satisfactory conclusion to conflicts both complex and straightforward. Doing the right thing requires the disentanglement of a sometimes complex web of interrelated values and viewpoints. Recognition and a more than cursory understanding of different theoretical perspectives are essential.

Most of our discussion on ethics will focus on the nature of **morals** and **moral problem solving**. However, one should be aware that the law requires lawyers and judges to obey a code of conduct (**code of ethics**) in addition to, distinct from, and even sometimes at odds with generally applicable standards of conduct. In addition, effective management of one's affairs, both personal and commercial, may require the assistance of other professional advisors such as accountants, insurance agents, and financial planners. As professionals, they, too, promise to conduct themselves according to a code of professional ethics. All professionals are required to vow to follow the rules of conduct of their respective professions. The discussions of legal ethics in this chapter and in Chapter 4 will serve as a guide to evaluating the professional integrity of the advisors you may hire one day.

The following incident illustrates an important ethical dilemma. We will refer to it in developing the ability to formulate a logical reasoning process for moral problem solving.



### LEGAL FOCUS—PROBLEM

A young woman, Kitty Genovese, returns from work just after 3:00 A.M. to a typical street in Queens, New York. She parks her car and begins the 100-foot walk to her apartment building. Concerned about a man standing between her path and the apartment building, she changes course and heads in the opposite direction. She was right to be concerned; he grabs her. She screams. No fewer than 38 neighbors turn on their lights and open their windows. Again she screams. "He stabbed me!" "Help!" An observer shouts, "Leave the girl alone," and the attacker walks away. Then the lights all go out and windows are slammed shut. While the victim staggers to reach the nearest apartment building, the attacker returns and stabs her again. The victim yells, "I'm dying." The commotion again gets the attention of the apartment dwellers and again the attacker leaves. Again the lights go out and the windows close. The victim crawls toward the apartment house as the attacker returns again one last time to stab and kill her.

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During that half hour, Kitty Genovese was stabbed three times. Had a call been made to police after the first attack, perhaps she could have been saved. (Actually, a call was made some 30 minutes after the first attack, but it was too late.)[22]

Although the law often provides instructions for community behavior, no New York law required any witness to report the crime to police. No New York law required any bystander to come to the young woman's aid. Absent some relationship with the woman, no one had a legal obligation to save her life. But is there a moral obligation to help an innocent victim? Although this incident occurred many years ago, it continues to be addressed in books, articles, and websites. Questions focus on why the neighbors did not act.

For purposes of this text, the killing of Kitty Genovese provides a real-life situation for learning how to apply different standards of ethical behavior and reason through a moral dilemma.

## The Nature of Ethical Inquiry

Ethical inquiry seeks to isolate the collection of moral judgments that society has made to govern behavior and to make moral judgments in daily life, in the political process, and in lawmaking.

The study of ethics is concerned not only with identification of societal values but with thinking logically about ethical challenges and developing practical approaches to moral problem solving. Other disciplines are also concerned with discovering society's moral precepts. For example, sociology and anthropology each study cultural norms.

Ethics departs from the other disciplines because ethics has another dimension. Whereas sociology and anthropology focus on identifying and accounting for societal norms, ethics goes beyond reporting. Ethics is concerned with value identification, moral problem solving, and behavior. Ethics entails action; it is not just a topic to mull or debate.[23] In short, ethics is an applied science.

Whereas anthropology and sociology would ask whether Americans believe abortion is wrong, ethics is concerned with the question itself: Is abortion wrong? Is abortion always wrong? Should abortion be banned? As a technical matter, ethics is prescriptive ("Thou shall not kill"). Anthropology and sociology are descriptive ("There is a low homicide rate in Ireland").

## The Object of Ethics

The object of ethics is to determine the right thing to do. This entails perceiving ethical distinctions and making difficult ethical choices. Making ethical choices requires clear thinking. Ethicists refer to this thinking process as **moral reasoning**. Ethics is concerned with the ability to discern right and wrong, to separate the ethical questions from the facts, and to scrupulously apply the moral standard to the circumstances. Moral reasoning is a rational approach to moral problem solving and it can be learned.

**moral reasoning** A rational thought process directed at testing whether action is right or wrong. The conclusion is a determination of moral responsibility or culpability.

## Ethical Standards

Ethics are standards of fair and honest conduct. These standards guide our behavior. They are the indications of what we must do to remain in good standing as members of a group.

Ethical standards are the basis for moral judgment and personal action. They are derived from principles of right and wrong, from religious and philosophical beliefs concerning the nature of good and evil. Courts or legislatures do not create ethical standards; these standards come from life. However, the ability to know right from wrong is not innate; it must be learned.

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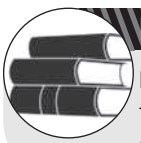
Our family, teachers, and peers bequeath moral standards to us. They are transferred to us though immersion in society. We perceive values through observation and imitation.

At first, we conform to moral standards because there are consequences: admonishment, punishment, and ridicule. As we mature, we internalize the moral instruction of those around us. As we become more experienced with the consequences of our behavior, we decide what to believe in. We adopt some beliefs and reject others. The collection of beliefs we adopt becomes our own personal philosophy.

Ethical standards are often subjective. Because our personal philosophy is based on our unique circumstances and experiences, our ethical standards differ from those of our neighbors in some respects. Of course, universal acceptance of certain standards determines membership in a particular group.

Ethical schools and resources are available for guidance in determining ethical standards. Inquiry into the nature of "the good" is an age-old pursuit. Although there are many ethical schools of thought, our inquiry will be limited to two fundamental approaches. One approach defines ethical behavior as conforming to a set of duties. The other approach determines what is ethical or good by the consequences of any given action. We examine each of these approaches below.

## Duty-Based Ethics



### LEGAL FOCUS—PROBLEM

Is it wrong to cheat on an examination? Assume that no one will ever know you cheated and that cheating will help you get into a good college. Further assume that you intend to devote yourself after college to the service of others.

**duty-based ethics**
The doctrine that actions are morally correct if they comply with existing obligations owed another or ourselves.

This question weighs the "end" or "consequences" of the action against the "means" used to attain the end. With **duty-based ethics**, if you believe that you have an ethical duty not to cheat or lie, these acts can never be justified by the consequences. This is true even if the consequences are charitable or desirable. In American culture, the dominant duty-based ethical standards come from religious sources.

### *Religious Ethics*

The Western religious tradition—more specifically, the Judeo-Christian religious tradition—is rooted in the belief that certain absolute truths have been revealed through the prophets, the Torah, the Bible, and religious institutions. The "Thou shalt not's" of the Ten Commandments and Christ's instructions to help and care for others ("Love thy neighbor as thyself") are examples. These teachings establish for those who believe in them an absolute ethical duty. It is not the consequences of an act but the nature of the act itself that determines whether it is ethical.

### LEGAL FOCUS—EXAMPLE

Leah Jordan decides to rob the rich to help the poor, as in the English legend of Robin Hood. She has acted unethically despite her humane motive. She has "sinned" because stealing violates the Seventh Commandment ("Thou shalt not steal").

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Religious ethical standards are absolute. When an act is prohibited by religious teachings, it is unethical. It should not be done, regardless of the consequences. Telling a lie for the sake of gaining a promotion is unethical—even if no one is harmed by the lie and the liar's future seems more promising.

Religious ethical standards, however, also involve an element of compassion. Therefore, although it might be profitable for a business to fire unproductive employees, those employees or their families may suffer. This potential suffering is given much weight by the decision maker. A compassionate manager or employer might decide to keep the employee and seek another way to increase profits.

The Golden Rule ("Do unto others as you would have them do unto you") also expects compassionate treatment of others to a certain extent. This rule has been adopted in some form by most religions.

***Kant and Duty-Based Ethics***

A duty-based approach to ethics not expressly based on religion is characteristic of the philosophy of Immanuel Kant (1724–1804). Kant identified some general guiding principles of moral behavior. He believed in the fundamental worth of human beings and that people were endowed with moral integrity and the capacity to reason and conduct their affairs rationally without resort to religious precept.

Kantian ethical reasoning gives philosophical weight to the Golden Rule. But the Golden Rule merely urges us to "do unto to others as we would have them do unto us." Kant's approach forces us to look at the larger picture and asks everyone to treat others as free individuals equal to everyone else. Thus, we have the duty to treat everyone with dignity and the right to expect such treatment from others. What would society be like if everybody acted as we did? Would it be positive or negative? Kant's theory forces us to look at and evaluate, from an objective point of view, social goals as well as our personal desires and welfare when considering our behavior.

The central premise in Kantian ethics is that the morality of conduct depends on the guiding principle, not on the results or consequences of the conduct. One must follow the guiding principle no matter what the circumstance. Kant called these no-matter-what principles *categorical imperatives*. They are absolute rules.

**LEGAL FOCUS—EXAMPLE**

You are thinking about whether to cheat on an examination. If you agree with Kant's categorical imperative, you will decide not to cheat because if everyone cheats, the examination is meaningless. Similarly, you would not cut in line to purchase a ticket for a music concert because if everyone else cut in line, the line would disappear and chaos would result.

The strength of Kant's duty theory lies in its relative simplicity. The Kantian model is easily applied. Determining the absolute rule and applying it to the real-world situation is all that is required to identify ethical conduct. Predictions about how others will be affected by one's actions are not necessary, although consequences do play an important role in defining the nature of conduct and formulating the categorical rule. Conduct is evaluated based on an unyielding rule: either the rule was followed or it was not. The effect of conduct is not determinative when evaluating the moral correctness of a specific action.

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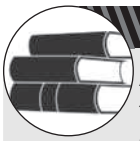
### *Problems with Duty-Based Ethics*

The efficacy of duty-based ethics is also its major shortcoming. Duty-based theory does not give clear guidance on resolving complex ethical dilemmas. Ethical decision making may involve fulfilling not just one ethical responsibility but several. When one ethical duty conflicts with another, you have to decide which is the most fundamental and act accordingly. Duty-based ethics provides no mechanism for prioritizing conflicting duties.

Duty-based ethics has other problems. Disagreements can arise about which duties exist. Different religions, although often agreeing on many things, disagree fundamentally on others. Kant's formulas are not precise. Are there limits to obligations? If so, what are those limits? Is it morally correct to kill in order to survive? Sometimes, applying religious or Kantian ethics is difficult.



**LEGAL FOCUS—PROBLEM**

A business executive negotiating with another firm's representatives may feel it necessary to stretch the truth or hold back information. The reason may be to get the best deal for the executive's employer. Is this a violation of the religious teaching that one should not lie or of Kant's categorical imperative?

Yes, it is probably unethical in both religious and Kantian terms. Remember, however, that executives also owe an ethical duty to their employers to make decisions that are profitable. Assume that the executive knows that, unless the deal is made, the employer will have to lay off several long-time employees. These employees depend on the firm for food on their table. Is "stretching the truth" consistent with the religious ethical duty to be compassionate toward others? Is it consistent with the Kantian imperative to act only as we would have all others act?

The executive may conclude that the ethical duty to be fully honest is more fundamental than the duty owed the business. This decision may include a personal cost, such as the loss of a raise, which may affect the executive's family. Alternatively, the executive might decide that the ethical duty owed to the business and its employees is the more fundamental one. The example illustrates that often ethical decisions are not clear-cut. Decisions involve choices, not between good and bad alternatives but between good and less good alternatives.

## Utilitarianism

**utilitarianism**
An ethical doctrine holding that determining right conduct is based on consequences; that the purpose of the behavior should be the greatest happiness of the greatest number.

"Thou shalt act so as to generate the greatest good for the greatest number." This is a paraphrase of the major premise of **utilitarianism**. This philosophical theory was first developed by Jeremy Bentham (1748–1832). In contrast to duty-based moral theory, utilitarianism is outcome oriented. It focuses on the consequences of an action. It does not focus on the nature of the action itself or on any set of pre-established moral values or religious beliefs.

### *Right and Wrong in Utilitarianism*

Under a utilitarian model of ethics, an action is morally correct or right when, among people it affects, it produces the greatest amount of good for the greatest number of people. When an action affects the majority adversely, it is morally wrong. Applying the utilitarian theory thus requires (1) a determination of the alternate actions available in a given situation, (2) a determination of who will be affected by these actions, (3) an

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assessment, or cost–benefit analysis, of the negative and positive effects of each alternative action on these individuals, and (4) a choice among the alternatives that will produce the maximum societal utility.

The major strength of utilitarian ethics is its flexible application. Duty-based ethics admits no exceptions or justifications for deviation from the moral standard. In contrast, utilitarians reject the notion that certain conduct is *always* right or *always* wrong. For example, utilitarians would deny that stealing is *always* wrong. Utilitarians consider the circumstances. A balancing of the harms resulting from unequivocal application of the moral standard is performed. Justifiable deviations are identified. Stealing would be morally acceptable if more good than harm would result from the theft. If a single mother of four, unemployed and starving, stole a loaf of bread from a supermarket, utilitarians would conclude that the theft was justified because five lives would be saved from starvation as weighed against the lost revenue (approximately $2.50) to the supermarket.

Another advantage of utilitarianism over absolutism is that utilitarianism may be applied in situations where moral standards collide. Because the practical application of the absolute duty approach offers no scheme for resolving inevitable conflict among moral standards, the conflict is irresolvable under that model.

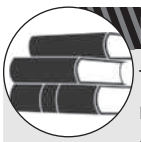
In situations that require a choice among competing moral values, the ranking of moral values is predicated on the consequences of alternative actions. The action resulting in the greatest social benefit or the least cost to society is deemed to be the proper course. Where the practical application of duty-based ethics would produce a moral predicament, utilitarian application produces a solution, however imperfect.

***Problems with Utilitarianism***

Utilitarianism also suffers from some problems. An accurate calculation of overall welfare, happiness, or utility requires knowledge of what the actual consequences, both negative and positive, of a given decision will be. Rarely, if ever, can all possibilities of a decision be accurately predicted. This is especially true with decisions that affect millions of people.

It is difficult to measure good and bad. What are your values? The cost–benefit method of measuring good and bad still requires the decision maker to assign values to expected outcomes. It isn't easy.

Another problem with utilitarianism is that it usually involves winners and losers. It is sometimes impossible to satisfy everyone with a policy action based on utility.



**LEGAL FOCUS—PROBLEM**

Tim Johnson, a manufacturer, owns many manufacturing plants. One of the plants is much older than the others. Equipment at the old plant is outdated and inefficient. The costs of production at the plant are twice that of any of Johnson's other plants. The product price cannot be increased because of competition. What should Johnson do about the plant?

In a utilitarian analysis of the problem, the costs of closing the plant, including the financial burden of laid-off employees, are weighed against the benefits of closing the plant. Benefits include the future financial security of the firm and the employees who retain their jobs at the other plants. If Johnson decides the issue from a utilitarianism perspective, he may close the plant. Closing the plant will yield the greatest benefit for the largest number of people. The winners are those helped by the decision. The losers are the workers now unemployed at the old plant.

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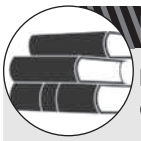
**situational ethics**
Term used disparagingly to describe an "end-justifies-the-means" maxim supplanting duty or obligation.

Utilitarianism is criticized because it is an objective, calculated approach to a problem. It reduces human beings to plus and minus signs on a cost–benefit worksheet. Utilitarian reasoning has also been used to "justify" human costs that many find unacceptable.

The strongest criticism of utilitarian theory is that an end-justifies-the-means maxim supplants the moral code. **Situational ethics** is a term often used disparagingly to describe such reasoning. In other words, ethical principle is minimized in favor of net social gain.



**LEGAL FOCUS—PROBLEM**

Is the execution an innocent man ever justified? Consider the following hypothetical: An African-American man is convicted of the rape-murder of a white woman in the Deep South. Should the governor commute the sentence of this death row inmate if he is convinced of the man's innocence?

Utilitarians would say no, if allowing the convict to be put to death would prevent a riot by the white community that would likely result in the killing of innocent African-Americans. Here, execution of an innocent man would be justified under utilitarian theory because society's interest in saving more than one life (the predicted killing of innocent African-Americans) trumps the rights of the individual.[24]

There are other theories of moral responsibility, but all of them involve making difficult choices in a world in which information is imperfect. Ethical choices involve choosing between self-interest and perceived ethical obligations.

**deductive logic**
A method of logical reasoning from two or more propositions to a conclusion. Inferences are drawn from a general premise to a specific premise. The conclusion is valid if the propositions on which the conclusion is based are true.

## Moral Reasoning

An important objective of this section is to help you develop a framework for moral problem solving. The following discussion will help you organize your thinking about what your personal philosophy is and how to apply it in an orderly fashion to circumstances for which you have little or no experience.

We present a rational approach to evaluating situations, but not the answers. We offer a method, not a conclusion. It is a compass, not a road map, only directions.

Moral reasoning is a process of testing whether a given action is right or wrong. It also determines moral responsibility or culpability. It uses deductive logic. **Deductive logic** is a method of logical reasoning from two or more propositions to a conclusion. Inferences are drawn from a general premise to a specific premise. The argument is sound if the propositions on which the conclusion is based are true and if the inferences are valid.

**syllogism**
A pattern of deductive logic that contains a major or general premise, a minor or specific premise, and a conclusion, always in that order. The conclusion follows from the premises but is not a premise itself.

Deduction may be understood as a pattern or **syllogism**. Syllogisms help to organize thinking so that a valid conclusion is reached. Syllogisms help to identify incorrect premises and flawed thinking. Moral reasoning follows the following pattern:

| | |
|---|---|
| **Proposition One** | (general premise) |
| **Proposition Two** | (specific, factual, or situational premise) |
| **Conclusion** | (moral determination) |

The general premise is the moral/ethical standard. The situational premise is the conduct ("what happened" or "what conduct is contemplated") being scrutinized. The conclusion is

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the product of applying the ethical standard to the conduct. It is the evaluation as to whether conduct was proper or improper as measured against the moral standard.

Consider the Kitty Genovese case, discussed earlier, under the utilitarian model and compare it with the Kantian model. Under the utilitarian model, failing to come to the rescue could be morally justified.

| | |
|---|---|
| **General premise** | One should come to the rescue of helpless living beings unless doing so would cause greater harm in the community. |
| **Factual premise** | Coming to the rescue of a helpless woman (Kitty Genovese) while her vicious attacker was stabbing her could have resulted in a multiple murder—greater harm. (*Note:* Predicting a likely result—a multiple murder—of the asserted failure to act, here a failure to come to the rescue—is necessary to reach a conclusion in utilitarian analysis.) |
| **Moral determination** | Failing to come to the rescue of Kitty Genovese was morally proper because coming to her aid could have resulted in more people being murdered. |

Under duty-based models, failing to come to the rescue of Kitty Genovese is not morally acceptable.

| | |
|---|---|
| **General premise** | Moral people must always come to the rescue of a helpless living being. |
| **Factual premise** | Kitty Genovese was helpless at the hands of her vicious attacker. |
| **Moral determination** | Because no one who witnessed the attack of Kitty Genovese, a helpless living being, came to her rescue, no witness acted morally. |

Note that the different conclusions under the utilitarian and duty-based models are the result of the variation in the general premise, not a variation in the logical process. The pattern of reasoning remains the same; only the standard changed. To summarize, moral reasoning is a deductive process that follows the same pattern regardless of which ethical standard is applied: Determine the moral standard (general premise). Apply the moral standard to the situation (factual premise). Decide whether action was right or wrong.

Individuals are not born with the ability to understand and apply moral standards.[25] People need to learn how to translate their personal philosophy into action. It requires inquiry, comparison, and reflection. It takes practice.

There are pitfalls to understanding ethics in general and moral problem solving in particular. Much of the terminology of ethics is used interchangeably. For example, the terms *morals* and *ethics* are often used synonymously. They are distinguishable, however. *Morals* are precepts or values held as beliefs. In contrast, *ethics* are the realization of those beliefs as standards of conduct or as evidenced by an act or failure to act.

Sometimes it is unclear whether one is referring to the moral standard (the rule) or the moral conclusion (the result of applying the standard to the situation). The two are distinct and especially so when one learns how to separate the steps of the moral reasoning process.

For learning purposes, it is critical to watch your language. For clarity, use vocabulary to distinguish conceptually distinct phases of the moral reasoning process and label the component terms carefully. For example, the statement "That's immoral" is an

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assertion that could mean the behavior is wrong. But, by what standard? It may not be a final conclusion, either. The behavior may be excused or justified.

### *Translating Moral Philosophy into Action*

The process of moral problem solving must be broken down, step by step.

**Step One** First, you must break down the moral reasoning process. Separate facts from the moral premise (ethical rule or standard) and the moral premise from the moral judgment (application of the ethical rule). Be aware that moral standards are often implicit. Distinguishing among statements is helpful in separating the standard from the facts of the situation. Some statements are matters of fact. They do not assert a value judgment. Other statements are value laden.

Statements that reflect no value judgment are objective. They are what is so. These statements are referred to as positive or **non-normative statements**.

**non-normative statements**
Statements that reflect no value judgment.

Statements that reflect what should be or how one should act are called **normative statements**. They tell what someone deems socially acceptable. The statement is subjective.

**normative statements**
Statements that reflect what should be or how one should act.

Practice in developing the ability to recognize one's own values and those of others begins with distinguishing between normative and non-normative statements. Again, it helps to watch your language and keep phases of the moral reasoning process separate.

#### *Non-normative Statements*

- This legislative session, Congress lowered taxes.
- The new state building has more offices than the older one.

#### *Normative Statements*

- Lowering taxes is bad because it will fuel inflation.
- Producing oil is more important than protecting the environment.
- It was not necessary to build a new state building.

It is not always easy to recognize the difference between normative and non-normative statements. One clue is that normative statements are asserted in a way that indicates both the conclusion and a justification or reason for the conclusion. The reason could be express or implied.

If we change the statement "Lowering taxes is bad because it will fuel inflation," to simply "Lowering taxes is bad," we are implying that if asked we can provide some justification for the statement.

Non-normative statements are matters of fact. They don't beg for reasons to validate their accuracy.

Another way to tell whether a sentence is normative or non-normative is to ask, "Does it tell how? Why? Why not?" If the statement expressly or impliedly answers these questions, then it's probably normative.

**Step Two** Once you have isolated the moral standard, gather all relevant facts—just the facts. What happened? When? Where? Who? Be sure you have enough facts to determine the moral standard. It is critical to be accurate and complete, to use only relevant facts,[26] and to separate the facts from the moral standard.

**Step Three** Using deductive logic, apply the moral standard to the facts of the situation. The result will be the moral determination.

This three-step process will result in a rational outcome, although it will not resolve all ethical dilemmas. Different people have differing moral philosophies and

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varying abilities to solve moral problems. However, this process will help you resolve moral conflicts in a coherent, rational way. Now you are prepared to articulate, defend, and negotiate for your moral conclusion. Let the moral problem-solving process begin.

## Morals and Ethics: Distinguishing between Laws and Moral Ethics

Throughout this text we present situations that combine moral and legal issues under the special header "Morals and Ethics." These situations ask you to examine more than just the law of the situation. To answer the question of whether an action is legal does not necessarily answer the question of whether it is ethical. Not all moral standards are formalized or codified. Therefore, discerning between legal duties and moral obligations will simplify the moral problem-solving process.

**positive law**
The rules members of a society are obliged to obey to avoid punishment or penalty imposed by the government.

Many ethical decisions are made for us by our laws. In most cases, law reflects many of a society's ethical values. Virtually all of what you will read in this text involves **positive law**, sometimes called *black-letter law*. Positive law tells individuals which actions are prohibited. The law gives warning that society (through government) will punish the violators. Nonetheless, simply obeying the law does not fulfill all ethical obligations. In the interest of preserving personal freedom, as well as for practical reasons, the law does not—and cannot—make all ethical requirements legal requirements.

In all societies, ethics and the law go hand in hand. Law can never operate in a vacuum. It cannot be a series of rules imposed upon society from outside the society. The law must reflect a society's customs and values. It must enforce principles of behavior that society thinks right and just. Law is thus an expression of the social forces at work in the society of which it is a part.

Criminal responsibility and civil liability imply failure to conform to a standard of conduct. Obviously, criminal responsibility and civil liability are not synonymous, and they are not coextensive with moral accountability. Significantly, moral accountability requires us to go beyond what the law requires.

In addition, the underlying rationale for criminal laws, civil laws, and moral standards and the consequences for violating or breaching them vary in important ways.

Criminal responsibility and civil liability are legal terms describing a duty to behave or refrain from conduct, the failure of which results in a penalty. Criminal responsibility is concerned with the behavior of the criminal. The penalty for criminal conduct generally involves curtailment of basic civil liberties: loss of life (death sentence), liberty (prison time), and property (fines). Criminal behavior (**culpability**) also results in contempt for the wrongdoer. The primary justification for punishing criminals is to vindicate society's norms. Some argue that the purpose of such punishment is deterrence; some call it retribution; some believe the goal is (or should be) rehabilitation.

**culpability**
Behavior that is sufficiently wrongful to be at fault or to be responsible for proscribed conduct.

Civil liability is concerned with the victim. The object of civil liability is to put victims back in the position they were in before the wrongful act, or as nearly as possible. A determination that a person is liable necessitates compensation for the victim, usually in the form of monetary payment. In theory, the law's focus is on paying the victim back rather than on reproving the wrongdoer.

A moral breach may involve contempt, banishment, excommunication, or isolation. It may look and feel like punishment, but it does not entail imposition of penalty by the government.

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# USING COURT CASES

Although case law is but one source of American law, it has a special place in the study of law. Court cases are about the actual legal problems of people. Each case is an individual drama, where parties seek help, justice, principles, and power. By reading cases, a student can see the legal problems of people and how the law is used to resolve these problems.

At the conclusion of each text chapter, we present a case to provide you with a real-life illustration of how courts interpret and apply the law. Other court decisions are referred to in footnotes and endnotes throughout the text, and some end-of-chapter problems are based on actual legal disputes. This section offers a brief introduction to case citations, the legal "shorthand" used to identify court cases.

Although the court system is discussed in detail in Chapter 3, one broad distinction is important. There are two types of courts, trial and appellate. A trial court is where two parties each present their version of the facts of a legal dispute and receive a decision or ruling. Appellate courts exist to review the actions of lower courts (trial or lower appellate courts) and to correct their mistakes of law.

## Federal Court Decisions

Federal trial court decisions are published in West's *Federal Supplement* (F.Supp.). Opinions from the circuit courts of appeal are reported in West's *Federal Reporter* (F. or F.2d). Opinions from the U.S. Supreme Court are reported in West's *Supreme Court Reporter* (S.Ct.), the *United States Reports* (U.S.), the *Lawyers' Edition of the Supreme Court Reports* (L.Ed.), and other publications.

The *United States Reports* is the official edition of all decisions of the U.S. Supreme Court for which there are written opinions. Published by the federal government, the series includes reports of Supreme Court cases dating from 1791. Sample citations for federal court decisions are listed and explained in Exhibit 1.1.

## State Court Decisions

Most state trial court decisions are not published. Usually, decisions from the state trial courts are filed in the office of the clerk of the court. The court clerk's job includes keeping court records and making the decisions of the court available for public inspection.

Written decisions of the state appellate courts, in contrast, are published and distributed. The reported appellate decisions are published in volumes called *Reports*. They are numbered consecutively.

State court appellate opinions also appear in regional units of the National Reporter System, published by West Publishing Company. Most libraries have the West reporters because they are published quickly and are distributed more widely than the state-published reports. Many states have eliminated their own reporters and use West's National Reporter System. The National Reporter System divides the states into the following geographical areas: Atlantic (A. or A.2d), South Eastern (S.E. or S.E.2d), South Western (S.W. or S.W.2d), North Western (N.W. or N.W.2d), North Eastern (N.E. or N.E.2d), Southern (So. or So.2d), and Pacific (P. or P.2d).

After appellate decisions have been published, they are normally referred to by:

1. The name of the case
2. The volume, name, and page of the state's official reporter (if different from West's National Reporter System)
3. The volume, unit, and page number of the National Reporter
4. The volume, name, and page number of any other selected reporter

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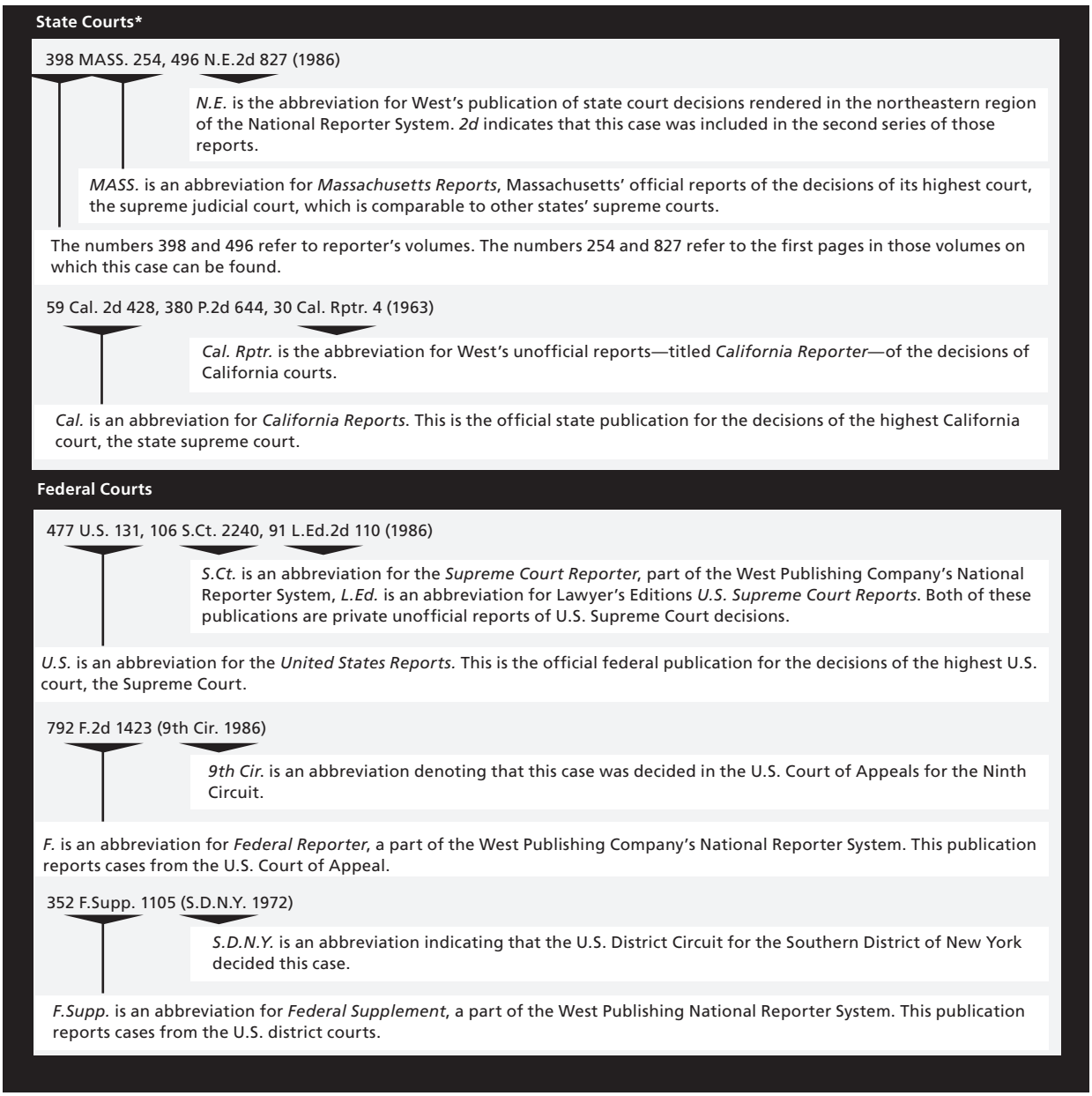
**EXHIBIT 1.1** National Reporter System—State/Federal




*The case names (for example, *Roe v. Wade*), have been deleted from these citations to emphasize the publications. It should be kept in mind, however, that the name of a case is as important as the specific page numbers in the volumes in which it is found. If a citation is incorrect, the correct citation may be found in a publication's index of case names. The date of a case is also important, both to provide a check on error in citations and because a recent case is likely to have more value as an authority than earlier cases.

**citation, legal** Abbreviated reference to a variety of legal authorities including court cases.

This information makes up what is called the **citation**. Citing a reporter by volume number, name, and page number, in that order, is common to all citations.

When more than one reporter is cited for the same case, each reference is called a *parallel citation*. For example, consider the following case: *Quality Motors, Inc. v. Hays*, 216 Ark. 264, 225 S.W.2d 326 (1949). The opinion in this case can be found in volume

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216 of the *Arkansas Reports* on page 264. The parallel citation is to volume 225 of the *South Western Reporter*, second series, page 326.

In cases presented in the text, we provide the citation, the name of the court hearing the case, and the year of the court's decision. A few of the states—including those with more than one appellate court, such as California, Illinois, and New York—have more than one reporter for the state court opinions. Sample citations are listed and explained in Exhibit 1.1.

## Reading Court Cases

The cases in this text have been reworded and condensed from the full text of the courts' opinions. For those wishing to review court cases for future research projects or to gain additional information, the following sections will help you to read and understand case law.

**unanimous opinion**
A judicial decision with complete agreement by all judges.

**majority opinion**
A written opinion by a judge outlining the views of the majority of the judges of the court deciding the case.

**concurring opinion**
A written opinion wherein a judge agrees (concurs) with the result reached by another judge, but for different reasons from those stated by the other judge.

**dissenting opinion**
A written opinion by a judge or judges who vote(s) contrary to the majority opinion and holding of the court.

### *Case Titles*

In the title of a case, such as *Adams v. Jones*, the *v.* or *vs.* stands for versus, which means "against." If the case is at the trial court level, the plaintiff—the person who files the suit—would be the first name mentioned, Adams. The second name, Jones, would be the defendant—the person who is sued. If the case is an appellate court case, however, often the original plaintiff cannot be determined from the case title. Some appellate courts retain the trial court order of names, but many place the name of the party appealing the decision first, so the case might be called *Jones v. Adams*. You must read the facts of each case carefully to identify each party.

### *Terminology*

You will frequently find the following terms and phrases in court opinions and legal publications.

### *Decisions and Opinions*

Most appellate or reviewing court decisions are explained in writing. A decision contains the opinion (the court's reasons for its decision), the rules of law that apply, and the judgment. Appellate courts consist of a panel of three or more judges, and there are four types of written opinions for cases decided by these appellate courts.

1. When the judges unanimously agree on an opinion, the opinion is written for the entire court and is called a **unanimous opinion**.
2. When the opinion is not unanimous, a **majority opinion** is written. This opinion outlines the views of the majority of the judges deciding the case.
3. Often, a judge who feels strongly about making a point that was not made in the unanimous or majority opinion will write a **concurring opinion**. The judge agrees (concurs) with the judgment given in the unanimous or majority opinion, but for different reasons.
4. If the opinion is not unanimous, a **dissenting opinion** may be written by a judge who disagrees with the majority. The dissenting opinion is important because it may form the basis of arguments used years later to overrule the majority opinion.

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### *Judges and Justices*

The terms *judge* and *justice* are simply different names given to judges in different courts. All members of the U.S. Supreme Court, for example, are called justices. "Justice" is also the formal title given to judges of appellate courts. In New York, a justice is a judge of the trial court (which is called the supreme court), and a member of the court of appeals (the state's highest court) is called a judge. The term *justice* is commonly abbreviated to J., and *justices* to JJ.

A Supreme Court case might refer to Justice Kennedy as Kennedy, J.; or to Chief Justice Roberts, Jr., as Roberts, C. J.

### *Appellants and Appellees*

**appellant or petitioner**
The party who appeals to a higher court for review of a lower court ruling.

An **appellant** is a party who appeals a case to another court. An appellant is sometimes called a **petitioner**, usually when the case involves a matter in equity. An **appellee** is the party against whom an appeal is made. This party is sometimes called the **respondent**, usually when the case involves a matter in equity.

**appellee or respondent**
The party who, on appeal, defends the earlier court determination.

### *A Note on Abbreviations*

In court opinions, and in other areas of this text, certain words in firm and organization names are abbreviated. Various terms for corporations, *Corporation*, *Company*, *Incorporated*, *and Limited*, for example, frequently appear in their abbreviated forms as *Corp.*, *Co.*, *Inc.*, and *Ltd.* Legislation and statutes are often referred to by their initials. To prevent confusion, we will give the complete name of each statute when it is first mentioned in the text. We also identify how we will refer to it in the future. For example, the Uniform Commercial Code is commonly referred to as the UCC.

We provide at least one case at the end of each chapter. We briefly introduce each case but we leave the discussion of the case in the language of the court (although we have edited the court opinion for reasons of space). Knowing how to find and read a court opinion is an important step in legal research. A further step involves "briefing" the case to help one understand it. Legal researchers routinely brief cases by summarizing and reducing the opinions to their most important elements. A discussion on how to brief a case and a sample brief of the following case is provided in Appendix A.

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## CASE

### Eric J. v. Betty M. The Court of Appeals Dist. 4

1 2

76 Cal.App. 4th 715, 90 Cal.Rptr. 2d 549 (1999)

3 4 5

*Robert brought home his new girlfriend, Helen, and her 8-year-old son, Eric, to meet his mother, father, brothers, sister, and their assorted spouses. The relationship between Robert and Helen continued and Helen and Eric were guests several times in various family homes. It was later discovered that Robert had sexually molested Eric during some of these visits at Robert's family's homes and that Robert was on parole for felony child molestation. Robert was convicted of molesting Eric and sent back to prison. Helen filed suit against Robert's family claiming they had a duty to warn her about Robert's criminal past and the potential danger to her child, and having failed that duty they were liable for monetary damages for the harm suffered by Eric. The trial court judge granted the defendant's motion to dismiss the case (nonsuit motion) after the completion of the evidentiary portion of the trial.*

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7 **Justice Sills Delivered the Opinion of the Court:**

When Robert was released from prison on rehabilitative parole after having been convicted of felony child molestation four years earlier, his family might have disowned him, but they didn't. They accepted him back. And when he found a girlfriend named Helen—who had an 8-year-old boy named Eric—they did not tell Helen about Robert's previous conviction, no doubt hoping against hope that he had reformed himself.

Unfortunately, and unbeknownst to any members of the family or Helen herself, Robert began molesting Helen's son early on in his relationship with her.

8

### Facts and Litigation Background

In 1978 Robert was arrested for the misdemeanor of "annoying" a minor. He pled no contest and served six months, and was on probation for the next three years. During that time he committed one probation violation for taking four high school freshman boys to dinner without supervision. Again he served some time in jail and was placed on probation.

Then in 1984 he was arrested for molesting a 10-year-old boy. He again pled no contest, this time to a felony count. He served four years in state prison, getting out in August 1988.

In June 1989, Robert met Helen and her 8-year-old son Eric at Magic Mountain. A relationship developed between Robert and Helen, and, by Thanksgiving 1989, Robert invited Helen and Eric for an overnight stay at the home of his mother Dorothy in Big Bear so she and Eric could meet some of the rest of his family. Besides Dorothy, Robert's family consists of his father Edwin, his father's wife Betty, Robert's three brothers Frank, Phillip and Eddie, and a sister named Diane.

The members of Robert's family concluded that Helen was his "girlfriend." Their relationship continued until early 1992, when Robert moved to Las Vegas.

Later that year, one of Helen's friends saw a special on television regarding convicts on parole, which showed a picture of a younger, beardless Robert and revealed that he was a convicted molester. She told Helen about the program, and a few days later, Helen took Eric to a police station. There, Helen learned that Robert had been molesting Eric. In June 1993 Robert was convicted of 23 counts of child molestation. He had never told Helen of his criminal history.

8

Helen, acting as guardian *ad litem* [Latin: "for purposes of the suit"] for Eric, sued various members of Robert's family. The case came to trial, during which it was learned that on several occasions Eric was molested on property owned by some of Robert's family members.

Each of the relatives had various degrees of knowledge of Robert's history. Father Edwin knew the most. He knew about the 1978 and 1984 convictions. Robert came to live with him and Betty for a short period after Robert's release from prison in 1988, and was visited by a parole officer shortly thereafter; Betty told Edwin that in her opinion Robert was a "pedophile." The parole officer also told Edwin that Robert had agreed to be put on a state parole rehabilitation program obligating him to

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report for psychiatric counseling, obtain gainful employment, not be alone with an unsupervised child, and allow for unannounced inspections of his residence.

Edwin also believed that his son was, as he would later testify in trial, "truly repentant of his unfortunate situation back in 1984 that he was trying to adhere to his parole very, very vigorously." Indeed, Robert had voluntarily "participated" in the television special regarding convicts on parole against his father's advice because, as he told his father, "Dad, I want to do it to show we can succeed. . . ."

The testimony was uncontroverted that none of the defendant family members ever told Helen about Robert's convictions.

After the evidence had been completed the trial court granted nonsuit motions made by the defendants in this appeal; Helen then filed a timely notice of appeal from the judgment in their favor. On appeal Helen now argues that the evidence was susceptible to liability based on either premises liability or general negligence theories. [We have omitted the discussion about premises liability.]

## Discussion

Absent a "special relationship," one cannot be held liable for mere nonfeasance, such as not protecting another from a criminal attack by a third party. (See *Totten v. More Oakland Residential Housing, Inc.* (1976) 63 Cal. App., 134 Cal.Rptr. 29 ["As a basic general principle, in the absence of a special relationship or circumstance, a private person has no duty to protect another from a criminal attack by a third person."].) The basic idea is often referred to as the "no duty to aid rule," which remains a fundamental and long-standing rule of tort law. As the Supreme Court said in *Williams v. State of California* (1983) 34 Cal.3d 18, 23, 192 Cal.Rptr. 233, 664 P.2d 137: "As a rule, one has no duty to come to the aid of another. A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act."

> *[Helen's] claim essentially requires this court to depart from the rule against liability for mere nonfeasance. That rule is foundational in California tort jurisprudence. The tort law of California does not impose mandatory good samaritanism.*

Helen argues that *Soldano v. O'Daniels* (1983) 141 Cal. App. 3d 443, 190 Cal.Rptr. 310 modified the no duty to aid rule. As one commentator has noted, *Soldano* stands out as the only case in the United States during the thirty year period since the death of Kitty Genovese that could "be read" as adopting a duty to aid rule, though the commentator who made that statement also noted that the "court's apparent holding [was] to the contrary." (See Payne, *Linking Tort Reform to Fairness and Moral Values* (1995) 1995 Det. C.L. Rev. 1207, 1237.) *Soldano* did not abrogate the rule against liability for mere nonfeasance. Rather like Justice Scalia's observation about the famous contracts case of *Hadley v. Baxendale* (1854) 156 Eng.Rep. 145 it is an instance of a court knowing the right rule but simply not applying it correctly. The time has come to explain why the result in the case is an aberration in American tort jurisprudence.

In *Soldano* a saloon patron ran across the street to a restaurant to try to phone the police about a threat that had been made in the bar. The patron requested that the bartender of the restaurant (in the fairly neutral language that the opinion used to describe the actual facts) "either call the police or allow him to use the [restaurant] phone to call the police. The [bartender] allegedly refused to call the police and allegedly refused to allow the patron to use the phone to make his own call." The threat in the saloon eventually escalated into a lethal shooting.

The appellate court reversed the judgment entered after a summary judgment motion when the son of the man who was shot and killed in the saloon sued the restaurant across the street. The appellate court began its substantive discussion by saying the "facts" of the case before it "come very nearly within section 327" of the Restatement Second of Torts, which the court then paraphrased for the rather noncontroversial point that if you know a third person is going to render aid to another you shouldn't "prevent" that person "from doing so." The opinion then . . . added the idea that you shouldn't "interfere" with another person's attempt to give aid as well as "prevent" it.

The problem with the court's analysis is that it subtly equated the concepts of prevention and interference with the fact that the bartender had *refused to allow* a saloon patron from across the street use the *restaurant's* phone. "Interference" and refusal to allow one's property to be commandeered, even for a good purpose, are simply two different things. If the English words *prevent* and *interfere* still mean anything, they necessarily convey the notion of some sort of affirmative action, not just refusal to turn one's property over to someone else.

Th[e] weighing process . . . has already been done by courts over the centuries in formulating the "no duty to aid" rule. We need only add that any result other than the one we reach today under the facts of this case would create intolerable conflicts of interest within families.

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9— The judgment in favor of the respondents is affirmed.
10— RYLAARSDAM, J., and BEDSWORTH, J., concur.

### Case Notes

1. The name of the case is *Eric J. v. Betty M.* Eric J. is the plaintiff, although as he is a minor, his mother brought the case on his behalf; Betty M. was the first-named defendant. Other defendants are not named in the title.
2. The court deciding the case was the California Court of Appeals District 4, an intermediate-level court in the California state court system.
3. This citation is from the state of California official reporter and indicates that this case can be found in Volume 76 California Appellate Reporter, fourth series, on page 715.
4. This citation is a parallel citation to a West's state reporter and indicates this case can also be found in Volume 90 of the California Reporter, second series, on page 549.
5. The case was decided in 1999.
6. The authors prepare a short summary of the important facts, decision in the law court, and issues to be decided in the case.
7. The name of the judge or justice writing the majority or unanimous opinion and her recitation of important facts, history of this court case, and indication of issues in the case to be decided by the court.
8. The court addresses the legal questions posed by the case facts. This is the analysis portion of the case and the part that shows the use of prior court decisions and the specific reasoning leading to the court's ultimate decision.
9. The holding or decision of the court.
10. The remaining members of the panel concur, so this is a unanimous opinion. If one of the judges had disagreed with the result, that judge could write a dissenting opinion to explain why. A judge who agreed with the decision but not the reasons behind it could write a concurring opinion.

### For Critical Analysis

1. What do you think of Robert's family's conduct? Should they have disclosed what they knew to Helen? Use both Kantian and utilitarian methods of ethical analysis to determine the duty to disclose, and compare results.
2. Is the rule determined by the court a substantive rule or procedural rule? Is this a criminal law case or civil case? Is this a state law or federal law matter?
3. Several of Robert's earlier pleas to criminal charges were "no contest." What does that mean? Why would that choice of a plea be made? Use the text index, glossary, or the Internet to find the answer.

## CHAPTER QUESTIONS AND PROBLEMS

1. Consider a current issue lacking a clear legal resolution. What activities are occurring within American society to address the issue? Is Congress considering passing a new law? Is a case headed toward or at a higher court? Are candidates for political offices declaring a position on the issue? What do you think will be the legal outcome of the issue? How do you think it will be resolved?
2. Contrast statutory law and case law. How are they different? What would be some strengths and weaknesses of each form of law? Texas is one of a few states that recognize common law marriage. Does that mean the law recognizing the marriage is statutory or case law?
3. Assume a fifty-first state called Columbia enacts the following statute sections during its 2008 session:
   a. Makes it illegal for anyone under age 23 to possess a can of aerosol spray paint unless that person is licensed by the state to do so
   b. Establishes an application form and sets a filing fee to obtain a spray paint possessor's license
   c. Defines the tort of spray paint trespass and indicates the circumstances under which victims can sue and recover damages from spray painting violators
   d. Provides that owners whose properties are wrongfully spray painted can sue in small claims court for damages not to exceed $25,000
   e. Makes it a misdemeanor to sell or give a spray paint can to any unlicensed person under age 23

   Characterize each of the statute sections above as either civil or criminal law, public or private law, and procedural or substantive.

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4. Explain to a friend the following types of court opinions: majority, concurring, and dissent.
5. Attorneys do not have a monopoly upon the legal issues within our society because everyone, individual or corporation, has the constitutional right to represent themselves without an attorney. Is this an accurate generalization?
6. Identify which of the following acts are crimes and which are civil wrongs (called torts).
   a. Dirk, brandishing a gun, robs a convenience store.
   b. Dirk captures and rapes Monica in the parking lot of a mall.
   c. Dirk shoplifts clothes from his employer's store.
   d. Dirk seduces Monica, age 17.
   e. Dirk carelessly drives his car into a school bus, killing one child.
   f. Dirk crudely asks Monica to engage in a sex act with him.
7. Which of the following issues would most likely be decided by both state and federal appellate courts?
   a. Proper selection of jurors
   b. Whether or not a witness lied during trial
   c. Whether or not a jury came to the correct decision
   d. Whether or not certain evidence should have been produced by attorneys during trial
   e. Whether or not the trial court judge made erroneous rulings on objections to evidence
8. There are nine U.S. Supreme Court justices today, just as there were in 1900 when our population was 76 million. Today, the U.S. population is over 300 million. Which of the following do you think should be done to rectify this situation?
   a. More justices should be appointed to share the workload.
   b. A new specialized court should be created to handle specified kinds of cases (say criminal appeals, only).
   c. Our justices should be paid more.
   d. Can you think of any other possible remedy?
9. Mandy, a 17-year-old high school student, was spending Friday night at her friend Kristie's house. Both decided to go to a party at a fellow student's home. The parents of the host were away for the weekend. Marijuana and Ecstasy were said to have been used at the party. It was reported that Mandy told a group of friends, including Kristie, that she had taken some Ecstasy, although no one actually saw her take the drug.

   Kristie went home without Mandy. As the evening wore on, Mandy complained of feeling sick. She was given lots of water to drink. (Dehydration is a common side effect of Ecstasy.) Soon Mandy vomited and was moved to a bedroom to rest.

   The next morning, Kristie awoke to find that Mandy had not returned to sleep at Kristie's house. Kristie ran back to the house where the party had taken place. She arrived just in time to see Mandy taken away by ambulance. She was taken to the nearby hospital and pronounced dead on arrival.[27]

   Who will be held responsible for allowing Mandy to die? Kristie? The students at the party? The student whose house was the site of the party? Could Kristie's parents be held responsible? The host's parents? Is there any criminal responsibility? Civil liability? Would your answer be different if Kristie gave Mandy the drug? As a matter of morality, who would be held responsible under utilitarian theory? Kantian ethics?
10. Refer to the provisions of the Code of Hammurabi provided in the text on page 20. Using modern categories of law, characterize each provided rule. Procedural or substantive? Public or private? Civil or criminal? Speculate about the societal purpose of each rule.
11. Why are the thousands of often complex state and federal appellate decisions totaling tens of thousands of pages annually printed in expensive, hardcover books to collect dust in libraries? Why are they made available on the Internet? Who reads these long and, frankly, often boring recitals of the law, precedents, and legal theory? Surely, all of these volumes cannot contain only significant and important cases. Why do we need volumes on the law of the 1800s, or of the 1920s?

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CHAPTER 2

# The Constitution

*"The layman's Constitutional view is that what he likes is Constitutional and that which he doesn't like is unconstitutional. That about measures up the Constitutional acumen of the average person."*

**Hugo Black, U.S. Supreme Court Justice, *New York Times*, 26 February 1971.**

## LEARNING OBJECTIVES

**After reading and studying this chapter, you should be able to:**

- Define *constitutionalism*.
- Distinguish between natural and positive law and provide examples of each.
- Explain the concept of judicial review.
- Describe how power and authority are divided among the branches of the government under the doctrine of separation of powers.
- Explain the organization of the national government and identify important attributes of each branch.
- Understand and define *federalism*.
- Identify the major processes of citizen legislation.
- Define and provide examples of police power, the supremacy clause, and the power to tax.
- Explain what the commerce clause is and describe its effects.
- Understand the nature of the Bill of Rights and provide some examples of restrictions on federal government and, through the doctrine of incorporation, state government.
- Discuss the application of the First Amendment to expressions of free speech and religion.
- Understand the major contentions involving the "right to bear arms."
- Understand and be able to discuss the due process and equal protection clauses and the right to privacy.



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Does a woman have a legal right to an abortion?
Does a person have a right to burn the American flag?
Do gay couples have a right to marry?
Can a state prohibit a local activity if it affects interstate commerce?
Can the government take or harm a citizen's property?
What rights do noncitizens have?
Can the president ignore a law?
Can persons be denied or granted rights or privileges based on the color of their skin?

These questions and more are partly or wholly answered by the U.S. Constitution or the interpretation of the Constitution by the courts. Many fundamental concerns related to social existence are about human rights, and the U.S. Constitution is a seminal document in the legal recognition of human rights. The Constitution is the foundation of the democratic institutions that define and provide our freedom and rights.

Our Constitution is a voluntary agreement among our citizens that specifies national rules of governance and expresses our fundamental principles of justice. It also lists the inalienable rights of the people that bind them to cooperate for their general welfare. Written 11 years after the Declaration of Independence, the Constitution became operative in 1789. It is the world's oldest effectively functioning written constitution. Current issues, such as abortion, gay rights, and fear of terrorism may appear to challenge the durability of a document written before these issues arose. However, U.S. history is filled with eras like the present, and the Constitution has persevered due to its legitimacy and flexibility.

Our Constitution ultimately derives its legitimacy from the guaranteed right of the people to vote in selecting their governmental representatives. This is also true of the written constitutions in all 50 states of the union. However, a democracy in which all of the qualified voters participate directly is obviously feasible only in small political entities, such as some early New England towns. Our populous nation is a **republic**, meaning that its sovereign (supreme) power resides in the people but is exercised by representatives chosen through direct votes cast by qualified voters (for example, qualified by age, citizenship, and registration) in free elections. The president and vice president are the only federal officials not elected directly; they are chosen by the Electoral College, which is, however, elected by the people. The Constitution did far more than create a democratic republic. The Constitution of the United States of America provides the means to protect important, enduring, and sometimes competing values through the concept of constitutionalism.

**republic**
A system of government with the supreme power in the people, exercised by representatives chosen through the votes of qualified voters.

## WHAT IS CONSTITUTIONALISM?

**Constitutionalism** means "a fundamental law, or a fundamental set of principles and … [an] institutional arrangement, which would [actually] restrict arbitrary power and ensure 'limited government.'"[1] Thus, "the governing power is limited by enforceable rules of law, and concentration of power is prevented by various checks and balances so that the basic rights of individuals and groups are protected."[2]

**constitutionalism**
The principles of constitutional government; adherence to them, including, notably, restrictions and limitations on government power.

Constitutionalism imposes limits on the exercise of government power. Many nations have constitutions, but that does not necessarily mean their citizens enjoy the fruits of constitutionalism. For example, a constitution that permits unlimited political power, whether in the hands of one, few, or many, does not provide constitutionalism. The

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**arbitrary and capricious**
Action taken impulsively or in bad faith and without good or valid reason.

Fascists' constitutions of Italy and Germany in the 1930s are examples. Neither included limitations on **arbitrary and capricious** uses of political power by the rulers. Arbitrary and capricious behavior has been aptly characterized as "willful and unreasonable action taken, without consideration of or in disregard of facts or without determining principle."[3] Even a constitution that provides limited political power, but establishes no mechanism to restrain the ruler's exercise of that power, fails to provide constitutionalism. For instance, a "freedom of the press" mandate in the Argentinean constitution did not prevent Juan Perón (president, 1945–1955) from destroying the world's largest Spanish-language newspaper, *La Prensa*, in Buenos Aires.

People enjoy constitutionalism only to the degree that their constitution limits power by specific provisions that effectively control the behavior of the rulers. One such control is having the judiciary serve as an enforcing watchdog on the exercise of powers by the executive and legislative branches, and even the lower levels of the judicial branch of government. The separation of powers concept is discussed more fully later in this chapter. A good example of its application occurred in 1952 when President Harry S. Truman ordered the secretary of commerce to seize and operate our country's privately owned steel mills after the United Steel Workers Union threatened to strike. Corporate managers retaliated by a "lockout" that kept the workers off their jobs. The president believed that a shutdown would impair the nation's ability to conduct the Korean War. Was the seizure order within the president's power? No. The Supreme Court held that "this seizure order cannot stand" for the following reasons:

1. The president's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. The U.S. Supreme Court could find no congressional statute or constitutional provision that expressly authorized the president to take possession of private property as he did in the steel mill case.
2. Moreover, prior to this controversy, when the Taft-Hartley Act was under consideration in 1947, Congress had refused to adopt a law authorizing the seizure method of settling labor disputes that Truman used.
3. The order could not be sustained as an exercise of the president's military power as commander in chief of the armed forces. The commander in chief does not have the power to take possession of private property for the purpose of keeping labor–management disputes from stopping production. The nation's lawmakers, not military authorities, should regulate labor disputes, declared the Court.[4]

The separation of powers inherent in the Constitution set the limit on the president's authority. The power and ability of the U.S. Supreme Court to dictate to President Truman, and have him obey, demonstrates how constitutionalism helps to protect the people of the United States from abuses of executive power, however well intended such abuses may be.

Another example of separation and limitation of power took place in 1974 when the Supreme Court ordered President Richard M. Nixon to release tape recordings of discussions concerning a politically inspired burglary in the Watergate apartment house in Washington, D.C. Initially, the president refused to release the tapes, claiming as "executive privilege" the right to withhold recorded information he deemed important to the exercise of his presidential duties. The tapes showed that he had halted an FBI investigation, a serious obstruction of justice.

Recently, another situation showcased the Supreme Court placing limits on the president's authority. In 2006, the Supreme Court ruled that a detainee from Afghanistan, Salim Ahmed Hamdan, was entitled to a military court marshal unless the president

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obtained direct authorization from Congress to prepare a special proceeding.[5] President George W. Bush had wanted to try numerous detainees, classified as enemy combatants, using military commissions where many normal rights, such as the right to see and confront the opposing evidence, would not necessarily apply.

**LEGAL FOCUS—CASE**

In 1997, Paula Jones filed a civil lawsuit for money damages against President William J. Clinton, alleging sexual harassment while he was governor of Arkansas. President Clinton asserted an executive privilege as justification for his request to suspend the litigation until after his presidency ended. Does the U.S. Constitution provide presidents with such an "executive privilege" to delay civil litigation?

*Clinton v. Jones*, 520 U.S. 681, 117 S.Ct. 1636 (1997).

No. The president contended that ongoing civil litigation would impair his ability to lead the nation—thus, it should be suspended by executive privilege. The president was subpoenaed (ordered by the court) to appear and testify in that litigation, and he ultimately agreed to do so.

## WHAT IS CONSTITUTIONAL LAW?

**natural law**
The higher law believed by some ethicists to be above and beyond people's power to change.

**natural rights**
Inalienable rights of every person that exist by virtue of natural law, notably to life, liberty, and property.

**positive law**
Law enacted by governmental authority, such as legislatures, courts, and administrative agencies, as distinguished from natural law.

Constitutional law in the United States has a variety of meanings. To the founders of our nation, it had to do with a concept known as **natural law** and its corollary concept of **natural rights**. From the founders' perspective, natural law was the higher law, in accordance with nature, applicable to all people, and unchangeable and eternal.* **Natural rights** are rights of persons that exist regardless of any other law. The founders believed they had incorporated natural law principles into the constitution in a manner consistent with the necessities of government or **positive law**. Positive law is defined as any law enacted by the sovereign (supreme power) and deemed necessary to regulate an ordered society.† The natural law doctrines found in the Constitution are reflected in the following fundamental beliefs, and they dictate the parameters within which legitimate governmental positive law must be exercised.[6]

*See Marcus Tullius Cicero, *De re publica*, trans. George Sabine and Stanley Smith (Indianapolis, NY: Dobbs Merrill, 1960). Cicero's definition of natural law reads thus: "True law is right reason, harmonious with nature, diffused among all, constant, eternal; a law which calls to duty by its commands and restrains from evil by its prohibitions…. It is a sacred obligation not to attempt to legislate in contradiction to this law; nor may it be derogated from nor abrogated. Indeed, by neither the Senate nor the people can we be released from this law; nor does it require any but ourselves to be its expositor or interpreter. Nor is it one law at Rome and another at Athens; one now and another at a later time; but one eternal and unchangeable law binding all nations through all time." Marcus Tullius Cicero, reported in Lactantius, *Divina institutiones*, trans. Roberts and Donaldson (1871), vi, 8, 370.

†As is often true with philosophies, there is an inherent conflict between the pure precept of positive law and natural law. As proffered by Thomas Hobbes (1588–1679), positive law is essential to protect people from their primitive state, so when a law is enacted, people are duty-bound to obey it. Natural law presupposes a system of law grounded on its intrinsic truth rather than on any power of compulsion, and it is held to exist irrespective of and sometimes inconsistent with man-made laws. The tension between individual belief in and respect for natural law versus the positive laws of the state is not the subject of an abstract debate. One justification often given for civil disobedience is that the violator is actually complying with a higher law, namely natural law.

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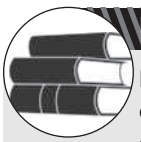
1. The *rights of man* are inalienable and indestructible.
2. Paramount is the natural law doctrine that the most fundamental rights of all human beings are life, liberty, and property.[7]
3. Legitimate governments are obligated (by natural law) under their social contracts (constitutions) to protect and guarantee these rights to every person within their respective jurisdictions.
4. The higher law acknowledges and promotes the principle of *private domain* into which governments should not intrude. Under this doctrine, the individual is free to do anything he chooses, unless specifically prohibited or circumscribed by reasonable positive law. This means that one may violate ethical standards, hallowed conventions, and Holy Writ, and yet not be answerable to the state unless the behavior involved has been prohibited or circumscribed by reasonable positive law. By contrast, many countries in today's turbulent world allow their citizens to do only that which is permitted by their man-made rules and decrees. All else that conflicts therewith is deemed prohibited.
5. No person is allowed to be a judge in her own cause.[8] Thus, a justice of the U.S. Supreme Court who has a personal interest in a controversy under appeal before the Court will refuse to participate in the case. A long-standing philosophical bias is not a disqualifying conflict of interest.
6. No person is above the law—not legislators, not presidents, not judges.

In Chapter 1, we used the following case to describe the difference between civil and criminal law and concluded that neither was applicable to the situation.



**LEGAL FOCUS—PROBLEM**

Late one night, David Thomas Cash, Jr., age 19, observed his friend Jeremy Strohmeyer, age 20, escort a young girl into a restroom inside the Primadonna casino near Las Vegas. Shortly thereafter, Cash followed them inside, where he peered over the top of a stall. He saw Strohmeyer grappling with the girl but said nothing and left. Later, Strohmeyer rejoined Cash in the casino. After discussing the killing of the girl, Cash and Strohmeyer continued their evening of conviviality and gambling. Strohmeyer ultimately pled guilty to the rape and murder of the victim and is serving life imprisonment without the possibility of parole. Did Cash have a natural law right to choose to assist, or to ignore, the victim?

Yes. Recall from paragraph 4 earlier: "… one may violate ethical standards, hallowed conventions, and Holy Writ, and yet not be answerable to the state unless the behavior involved has been prohibited or circumscribed by reasonable positive law." Under the natural law principle of private domain, Cash was free either to help the victim or to ignore her plight. Nevada had no statute (positive law) criminalizing a refusal to prevent a crime from occurring. Further, it is unclear whether a law requiring citizens to intervene in criminal conduct would be constitutional.

Important elements of the natural law and natural rights were included in the second paragraph of the Declaration of Independence:

> *We hold these truths to be self-evident, that all men are created equal, that they are Endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.*

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> *That whenever any Form of Government becomes destructive of these ends, it is the Right of the people to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.*

In January 1776, George Washington wrote of "the propriety of separation [from England on the basis of] … the sound doctrine and unanswerable reasoning contained in the pamphlet *Common Sense*." The author of *Common Sense*, Thomas Paine, summed up the spirit of the time in these lofty words:

> *But where, say some, is the King of America? I'll tell you, Friend. He reigns above, and does not make havoc of mankind like the royal brute of Britain. Yet, that we may not appear to be defective even in earthly honors, let a day be solemnly set apart for proclaiming the charter; let it be brought forth placed in the divine law, the word of God; let a crown be placed thereon, by which the world may know, that so far as we approve of monarchy, that in America the law is king. For as in absolute governments the king is law, so in free countries the law ought to be king; and there ought to be no other.*[9]

When we speak of constitutional law today we mean the fundamental law or the supreme law of the land. Constitutional principles accorded special designation as constitutional laws are (1) judicial review, (2) separation of powers, (3) federalism, and (4) civil rights and liberties. These four special categories contain the most publicized and exciting principles of constitutional law.

## WHAT IS JUDICIAL REVIEW?

**judicial review** Power of the U.S. Supreme Court to declare unconstitutional an act of Congress, a presidential order, or a state law.

**Judicial review** is the power and duty vested in the U.S. Supreme Court to declare null and void (that is, of no validity or effect) any statute or act of the federal government or of any state government that violates the U.S. Constitution. (State supreme courts possess similar powers to nullify laws of their own legislatures that violate their respective state constitutions.) Although not specifically authorized in Article III (the Judicial Article of the Constitution), some form of judicial review was presumably envisioned by the framers of the Constitution. According to Alexander Hamilton, the Supreme Court is the "least dangerous branch" because it controls neither sword nor purse.[10] He said the Supreme Court and not the Congress or the president should be the custodian of the Constitution. Further, he referred to "the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." What *judicial review* meant, however, was not articulated until 1803, in the case of *Marbury v. Madison*.[11] This case did more than validate (that is, give legal force to) the judicial review of legislative and executive enactments and orders. Chief Justice Marshall enunciated a major power for the Supreme Court, recognizing it as the sole interpreter and custodian of the Constitution, to the exclusion of the president and Congress. With this declaration came the awesome duty of defining what the Constitution means and what it does not mean.

Although the exclusive judicial power of review has engendered heated controversy over the years, it also has been a stabilizing force for a growing and changing society. As national economic, social, and political conditions have changed, so, too, have attitudes and opinions of the people. This evolution is reflected in the leaders the people elect to office and in the Supreme Court justices who are appointed. As a result, some long-standing Supreme Court decisions have been changed. What once was ruled

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constitutional thereafter is declared unconstitutional. For example, as the twentieth century began, racial segregation in schools was accepted and even endorsed by the separate but equal rule of *Plessy v. Ferguson*.[12] In 1954, however, the "separate but equal" rule was rejected by *Brown v. The Board of Education of Topeka*.[13]

Besides judicial review effectuating the equivalent of a change to the Constitution through interpretation, there is a way to directly change the Constitution. The people can and do make changes through the more difficult process of formal amendment. For example, women obtained the right to vote in 1920 by the Nineteenth Amendment to the Constitution, and in 1971 the Twenty-Sixth Amendment lowered the voting age in national elections to 18.

## WHAT IS SEPARATION OF POWERS?

**separation of powers**
The distribution of the various powers of government among three branches so that each branch checks the other two.

**Separation of powers** is an indispensable element of our charter of government. The Constitution allocates powers of government according to function. The functional branches are legislative (law making), executive (law enforcing), and judicial (adjudicating).[14] Separation of powers provides an effective balance of power among the three branches of government. Different officials have unique and specific powers, and each branch operates under the direction of different persons. Each branch checks the other two to prevent them from garnering or exercising power illegally.[15] This institutional structure restrains a natural human tendency toward expansion of personal power. While preventing possible tyranny (that is, despotic abuse of authority), the separation of powers provides officials sufficient independence to faithfully execute their constitutionally delegated powers.

The constitutional doctrine of separation of powers speaks of the relationships among the divisions of government. Although there are indeed exclusive functions assigned to each (for example, tax bills must begin in the House of Representatives), much of the work engaged in by the three branches of government is shared.

Congress may pass a bill; the president may sign or veto it. Congress may override the veto and enact the bill as law. The Supreme Court may strike down the statute as unconstitutional. If necessary, Congress may initiate a campaign to have the Constitution amended to accomplish the purpose of the statute, or more likely it may attempt to pass a new statute that is in conformity with the Constitution. Note, too, that the president may be able to appoint new members to the Supreme Court (with the advice and consent of the Senate) who are sympathetic to his views.

Most members of the public probably would approve of a litmus test (single-issue test that determines result) for nominees to the Supreme Court. However, over a lifetime, a justice will face an extraordinary number of important issues involving significant values, and most people, no doubt, also would prefer the appointment of highly qualified persons rather than persons sympathetic to one specific controversial issue—unless that issue was of supreme importance to the individual. This obvious conundrum is typically resolved by the refusal of candidates to respond specifically to such questions, reciting their loyalties to follow the rule of law.

### LEGAL FOCUS—EXAMPLE

In 2005, Sandra Day O'Connor announced her intent to retire from the U.S. Supreme Court. President George W. Bush nominated Judge John Roberts, then a federal court of appeals judge for the District of Columbia Circuit to fill the vacancy. On September 4, 2005, before the confirmation

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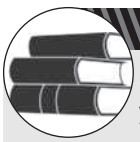
hearing, Chief Justice Rehnquist passed away. The president then changed Roberts's nomination to instead nominate him to replace Rehnquist as chief justice. After Justice Roberts was confirmed by a vote of 78–22, President Bush nominated Harriet Miers for the still vacant seat of Justice O'Connor.

Ms. Miers eventually withdrew her nomination before the formal confirmation process began, and President Bush nominated U.S. Court of Appeals Judge Samuel A. Alito, Jr., for the position. Eventually, Justice Alito was confirmed, albeit by a much tighter vote of 58–42. Along the way, both Roberts and Alito endured congressional hearings where repeated questions about their views on controversial topics including abortion were asked. Many felt that they repeatedly avoided answering those questions directly. Specifically, on the abortion-related questions, Justice Roberts' responses included: "I should not, based on the precedent of prior nominees, agree or disagree with particular decisions … I'm reluctant to do that," "I didn't [then] have a position," and "I feel the need to stay away from a discussion of particular cases."[16]

It is reassuring to note that, in the final analysis, the power to decide most issues rests with the people, who may use their votes—the power of the ballot box—to elect representatives who are expected to comply with the expressed will of the people. However, elected representatives are not legally obliged to do so. Even if they were, public opinion is often divided and sometimes fragmented on controversial issues.

The presidential veto procedure is prescribed by Article I, Section 7 of the Constitution, which states, "Every Bill which shall have passed the House of Representatives and the Senate shall, before it becomes a Law, be presented to the President." Thereupon, "if he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated." If, after reconsideration, it is approved by two-thirds of both houses, it shall become a law. Note that "if any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law."

Each year, Congress presents a budget to the president for signature into law. Typically, some proposed expenditures in the budget are intended primarily as political patronage. These so-called "pork barrel" budget items are added by the most powerful legislators in Congress, a tactic that assists them in their reelection campaigns.



## LEGAL FOCUS—PROBLEM

Congress presented the fiscal year budget for the year 2004 to the president for signature or veto. Included was an item for $10 million for "parks and recreation" projects in Congresswoman Peavy's hometown. For years, Peavy had been a vocal critic of the president. Can the president approve the budget yet, in retaliation, veto the proposed appropriation for Peavy?

No. The power to make partial vetoes (called *line-item vetoes*) would have the practical effect of amending enactments by Congress. The president is not authorized by the Constitution to amend laws proposed by Congress.[17]

Thus, the separation of the legislative and executive powers cannot be blurred by line-item vetoes.

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# HOW IS THE NATIONAL GOVERNMENT ORGANIZED?

## Legislative Branch (Congress)

Article I of the Constitution provides the organization and functions of the legislature. The legislative branch is *bicameral* (having two parts), with an upper house (the Senate) and a lower house (the House of Representatives). Members of the Senate originally were appointed by state legislatures, but in 1913 the Seventeenth Amendment changed the system to direct selection by popular vote. The Senate has 100 members, two from each state. Members of the House of Representatives are elected to 435 seats that are allocated to the states on the basis of population, as determined in the decennial national census.

The basic function of the legislative branch is to enact laws. This is usually accomplished by a majority vote for or against enactment, amendment, or repeal. In both the House and the Senate, a quorum consists of a majority of the members who have been elected and sworn (that is, taken an oath of office) to serve. Powers of the Congress are spelled out in Article I, Section 8 of the Constitution. They include the power to tax and borrow money, to regulate interstate commerce, to make laws regulating bankruptcies, to coin money, to establish post offices, to establish courts inferior to the Supreme Court, to declare war, and to govern the District of Columbia (the area of the nation's capital). However, Congress has great latitude in the detailed application of its enumerated powers by virtue of its blanket authority "to make all Laws which shall be necessary and proper for carrying into Execution" its stated powers.[18]

Once the legislature enacts a law, its job is usually done. All persons subject to the newly enacted law are then required to comply. If necessary, lower-level government officials in the executive branch (for example, police) enforce compliance. If and when the constitutionality of a statute is challenged, the dispute may ultimately be resolved by decision of the Supreme Court.

Sometimes newly enacted laws never actually become law.

**LEGAL FOCUS—EXAMPLE**

Congress passed a law releasing alien Chinese students who were studying in the United States from the requirement of returning to China upon the expiration of their visas. (A visa is a document that grants a citizen of a foreign country legal permission to live, work, or study in the host country.) This was done because Congress believed that the Chinese government would punish most of these students for supporting the 1989 student uprising in Tiananmen Square and elsewhere in China. The proposed law was sent to the White House for signature by the president.

President George H. W. Bush vetoed the legislation on the grounds that Congress was interfering with foreign policy matters, a presidential responsibility. Moreover, the students were already protected against forced repatriation by his executive order, which directed the Immigration and Naturalization Service to extend the Chinese student visas indefinitely. When the bill was returned to the Congress, the House voted to override the veto, but the Senate did not; thus, the president's veto stood.

The only constitutional method to remove a president from office is by a congressional proceeding called *impeachment*. Impeachment is a process potentially leading to removal from office of certain federal officers, including the president. The process for the president is provided for in the U.S. Constitution Article II, Section 4: "The

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President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Impeachment requires a majority vote in the House of Representatives. The impeached office holder is then subject to trial in the Senate with removal from office requiring a two-thirds majority vote of the Senate after trial. In 1998, the U.S. House of Representatives voted to impeach President William Jefferson Clinton for obstruction of justice and perjury relating to his conduct following the infamous "Monica Lewinsky affair." The U.S. Senate, with Supreme Court Chief Justice William Rehnquist presiding, conducted an impeachment trial. On February 12, 1999, it voted 50–50 and 45–55 on the respective charges, thereby declining to remove the president from office.

## Executive Branch (Presidency)

The president and vice president are each elected to a term of four years, with a limit of two consecutive full terms.* The constitutional process for choosing the chief executive and his running mate is cumbersome because the method is indirect, with state electors actually electing the president by casting electoral votes. The number of electors in each state is determined by the number of representatives the state has in the House, plus its two senators. After the 2000 census, each of seven states (Alaska, Delaware, Montana, North and South Dakota, Vermont, and Wyoming) and the District of Columbia had three votes, for a total of 24; populous California alone had 55; and New York had 31.

In total, there are 538 electoral votes: 435 based on members of the House, 100 based on members of the Senate, and three from the District of Columbia. To win requires a majority (270) of the electoral votes. Note that presidential elections and vacancies are further regulated by technical amendments to the Constitution.[19]

The unique Electoral College has survived despite repeated efforts to alter or abolish it. This survival may be because the Electoral College maintains the viability of political parties which in turn create a balanced system that brings forward positions on the latest controversies and issues. A new Electoral College is created for every presidential election; that is, the people who serve as electors (casting votes) in the Electoral College are different for each election.

**Powers of the President** Section 2 of Article II of the Constitution specifies the following presidential powers. First and foremost, and of momentous importance during most of the twentieth century, is the power of the president as "Commander in Chief of the Armed Forces of the United States and of the militia of the several states, when called into actual service of the United States …."

Whereas Congress retains to itself the power to declare war, the power "to make war" is granted solely to the president. It was during the Civil War that the commander in chief was declared to be the sole determiner of whether the hostilities were of "… such alarming proportions as will compel him to accord to them the character of belligerent"[20] and whether he would engage the armed forces of the United States in such hostilities. Advanced technology has changed the nature of modern warfare, thus further justifying the presidential power to respond quickly with military force to a military attack without congressional approval.

*"No person shall be elected to the office of the president more than twice, and no person who has held the office of president, or acted as president for more than two years of a term to which some other person was elected president, shall be elected to the office of the president more than once." (U.S. Constitution, Twenty-Second Amendment)

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The president has the duty and power to make treaties, but they must be approved by a two-thirds vote of the Senate.[21] For example, three controversial yet vitally important treaties entered into by our country in the twentieth century were the Charter of the United Nations (1945); the North Atlantic Treaty Pact (1948), which created NATO (North Atlantic Treaty Organization), a defensive military alliance; and the North American Free Trade Agreement (NAFTA) among Canada, Mexico, and the United States. All three of these treaties were duly voted on and approved by the Senate. The president may also sign *executive agreements*, which do not require Senate ratification. For example, during the early months of World War II, when German submarines were sinking many supply ships in an attempt to starve England into surrender, President Franklin D. Roosevelt signed an executive agreement giving the British 50 1914-type destroyers in exchange for eight naval bases. This was constitutional, despite the fact that the United States had not yet declared war on Germany.

With the "advice and consent" of the Senate, the president appoints ambassadors, public ministers and consuls, Supreme Court justices, and presidential advisors.[22] Congress has empowered the president to choose other federal officers and commission heads. The Judiciary Act of 1789 gave presidents the power to nominate appellate and district court judges for the federal courts. Congress must approve these appointments, a function that is another example of shared power between the branches of government.

Some scholars contend that the power to nominate Supreme Court justices, who serve for life, is the single most important power of the president.

**LEGAL FOCUS—CASE**

In the case of *Roe v. Wade,* the U.S. Supreme Court held for the first time that women have a constitutionally protected right to choose whether or not to have an abortion. Following this declaration, the states could no longer abolish abortion within their borders. Four justices voted against the majority in *Roe v. Wade*. Could the replacement of one justice cause reversal of Roe, thereby altering or even eliminating the abortion law?

*Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705 (1973).

Yes. Many of the most controversial Supreme Court cases are decided by 5–4 votes. Nonetheless, presidential candidates historically have not announced the names of persons they would, if elected, nominate to the Supreme Court if the opportunity should arise. Nor do presidential candidates announce the names of possible appointees to their cabinets (department heads with the highest authority in an administration). Thus, voters make assumptions about their future based upon the campaign statements and track records of presidential candidates.

## Judicial Branch (Courts)

Article III of the Constitution, the judicial article, declares, "The Judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[23] Compared with detailed mandates given to the executive and legislative branches, Article III is sparse in providing guidance to the judiciary. Despite this lack of a closely defined role, the federal courts have become central to the doctrine of separation of powers. The U.S. Supreme Court has created and refined the "proper" place of the court within the federal government, beginning with its landmark case of *Marbury v. Madison* mentioned earlier.

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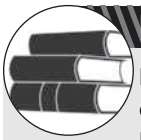
The power to determine the constitutionality of federal and state legislative enactments, as well as judicial review of actions taken by the executive branch, has given the U.S. Supreme Court major responsibility for maintaining the integrity of the Constitution. The Supreme Court is commonly thought to be the branch of government least likely to be swayed by political pressures and popular whims. One reason for this is that, like all federal judges, Supreme Court justices hold office for life, contingent only on good behavior. It is not uncommon for Supreme Court justices to remain active on the bench well beyond the traditional retirement age of 65. For this reason, the Court was once referred to as "the nine old men."

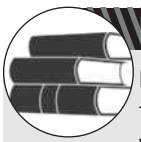
All courts are empowered to issue orders to compel compliance with their rules and procedures. For example, courts authorize the issuance of subpoenas (orders to appear at a certain time and place) upon proper request by officials or lawyers (for their clients) who are engaged in litigation or investigation. Failure to comply with such a judicial order can prompt a court to hold the witness in "contempt" of court. The court's penalty for contempt may range from a monetary fine to jail time.



**LEGAL FOCUS—PROBLEM**

In 1971, the Supreme Court approved the legality of a subpoena served upon President Richard Nixon (executive branch) to deliver to the Congress (legislative branch) certain tape-recorded conversations that Nixon most certainly knew would end his term of office. He could have refused to obey the subpoena and destroyed the tapes. If Nixon had refused to comply with the subpoena and had destroyed the tapes, what would have happened?

Most likely, the Congress would have impeached President Nixon for failure to comply with a lawful subpoena approved by the U.S. Supreme Court. But it is not clear that disregard of a subpoena issued by Congress is a legal basis for impeachment. We never will know what would have happened then. But it is important to know how the three powers of government must interact, and that the gravity of the crisis then related to the president's willingness to comply with an order of the judicial branch of government.



**LEGAL FOCUS—PROBLEM**

In 1998, President Clinton was subpoenaed to testify before a federal grand jury, not as a witness, but concerning his personal conduct. Again, rather than create a constitutional confrontation about the obligation of a president to respond to a subpoena, President Clinton ultimately agreed to testify, and did. Could the president personally have appeared at the time and place to testify, but then refused to answer questions?

In Chapter 6, you will review the fundamental principle in our society that no person is required to testify against himself in a criminal proceeding. A person may volunteer to do so, but she need not. President Clinton did not assert his privilege against self-incrimination, either because there was no criminal conduct about which he was concerned or because he simply waived his right. He became the first sitting president in history to testify before a federal grand jury (by closed-circuit television). But in either case, he ultimately chose the course of former President Nixon by complying with the dictates of the subpoena.

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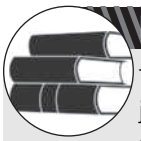
Federal judges can be removed from their courts only by death, voluntary retirement, or impeachment by the Congress of the United States.

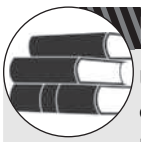


**LEGAL FOCUS—PROBLEM**

The Honorable Harry E. Claiborne, a federal district judge in Nevada, was tried and convicted of cheating on his income tax by filing a false return. He was sentenced to federal prison for two years. Upon conviction, the judge refused to resign his office and continued to collect his $78,700 annual salary. He made clear his intent to resume his lifetime office after the completion of this term.[24] Can he be impeached?

Yes. Eight months after returning to his job as a judge, Claiborne was finally removed from the court by impeachment.[25] "Only 13 federal judges have been impeached in the history of the United States, and of those, only seven were convicted."[26]

Congress is reluctant to use the impeachment procedure to remove public officials from office because it is costly, cumbersome, and time-consuming. But impeachment is the only way to remove federal judges from the public payroll even when they are proven guilty of criminal conduct. Fortunately, criminal acts by federal judges are rare.[27]



**LEGAL FOCUS—PROBLEM**

U.S. District Court Judge James Ware told a conference of federal judges and lawyers a riveting story of how his brother had been killed in 1963 by a racist's bullet in Alabama on the same day of the Ku Klux Klan's bombing of a Baptist church in which four black girls were killed. Later, it was discovered and widely publicized that Judge Ware's story was a lie. What punishment, if any, do federal judges receive for conduct that goes to the heart of the credibility of the courts—honesty in public life?[28]

Before his misrepresentation, Judge Ware had been nominated for promotion to the U.S. Court of Appeals. After publication of his falsehood, Judge Ware withdrew his nomination. He also was publicly reprimanded by a panel of federal judges who stated that his conduct "was prejudicial to the effective administration of the business of the courts." Judge Ware was not removed from office.

Under the Constitution, the Senate has the sole power to try all impeachments, and no person may be convicted without the concurrence of two-thirds of the members present. When political loyalty to the accused is involved, such a majority can be difficult to obtain unless the alleged offense is flagrant. Understandably, therefore, the practice is seldom used.

Congress sets the salaries for all federal employees, including judges. However, once the salaries for federal judges are set by Congress, they can never be reduced for any reason during the tenure of judges then on the court.[29] This serves to forestall possible improper efforts to impose financial pressure on judges whose opinions are not favored. Of course, the salaries of new appointees may be lower than those of their predecessors, but this is unlikely to happen.

Reduction of salaries has been the least of the current problems for federal judges. A report of the American Bar Association stated, "The Constitutional guarantees of life tenure and an undiminished salary were designed to protect the independence of the

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Federal judiciary. In today's environment, neither guarantee is secure. Although erosion of pay may not legally constitute a diminution in salary, it undermines the purpose of the guarantee of an undiminished salary. Similarly, the commitment to lifetime tenure is undermined when inadequate judicial salaries deter candidates from seeking appointment to the bench and discourage judges from remaining on the bench."[30] Former chief justice of the Supreme Court William H. Rehnquist agreed, stating, "I consider the increase in judicial salaries to be the most pressing issue before the federal judiciary today."

## WHAT IS FEDERALISM?

**federalism**
A form of government consisting of a union of more or less self-governing states under an umbrella of federal government.

**writ of *habeas corpus***
[Latin: "you have the body"] A formal written order that an arrestee be brought before a court.

**bill of attainder**
Act of the legislature inflicting capital punishment upon a named person or member of a specific group without trial and conviction. Forbidden by the U.S. Constitution.

***ex post facto* laws**
[Latin: "after the fact"] A statute that retroactively makes previously lawful conduct a crime. Such a statute is unconstitutional.

**Federalism** may be defined as a political arrangement in which two or more levels of government provide a variety of services for a given group of citizens in a specified geographic area. For example, Iowans are served by the national government and by their state government as well as by a variety of local governance structures.

The United States is a case study in federalism. Scholars have estimated that more than 80,000 state and local governments* exist in the United States, each striving to meet the needs and wants of our complex, technologically driven society. This governmental profusion operates in a climate of political pressures, involving both competition and cooperation among various public officeholders. In effect, the U.S. Constitution created and endorsed some of this complexity when it reserved a large measure of sovereignty for each of the original 13 states, in accordance with Article IV and the Tenth Amendment of the U.S. Constitution.

In any event, we are a people served by, but also subject to, government rules that range from taxation mandated by Congress to the narrowly defined standards for admission of toddlers to kindergarten mandated by local school boards.

The Constitution defines the boundaries between the national government and the state governments, providing that national government has only those powers delegated to it and such other powers that naturally flow therefrom. Congress shall have the power "to make all laws which shall be necessary and proper for carrying into Execution the foregoing powers."[31] Some powers are exclusive as to the national government, such as "to coin Money" and "to make Treaties."[32] But other powers are shared, such as taxing and spending. As noted, all other powers "are reserved to the States respectively, or to the people."[33]

Our Constitution also limits the power of the national government; for example, it is prohibited from denying a request for a **writ of *habeas corpus*** (Latin: "you have the body"), a formal written order that an arrestee be brought before a court, usually to protect against abusive incarceration without release on bail, pending a formal trial. [34]

Under the Constitution, some powers are also denied to the states, such as the power to make a treaty. Finally, there are powers denied to both, such as the passage of **bills of attainder**, which are acts of the legislature punishing a named individual(s) or member(s) of a specific group without a judicial trial; and ***ex post facto*** laws (Latin: "after the fact"), which are retroactive laws that would punish alleged violators for acts lawful when committed, or that would increase the punishment applicable at the time the act was committed.

*All governments within states were (are) created by the state legislatures under provisions in their respective state constitutions. The governments of cities, boroughs, and counties are most commonly recognized by citizens. Other varieties of local governments are school districts, flood-control districts, mosquito-abatement districts, and park districts. Under their charters of government (granted by state legislatures), they have budgets, collect taxes, and perform various other government functions.

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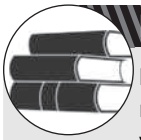

**LEGAL FOCUS—PROBLEM**

David Cash (mentioned earlier in this chapter) was not guilty of any crime by declining to rescue a young girl from his friend's murderous acts. Assume that in response to public outcry, Nevada passed a statute that made failure to assist the victim of criminal behavior a felony (that is, a serious crime). If the state of Nevada then arrested, prosecuted, convicted, and sent Cash to jail, what, if anything, could he do?[35]

Under the preceding hypothetical example, Cash could sidestep the Nevada judicial system altogether and petition a federal court to protect him from this *ex post facto* law. The U.S. Constitution prohibits states from subjecting people to such laws regardless of the outcry or sentiment of most citizens. The federal court would order Nevada to release Cash.

## WHAT CONSTITUTIONAL POWERS BELONG TO CITIZENS?

**initiative process**
An electoral process for making new statutes or changing the constitution by filing appropriate formal petitions to be voted upon by legislature (and governor) or by the total electorate.

**referendum**
A democratic process whereby a state legislature submits (refers) proposed or existing laws to the electorate for approval or rejection.

**recall**
A democratic process for removing public officials from their elective positions by a vote of the people taken after filing of a petition signed by the required number of qualified voters.

Although much power is delegated to the national government, and great power is reserved to states, it is the people who possess the ultimate power in our free society with its constitutional system. One of the great powers of the people is found in their right to vote.

Every citizen wishing to govern personally must compete with political opponents and win this privilege by receiving a majority of the people's vote. "[T]hose who make public policy [laws] in this society are privileged to do so because they have won the struggle against others who seek the privilege of making policy."[36] It is by popular vote that lawmakers and governors are chosen.

Some state constitutions give qualified voters the right and power to bypass customary lawmaking procedures of state and local governments and to make laws directly. This is called the **initiative process**. It enables groups of voters, if sufficient in numbers, to originate and pass statutes, ordinances, and amendments to their respective constitutions without recourse to the legislature. State legislatures may submit a **referendum** petition to voters for their approval or disapproval of an existing or proposed law. State constitutions as well as statutes can be created, amended, or disapproved through the referendum process. The **recall** petition enables voters to remove from office any elected state or local official before the expiration of his term. For most of the past hundred years, these three practices of direct democracy have given the people enhanced power of control over legislation and legislators.

These practices, especially the initiative process, are sometimes misused by well-financed special interest groups, businesses, and professions to secure enactment of laws that favor their own purposes. Such groups may hire public relations firms to run a campaign for passage of certain desired legislation. With the use of direct-mail fund-raising, and with payments offered to "vote hustlers" for each signature obtained, the public relations firms readily qualify their initiatives for the ballot. Later, absentee ballots may be mailed to persons who have signed the petitions to make it easy for them to vote on the particular proposal.

**LEGAL FOCUS—EXAMPLE**

Citizens have used the initiative process to establish a statewide lottery in California, to protect the moose in Maine, to encourage the death penalty in Massachusetts, to approve the sale of wine in local grocery stores in Colorado, to abolish daylight saving time in North Dakota, and to limit rights of gays in Colorado.[37]

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Critics have condemned the initiative process as it is presently used. Controversial issues make their way onto the ballot and are often written in a manner so verbose and confusing that most people cannot reasonably evaluate the relevant pros and cons or fairly understand how they should vote. The confusion frequently is increased by slick media advertising. Despite the potential abuse inherent in the initiative process, however, it has the big advantage of increasing voter interest and participation.

**LEGAL FOCUS—CASE**

In 1996, California voters approved by majority vote a bitterly contested initiative. The effect of Proposition 209 was to prohibit affirmative action in public education, employment, and other state programs. Minorities affected by the change in the law filed lawsuits in federal court on the grounds that it would deny them equal protection under the law as guaranteed by the U.S. Constitution. What was the result?

*Coalition for Economic Equity v. Wilson*, 110 F. 3rd 1431 (Ca.9, 1997).

In an *ex parte* (no opposition) hearing, a federal court judge initially suspended Proposition 209 pending a future trial. Shortly thereafter, a higher federal court overruled the decision, and Proposition 209 then went into effect. Thus, through the initiative process, the voter majority was able to create a new law that the state legislative branch was unwilling to enact. Proposition 209 raised the visibility of affirmative action and has been the catalyst for the creation and hardening of opposition groups on both sides of the issue.

## THE POLICE POWER

**police power**
The inherent power of the government to make laws and impose reasonable regulations for the health, safety, morals, or general welfare of the public, even when this limits individual freedom.

Neither those who wrote the Constitution nor those who ratified it intended the national government to have authority over most details in the everyday lives of people. James Madison believed that limitation on the power of the national government was a major virtue of federalism,[38] whereby the police power is implicitly reserved to the states under the Tenth Amendment. The **police power** is the right to enact and enforce laws for the prevention of fraud and crime and to promote order, safety, health, morals, and the general welfare of the people. Both state and local governments implement police power.

**LEGAL FOCUS—CASE**

The Virginia state entomologist ordered Julia Miller to cut down a large number of fungoid-infected ornamental red cedar trees growing on her property. The order was made to prevent the transfer of cedar rust disease to local apple orchards. The disease did not affect the value of the cedar trees but did threaten to destroy apple crops in the vicinity. Is Miller bound to comply with the order, and if so does she have a right to compensation for the loss of value to her property?

*Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246 (1928).

It is not unusual for local governments to quarantine crops, create firebreaks, and delay people to respond to important or emergency situations. Persons subject to these actions

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may suffer significant losses without any legal right to recover these losses from government. Julia Miller had to comply with the order, and no reimbursement for her loss was required of government. "And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property."[39]

The police power is thus an essential attribute of government but is subject to the limitations of the federal and state constitutions. Under the Constitution, the national government's power to regulate, control, and circumscribe human conduct is specifically tied to one or more of its delegated powers.[40]

**LEGAL FOCUS—EXAMPLE**

The Federal Aviation Administration (FAA) was established to provide for safety regulation in the manufacture of aircraft as a "necessary and proper" extension of Congress's power to "regulate Commerce … among the several States," as prescribed in the Constitution: The Congress shall have Power … To regulate Commerce with foreign Nations, and among the several States…. And To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.[41]

We will examine the commerce clause of the Constitution in more detail later in this chapter. Here, the point is that to create the FAA, Congress needed authority in the Constitution. They relied upon the commerce clause. The FAA is an example of an administrative agency. Chapter 5 examines administrative agencies and administrative law in detail. The topic of what authority Congress or a state has or does not have is a persistent one.

## WHAT IS THE SUPREMACY CLAUSE?

According to the U.S. Constitution:

> *This Constitution and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary not withstanding.*[42]

**supremacy doctrine**
The judicial doctrine that holds that any state or federal law that is inconsistent with the U.S. Constitution is null and void.

Thus, the Constitution and federal laws made under it, as well as decisions of the Supreme Court of the United States, together with related supporting opinions, are constituent parts of the "supreme law of the land." The significance of the **supremacy doctrine** is that it invalidates any conflicting state law by preemption, meaning that federal law takes precedence over state law in areas of control expressly delegated to the United States by the Constitution.[43] The supremacy clause does not give the federal government additional authority, it just makes what authority it has the superior law. The supremacy clause, however, makes commerce clause authority powerful.

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**LEGAL FOCUS—CASE**

An Arizona statute made it unlawful to operate a train of more than 14 passenger cars or 70 freight cars within the state. The law was a safety measure enacted under the state's police power. Was such state regulation of train lengths lawful?

*Southern Pacific v. Arizona*, 325 U.S. 761, 65 S.Ct. 1515 (1945).

No. Trains move into and out of Arizona, from and to other states. Interstate commerce is subject to federal regulation under Article I, Section 8 and the Arizona statute unduly burdened interstate transportation. If the state regulation affects interstate commerce only slightly, or if national interests are served well by it, then states may regulate the particular interstate commerce and preemption is unnecessary.

Today, there is no argument about the supremacy of the national government. Most of the debate about proper state and federal roles has to do with "effectiveness": should it be done nationally, or can it be done better locally? The availability of necessary funds and adequate resources are also important factors. States, counties, and cities that are "strapped for cash" eagerly seek federal funding for local projects such as public housing, mass transit construction, education, and indigent care. Also, major natural disasters require a national response. The terrible and devastating harm done by Hurricane Katrina will probably have a powerful effect on the direction of the debate over national versus local response, though which direction it will go is not so obvious.

## WHAT ABOUT TAXES?

In the famous case of *McCulloch v. Maryland*, Chief Justice John Marshall observed that "The power to tax involves the power to destroy."[44] Although primarily revenue-raising measures, taxes also are used to influence the behavior of people and the production and distribution of goods and services. Income taxes and estate and inheritance taxes (so-called *death taxes* on the privilege of giving and receiving part of a decedent's estate) tend to redistribute wealth. So-called *sin taxes* on liquor and tobacco products presumably tend to discourage harmful use of such products. Credits against the payment of taxes otherwise due by renters tend to ease the costs of housing. Tax benefits accorded parents of dependent children tend to ease family costs. And so on.

The authority to tax is provided to the Congress in Article I, Section 8 of the Constitution.

> *The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.**

Taxes are never popular, but, it has been said, they are the price of civilization. They are essential for the operation of government at all levels. The U.S. Constitution gives Congress "Power To lay (that is, impose) and collect Taxes, Duties, Imposts (a generic term for taxes, usually referring to schedules of customs duties), and Excises (the term loosely applied to most taxes, including the sales tax, but excluding the income tax and the property tax)."[45]

*Significant limitations on how the federal government could tax were removed by constitutional amendment. "Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." Sixteenth Amendment (ratified on February 3, 1913).

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## LAW AROUND THE WORLD

### The Taxman Still Cometh

The United States might have a complex tax regime, but so do many other countries. And nearly every country has a vastly different tax scheme. Lucky businesses and individuals in the United Arab Emirates pay no income tax at all. Most other developed countries have some form of income tax. But rates differ, calculation methods differ, payment timing and methods vary, and thus every country has unique tax laws. Tax is even an international competition tool. For example, Switzerland, Bermuda, and the Cayman Islands all offer secrecy and special benefits to lure savings and investment from individuals in more tax aggressive countries. Meanwhile, in Russia, the death penalty is available to punish tax evaders.

For most employees, the personal income tax is collected by their employers, who are required to withhold proper amounts from wages or salaries earned. All wage earners are reminded of this each payday when they compare the difference between their "gross" and "net" earnings. The difference is a wide range of federal and state income taxes. Through the process of withholding income taxes, compliance and payment are comparatively simple and assured. Otherwise, at year's end, taxpayers might find that they did not have enough money on hand to pay their taxes.

But for persons with incomes from various investments, and for business firms, the income tax has evolved into a monstrous maze of confusing regulations. Certified public accountants (CPAs) and tax lawyers often disagree as to the proper interpretation of many clauses. Huge national CPA firms employ both accountants and tax lawyers to offer their customers full tax services. Less wealthy individuals obtain assistance in preparing their returns from tax preparer businesses available in most cities in the United States. Computer programs also enable many people to prepare their own tax returns without professional assistance, and some file them electronically. Entire books are written on the topic of tax computation ideas, interpretations, rules, and controversies. The concept of a "tax shelter" (an investment or activity with at least one purpose being to reduce tax liability) is constantly tested in courts.

The income tax on individuals and corporations has become the most important single source of revenue for the federal government. It is also imposed by most states and by some local governments. Economists justify it as the most equitable, or progressive, of taxes, especially when rates are graduated, because the levy is imposed in accordance with apparent ability to pay.

## MORALS AND ETHICS

### Duty to Pay Taxes?

Paying taxes in the United States, with its myriad of credits, special exemptions, and other means to reduce one's taxes, presents a moral and ethical question. Although tax evasion is a crime, the last many decades have been filled with persons finding a way to deduct an expense, only to see Congress "plug the hole" with a statute prohibiting such a "tax shelter." Americans can often be divided into two camps: those who say it is your duty to pay your taxes and those who say it is your duty to pay the minimal amount of taxes the law allows. These latter taxpayers strive to find interpretations or loopholes that allow them to exploit an exemption or obtain a credit. Corporations pay lawyers expensive fees for advice that a tax strategy is "reasonable." What it all comes down to is that paying taxes for many involves finding the gray line between a legal obligation to pay taxes and the moral justification not to pay them.

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In contrast, the sales tax is regressive in that it imposes a disproportionately heavy burden on persons with *low* incomes. For example, the sales tax on an automobile is the same regardless of the purchaser's income. This sum may represent a substantial percentage of one person's disposable income yet hardly be noticed by another, more wealthy individual.

**commerce**
The exchange of goods or commodities for payment in cash, credit, services, or other goods.

It also should be noted that the ability to pay taxes is not necessarily related to income. Wealth and annual income are not the same thing. For example, large land holdings—although subject to real property taxes—may produce no taxable income for their land-rich owners. Likewise, persons of great wealth may own tax-exempt bonds issued by the federal or state governments or other public agencies. However, the interest rate on such bonds is generally lower than rates paid by private corporate borrowers. So the owner of tax-free bonds indirectly helps to support the government. Moreover, corporations that reinvest all earnings and pay no dividends (which are taxable income) may, gradually, grow in value and increase the wealth of their shareholders, who pay no income taxes until their shares are sold, if ever, and then at reduced tax (capital gains) rates.

**commerce clause**
A part of the U.S. Constitution that provides Congress with the power to pass laws to provide for trade with foreign countries and among states.

Obviously, there is much to be considered in understanding income taxation. From a constitutional standpoint, there is no right to equality of wealth. That the more wealthy citizens may acquire more luxuries in life, or even better legal services, than less wealthy persons is of no constitutional significance. For example, criminal defendants are constitutionally entitled to *competent* legal services, not the best available legal services nor any particular lawyer of choice.

## WHAT IS THE COMMERCE CLAUSE?

In Article I, Section 8, the Constitution expressly grants the federal government the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." This power to "regulate Commerce" allows the federal government to regulate most business activities in the United States with uniform rules.

**Commerce** includes the buying, selling, and transporting of things of value from place to place. The Supreme Court has held that Congress through the **commerce clause** has the power to regulate any activity, **interstate** or **intrastate**, that "affects" interstate commerce. *Interstate* means any activity that crosses state boundaries. *Intrastate* means any activity that occurs entirely within a state's boundaries. Thus, Congress can pass laws that regulate intrastate commerce if, but only if, interstate commerce is affected. From the 1930s until recent years, the commerce clause authority seemed unlimited. In 1995, however, the Supreme Court decided a case that defined limits, albeit vague ones, on the extent to which the commerce clause could be used as justification for federal authority to regulate.

**interstate**
Activity that crosses state boundaries.

**intrastate**
Activity that occurs entirely within a state's boundaries.

### LEGAL FOCUS—CASE

In 1990, the United States enacted the Gun-Free School Zones Act (GFSZA) which, among other things, prohibited the possession of a firearm in a local school zone. Congress relied upon the commerce clause for its authority to pass the law. Fred was subsequently convicted of possessing a handgun in a school zone. He appealed his conviction in part claiming Congress lacked authority to pass this law and it ultimately was heard in the U.S. Supreme Court. The

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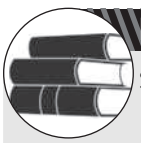
government, in defending the law, essentially argued that guns around schools could cause a violent crime and that violent crime could adversely affect the national economy by either raising the cost of insurance or deterring interstate travel. Thus, the law regulated interstate commerce.[46] Did the Supreme Court accept the interstate commerce basis of federal authority to ban firearms around schools?

No. The Supreme Court noted that "… under the theories that the Government presents in support of [the Act], it is difficult to perceive any limitation on federal power…. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." The Court held that commerce clause authority had to either directly regulate travel or movement across state borders, regulate the instruments of such interstate movement of goods or persons, or regulate "commercial activities that substantially affect interstate commerce."[47] GFSZA did not regulate movement at all, and the activity it did regulate—possession of guns near schools—did not substantially affect commerce; thus, the law was unconstitutional and the conviction overturned.

When states seek to regulate local activities, they frequently collide with the commerce clause. As part of their inherent sovereignty (power to govern), states possess police powers to regulate private activities to protect or promote the public health, safety, or general welfare of their citizens. For example, states have a clear interest in keeping their local roads and highways safe. However, when a state regulates the use of its roads and highways, those laws will also affect interstate commerce. A law setting a top speed on a highway affects all drivers, including interstate truckers.

If the state law affects interstate commerce, the courts may be asked to balance the state's interests with those of the federal government. The question is, does a state's exercise of its police power interfere with the federal government's right to regulate interstate commerce? Recall that the Constitution provides that when state and federal law conflict, federal law is supreme. The courts try to answer this question by balancing the interests of the state with those of the federal government. The courts will consider several factors, including the following:

- What interest is the state furthering by its law?
- Does the state law burden (make more difficult) interstate commerce?
- Is there another way the state could accomplish its purpose without burdening interstate commerce?



## LEGAL FOCUS—PROBLEM

Suppose Georgia passes a law requiring use of "contoured" rear-fender mudguards on trucks and trailers operating on its highways. All other mudguards are declared illegal. In 35 other states, including the neighboring state of Florida, "straight" mudguards are either legal or required. Evidence suggests that contoured mudguards are safer than straight mudguards. Is the Georgia statute constitutional?

No. Truckers traveling through Georgia would have a problem. What is legal in Georgia is illegal in other states, including Florida, and vice versa. Clearly, the Georgia law would affect interstate commerce. Even though Georgia's purpose in passing the statute was to

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increase safety on the highways, a possible increase in safety would not justify requiring truckers to either avoid Georgia or change their mudguards before they pass through.

**LEGAL FOCUS—CASE**

### The Direct Shipping Cases

Following the repeal of the federal prohibition on the sale, manufacture, and transport of intoxicating liquor with the enactment of the Twenty-First Amendment to the Constitution, states stepped into the void to regulate and control the sales of liquor. Many states developed a complex system of liquor regulation, and liquor law in the United States is now characterized by a maze of differing requirements from state to state. Many states include prohibitions on the sale and shipping of alcohol to consumers via mail or other third-party shipping services, so-called "direct shipping." Gradually, many states made exceptions to the direct shipping prohibition for in-state wineries. Other states went further and allowed out-of-state wineries to ship wine to their residents. New York and Michigan were two states that prohibited out-of-state wineries from shipping wine to in-state residents but allowed in-state wineries to do so. Residents desiring to receive wine shipments from out-of-state wineries sued, challenging the laws, and won. The states appealed to the Supreme Court, which heard the cases in 2005.[48] The states argued that safety concerns related to liquor and the fact that out-of-state wineries were more difficult to regulate combined to justify the ban on out-of-state winery shipping. Did the Supreme Court agree?

No. The Supreme Court held that the state laws burdened interstate commerce unnecessarily and they invalidated the laws.[49] Since then numerous states have changed their laws regarding direct shipping.[50] Note that the U.S. Postal Service would be immune from any state penalty for violating a wine shipping law under the doctrine of supremacy; only the shipper and possibly the purchaser could be held responsible. Private shipping companies such as FedEx or UPS do not enjoy such immunity.

## WHAT IS THE BILL OF RIGHTS?

**Bill of Rights**
The first 10 amendments to the U.S. Constitution.

The **Bill of Rights** is the all-inclusive title popularly given to the first 10 amendments to the U.S. Constitution (see Exhibit 2.1). The Bill of Rights mandates specific and general restraints on the national government to protect all persons from arbitrary and capricious acts by federal officials. Thus, the Bill of Rights originally applied only as a restraint on the national government. States were bound only by provisions on civil rights if and as specified in their own state constitutions.[51]

Following the Civil War, several amendments were added to the U.S. Constitution to protect and assist the newly freed slaves. In 1865, the Thirteenth Amendment formally outlawed slavery. Previously, most African-Americans had been denied liberty despite the contrary words of the Declaration of Independence, "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness" and the mandate of the Fifth Amendment that "no person shall be deprived of life, liberty, or property without due process of law."[52] Three years later, in 1868, the Fourteenth Amendment reiterated the right of all persons to liberty and extended the scope of its protection by binding all state and local governments with these words:

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**EXHIBIT 2.1** The Bill of Rights

| | |
|---|---|
| **First Amendment** | Guarantees freedom of religion, speech, press, assembly, and petition. |
| **Second Amendment** | Guarantees the right to keep and bear arms because a state requires a well-equipped citizen army for its own security. |
| **Third Amendment** | Prohibits the lodging of soldiers in peacetime without the dweller's consent. |
| **Fourth Amendment** | Prohibits unreasonable searches and seizures of persons or property. |
| **Fifth Amendment** | Prohibits deprivation of life, liberty, or property without due process of law, and fair payment when private property is taken for public use, such as in eminent domain; prohibits compulsory self-incrimination and double jeopardy (trial twice for the same crime). |
| **Sixth Amendment** | Guarantees the accused in a criminal case the right to a speedy and public trial by an impartial jury and with counsel; allows the accused to cross-examine witnesses against her and to solicit testimony from witnesses in her favor. |
| **Seventh Amendment** | Guarantees a trial by jury for the accused in a civil case involving $20 or more. |
| **Eighth Amendment** | Prohibits excessive bail and fines, as well as cruel and unusual punishments. |
| **Ninth Amendment** | Establishes that the people have rights in addition to those specified in the Constitution. |
| **Tenth Amendment** | Establishes that those powers neither delegated to the national government nor denied to the states are reserved for the states. |

**due process**
The requirement that legal proceedings (including arrest, civil and criminal trials, and punishment) comply with the U.S. Constitution and other applicable substantive and procedural laws.

**equal protection**
The clause in the Fourteenth Amendment to the U.S. Constitution declaring that "no state shall … deny to any person within its jurisdiction the equal protection of the laws."

**incorporation doctrine**
The Supreme Court's utilization of the Fourteenth Amendment to find Bill of Rights limitations on state and local governments.

> *No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.*

The clauses guaranteeing due process of law and equal protection of the law were not defined at the time of the Fourteenth Amendment, leaving the work of definition and specific application to the judicial branch. The due process and equal protection clauses have been used by the Supreme Court to restrict the constitutionally reserved powers of the states.

Simply stated, the Supreme Court defines **due process** as the equivalent of fundamental fairness and **equal protection** as the prevention of invidious discrimination (that is, differentiating offensively or unfairly). Thus, states cannot violate the due process or equal protection guaranteed to the people, regardless of what is contained in their respective constitutions. But the application of those terms to specific examples of state action was to evolve through Supreme Court decisions using an interpretive process referred to as the **incorporation doctrine**.

## Incorporation Doctrine

In its trailblazing decision in *Gitlow v. New York* in 1925, the U.S. Supreme Court announced, "[W]e may and do assume that freedom of speech and of press—First Amendment protections—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[53]

With the *Gitlow* decision, the Supreme Court began a policy that it has maintained ever since. As selected cases reach it, the Court has systematically imposed on the states

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most of the guarantees found in the Bill of Rights by interpreting the Fourteenth Amendment's due process clause to restrict state impositions on individual liberty. Its ongoing impact is to bind both the national and state governments to a similar standard of compliance regarding due process and equal protection.

## THE FIRST AMENDMENT AND FREE SPEECH

**First Amendment**
"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The **First Amendment** contains what are known historically as *primary rights*. It is no accident that this amendment begins with the phrase, "Congress shall make no law…." Nor is it accidental that first among our primary rights is freedom of speech and press. They are "the matrix, the indispensable condition, of nearly every other form of freedom."[54] As Justice Hugo Black remarked, "Freedom to speak and write about public questions is as important to the life of our government as is the heart to the human body…. If that heart be weakened, the result is debilitation; if it be stilled, the result is death."[55] Accordingly, the Supreme Court has decided incrementally, one case after another, that the states must also guarantee to their citizens First Amendment rights of freedom of speech and press.[56]

**free speech**
"Congress shall make no law … abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Court, however, has been unable to define **free speech** with precision. It has moved successively through certain legal expedients, or "tests:"

1. The "clear and present danger" test under which speech could be regulated by government was explained in *Schenck*.[57]
2. The "bad tendency" test was exemplified in *Abrams*. Here the Court accorded little importance to the guarantee of free speech, focusing almost solely on the impact of the challenged speech on the war (World War I) effort.[58]
3. The "preferred position" test was articulated in Justice Harlan Stone's famous footnote in the *Carolene Products* case. Stone presented the view that free speech enjoyed a preferred position in relation to other constitutional guarantees, calling for a more precise and searching scrutiny of legislation that might curtail "political processes."[59]
4. During the Cold War of the late 1940s and 1950s, the Supreme Court upheld the conviction of 11 leaders of the American Communist Party by enforcing the Smith Act of 1940, which made it a crime to teach or advocate the overthrow of government by force. In doing so, the Court adopted the "probability" statement of the "clear and present danger" rule, as expressed by the highly respected Chief Judge Learned Hand, writing for the lower court majority: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[60]
5. Political dissent during the late 1960s and early 1970s found the Court using the "ad hoc balancing" test. Using the "clear and present danger" test, the Court weighed the competing interests of free speech and law and order. Every ordinance attempting to serve the interests of the state must be drawn with "reasonable specificity toward the [speech] and conduct prohibited."[61]

### LEGAL FOCUS—CASE

Paladin Press published a book *Hit Man: A Technical Manual for Independent Contractors*, which provided instructions for would-be contract murderers. Lawrence Horn hired James Perry, a contract killer, to murder his ex-wife and their brain-damaged son, after which Horn expected

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to inherit a $2 million trust fund intended for the boy. Perry, using principles studied in the Paladin murder text, suffocated the boy and fatally shot the ex-wife and an overnight nurse. A sister of the ex-wife sued Paladin Press in a civil case for damages for aiding and abetting the murderer. Is the publication of an instructional book for murder protected by the First Amendment from a civil lawsuit?[62]

*Paladin Enterprises, Inc. v. Rice*, 940 F.Supp. 836 (D. Md. 1996), rev'd, 128 F.3d 233 (4th Cir. 1997), cert. denied, 523 U.S. 1074, 118 S.Ct. 1515 (1998).

No. The Constitution does not shield from civil lawsuits such things as bomb-making guides, assassination manuals, or similar works that exhort people to take the law into their own hands. Nor does the Constitution prevent the publication of libelous (untruthful) material and any subsequent civil lawsuits that may follow. The **prior restraint** of speech that is offensive for any reason is a judicial power that is exercised only in the most extraordinary circumstances.

**prior restraint**
Restraints on a publication before it is actually published.

The Court has been careful to protect expressive activity and symbolic speech,[63] and has ruled that burning of the national flag of the United States, as political speech, can be restricted neither by the states nor by the Congress.[64] Several attempts have been made to establish an amendment granting Congress specific authority to prohibit the physical desecration of the U. S. flag, but none have yet passed the Senate.

**commercial speech**
Oral, written, and other forms of communication used in advertising and in other business activities.

## Is Commercial Speech Protected?

**Commercial speech**, which is defined as any communication that advertises a product or service for a business purpose to earn a profit, is also protected, but not as comprehensively as other speech.

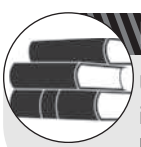
### LEGAL FOCUS—CASE

San Diego enacted an ordinance that prohibited commercial outdoor advertising signs within the city limits. Sign owners sued the city for injunctive relief, claiming that the law violated their rights under the First Amendment. Does the ordinance violate the Constitution?

*Metromedia Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882 (1981).

Yes. Speaking for the Court, Justice Byron B. White stated:

*"Prior to 1975, purely commercial advertisements of services or goods for sale was considered to be outside the protection of the First Amendment …. [But] in* Virginia Pharmacy Board v. Virginia Citizens Consumer Council, *425 U.S. 748 (1976), we plainly held that speech proposing no more than commercial transaction enjoys a substantial degree of First Amendment protection. A State may not completely suppress the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information's effect upon its disseminators and its recipients …."*[65]



### LEGAL FOCUS—PROBLEM

U.S. Beverage Co. produced Phat Boy, an inexpensive malt liquor that was sold in bigger bottles with a higher alcohol content than competing beers. It also sported a funky red, black, and yellow label and contained ginseng, which some consider an aphrodisiac. ("Phat" is a

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'90s version of the word "cool.") A public interest group contended that Phat Boy was targeted to underage African-Americans, much like cigarette ads featuring Joe Camel allegedly targeted teenagers. Does the Constitution protect focused commercial advertising?

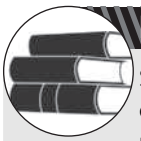
Yes, but to a lesser extent than other forms of speech. When alcohol is involved in any commercial activity, the states have an additional interest in protecting the public from harm. However, the North Carolina Alcoholic Beverage Commission received no complaints from the public, and the product was promoted and sold widely, not targeted in specific neighborhoods.

## Is Symbolic Speech Protected? Even "Hate Speech"?

Although originally expressed as protection for spoken, written, or printed words, the First Amendment has been appropriately construed by the Court to embrace many forms of the communication of ideas.

Motion pictures, television programs, electronic tapes, digital discs, and electronic and fax transmissions have taken their place alongside the formerly dominant person-to-person speech and printed statements. In Des Moines, Iowa, the U.S. Supreme Court upheld the right of students to wear black armbands in school to show their opposition to the Vietnam War. The conduct was "a symbolic act that is within the Free Speech Clause … [and] was entirely divorced from actually or potentially disruptive conduct" that would interfere with appropriate discipline in the operation of the school.[67] As noted earlier, the symbolic act of burning an American flag is likewise protected under the First Amendment.

As indicated by these cases, the U.S. Supreme Court zealously erects ramparts around the cherished First Amendment freedoms to communicate.



### LEGAL FOCUS—PROBLEM

Stanford University, a private institution, adopted a code stating that "one student cannot with purpose vilify another with fighting words that are ugly gutter epithets like 'nigger' and 'kike.'" The code also banned such hate-associated symbols as the swastika. Can a private university proscribe undesirable speech?

**hate speech**
Words spoken, written, or symbolized (for example, by placing burning crosses on private lawns) that express irrational and false ideas that insult and demean certain persons or classes of persons.

No. Stanford students challenged the code in a state superior court (trial court) where the judge granted a preliminary injunction declaring Stanford's "**hate speech**" ban unconstitutionally broad.[68] Basing his decision on a state law, the judge ruled that the university violated students' freedom of expression by prohibiting only certain "fighting words" linked to sex and race. Stanford defended their 18-months-in-the-making speech code by contending that [California's] Leonard Law, which extended free speech protections to private schools, "intruded on the university's right to govern itself and establish rules of proper behavior."[69]

In 1992, the U.S. Supreme Court unanimously condemned a St. Paul, Minnesota, ordinance that outlawed any hate-motivated expression (for example, burning crosses, displaying swastikas) that "one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender."[70] In the hate speech case in question, a 17-year-old skinhead (that is, an antisocial or

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delinquent youth who wears his hair closely cropped) was arrested after setting fire to a crude cross in the yard of an African-American family that had recently settled in a predominantly white neighborhood. Justice Antonin Scalia noted that such conduct "is reprehensible…. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire."[71] Note, however, that in the following year the Court unanimously upheld a Wisconsin statute that imposes harsher penalties on a criminal who "intentionally selects the person against whom the crime … is committed … because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person."[72] Most states now have similar "hate crime" penalty-enhancement laws.

In other cases, the Court has withheld the protective shield of the First Amendment from "fighting words," meaning words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace" and conduct that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[73]

Reference in the Wisconsin statute to "sexual orientation" exemplifies increasing concern of legislative bodies and courts with the civil rights of homosexual persons, male and female. No doubt many homosexual persons have served with honor and distinction in military uniforms. In 1993, the Clinton administration took steps to permit them to openly disclose their sexual orientation. Opposition from top military commanders and others resulted in adoption of a compromise policy that is reflected in the advice, "Don't ask; don't tell; don't pursue."

**LEGAL FOCUS—CASE**

Master Chief Petty Officer McVeigh sent an e-mail with return address of "Boysrch," which prompted a sexual orientation investigation by the U.S. Navy. America Online revealed McVeigh's identity in violation of a federal privacy law. The Navy began proceedings to discharge McVeigh without benefits. Has the Navy violated the "Don't ask; don't tell; don't pursue" policy?

*McVeigh v. Cohen*, 983 F.Supp. 215 (D.D.C., 1998) and 996 F.Supp. 59 (D.D.C., 1998).

Yes. A federal judge ruled that the Navy's investigation into McVeigh's sexual orientation was a violation of the policy. McVeigh retired with full benefits and received money damages from America Online.[74]

It is noteworthy that the members of the military are controlled by the Uniform Code of Military Justice, which closely prescribes conduct within the military services. Serious issues regarding the discharge of homosexual persons from the service, of women in combat roles, and of immoral sexual behavior continue to plague the military branches.*

Certain artists and their publishers have produced paintings, photographs, magazines, books, songs, videotapes, and compact discs that allegedly violate traditional and appropriate standards of morality and decency. Probably most people are not offended because they are not within the targeted markets for most of this bizarre art. However, programs on free television and cable television now enter most homes. Increasing numbers of viewers, both old and young, find excessive violence and perceived obscenity intolerable and are demanding government imposition of restraints or standards. But the

*The president is the "Commander in Chief of the United States… ." U.S. Constitution, Article II, Section 2. However, the president is not subject to the Uniform Code of Military Justice that applies to the military and prohibits, among other things, immoral sexual activity such as adultery.

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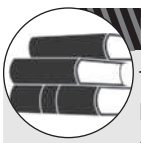
practical difficulty of imposing effective controls is readily apparent from a reading of the 1973 case of *Miller v. California*, in which the U.S. Supreme Court decreed that to be legally condemned as obscene, the material must be such that

1. the average person,
2. applying contemporary community standards,
3. would find that the work taken as a whole appeals to the prurient (that is, characterized by lustful thoughts) interest, and
4. the work depicts or describes in a patently offensive way sexual conduct proscribed by state law,
5. and whether—taken as a whole—it is lacking in serious artistic, political, or scientific value.[75]

The inherently subjective nature of the listed criteria, coupled with potentially thousands of different problems or cases, every one of which is unique in at least some respect, makes any comprehensive policing effort predestined to fail, except in the most egregious cases.

What is known is that nearly nude dancing by females (wearing pasties and G-strings) is not inherently obscene and may be expressive conduct protected by the First and Fourteenth amendments.[76] Essentially, juries make the determination of specifically what is obscene and, therefore, may be prohibited by state or local government on a case-by-case basis.

Symbolic speech may also sometimes be deemed offensive because of historical implications related to race, religion, or other constitutionally protected classifications.



**LEGAL FOCUS—PROBLEM**

The mascot of Birmingham High School in Pontiac, Michigan, is a headdressed American Indian based on Chief Pontiac, an Ottawa Indian who was an organizer of tribes against the invading English during the 1700s. The city of Pontiac is named after this chief. The high school's team name is the "Braves." In response to demands of American Indian activists, the local board of education chose to change the mascots of four high schools, including the "Mohicans" and the "Warriors." Removing the "Braves" logo from the Birmingham High School gym floor and track and purchasing new gym clothes and uniforms will cost $240,000. The activists argued that portrayal of an American Indian with a headdress is sacrilegious.[77] Does the Constitution protect the use of insulting or sacrilegious speech?

Yes. However, a public school may choose to avoid offensive language or symbols for other reasons. Even if offensive speech is protected from censorship by the Constitution, that does not mean it should be employed.

## Public Employees and Free Speech

When a public employee makes statements, drafts letters, or otherwise "speaks" in the course of his duties, is such speech protected? Can a supervisor take an adverse action against the employee because of the content of the speech? The First Amendment could be interpreted to protect such speech. Under a recent Supreme Court decision, *Garcetti v. Ceballos*, however, speech in the course of official duties is not protected by the First Amendment. Thus, a deputy district attorney could be disciplined by his employer for stating in court that the police had made false statements while seeking an arrest warrant.[78] When public employees speak outside of their official duties, such as a teacher

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sending a letter to a local newspaper about school funding, such speech can be protected under the First Amendment.[79]

## Free Speech and the Internet

The Internet began in 1969 as an international network of computers among the military, defense contractors, and universities conducting defense-related research. Redundant connections were established to preserve communications even if some portions of the network were damaged in a war. Today, civilian networks link with one another, allowing many millions of people to communicate and access vast amounts of information from around the world. The Internet is a unique and wholly new medium of worldwide human communication, the use of which is posing new challenges to our Constitution and legal system.

Although the Internet is around 40 years old, it is still young in terms of governments applying control through legal rules. The growth of Internet use, with its attendant social and economic impacts, makes access and control important to people and to governments. Issues such as individual privacy, spam, identity theft, and pornography are but some issues that send people to the government asking for rules. As electronic transmissions cross state and national boundaries, the potential legal problems are growing in number and complexity almost as fast as the Internet itself.

Among the important legal issues in the United States about the Internet are fundamental questions concerning free speech and pornography. Sexually explicit material on the Internet includes text, pictures, and chat that range from the modestly titillating to the completely explicit. Many people go looking for sexually explicit material but your authors know from experience that sometimes these sites show up in search requests for material totally unrelated to sex. In 1996, Congress adopted two acts, the Communications Decency Act (CDA) and the Child Pornography Prevention Act (CPPA), in an attempt to regulate sexually explicit Internet content as it relates to children.[80] The CDA attempted to prohibit the knowing transmission of obscene or indecent messages to any recipient under 18 years of age. In 1997, the Supreme Court held the CDA to be an unconstitutional infringement of free speech guaranteed by the U.S. Constitution.[81]

**LEGAL FOCUS—CASE**

The CPPA provided a federal prohibition against sexually explicit images that appear to depict minors produced without using any real children—virtual child pornography. The statute prohibited possessing or distributing these virtual images. Is the act constitutional, or does it violate the First Amendment protection against free speech?

*Ashcroft v. The Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389 (2002).

The Court stated: "[A]s a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children." Among the arguments in favor of the statute was that to eliminate the market for pornography produced using real children necessitated a prohibition on virtual images. The Court's response to that argument was, "The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter." In holding the second of the two 1996 congressional attempts to control Internet pornography unconstitutional, the Court stated the provisions considered "are overbroad and unconstitutional."

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Do these two cases mean that Internet content cannot be regulated? Hardly. But the cases do make clear that constitutional freedoms such as the First Amendment make regulation of the Internet and new technologies a challenging task for the legislatures. Still improper use of the Internet by individuals, such as by publishing libelous material (civil) or by conspiring to commit criminal offenses, can result in civil or criminal penalties. Free speech does not equate to freedom from personal responsibility to comply with laws enacted under proper exercise of the police powers of the states.

**LEGAL FOCUS—CASE**

"Approximately 10 percent of the Americans who use the Internet access it at public libraries. And approximately 95 percent of all public libraries in the United States provide public access to the Internet." Can Congress require public libraries to provide software filters to guard against sexually explicit content as a condition to the receipt of federal subsidies?

*American Library Ass'n, Inc. v. United States*, 201 F.Supp.2d 401 (E.D.Pa., 2002).

The United States was sued by a group of libraries, library associations, library patrons, and website publishers alleging that the Children's Internet Protection Act (CIPA),[82] requiring filtering of sexually explicit content, forces the libraries to violate their patrons' First Amendment rights. The district court agreed with the plaintiffs. The lower court decision was ultimately overturned, however, by the U.S. Supreme Court, which upheld CIPA.[83] Though a plurality decision, the common thread in the justices' opinions related to ease or means by which patrons or libraries could defeat or bypass the filter.

## THE FIRST AMENDMENT AND FREEDOM OF RELIGION

**freedom of religion**
"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…."

It is not surprising that the Bill of Rights provides for the protection of religious liberty first, because many of the colonists came here to escape religious persecution. The First Amendment guarantees **freedom of religion** in two ways. The First Amendment *establishment clause* prohibits Congress from establishing a religion ("Congress shall make no law respecting an establishment of religion"). Additionally, the *free exercise clause* prohibits government interference in the free exercise of religious beliefs ("Congress shall make no law … prohibiting the free exercise of [religion]"). Government action, both federal and state, is expected to be neutral toward religion. Regulation that does not promote religion or place a significant burden on religion is constitutional.

Religious pluralism is a hallmark of American life, together with our commitment to religious freedom. In many parts of the world, governments maintain "official" religions and official religions maintain governments. In the United States, a wall has been erected between church and state; any significant breach of that wall by either government or church, no matter how compelling, is generally suspect. Yet attempts to promote or dissuade certain religions are made from time to time in spite of the First Amendment. What should be the government's position respecting religion? The Supreme Court has answered. The First Amendment (on religion) means this:

> *Neither a state nor the federal government can set up a church. Neither can pass laws, which aid one religion, aid all religions, or prefer one religion to another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or*

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*professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa … the [religious] clause was intended to erect "a wall of separation between church and state."*[84]

## Establishment Clause

Accordingly, the Supreme Court has declared unconstitutional various state attempts to promote "religious values" in public schools under the establishment clause. In 1962, in a controversial decision (*Engel v. Vitale*), the Court outlawed the recitation of a nonsectarian prayer in the public schools of New York State. The prayer was to be said aloud in class in the presence of a teacher at the beginning of every school day. The prayer provided by the New York Board of Regents was: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our country." Speaking for the Court, Justice Hugo L. Black pointed out that the prayer violated the establishment clause of the First Amendment:

*Its first and most immediate purpose [referring to the clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religions.... [G]overnmentally established religions and religious persecution go hand in hand.... It was in large part to get completely away from this sort of systematic religious persecution that the Founders brought into being our Nation, our Constitution and our Bill of Rights.*[85]

The Court said that even a one-minute period of silence for "meditation or voluntary prayer" is constitutionally impermissible.[86]

## Free Exercise Clause

The First Amendment's protection of religion is complicated because whereas it restricts any government establishment of religion it also restricts government from "prohibiting the free exercise" of religion. There clearly is a tension between these two admonitions. Do individuals have the right to act any way they want to on the basis of their religious beliefs? No. There is an important distinction between belief and practice. Although the government lacks authority to compel you to accept or reject any religious belief, the right to practice one's beliefs does have some limitations. Through the years, the Supreme Court has followed the general principle that people are free to believe and worship as they wish so long as their conduct violates no laws that validly protect the health, safety, or morals of the community.

### LEGAL FOCUS—CASE

It is the 1870s in Utah, and Reynolds is a Mormon with two wives. The then territory of Utah prosecutes him for violation of a U.S. Territory statute stating "Every person having a husband or wife living, who marries another … is guilty of bigamy, and shall be punished by a fine of not more than $500, and by imprisonment for a term of not more than five years." Among the defenses offered by Reynolds were that the church doctrine of the time made it "the duty of male members of said church, circumstances permitting, to practise [sic] polygamy,"[87] and the First Amendment restricts government from passing a statute that prohibits the free exercise of his religion. Was he correct?

*Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244 (1878).

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This U.S. Supreme Court case was one of the first to consider whether the free exercise clause provides a defense to a criminal act. The Court bluntly said no. "To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

In recent years, a number of cases have raised the question of allowing free exercise of religion in public schools as a counter to public school establishment of religion. In other words, although the public school cannot encourage a religious practice, must it allow it? In 1984, Congress passed the Equal Access Act,[88] making it unlawful for any public high school receiving federal assistance (funds) to prevent student groups from using school facilities for religious activities. In addition, the Religious Freedoms Restoration Act[89] was passed in 1993 stating that "governments should not substantially burden religious exercise without compelling justification."[90] These statutes have been interpreted to authorize student-initiated religious activities if other types of student-initiated gatherings are permitted. The Supreme Court had already declared constitutional student-initiated religious worship at state universities and colleges.[91]

Other activities involving religion are permissible in public schools. These include:

- Silent prayer before tests so long as other students are not persuaded to participate.
- The teaching of the history of religion as distinguished from teaching religion.
- The expression by students of their religious beliefs in the form of reports that are germane to their assignments.
- Participation in religious clubs.[92]
- The wearing of religious garb including ceremonial knives.[93]

## CAN GUNS BE BANNED?

According to the Second Amendment:

> *A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.*

When this amendment was penned, the common practice of states was to have large standing armies. There was a strong public sentiment that a large permanent army should not be part of the national government. Also, the amendment was designed to prevent Congress from disarming and abolishing state militias.

The Supreme Court had sustained this sentiment holding "The Second Amendment guarantees *no* right to keep and bear a firearm that does not have some reasonable relationship to the preservation or efficiency of a well-regulated militia."[94] Then beginning with a case in 2008, the court established a doctrine that the Second Amendment gives citizens individual rights to own guns for self defense.[95] As this edition was being prepared, the U.S. Supreme Court handed down another decision, in *McDonald versus Chicago*, that applied Second Amendment rights to own and bear firearms to citizens subject to state and local laws using the doctrine of incorporation, discussed earlier.[96] This case is presented as one of the featured cases in this chapter. *McDonald*, like many modern U.S. Supreme Court cases, is a plurality. The plurality agreed that Chicago's handgun ban was a violation of the Second Amendment but left open the question of what level of restriction or control over the ownership of handguns or firearms would be constitutional. You can expect legal challenges of gun laws in many locations across the country over the next several years.

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## FREEDOM FROM UNREASONABLE SEARCHES

**exclusionary rule** The court-made rule that precludes the use in criminal court proceedings of any evidence improperly obtained by the prosecution.

The Fourth Amendment recognizes "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." But note that *reasonable* searches and seizures are permitted. Consequently, search warrants may be issued "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." In two cases, *Wolf v. Colorado* (1949)[97] and *Mapp v. Ohio* (1961)[98], the Supreme Court imposed on the states the same standards of care in search and seizure procedures and the exclusion of evidence illegally obtained as that imposed by the Constitution on the national government. The Court said that citizens have a "right to privacy" and to be "free from unreasonable state intrusions…. We hold that all evidence obtained by search and seizures in violation of the Constitution is, by the same authority, inadmissible in a state Court." This is known as the **exclusionary rule**. The exclusionary rule has been narrowed in its applicability since.[99] The exclusionary rule is discussed more fully in Chapter 6.

## RIGHTS OF AN ACCUSED TO DUE PROCESS OF LAW

**Fifth Amendment** "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The due process clause of the U.S. Constitution is really two clauses: the **Fifth Amendment**, which restricts federal government power, and the Fourteenth, which restricts state government power. The clauses hold that no person shall "be deprived of life, liberty, or property, without due process of law." These few words have led to millions of words by courts, lawyers, and laypeople attempting to define what due process means. Due process means government is expected to use fair and reasonable methods when exercising power over individuals, which is a matter of procedural due process. The clause has also been used to limit government exercise of power over the content of the law, which is a matter of substantive due process.

Many examples of procedural due process questions arise in the processing of individuals in the criminal justice system. Among the many due process rights recognized over the years is the right to be represented by a lawyer during police questioning. This perhaps famous right arises after one is taken into custody or otherwise deprived of freedom in any significant way. Courts have established that representation by an attorney is necessary to protect against compelled testimony and self-incrimination, and that each is a basic right mandated by the U.S. Constitution. As such all states as well as the federal government are obligated to recognize and accommodate this right.[100]

### LEGAL FOCUS—CASE

A police undercover agent was planted in a cell with prisoner Perkins, who had been jailed for aggravated assault. Perkins was also under investigation for murder. The undercover agent asked Perkins if he had ever killed anybody. In answering the question, Perkins made statements implicating himself in the murder. Is this testimony that was given voluntarily but unknowingly by Perkins to a police officer admissible as evidence despite the way it was obtained?

*Illinois v. Perkins*, 496 U.S. 292, 110 S.Ct. 2394 (1990).

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**Fourteenth Amendment**
In part, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Yes. The Supreme Court held that an undercover officer posing as an inmate has no obligation to warn an incarcerated suspect of any constitutional rights before asking questions, even though the response could be legally incriminating.

Through a series of decisions based on Section 1 of the **Fourteenth Amendment**, the Supreme Court has imposed an obligation on the states to honor the human rights identified in the Fifth and Sixth amendments. Included is the right to a speedy[101] and public trial[102] by an unbiased jury,[103] assuredly among the most vital of rights in a free society. To further guarantee a fair trial, the Court in other cases also incorporated the right to have **compulsory process*** for obtaining witnesses for the defense of the accused person[104] and to the assistance of professional legal counsel in all cases and at all stages[105] of criminal procedures to which the defendant is subjected. An exception is made as to counsel in appellate proceedings (although, in fact, appellants are generally assisted by state-compensated counsel).

## LEGAL FOCUS—CASE

Chicago adopted an antiloitering ordinance intended to curb the "expanding cancer" of urban gangs. Under the ordinance, people loitering (standing) in a public place could be ordered to move along if a police officer believed one or more was a gang member. Those who refused to move along could be arrested and sent to jail for up to six months, fined $500, and ordered to perform three weeks of public service—even without proof of criminal intent. Does the ordinance as applied deprive defendants of due process of law?

*City of Chicago v. Morales*, 527 U.S. 41, 119 S.Ct. 1849 (1999).

**compulsory process**
(a) The right guaranteed by the Sixth Amendment to every person accused of a crime to require witnesses to appear in his favor, by court order. (b) Official action to force a person to appear as a witness in court, at an administrative hearing, or before a legislature.

Concern about criminal activity by members of urban gangs has prompted many local boards and councils to adopt ordinances designed to protect their residents. The Chicago ordinance is but one example. Ordinarily, a person cannot be convicted of a crime by mere association and without criminal intent. In the above case, the Illinois Supreme Court concluded that the Chicago ordinance did not provide sufficiently specific limits on the enforcement discretion of the police to meet constitutional standards for definiteness and clarity. In upholding the Illinois Supreme Court, the U.S. Supreme Court stated: "We recognize the serious and difficult problems testified to by the citizens of Chicago that led to the enactment of this ordinance. We are mindful that the preservation of liberty depends in part on the maintenance of social order. However, in this instance the city has enacted an ordinance that affords too much discretion to the police and too little notice to citizens who wish to use the public streets."

*Compulsory process means the court, at the request of a defendant in a criminal prosecution, must use its legal powers to compel the appearance of witnesses in favor of the defendant (U.S. Constitution, Sixth Amendment).

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The war on terror that has grown from the September 11, 2001, terrorist attacks has raised controversy regarding the rights guaranteed under the Constitution to noncitizens, to terrorist suspects, and to "enemy combatants."* What due process do such persons deserve or have a right to when the U.S. government conducts proceedings to determine their fate or punishment? The answer is not clear. A recent Supreme Court decision held that certain proposed military tribunals for enemy combatants lacked sufficient protections of the accused's rights but did not fully explain the rights such persons had.[106] The Court did make it clear that enemy combatants might not be entitled to the same due process protections to which criminal defendants are entitled.

Chapter 6 addresses this topic in part as it more fully addresses the rights of persons accused of a crime.

## EQUAL PROTECTION OF THE LAW IN EDUCATION

The Fourteenth Amendment of the U.S. Constitution also provides that "no state shall … deny to any person within its jurisdiction the equal protection of the laws"; this is commonly called the equal protection clause. Understanding this expectation of equal treatment requires context. As college students, some of you received government grants and loans, but many of you did not. Virtually no one is paying the same for their college education. Faculty, administrators, and handicapped persons probably have a better parking place at universities than others. The equal protection clause has not been interpreted to afford equality among persons; instead, it requires equal treatment of persons in similar situations. In other words, government must treat people similarly if they are "similarly circumstanced." Note again the requirement of government action, as the Constitution protects against government, not private, conduct.

The Supreme Court has developed a three-stage test based on the nature of the right (for example, to vote) or the class of individuals (for example, gender) being affected when considering equal protection challenges. The Court begins with presumption of legislative validity.

1. **Strict scrutiny test.** Is the nature of the right or the class of individuals being affected inherently suspect? Distinctions based on race, alienage, national origin, ethnicity, religion, marriage, and voting have been held inherently suspect. Government must demonstrate that any law providing for differential treatment serves a compelling state interest and is narrowly tailored to serve that interest.
2. **Intermediate scrutiny test.** Is the right or classification similar to a protected fundamental right? If so, the court provides for "heightened scrutiny." The standard has been used for gender- and legitimacy-based discrimination cases. Government must show that the discriminating law or policy bears a "substantial relationship" to an "important" government interest.
3. **Minimal scrutiny or rational basis test.** Does the challenged law involve neither a suspect classification nor a fundamental right? In that case, government need show

*The term *enemy combatant* is harder to define in a war against a terrorist organization. The term historically referred to persons who were members of the armed forces of a state with which a nation was at war. Hence, an often equivalent term is *military combatant*. One recent congressional bill put it succinctly: "Enemy combatants in the present conflict, however, come from many nations, wear no uniforms, and use unconventional weapons. Enemy combatants in the war on terrorism are not defined by simple, readily apparent criteria, such as citizenship or military uniform. And the power to name a citizen as an 'enemy combatant' is therefore extraordinarily broad." Detention of Enemy Combatants Act (Introduced in House) 109th CONGRESS 1st Session H.R. 1076, March 3, 2005.

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only that the law is rationally related to a legitimate state interest. Usually, classifications based on economic and social status fall within this minimal scrutiny range.

The equal right to education is arguably the first key to providing an opportunity for all students to realize their potential. The second would be employment, and the third would be housing. The three are interdependent, forming a repeating cycle.

In the *Brown v. Board of Education of Topeka* cases discussed shortly, the U.S. Supreme Court acted to give disadvantaged minorities benefits of education that others have routinely enjoyed. Implementation, however, has been difficult and time-consuming. At this writing, more than 50 years later, the education problems remain despite much progress. When they married, many children of older residents in large cities found more desirable housing at affordable prices in new suburban subdivisions readily accessible by private automobiles on new superhighways. This pattern accelerated the decline of the aging city neighborhoods, which now attracted lower-income families, often minorities. Thus, the minority literally became the majority in the inner cities of a large number of metropolitan areas. Government attempts to integrate white and African-American students in elementary and secondary schools were resented by many whites (and also by some African-Americans), and in large measure were effectively frustrated by the migration to the suburbs.

The nationalization of equal opportunity continues to be a major priority of our legislatures and courts. Nowhere is this commitment by the federal government more evident than in the field of education at all levels. In 1954, a unanimous U.S. Supreme Court decreed that separation of the races in schools violated the right to *equal protection of the laws* guaranteed by the Fourteenth Amendment. Chief Justice Earl Warren declared that "segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprives the children of the minority group of equal educational opportunities…. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[107] A year later, the Court ordered all public school districts to desegregate "with all deliberate speed."[108]

In 1976, the Court extended the principles of the Brown cases to private schools. It held that federal civil rights laws prohibited private nonsectarian schools from refusing to admit prospective students because they were black.[109]

Congress passed the Civil Rights Act of 1964, which is divided into subject matter sections called titles. Title VI requires that all federal funds must be withdrawn from any school, college, or university that is guilty of discrimination on the "grounds of race, color, or national origin in any program or activity receiving federal financial assistance." (Gender, disability, age, Vietnam veteran status, and disability of veterans were later added to the list.)

## LEGAL FOCUS—CASE

Grove City College, a private, coeducational liberal arts institution, declined all state or federal financial assistance in order to preserve its autonomy. However, many of its students received Basic Educational Opportunity Grants (BEOGs) from the U.S. Department of Education. The department required every participating institution to file a report certifying that no sex discrimination existed on its campus. Grove City College refused to file the report and brought suit to prevent the department from canceling all BEOGs. What was the result?

*Grove City College v. Bell*, 465 U.S. 555, 104 S.Ct. 1211 (1984).

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Grove City College gained a partial victory. The Supreme Court found that even though Grove City did not directly distribute the students' awards, the BEOGs clearly augmented the college's financial aid program. Therefore, Grove City must assure the U.S. Department of Education that no discrimination exists in the college's financial aid program. However, the receipt of the BEOGs by some of Grove City's students was not determined to trigger institution-wide coverage under nondiscrimination statutes. Grove City challenged the conditioning of federal assistance on compliance with the nondiscrimination requirements, claiming it infringed on the First Amendment rights of the college and its students. "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." In other words, the college can avoid compliance requirements by not allowing students attending to accept BEOG awards. In similar cases involving tax-exempt organizations, such as religious schools, a failure to comply with legal orders to eliminate discrimination has resulted in threats from the Internal Revenue Service to remove their tax-exempt status.

**LEGAL FOCUS—CASE**

Bob Jones University (BJU) is a private learning institution whose founding principles include a specific religious belief. BJU receives no government assistance, but the IRS denied its tax-exempt status because of the school's policy prohibiting interracial association and intermarriage. Can the IRS cause a private, religious university to pay income taxes (by denial of exempt status) while other religious organizations are exempt?

*Bob Jones University v. United States*, 461 U.S. 574, 103 S.Ct. 2017 (1983).

Yes. Even though all races can enroll, discrimination by racial affiliation (for example, ban on intermarriage) is against public policy. The state has a compelling interest in banning racial discrimination in any form. The intent of the tax law is that entitlement to tax exemption depends on meeting "certain common-law standards of charity—namely that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy," which could not be satisfied by less restrictive means. Loss of tax-exempt status could cause the closure of many otherwise worthwhile organizations.

**affirmative action**
Policies and practices designed to assure employment of women and of minorities until their percentages in the workforce approximate their percentages in the community.

Segregation in public schools due to socioeconomic factors does not, in itself, violate the Constitution. For example, in one case, the Court ordered removal of a court order that required busing of students to achieve integration goals in Oklahoma City—if as much had been accomplished as was practical.[110] But schools must adopt policies that remove the effects of past discrimination. Race-neutral policies are not enough.[111] Otherwise, the courts will intervene.

## AFFIRMATIVE ACTION IN EDUCATION

African-Americans in particular have been victims of discrimination in education, employment, and housing. **Affirmative action** is a process to eliminate continued discrimination (for example, based on arbitrary classifications, such as race or sex) through the conscious adoption and implementation of policies favoring minorities in university admissions, public employment, and housing. Proponents argue that preferences are essential to erase the effects of prior and long-continued discrimination. Opponents argue that preferences themselves are an invidious form of discrimination—the claim is essentially that two wrongs do not make a right. There are other more sophisticated arguments concerning the possible indirect and psychological effects of preferential treatment.

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Critics of racial preferences in education claim that what began as reasoned argument to overcome past discriminatory practices soon emerged as a series of numerical goals, quotas, and timetables created to bring African-Americans, Asian-Americans, Hispanic Americans, and Native Americans into the nation's colleges and universities. Although there is much opposition to the way it is being done, there is no question that affirmative action is alive and well throughout the country.[112] But is it constitutional?

## LEGAL FOCUS—CASE

The Medical School of the University of California, Davis (UCD) set aside 16 class admissions for minority applicants. Allan Bakke, a white male and a top undergraduate student at the University of Minnesota and Stanford University, applied for admission to the UCD Medical School and was rejected twice. On both occasions, minority students with lower admission test scores, lower grade-point averages, and less impressive interviews were nonetheless admitted.

Bakke sued the university claiming he had been rejected because of his race, in violation of the Fourteenth Amendment and of Title VI of the Civil Rights Act of 1964. The trial court and the California Supreme Court found that UCD's admission plan did indeed violate the constitutional requirement of equal protection under the law. The U.S. Supreme Court accepted the case. How should it rule?

*University of California Regents v. Bakke*, 438 U.S. 265, 95 S.Ct. 2733 (1978).

The U.S. Supreme Court found for Bakke* and declared the UCD admissions plan unconstitutional, thus affirming the decision of the California Supreme Court. The Court also held—with five votes and five different rationales—that ethnic diversity among medical students is an appropriate goal and therefore race can be one of the factors considered when students apply for admission. There have been no decisions by the Court to clarify this language. U.S. Supreme Court Justice Byron White summarized the situation accurately when he wrote: "Agreement upon a means for applying the Equal Protection Clause to an affirmative action program has eluded this Court every time the issue has come before us."[113]

As noted earlier in this chapter, California eliminated all affirmative action policies through the initiative process (direct vote of the people). Although the U.S. Supreme Court has authorized race-conscious admissions policies, California has chosen to achieve racial balance through other practices, such as improved outreach programs to fully qualified students. Other states have variations of processes in admissions and employment to achieve racial equality.

*Allan Bakke was finally admitted to UCD, received his medical degree, and practiced in Minnesota. In 1996 Senator Edward Kennedy declared to a Senate committee: "Dr. (Patrick) Chavis is a perfect example (of the positive results of affirmative action). He is the supposedly less qualified African-American student who allegedly displaced Allan Bakke … and triggered the landmark case. Today, Dr. Chavis is a successful ob-gyn in central Los Angeles, serving a disadvantaged community and making a difference in the lives of scores of poor families." Writing in *The Nation*, California State Senator Tom Hayden noted that whereas Allan Bakke became an anesthesiologist in Minnesota, Chavis was "providing primary care to poor women" in a mostly black community. "Bakke's scores were higher," Hayden admitted, "but who made the most of his medical school education?" In 1996 Chavis's medical license was suspended by the California Medical Board for gross negligence and incompetence in the liposuction treatment of three women—one of whom died as a result. Jeff Jacoby, *Boston Globe*, "How Affirmative Action Can Be Fatal" (New York Times Service, 20 August 1997).

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## RIGHT TO PRIVACY

The right to privacy is the right to be left alone by other persons and by government. It is generally recognized as an essential component of personal dignity, peace of mind, and independence. Nevertheless, a right to privacy has not always been implicitly recognized and respected as a constitutionally protected right. There is no reference to privacy, as such, in the Constitution or the Bill of Rights. Indeed, it was not until 1965 that the U.S. Supreme Court recognized "the new constitutional right of privacy," in the words of Justice William O. Douglas. In the case of *Griswold v. Connecticut*, the Court held invalid a Connecticut statute that made it a criminal offense for married persons to use any drug or instrument to prevent conception. The Court held that the statute violated the First, Third, Fourth, Fifth, and Ninth amendments, plus the equal protection clause of the Fourteenth.[114]

The nation's highest court subsequently has used the declared and implicit right of privacy to affirm (1) the right of unmarried persons to have access to contraceptives, (2) the right of persons of different races to intermarry (also protected by the due process and equal protection clauses of the Fourteenth Amendment), (3) the right of a woman to have an abortion under certain conditions, and (4) the right to possess obscene materials in one's home.[115]

### LEGAL FOCUS—CASE

Ohio passed a law making it a crime to possess obscene materials that depict minors having sex in any form or manner. Osborne was arrested for having photographs of children having sex. Does Osborne have a constitutional right of privacy to possess this particular matter in his home?

*Osborne v. Ohio*, 495 U.S. 103, 110 S.Ct. 1691 (1990).

No. Osborne's right of privacy allowing possession of obscene materials is not absolute. The state's interest in protecting "the victims of child pornography" is paramount and sufficient to ban its possession. The U.S. Supreme Court upheld the accused's conviction.

The Court has held that the right of privacy does not extend to "places of public accommodation" and therefore adults do not have a constitutional right to acquire pornographic materials in bookstores or theaters.[116] In 2003, the Supreme Court held, in *Lawrence v. Texas*, that private homosexual sexual relations are protected as a liberty right.[117] In the past, cases involving sexual relations between persons of the same sex had usually focused on the sexual activity itself. In *Lawrence*, however, the Supreme Court focused on the relationship that the sexual activity might be a part of, rather than the sexual act.

Do "coerced" polygraph tests administered by private employers violate the right to privacy? Yes, at least in California. In a huge out-of-court settlement, the Federated Groups agreed to pay $12.1 million to job applicants forced to take polygraph (lie detector) tests as a condition of employment.[118]

It should be noted that the reliability of lie detectors is sufficiently uncertain that they are not accepted as evidence in court over a defendant's objection. This factor of unreliability differentiates lie detector tests from others, such as blood, urine, or breath-analyzer tests.

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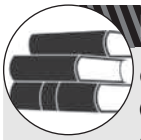

**LEGAL FOCUS—PROBLEM**

Certain U.S. companies desire to sell encryption (secret code) software internationally. The software encodes e-mail and files to protect them from prying eyes. A supercomputer would need 10,000 years to break the code of a file with 128-bit encryption. The U.S. Commerce Department requires that such companies provide them with a key with which to decipher the code. Does the Constitution's right of privacy guarantee citizens and companies the right to make private and secret encoded communications?[119]

The specific issue presented may never arise because encryption software is generally available on the international market. The right of government to ban encryption software unless a key is provided involves balancing national security interests against those of privacy and free speech.

Congress long ago banned the manufacture, sale, advertisement, and use of devices intended to secretly listen to and record telephone and oral communications.[120] Yet today sophisticated electronic spy equipment is accessible in "spy shops" and from mail-order companies. A stranger can monitor conversations inside a bedroom from a mile away, and spouses can track the movements of each other in the family car. Employers can listen to the conversations of every employee on the job. Although laws prohibiting the sale of spying equipment are on the books, lax enforcement, rapid changes in technology, and lack of public complaint have distorted (lowered) the public's expectation of privacy. Government cannot make wiretaps or otherwise perform searches without a prior search warrant, as will be discussed further in Chapter 6. But the Constitution does not guarantee a right of privacy to its citizens in the sense that they are protected from the intrusiveness of one another. The Constitution restrains only government from unreasonable intrusiveness.

## DUE PROCESS AND EQUAL PROTECTION AND MEDICAL TESTING

The 1980s saw the emergence of a number of hotly contested issues pitting individual rights against the police power of the state to protect the public. State constitutions can require more stringent protective laws than are required by the U.S. Constitution. However, no state constitution or law can relax standards established by federal law, because of the doctrine of supremacy.

Among these problems, none are more difficult to resolve than the issues surrounding AIDS (acquired immune deficiency syndrome). For example, should individuals be subject to a mandatory AIDS testing program, especially those who work in certain high-risk areas or with high-risk persons? The general answer is no.

**LEGAL FOCUS—CASE**

Nebraska requires state healthcare workers who work with the mentally retarded to submit to blood tests for AIDS. Is such a requirement an unreasonable search of a person's body?

*Glover v. Eastern Neb. Community Office of Retardation*, 686 F.Supp. 243, 250 (D. Neb. 1988), aff'd, 867 F.2d 461 (8th Cir.), cert. denied, 493 U.S. 932 (1989).

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Yes. The Nebraska statute is unconstitutional. The Supreme Court, without comment, upheld a lower court's decision that blood tests for AIDS did violate the Fourth Amendment. For now, the Supreme Court seems content to accept the doctrine that AIDS testing must meet the same constitutional requirements of reasonableness as other warrantless search and seizure practices.

Critics of universal blood testing charge that the Fourth Amendment "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizure" is violated by indiscriminate blood testing (that is, taking blood from one's body is a "search"). However, the Supreme Court said it was not unconstitutional to take blood from a person without permission if that person is believed to be driving under the influence of alcohol. (In this case, the person in question was convicted of drunk driving on the basis of the amount of alcohol in his blood.)[121]

Another area of constitutional conflict is mandatory drug testing. The legal status of drug testing in the private sector varies from state to state. Although the Supreme Court has ruled that certain government drug-testing plans are constitutional, some authorities believe that the states will have to make their own decisions about drug testing. As long as drug testing meets a "reasonableness" test as to safeguards, such as providing sufficient notice and keeping the test results secret, the business community apparently will be permitted to continue testing employees and job applicants.[122]

**LEGAL FOCUS—CASE**

Lawrence Berkeley Laboratory is a research institution jointly operated by state and federal agencies. Several African-American employees allege that as part of mandatory employment medical examinations, Lawrence tested their blood and urine for intimate medical conditions—namely, syphilis, sickle cell trait, and pregnancy—and that this was done without their knowledge or consent. Assuming the factual contentions are correct, would such tests violate their right to privacy as guaranteed by the U.S. Constitution?

*Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260 (C.A.9, 1998).

The court stated it did. "The constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its confidentiality. One can think of few subject areas more personal and more likely to implicate privacy interests than that of one's health or genetic make-up."

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## CASE

### Thomas et al. v. Chicago Park District

534 U.S. 316, 122 S.Ct. 775 (2002)

*The Chicago Park District operates the Chicago public parks and is responsible for group use. It adopted an ordinance requiring park users to get permits before any public assembly, parade, picnic, or other event involving more than 50 people, or events using amplified sound. The applications are processed in order of receipt, and the Park District decides whether to grant or deny most applications within 14 days. Applications can be denied on any of 13 specified grounds. A denial requires written explanation and, when feasible, suggestions as to how to prepare a successful application. If a denial is given, one can appeal to the Park Superintendent, who has seven days to respond. If the Park Superintendent denies the appeal, the applicant may seek judicial review in state court.*

*Petitioners have applied to the Park District on several occasions for permits to hold rallies advocating the legalization of marijuana. The Park District granted some permits and denied others. Unsatisfied, the petitioners filed suit in U.S. District Court, alleging that the ordinance is unconstitutional. The district court granted summary judgment for the Park District, and the U.S. Court of Appeals for the Seventh Circuit affirmed.*

**Justice Scalia delivered the opinion of the Court.**

**II**

The First Amendment's guarantee of the freedom of speech, or of the press, prohibits a wide assortment of government restraints upon expression, but the core abuse against which it was directed was the scheme of licensing laws implemented by the monarch and Parliament to contain the evils of the printing press in 16th- and 17th-century England. The Printing Act of 1662 had prescribed what could be printed, who could print, and who could sell. It punished the publication of any book or pamphlet without a license and required that all works be submitted for approval to a government official, who wielded broad authority to suppress works that he found to be heretical, seditious, schismatical, or offensive. The English licensing system expired at the end of the 17th century, but the memory of its abuses was still vivid enough in colonial times that Blackstone warned against the restrictive power of such a licenser—an administrative official who enjoyed unconfined authority to pass judgment on the content of speech.

In *Freedman v. Maryland* (1965), we confronted a state law that enacted a strikingly similar system of prior restraint for motion pictures. It required that every motion picture film be submitted to a Board of Censors before the film was shown anywhere in the State. The Board enjoyed authority to reject films that it considered obscene or that tend[ed], in the judgment of the Board, to debase or corrupt morals or incite to crimes, characteristics defined by the statute in broad terms. The statute punished the exhibition of a film not submitted to the Board for advance approval, even where the film would have received a license had it been properly submitted. It was no defense that the content of the film was protected by the First Amendment.

We recognized in *Freedman* that a scheme conditioning expression on a licensing body's prior approval of content presents peculiar dangers to constitutionally protected speech. [T]he censor's business is to censor, and a licensing body likely will overestimate the dangers of controversial speech when determining, without regard to the film's actual effect on an audience, whether speech is likely to incite or to corrupt [the] morals. In response to these grave dangers of a censorship system, we held that a film licensing process must contain certain procedural safeguards in order to avoid constituting an invalid prior restraint: (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.

[T]he licensing scheme at issue here is not subject-matter censorship but content-neutral time, place, and manner regulation of the use of a public forum. The Park District's ordinance does not authorize a licensor to

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pass judgment on the content of speech: None of the grounds for denying a permit has anything to do with what a speaker might say. The picnicker and soccer-player, no less than the political activist or parade marshal, must apply for a permit if the 50-person limit is to be exceeded. As the Court of Appeals well put it: [T]o allow unregulated access to all comers could easily reduce rather than enlarge the park's utility as a forum for speech.

We have never required that a content-neutral permit scheme regulating speech in a public forum adhere to the procedural requirements set forth in *Freedman*. [T]he [permit] required is not the kind of prepublication license deemed a denial of liberty since the time of John Milton but a ministerial, police routine for adjusting the rights of citizens so that the opportunity for effective freedom of speech may be preserved. Regulations of the use of a public forum that ensure the safety and convenience of the people are not inconsistent with civil liberties but [are] one of the means of safeguarding the good order upon which [civil liberties] ultimately depend. Such a traditional exercise of authority does not raise the censorship concerns that prompted us to impose the extraordinary procedural safeguards on the film licensing process in *Freedman*.

### III

Of course even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression. Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content. We have thus required that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review. Petitioners contend that the Park District's ordinance fails this test.

We think not. As we have described, the Park District may deny a permit only for one or more of the reasons set forth in the ordinance. It may deny, for example, when the application is incomplete or contains a material falsehood or misrepresentation; when the applicant has damaged Park District property on prior occasions and has not paid for the damage; when a permit has been granted to an earlier applicant for the same time and place; when the intended use would present an unreasonable danger to the health or safety of park users or Park District employees; or when the applicant has violated the terms of a prior permit. Moreover, the Park District must process applications within 28 days, and must clearly explain its reasons for any denial. These grounds are reasonably specific and objective, and do not leave the decision to the whim of the administrator. They provide narrowly drawn, reasonable, and definite standards to guide the licensor's determination. And they are enforceable on review first by appeal to the General Superintendent of the Park District and then by writ of common-law *certiorari** in the Illinois courts.

For the foregoing reasons, we affirm the judgment of the Court of Appeals.

### For Critical Analysis

1. What was the importance of the court's determination that the Chicago Park District's procedures were content neutral?
2. Why is the court applying a federal constitution test to a state governmental entity?
3. Are the petitioners attempting to argue that actions by the Park District are a prior restraint? If so, did they succeed? Do you believe it is a prior restraint? What requirements are necessary for a prior restraint to be held valid?

*A writ or order by which an appellate court exercises its discretionary power to decide which lower court cases it will hear. Writs of certiorari are discussed in more detail in Chapter 3.

## McDonald v. Chicago

WL No. 08-1521. (2010)

*The Second Amendment's prohibition on infringing the "right of the people to keep and bear Arms" has long been controversial. Some feel it applies only to local government and militias. Others feel it protects individual rights. In 2008, the Supreme Court,* (District of Columbia v. Heller, *554 U.S. -—, 128 S.Ct. 2783, 171 L.Ed.2d 637*) *held that the Second Amendment protected an individual's right to keep and bear arms for the purpose of self-defense. That was a watershed decision, but it left open the question of whether and how the second amendment applied to the states' right to regulate firearms. One question was whether and how the Fourteenth Amendment had made the Second Amendment also protect citizens as to state and local laws that attempted to restrict firearm ownership. Because*

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*many municipalities had severely restricted or banned various forms of firearm ownership in the latter half of the twentieth century, the Second Amendment question has been a brooding issue of basic constitutional law only partly answered by the 2008* Heller *decision.*

*The City of Chicago had essentially banned the ownership of handguns since 1983. Otis McDonald and other residents challenged the law in federal court. The District Court upheld the law as did the Seventh Circuit Court of Appeals. The petitioners appealed to the Supreme Court.*

### Justice Alito announced the judgment of the court.

Two years ago we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense and we struck down a District of Columbia law that banned the possession of handguns in the home. The City of Chicago and the village of Oak Park, a Chicago suburb, have laws that are similar to the District of Columbia's, but Chicago and Oak Park argue that their laws are constitutional because the Second Amendment has no application to the States. We have previously held that most of the provisions of the Bill of Rights apply with full force to both the Federal Government and the States. Applying the standard that is well established in our case law, we hold that the Second Amendment right is fully applicable to the States.

Chicago enacted its handgun ban to protect its residents "from the loss of property and injury or death from firearms." The Chicago petitioners and their *amici,* however, argue that the handgun ban has left them vulnerable to criminals. Chicago Police Department statistics, we are told, reveal that the City's handgun murder rate has actually increased since the ban was enacted and that Chicago residents now face one of the highest murder rates in the country and rates of other violent crimes that exceed the average in comparable cities.

Several of the Chicago petitioners have been the targets of threats and violence. For instance, Otis McDonald, who is in his late seventies, lives in a high-crime neighborhood. McDonald and the other Chicago petitioners own handguns that they store outside of the city limits, but they would like to keep their handguns in their homes for protection.

Petitioners argue that the Chicago and Oak Park laws violate the right to keep and bear arms. Petitioners contend that the Fourteenth Amendment's Due Process Clause "incorporates" the Second Amendment right. Chicago maintains that a right set out in the Bill of Rights applies to the States only if that right is an indispensable attribute of *any* "civilized" legal system.

The Bill of Rights, including the Second Amendment, originally applied only to the Federal Government. The constitutional Amendments adopted in the aftermath of the Civil War fundamentally altered our country's federal system. The provision at issue in this case, §1 of the Fourteenth Amendment, provides, among other things, that a State may not abridge "the privileges or immunities of citizens of the United States" or deprive "any person of life, liberty, or property, without due process of law."

Four years after the adoption of the Fourteenth Amendment, this Court was asked to interpret the Amendment's reference to "the privileges or immunities of citizens of the United States." The case involved challenges to a Louisiana law permitting the creation of a state-sanctioned monopoly on the butchering of animals within the city of New Orleans. Justice Samuel Miller's opinion for the Court concluded that the Privileges or Immunities Clause protects only those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws." The Court held that other fundamental rights—rights that predated the creation of the Federal Government and that "the State governments were created to establish and secure"—were not protected by the Clause.

The Court wrote that the right of bearing arms for a lawful purpose "is not a right granted by the Constitution" and is not "in any manner dependent upon that instrument for its existence." "The second amendment," the Court continued, "declares that it shall not be infringed; but this … means no more than that it shall not be infringed by Congress."

We see no need to reconsider that interpretation here. For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. The Court held that the general "right of the people peaceably to assemble for lawful purposes," which is protected by the First Amendment, applied only against the Federal Government and not against the States. Nonetheless, over 60 years later the Court held that the right of peaceful assembly was a fundamental right safeguarded by the due process clause of the Fourteenth Amendment. We follow the same path here and thus consider whether the right to keep and bear arms applies to the States under the Due Process Clause.

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In the late 19th century, the Court began to consider whether the Due Process Clause prohibits the States from infringing rights set out in the Bill of Rights. Employing this approach, the Court overruled earlier decisions in which it had held that particular Bill of Rights guarantees or remedies did not apply to the States.

With this framework in mind, we now turn directly to the question whether the Second Amendment right to keep and bear arms is incorporated in the concept of due process. In answering that question, we must decide whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty, or as we have said in a related context, whether this right is "deeply rooted in this Nation's history and tradition."

Our decision in *Heller* points unmistakably to the answer. Self-defense is a basic right, recognized by many legal systems from ancient times to the present day and in *Heller,* we held that individual self-defense is "the *central component*" of the Second Amendment right. Explaining that "the need for defense of self, family, and property is most acute" in the home, we found that this right applies to handguns because they are "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family." Thus, we concluded, citizens must be permitted to use handguns for the core lawful purpose of self-defense.

After the Civil War, many of the over 180,000 African Americans who served in the Union Army returned to the States of the old Confederacy, where systematic efforts were made to disarm them and other blacks. The 39th Congress concluded that legislative action was necessary. Its efforts to safeguard the right to keep and bear arms demonstrate that the right was still recognized to be fundamental. The Civil Rights Act of 1866 sought to protect the right of all citizens to keep and bear arms. In debating the Fourteenth Amendment, the 39th Congress referred to the right to keep and bear arms as a fundamental right deserving of protection. Senator Samuel Pomeroy described three "indispensable" "safeguards of liberty under our form of Government." One of these, he said, was the right to keep and bear arms. The right to keep and bear arms was also widely protected by state constitutions at the time when the Fourteenth Amendment was ratified. In 1868, 22 of the 37 States in the Union had state constitutional provisions explicitly protecting the right to keep and bear arms.

In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.

In *Heller,* we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense. Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

It is so ordered.

***Justice Scalia and Justice Thomas wrote concurring opinions. Chief Justice Roberts and Justice Kennedy concurred at least in part in the judgment, thus establishing a plurality.***

***Justice Stevens and Justice Breyer wrote dissenting opinions.***

**Justice Stevens dissent:** In *Heller* the Court answered the question whether a federal enclave's "prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution." The question we should be answering in this case is whether the Constitution "guarantees individuals a fundamental right," enforceable against the States, "to possess a functional, personal firearm, including a handgun, within the home." That is a different—and more difficult—inquiry than asking if the Fourteenth Amendment "incorporates" the Second Amendment. The so-called incorporation question was squarely and, in my view, correctly resolved in the late 19th century.

This is a substantive due process case. Section 1 of the Fourteenth Amendment decrees that no State shall "deprive any person of life, liberty, or property, without due process of law." The Court has filled thousands of pages expounding that spare text. As I read the vast corpus of substantive due process opinions, they confirm several important principles that ought to guide our resolution of this case.

The first, and most basic, principle established by our cases is that the rights protected by the Due Process Clause are not merely procedural in nature. At first glance, this proposition might seem surprising, given that the Clause refers to "process." But substance and procedure are often deeply entwined. The second principle woven through our cases is that substantive due process is fundamentally a matter of personal liberty. The third precept to emerge from our case law flows from the second: The rights protected against state infringement by the Fourteenth Amendment's Due Process Clause need

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not be identical in shape or scope to the rights protected against Federal Government infringement by the various provisions of the Bill of Rights.

So far, I have explained that substantive due process analysis generally requires us to consider the term "liberty" in the Fourteenth Amendment, and that this inquiry may be informed by but does not depend upon the content of the Bill of Rights. How should a court go about the analysis, then? Our precedents have established, not an exact methodology, but rather a framework for decision making. In this respect, too, the Court's narrative fails to capture the continuity and flexibility in our doctrine.

The basic inquiry was described by Justice Cardozo more than 70 years ago. When confronted with a substantive due process claim, we must ask whether the allegedly unlawful practice violates values "implicit in the concept of ordered liberty."

If the practice in question lacks any "oppressive and arbitrary" character, if judicial enforcement of the asserted right would not materially contribute to "a fair and enlightened system of justice," then the claim is unsuitable for substantive due process protection.

The question in this case, then, is not whether the Second Amendment right to keep and bear arms (whatever that right's precise contours) applies to the States because the Amendment has been incorporated into the Fourteenth Amendment. It has not been. The question, rather, is whether the particular right asserted by petitioners applies to the States because of the Fourteenth Amendment itself, standing on its own bottom.

What petitioners have asked is that we "incorporate" the Second Amendment and thereby establish a constitutional entitlement, enforceable against the States, to keep a handgun in the home. Of course, owning a handgun may be useful for practicing self-defense. But the right to take a certain type of action is analytically distinct from the right to acquire and utilize specific instrumentalities in furtherance of that action.

The right to possess a firearm of one's choosing is different in kind from the liberty interests we have recognized under the Due Process Clause. Despite the plethora of substantive due process cases that have been decided, I have found none that holds, states, or even suggests that the term "liberty" encompasses either the common-law right of self-defense or a right to keep and bear arms. I do not doubt for a moment that many Americans feel deeply passionate about firearms, and see them as critical to their way of life as well as to their security. Nevertheless, it does not appear to be the case that the ability to own a handgun, or any particular type of firearm, is critical to leading a life of autonomy, dignity, or political equality. Although it may be true that Americans' interest in firearm possession and state-law recognition of that interest are "deeply rooted" in some important senses it is equally true that the States have a long and unbroken history of regulating firearms.

The fact that the right to keep and bear arms appears in the Constitution should not obscure the novelty of the Court's decision to enforce that right against the States. By its terms, the Second Amendment does not apply to the States; read properly, it does not even apply to individuals outside of the militia context. The Second Amendment was adopted to protect the *States* from federal encroachment. And the Fourteenth Amendment has never been understood by the Court to have "incorporated" the entire Bill of Rights. There was nothing foreordained about today's outcome. I cannot accept either the methodology the Court employs or the conclusions it draws. Although impressively argued, the majority's decision to overturn more than a century of Supreme Court precedent and to unsettle a much longer tradition of state practice is not, in my judgment, built "upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms."

Accordingly, I respectfully dissent.

## For Critical Analysis

1. Is the court interpreting the scope of the Second Amendment and the right "to keep and bear Arms" or is it evaluating the meaning of the Fourteenth Amendment? Or both?
2. In Justice Stevens's dissent, he considers the case a question of substantive due process. What does he mean? Does Justice Alito disagree with that characterization? Does the question of whether the issue is procedural or substantive due process determine the outcome?
3. How do Justice Alito and Justice Stevens disagree on how the Incorporation doctrine is to be enforced? Is that disagreement, ultimately, the dividing line between their opposite conclusions?

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## CHAPTER QUESTIONS AND PROBLEMS

1. Wayne Gerber, an inmate at Mule Creek State Prison, is serving a sentence of 100 years to life, plus 11 years as a habitual felon under California's "three strikes" law. Although conjugal visits are allowed in California, they are not allowed to prisoners serving life terms. As his prospects of walking among the general public are slim, so are his prospects of impregnating his wife. Gerber requested that he be allowed to package his semen in a plastic collection container and mail it to a laboratory, eventually to artificially inseminate his wife. His request was denied.
   a. Does a prisoner lose all constitutional rights?
   b. Does a prisoner have a constitutional right to conjugal visits? What constitutional provisions would be argued?
   c. Is the warden's denial of Gerber's right to provide sperm samples a violation of the equal protection clause because the state allows conjugal visits for some prisoners but not others?
2. Organizers of the annual Fiesta Bowl football game held in Arizona proposed establishing a race-specific scholarship fund for players of the competing teams. Are such scholarships unconstitutional because they are awarded only to members of one race? Would your answer be any different if the scholarships were awarded in schools that had a history of intentional racial segregation?
3. Can government constitutionally regulate the content (that is, censor) of e-mail by banning "spam" (unwanted advertisements) and web sex or pornography available on websites? What constitutional arguments would you make pro and con?
4. Do state laws that criminalize sodomy between members of the same or opposite sex violate the constitutional right of privacy? Equal protection clause? Are such laws necessary in a free society?
5. In the Seattle School District, students are allowed to choose which high school they wish to attend. If too many students choose the same school, the district has to turn some students away. To assist in this determination, the district uses tiebreakers. The first tiebreaker tries to keep families together—a student with a brother or sister at the chosen school is given preference. The second tiebreaker tries to keep the racial mix in each high school equal to the racial mix in the district—if a school has too many white students, nonwhites are given preference, and vice versa. Is this use of race constitutionally permissible? What other selection criteria might the district use to make the decision? [*Parents Involved in Community Schools v. Seattle School Dist., No. 1*, 285 F.3d 1236 (C.A.9 Wash. 2002).]
6. Several recent counterterrorism measures raise constitutional questions. Discuss the constitutional questions that can reasonably be raised in each situation. What is the probable outcome if the challenge is made?
   a. Visitors to the United States who hold visas from Iran, Iraq, Libya, Sudan, and Syria will be fingerprinted and photographed. Visitors from other countries will not be unless the immigration service believes they represent a security risk.
   b. A presidential order allows trials by special military commissions for non-U.S. citizens who are suspected of involvement in international terrorism.
   c. Police or federal agents eavesdrop on phone calls between detained suspected terrorists and their lawyers without seeking judicial approval.
7. The City of Oakland passed an ordinance that prohibited the burning of all substances in residential yards within the city limits on days when a fire hazard warning was in effect. Violation was made a misdemeanor crime with a minimum fine of $500. Harry Haggerty, a political science major, invited student friends to his home in Oakland where, among other backyard activities, he intended to burn an American flag in protest of U.S. involvement in Iraq. If a fire warning were in effect, could Harry be convicted of the misdemeanor offense?
8. In an editorial comment, the highly respected British journal The *Economist* (27 March 1992, p. 15) opined, "Short of declaring war, nothing an American President can do has as much effect as appointing a justice to the Supreme Court." Do you agree? Why or why not?
9. The principal of Nathan Bishop Middle School in Providence, Rhode Island, invited Rabbi Leslie Gutterman to deliver prayers at the public school graduation ceremony. The rabbi agreed to deliver a nonsectarian prayer at the ceremony. Weisman, the father of a student, sued to prohibit school officials from including prayer in the ceremony. He was unsuccessful, and the ceremony took place with the

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Weismans in attendance. Weisman then sued to permanently bar prayers at future ceremonies, including his daughter's high school graduation. Does including a nonsectarian prayer in a public high school graduation ceremony constitute the establishment of a religion by government in violation of the First Amendment? [*Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649 (1992).]

10. Many changes in human rights law in the United States have occurred only because somebody broke the law, was convicted, and then appealed her case. Rosa Parks, an African-American who died in 2006, was famous for refusing to surrender her seat on a bus to a white person as required at the time. This is partly a result of the fact that a court usually must have a true controversy before it to decide. Is it fair to force individuals to risk imprisonment and fines to vindicate their civil rights? Does this make it morally acceptable to break the law when you believe the law is wrong? Consider the effect, however, if anybody could require a court to review a law for constitutionality whenever they chose.

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CHAPTER 3

# The Court System

**Sir Thomas More:** *The law, Roper, the law. I know what's legal and not what's right. And I'll stick to what's legal.*

**William Roper:** *Then you set man's law above God's.*

**Sir Thomas More:** *No, far below; but let me draw your attention to a fact—I'm not God. The currents and eddies of right and wrong, which you find such plain sailing, I can't navigate.*

**William Roper:** *So … you'd give the Devil benefit of the law!*

**Sir Thomas More:** *Yes. What would you do? Cut a great road through the law to get after the Devil?*

**William Roper:** *I'd cut down every law in England to do that!*

**Sir Thomas More:** *Oh? And when the last law was down and the Devil turned round on you where would you hide, Roper, the laws all being flat? Yes, I'd give the Devil benefit of law, for my own safety's sake.*

*Robert Bolt*, slightly and reverently edited from his play *A Man for All Seasons*.

## LEARNING OBJECTIVES

**After reading and studying this chapter, you should be able to:**

- Explain what a court is and distinguish between a trial court and an appellate court.
- Understand the concept of jurisdiction and explain the various types of jurisdiction. Recognize challenges to concepts of jurisdiction raised by new technologies.
- Describe a typical state court system.
- Describe the federal court system.
- Understand how a typical civil case is processed though the court system.
- Understand the nature of juries and be able to discuss jury size, jury selection, and a litigant's right to a jury trial.
- Explain and provide examples of actions or causes in equity.
- Understand the various ways a trial might conclude.



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America is governed by law, not by people. "A government of laws, and not of men" was written in 1774 by John Adams, first vice president and second president of the United States.[1] This means that decisions establishing and affecting rights and duties are not based on the personal values of certain individuals but rather are made by the courts according to existing rules and using fair and impartial processes. Sir Thomas More, quoted above, would no doubt approve of the United States' emphasis on established rules rather than individual discretion. The American court system is still one created by and administered by individuals, however.

**rule of law**
Principle that decisions should be made by the application of established laws without the intervention of individual discretion.

Indeed, providing a fair, impartial, and consistent application of the **rule of law** is a difficult task, especially in the United States, which contains such a diversity of ethnic origins and cultural backgrounds. Yet, it is that very diversity that makes the rule of law so vitally important for the resolution of disputes with "equal justice under law" for all.

> *"We are going to have to decide what kind of people we are—whether we obey the law only when we approve of it or whether we obey it no matter how distasteful we may find it."*
>
> —Harry S. Ashmore, "On Integration of Little Rock High School," Arkansas Gazette 4 September 1957.

Probably no other country is more reliant on its judges and its courts than the United States. One hundred fifty years ago, French political scientist Alexis de Tocqueville noted the unique importance of courts in the American political system. "Restricted within its limits, the power granted to American courts to pronounce on the constitutionality of laws is yet one of the most powerful barriers ever erected against the tyranny of political assemblies."[2]

Although the power of courts can and does restrict arbitrary abuse of power, bias can creep into the court system. As an example, consider the following episode in traffic court:

> *The traffic court judge found himself facing two attorneys, both of whom he knew very well. Both were charged with speeding violations. "Gentlemen," he said, "I could not be truly objective in either of your cases, so I'm going to let you judge each other's case." Both lawyers agreed. Attorney Number One climbed to the bench. "You are charged with driving 40 in a 25 mph zone. How do you plead?" he asked Attorney Number Two. "Guilty," was the response. "I fine you $50," said Number One. Then they exchanged places. "You are charged with driving 40 in a 25 mph zone," said Number Two. "What is your plea?" "Guilty," said Number One. "Then I fine you $200," said Number Two. "Hey! That's unfair," said the first. "I fined you only $50." "Yes," was the reply, "but there is too much speeding going on. This is the second case we've had like that today."*

**bias**
A preconceived belief affecting neutrality.

Although the purpose of the story is to amuse, it illustrates the injustice of an inconsistent and unfair decision made by a biased judge. **Bias** is a preconceived belief about some person or fact that makes it difficult to be neutral, dispassionate, or fair in evaluating that person's rights and duties, guilt, or innocence. Judges are biased when they have a personal interest in the outcome of a case or have reached a conclusion about a case before hearing the evidence and legal arguments. The U.S. system of justice strives to provide both reasonable consistency and neutrality.

## WHAT IS A COURT?

Clearly, it is important and useful to know where our courts are located, how they function, and the important role they play in our society. Court-based drama permeates American culture and media. Significant decisions of appellate courts, especially the

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U.S. Supreme Court, receive widespread media coverage and drive the thought and conversations of citizens over important issues. For example, courts have recently affected issues ranging from the right to keep a handgun in your home to the right of same-sex couples to marry. The public's acute interest in such decisions prompts lively debate on the Internet, in coffee shops, on talk radio, and so on. Because the actions of courts receive such expansive notoriety, it is obvious that you, as educated citizens, must be familiar with the functions of courts.

**court**
(a) A government body that administers justice by applying laws to civil controversies and criminal offenses. (b) The place where trials are held.

**Courts** are public facilities, available to private persons, business organizations, and government agencies, where legal disputes are heard and decided. Courts offer their tax-supported services practically free to users. Under the U.S. Constitution, courts are essentially independent of the other branches of government.* This independence protects the courts from potential interference by the executive or legislative branches.

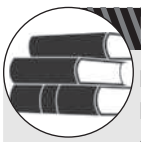
A court is both a place and a system. It is a place where you may go to peacefully resolve your legal disputes with others ("I'll see you in court!"). The word *court* is also used to describe all the court system participants, including judges, attorneys, clerks, witnesses, parties, and the public ("Court is in session"), and sometimes only the presiding judge or justice ("If the court please, may I be heard at this time?").

Courts are also part of a system, as there are different courts for different types of legal disputes, each with different specified procedures. Some courts determine the facts of individual disputes (trial courts); others review decisions of lower courts for correctness, consistency, and fairness (appellate courts). Under the common law system, appellate judges, both in the state and federal systems, have the power to make new law. To understand the courts, it is useful to recognize some of their different functions, including those of trial and appellate courts.

## WHAT IS A TRIAL COURT?

**trial court**
The initial court that hears evidence and applies the law to decided facts.

**Trial courts** conduct the initial proceedings in legal disputes. These proceedings have three distinct purposes: (1) to determine the facts of the dispute ("What happened between the competing parties?"), (2) to determine what rules of law should be applied to the facts, and (3) to apply those rules to the facts.



### LEGAL FOCUS—PROBLEM

Marya Martinez signed up for ski instruction at Heavenly Mountain in Idaho. Gary Graf, a certified ski instructor, fitted Martinez with rental skis. He then taught her how to snowplow (a beginning maneuver for turning, reducing speed, or stopping). Later that afternoon, Martinez was showing her new skills to Luther Thomas, whom she had just met during lunch. Her show was short. Martinez fell and suffered a spiral fracture of her right leg, just above the ankle. Her bindings had failed to release her boot from the skis when she fell. She sued Graf in a civil action for damages, alleging that he had carelessly adjusted the bindings too tightly. Can she win?

Maybe, but maybe not. The outcome will turn on the facts, the applicable law, and the decision by the judge or jury based on those facts and the applicable law. The "facts" you

*The courts are not totally independent of the other two branches. For example, the executive branch of government makes judicial appointments, collects taxes, and distributes funds necessary to pay judges and otherwise operate the judicial system. The legislative branch sets salaries and benefits of judges and often confirms judicial appointments.

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just read above are likely not all the facts, and the court might not even allow all of the facts you read above to be considered. The court has also not determined the applicable law yet. As the lawsuit progresses, many other issues are likely to be considered. Did Graf secure the bindings too tightly? Did Martinez, or anyone else, tamper with the bindings after Graf set them? Did the bindings fail because they were too tight or because Martinez had allowed ice to accumulate beneath her boot? Was Graf responsible for the binding setting? Was there a contract that disclaimed or limited Graf's liability? Were the bindings themselves defective? A civil trial will determine the answers to these and other relevant factual and legal contentions. In the trial, Martinez is the **plaintiff** (person seeking relief in a civil trial) because she is seeking to recover **damages** (money) from Graf, the **defendant** (in a civil trial, the person whom a lawsuit is brought against). The entire process, designed to resolve (that is, decide or settle) the legal controversy, is called a **lawsuit** or **litigation**.

**plaintiff**
In trial, the person trying to recover money damages or other relief from a defendant.

**damages**
Money awarded by a court to a plaintiff for injury or economic loss caused by the defendant.

**defendant**
(a) In a civil trial, the person from whom money damages or other relief is sought by the plaintiff. (b) In a criminal trial, the accused.

**lawsuit or litigation**
A court process at law or in equity to determine the legal merits of a controversy.

**civil dispute**
A lawsuit commenced for the purpose of resolving a civil conflict.

**criminal dispute**
A trial in which the government prosecutes a person charged with a crime.

Martinez's attempt to collect damages from Graf is an example of a *civil dispute* (also called a *civil action* or *civil lawsuit*). **Civil disputes** are private controversies between persons.* A civil dispute is sometimes defined broadly by stating what it is not. It is not a matter involving criminal law. A **criminal dispute** (also called a *criminal action* or *criminal case*) is brought by government to determine whether an accused (also called a defendant) is guilty of an act committed against the public and in violation of a penal statute.

Civil matters and criminal matters are separate fields of law; in large cities, attorneys and judges often specialize in one or the other. The dependence of courts upon attorneys is such that it would be foolhardy for a civil case attorney to defend an accused murderer even before an impartial jury. There are similarities as well as differences between civil and criminal matters. Both involve formal proceedings before a court. Both are conducted to resolve disputed questions of fact and law that will, in turn, define applicable rights and duties of the parties involved. Different terminology, however, is often used. For example, a defendant found to be responsible in a civil trial is said to be *liable*, whereas in a criminal trial such a person is said to be *guilty*. The accused in both processes, though, is called a *defendant*.

In a criminal trial, a prosecutor (for example, a public prosecutor or district attorney) from the local governing unit (county) represents the public on behalf of the state. If a federal crime is involved, an attorney from the Department of Justice, a division of the federal government, represents the public. Although government can be a party in either a civil or criminal matter, only the government can prosecute a criminal action, because crimes—although usually committed against private persons—are prosecuted as public offenses against all society. Procedures differ substantially in criminal actions from those used in civil actions. The focus of this chapter is on the civil court system, although we make some references to the criminal system. (See Chapter 6 for a more complete discussion of criminal law and criminal procedure.)

Most court proceedings and court records are open to public scrutiny, thereby assuring us that no secret **kangaroo court** sessions take place. Court TV broadcasts trials of high interest to national, and sometimes worldwide, audiences. However, public attendance at a trial can be restricted or barred for security reasons. Sometimes one or both parties request privacy, and the court will agree when there is an overriding reason for the public to be excluded from hearing the details of the dispute or seeing witnesses

*The term *persons,* for most situations in law, also includes artificial persons, such as government bodies and business entities including corporations.

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whose privacy ought to be protected. Even if the proceeding is closed to the public, a verbatim transcript of the trial is prepared so reviewing courts may know precisely what was said and by whom. Moreover, the press follows important and interesting cases and often has an investigative posture when dealing with government, including courts.

**LEGAL FOCUS—CASE**

The attorney general of Maryland filed a civil suit against Cottman Transmissions Systems, Inc., related to allegations of fraudulent activities. Cottman was accused of removing automobile transmissions for inspection and maintenance when this costly action was unnecessary. The attorney general distributed news releases elaborating on the charges against Cottman. When the attorney general made additional claims, Cottman asked the court to close the courtroom except for parties directly involved in the proceeding. Did the court agree to do this?

*Maryland v. Cottman Transmissions, Inc.*, 75 Md.App. 647, 542 A.2d 859 (Md., 1988).

**kangaroo court**
A farce trial—one that lacks proper procedure and fairness and where the outcome is predetermined. Origin of the term is thought to be the bizarre appearance of the animal after which it is named.

Initially, yes. Cottman's counsel convinced the trial court judge that the press releases harmed their client's ability to obtain a fair trial, and so the public was barred. Before trial began, however, a higher court overruled this decision. A request for a closed proceeding is most likely to be favorably considered in domestic and family relations matters.[3]

Restricting access to civil law proceedings is unusual and restricting access to criminal law proceedings is rare. The possibility of secret trials resulting in loss of individual liberty through a jail sentence is an abomination in our democracy. Equally disturbing would be the secret exoneration of a favored celebrity or public figure. Criminal proceedings may be conducted in private only in extraordinary situations that are demonstrated to, and then justified by, the trial court judge.[4]

An exception to the openness in most court cases is the juvenile court proceeding, which is conducted privately in most states to protect youthful offenders. The media typically cooperates with the juvenile courts by not publicizing the names of juveniles accused of status offenses (for example, truancy and running away) and even conduct considered criminal when committed by adults.

**appeal**
Formal request to a higher court to review any action of a lower court.

As the Industrial Revolution progressed and spread across the country, bringing increasing opportunities for mischief by juveniles in cities, the states began adopting laws protecting minors (under age 18) from the adult criminal system. Reconsideration of the special status for minors appears to be taking place. Many believe that people reach maturity at an age younger than 18, at least for purposes of criminal law. The states are increasingly willing to treat children aged 16, 14, and even younger as adults by trying and sentencing them similarly to adult criminals.

## WHAT IS AN APPELLATE COURT?

**appellate court**
Court that reviews decisions of prior courts for substantive and procedural correctness.

Within a specified time following the trial court's final determination (a *judgment*), the losing party can **appeal**, which is a formal request to a higher court to review the trial judge's ruling. These review courts are called **appellate courts**. Consisting of three or more judges, called justices, these courts review decisions of trial court judges for substantive and procedural correctness. In civil cases, there is no automatic right to have the state's highest court consider an appeal. In criminal cases resulting in the death penalty, the right to an appellate review by the state's highest court is guaranteed. This is a

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safeguard against imposing an irreversible penalty without thorough review of all aspects of the conviction. Lawyers research the written opinions of appellate courts to determine what law should be applied in the trial courts to the problem facing their clients. This is one example of how trial courts depend on attorneys.

The appellate court works from a verbatim record (court transcript) of what was said and what *evidence* was accepted in the lower court. Appellate courts do not listen to witnesses, accept new evidence,* make new determinations of fact, or utilize a jury. Instead, the court receives written **briefs**, prepared by lawyers, that contain legal arguments as to how the law was correctly or incorrectly stated or applied to the facts as presented to the trial court. This is an example of how appellate courts rely on attorneys. The appellate court accepts as true the facts found by the trial court, which considered all the testimony of all witnesses along with all other evidence and, upon so doing, decides whether rules of substantive and procedural law were properly applied by the trial judge. However, appellate judges may also weigh, or evaluate, the factual evidence as presented in the trial court and then decide whether, as a matter of law, the facts presented were sufficient to justify the judgment.

**briefs**
Written arguments addressed to the appellate court.

If the appellate court justices conclude that the trial court erroneously applied or interpreted the law, it may modify or reverse the judgment or decision, and either enter a new judgment or *remand* (return) the case to the trial court for a new trial or other proceedings in compliance with the appellate court's instructions. In other words, the trial court is instructed to "do it right this time." Merely finding an error at the trial court level is not sufficient to overturn the trial court's judgment. If an error is minor, it is believed unlikely to have affected the case outcome. The error found must be serious, requiring correction by the appellate court in order to avoid a miscarriage of justice. Therefore, it can be concluded that when a reversal occurs, the trial court judge is deemed to have made a serious error in one or more legal rulings.

In the previously discussed *Cottman* case, the trial court judge's decision to ban the press was appealed and reversed even before the trial took place. The Maryland appellate court stated:

> *To close a court to public scrutiny of the proceedings is to shut off the light of the law. How else will the citizenry learn of the happenings in the courts—their government's third branch—except through access to the courts by the people themselves or through reports supplied by the media? A … corporate entity involved as a party to a civil case is entitled to a fair trial, not a private one.*[5]

Relative to the number of cases heard in trial court, few cases are appealed. The cost to appeal can be prohibitive in time, money, and peace of mind. Although losing parties may not be pleased with the outcome of a trial, they nonetheless have had their "day in court."

Thus, to win a corrective action by an appellate court, the appellant or petitioner, the party who appeals the case to a higher court, must show that an error by the court prejudiced the appellant's cause. The appellee or respondent, the party against whom the appeal is brought, will contend that no error was made, or that any error did not affect the outcome of the trial. Clearly, the trial is the crucial, potent, and final source of justice for most persons involved in litigation.

*Examples of evidence are testimony of witnesses, photographs, documents, handwriting samples, dented fenders, and so on. In weighing the believability of testimony evidence, the finder of fact also considers the demeanor, eye contact, dress, and mannerisms of a witness.

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## WHAT IS JURISDICTION?

**jurisdiction**
The power of a court to decide a controversy and to award appropriate relief.

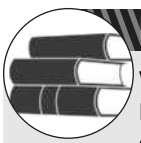
To understand courts, we must understand the concept of **jurisdiction**. The power to speak the law is the broad meaning of the term *jurisdiction*. It refers to the geographic area within which a court has the right and power to operate (that is, "speak"). It also refers to the persons over whom and the subject matter about which a court has the right and power to make decisions that are legally binding. Obviously, the term is used many ways, but always in relation to the right and power of the courts to act. Jurisdiction is about (1) political boundaries (states, federal government, territories, foreign countries, and so on), (2) the type of dispute and dollar amount involved, and (3) persons and property. In other words, jurisdiction is about a plaintiff choosing the right place to sue and choosing the right court in that place, and about compliance with rules of fairness governing when a person must appear in court to defend his liberty or property.

### Political Boundaries of State and Federal Courts

Government power begins and ends at geographical boundaries. It is clear to most that the courts of one sovereign power ordinarily have no authority over someone present in another sovereign power, absent extraordinary reason. The United States is, however, a country with shared political boundaries, and the states are not entirely sovereign. Federalism exists in the U.S. court system as well as in the executive and legislative branches of government. Simply put, we have both federal and state court systems. There are 51 court systems—one for each of the 50 states and for the federal government.* They have much in common and are interrelated, but each is still an independent system.

**concurrent jurisdiction**
The power of more than one court to hear a case.

Interestingly, a party seeking judicial resolution of a dispute often may have the choice of which court system, federal or state, he wishes to use. When both a federal court and a state court have the power to hear a case, they have **concurrent jurisdiction**. Which court, federal or state or both, has power or authority over a given matter is a question of jurisdiction, as provided for in the constitutions and statutes of the federal government and of the respective states.



**LEGAL FOCUS—PROBLEM**

While walking along a busy street in Tallahassee, Florida, Jorge Cepada, a citizen of Florida, was struck by a crate that flew off a move-yourself rental driven by Laura Alexander, a new resident of Oklahoma. Desiring compensation for his injuries, Cepada intends to sue Alexander in the convenient Florida courts. May he do so? Could he instead sue in a federal court?

When Alexander allegedly injured Cepada in Florida, the Florida state courts and the U.S. District Court had concurrent jurisdiction. An injured victim has the right to use the courts of the state where harm occurs. A plaintiff also generally has the right to bring suit in the courts of the state in which he is a resident.

*Federal courts include courts for the District of Columbia and the U.S. Territories, Puerto Rico, Virgin Islands, Canal Zone, Guam, and the Northern Mariana Islands.

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A right may also exist to use a federal court when the parties to a dispute are each citizens of different states. When such diversity of citizenship exists, a plaintiff may file an action in federal court if the claimed damages exceed $75,000. The party could also choose to file in a state court. The federal basis for jurisdiction in this example is called *diversity of citizenship* (discussed further later in this chapter). In diversity of citizenship cases, the federal court applies the substantive law of the state in which it sits, such as the state's law of negligence. Different procedural rules apply in federal civil courts than in state courts, and attorneys may seize upon advantages sometimes available in this regard. Note that diversity jurisdiction allows persons to use the federal courts when their claims are based on state law. Claims based on federal law may be filed in a federal court without the need for diversity jurisdiction.

**subject matter jurisdiction**
The power of a court to hear and decide cases of the general type to which the subject in question belongs.

## Jurisdiction over Subject Matter

**Subject matter jurisdiction** determines which types of cases a court can hear. Probate courts—courts that handle only wills and estate matters—are examples of courts of **limited jurisdiction**, meaning courts authorized to hear limited types of cases. A court of **general jurisdiction** is a court that can hear and decide almost any type of case.

**limited jurisdiction**
Limitation on a court as to the types of cases it can hear and decide.

The subject matter jurisdiction of a court is usually defined in the constitutional or statutory law that creates the court. This creating law may refer to the type of case, its seriousness as reflected by the amount of money requested by the person bringing the lawsuit, or the type of relief requested of the court. For example, a court may be able to hear only cases where the damages requested are $50,000 or less, or when the court is asked to compel a person to do or not do something (an equitable remedy).

**general jurisdiction**
Authorization of a court to hear and decide virtually any type of case occurring within the political boundaries of the geographical area in which it is located.

In criminal matters, the seriousness of a crime often determines which court hears a case. For example, a murder trial is held in the trial court of general jurisdiction rather than one of limited jurisdiction. Whether the proceeding is a trial or an appeal is perhaps the most obvious subject matter limitation on jurisdiction.

**Venue** The proper place for a trial that otherwise has appropriate subject matter jurisdiction for either a civil or criminal case is called its venue (French: "to come"). Venue is the local place, within the geographical boundaries of a larger political jurisdiction, where a case is most appropriately tried. Proper venue reflects a policy of closeness—that is, a court trying a suit should be close to where the incident leading to the suit occurred or close to where the defendant resides.

**venue**
The local place, within the geographical boundaries of a larger jurisdiction, where a case is generally most appropriately tried.

All things being equal, the following are typical of state venue rules:

- In divorce cases, proper venue is the county of the family residence.
- In automobile accident cases, proper venue is the county where the accident occurred or where the defendant resides.
- In breach of contract cases, proper venue is where the contract was made, or where it was breached, or where the defendant lives.
- In criminal cases, proper venue is the county in which the crime occurred or where the defendant was apprehended.

All things are not equal, however, when a significant event occurs that makes a different venue more likely to produce a just result. For example, excessive publicity in the county where a crime occurred may unreasonably prejudice an accused person's right to a fair trial. Under such circumstances, courts will grant a **motion for change of venue** and order that the case be tried in a more appropriate place.

**motion for change of venue**
Request to a judge by counsel to transfer the trial to a different geographic location within the jurisdiction of the court.

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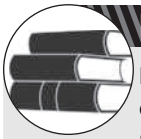


**LEGAL FOCUS—PROBLEM**

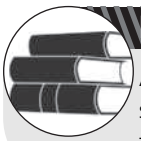
It is difficult to predict what will catch the attention of the nation, but the disappearance of attractive, pregnant Laci Peterson on Christmas Eve in Modesto, California, in 2002 did just that. A concerned and curious nation kept track of her handsome husband, Scott Peterson, and the community of Modesto mobilized in the search for Laci. After the bodies of Laci and her unborn child were discovered four months later in the San Francisco Bay, Scott was charged with two counts of murder. Scott Peterson's attorneys requested that the trial be moved from Stanislaus County, claiming that news coverage of the murder made a fair trial in the local courts impossible. Prosecutors countered that as the media coverage was national the local courts were as likely to be unbiased as anywhere in the state. What did the trial court rule?

Citing the extraordinary media coverage locally, as well as nationally, the court agreed with the defense and granted the motion for a change of venue. "Despite the court's best efforts, the nature and extent of the publicity this case has received has rendered Stanislaus County an inappropriate venue." The defense victory was not complete, however, as the court transferred the case to the Northern California County of San Mateo rather than Los Angeles as requested by the defense.[6]

## Jurisdiction over Persons and Property

***in personam* jurisdiction**
The power of a court over a person.

In our earlier example, if Laura Alexander can be served with a *summons*—an order informing her that a lawsuit has been filed against her—within the boundaries of Florida, the Florida state court has the power and right to hear the case. Under such circumstances, Jorge Cepada's Florida court would have ***in personam* jurisdiction** over Alexander, meaning power over her. The most common means of obtaining *in personam* jurisdiction in a civil case is by personal service of a summons and complaint on the defendant who is within the boundaries of the state in which the suit is commenced.



**LEGAL FOCUS—PROBLEM**

Assume the address given to Cepada by Alexander shows her new home is in Oklahoma, and by the time the suit is filed, she lives in Oklahoma. Can Cepada still sue Alexander in Florida, or must he now sue in Oklahoma?

**long-arm statute**
A state law authorizing a court to hear cases brought against nonresidents under specified circumstances.

Clearly, if the process server (a person in the business of serving summons upon defendants) can find Alexander within Florida, Cepada can sue in the Florida court. But, if Alexander had returned to Oklahoma before Cepada engaged the services of a lawyer and began litigation, the question is whether or not the Florida court could obtain jurisdiction over an Oklahoma citizen who never returns to Florida. The answer is yes, because Florida, like all states, has a **long-arm statute** and because it would be "fair" to Alexander, under due process rules, to hear the case in Florida.

Two requirements must be met before a plaintiff can obtain jurisdiction over an out-of-state defendant. First, the state must have a statute that authorizes it to get jurisdiction under the particular circumstances. Second, the Constitution requires that the basis for jurisdiction satisfy procedural due process. Is it fair to require the defendant to come to the state to defend the lawsuit? "A three-pronged test has emerged for determining whether the exercise of specific personal jurisdiction over a non-resident defendant is

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appropriate: (1) the defendant must have sufficient "minimum contacts" with the forum state, (2) the claim asserted against the defendant must arise out of those contacts, and (3) the exercise of jurisdiction must be reasonable."[7]

Long-arm statutes subject nonresident defendants to local jurisdiction for wrongful activities they engage in while physically within a state even if they have left the state before they are sued. Long-arm statutes also can be used to obtain jurisdiction over some activities of a defendant that occur outside the state but that caused harm within the state. If a person drives a motor vehicle within a state, she is deemed to give her agreement to appear and answer for any harm she causes while driving in that state (called *implied consent*). Cepada won't even be required to hire a process server in Oklahoma, although that would be permissible; service of the summons by registered mail to Alexander's home would typically be adequate. Defendants also give implied consent to jurisdiction of states in which they do business. Thus, consumers in Florida can use their local courts to sue out-of-state companies who do business in their state. When defendants are not subject to long-arm statutes, plaintiffs can always sue a defendant in the state of the defendant's residence.

Although *in personam* jurisdiction is the most common way to get jurisdiction over a defendant, sometimes a dispute involves ownership or title to property. In these cases, plaintiffs will seek ***in rem* jurisdiction** (Latin: "against a thing"). *In rem* jurisdiction empowers courts to declare rights against the world rather than just the named defendant(s). If the legal question involves ownership of real property located in Washington, for example, the appropriate court to hear the case would be the trial court where the property is located in Washington. Parties known to the plaintiff, who have an interest in the property, have a due process right to receive fair notice of any proceeding based on *in rem* jurisdiction, as well as a right to participate in the case.

***in rem* jurisdiction**
The power of a court to declare rights against the world rather than solely against the named defendant(s).

## Jurisdiction and the Internet

The Internet is just one of the relatively new technologies to challenge settled concepts of law. The challenge comes from the sheer number and variety of exchanges and transactions on the Internet involving people from different places who do not know one another. An Internet transaction seems local to each party, but it may even be international. The dilemma posed by the Internet to jurisdiction is easy to understand. Any consumers or parties considered aggrieved would prefer to sue where they reside. The parties with whom they have disputes could be anywhere in the world. A long list of possible disputes can arise, including consumer contracts (an unsatisfactory purchase), an intellectual property dispute (someone using a company's trade name), or a website's disparaging a name or product.

### LEGAL FOCUS—CASE

Although the law is not settled as to what Internet activities are sufficient to confer jurisdiction, this list, found in the case of *Morantz, Inc.*, v. *Hang & Shine Ultrasonics, Inc.*, is helpful.

- [A] mere presence on the World Wide Web does not establish the minimum contacts necessary to subject a corporation to personal jurisdiction on a worldwide basis.
- [T]he minimum contacts analysis in cases involving the Internet is conducted on a "sliding scale," on which the constitutionality of the exercise of personal jurisdiction is directly proportional to the level of commercial interactivity on a corporation's Web site.
- [A] Web site targeted at a particular jurisdiction is likely to give rise to personal jurisdiction.
- Court[s] will consider the quality and quantity of contacts with the plaintiff's jurisdiction to which the Internet site has given rise in determining whether personal jurisdiction may be exercised.[8]

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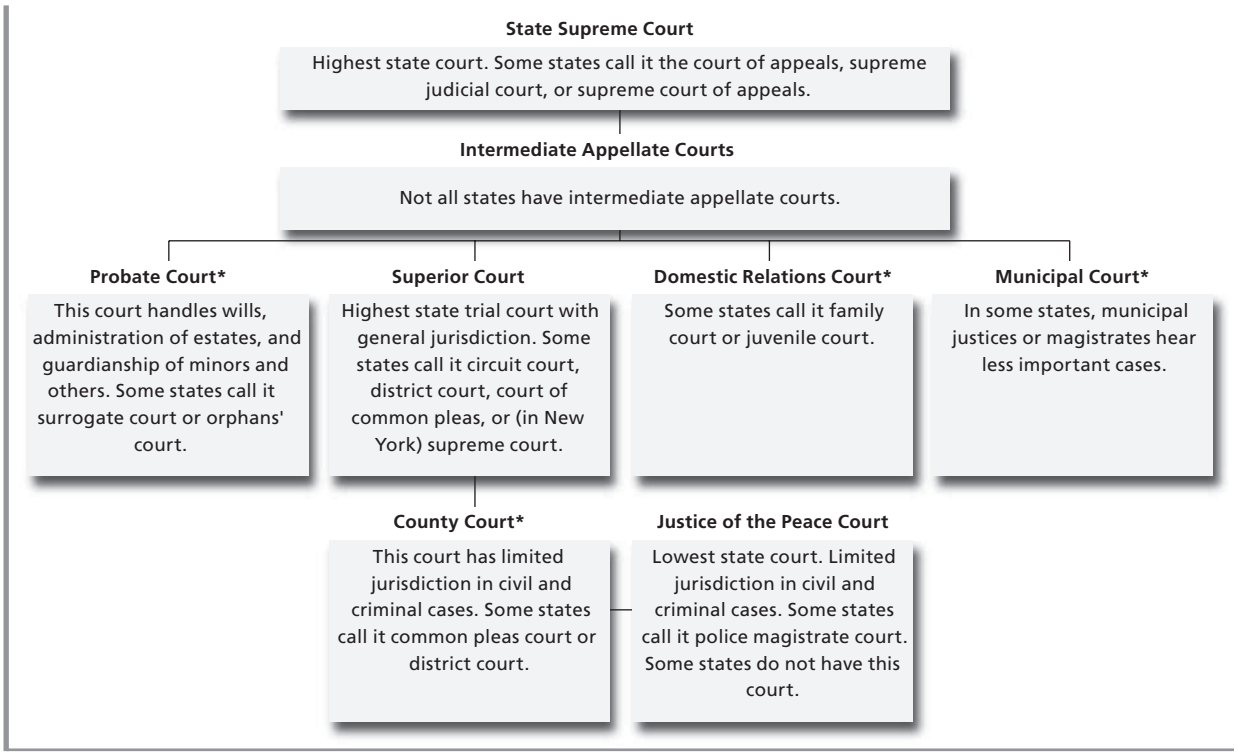
Most courts have followed the case of *Zippo Manufacturing* and categorized Internet contacts in three ways.

1. Passive websites: "A passive website that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction."
2. Interactive websites: "In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website."
3. Commercial websites: "If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper."[9]

## HOW ARE STATE COURT SYSTEMS ORGANIZED?

The typical state court system consists of both trial and appellate courts. Consider the typical state court system shown in Exhibit 3.1. It has three main levels: (1) trial courts of general or limited jurisdiction, (2) intermediate appellate courts, and (3) the highest court (usually named the supreme court). Although most state court systems provide

**EXHIBIT 3.1** A Typical State Court System




* Courts of limited jurisdiction, such as probate, domestic relations, municipal, or county courts, may be separate courts or may be part of a trial court of general jurisdiction.

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two levels of appeal, some states have but one appellate court.* Also, unfortunately, titles of state courts are not uniform; names of courts in one state frequently apply to quite different courts in another state. Confusion can be avoided by focusing on the function a court performs: trial or appellate.

The typical state will have a trial court of general jurisdiction, often called the *superior court*. That court may hear money matters with unlimited dollar limits and serious criminal matters. Most states have courts with limited subject matter jurisdiction, often called special *inferior trial courts or minor judiciary courts*. A small claims court, discussed shortly, is an example of an inferior trial court of limited jurisdiction. Small claims courts hear claims involving relatively small dollar amounts. A domestic relations court, which handles only divorce actions and child custody cases, is another example of a court of limited jurisdiction. Local municipal courts handling, for example, misdemeanors and civil cases of modest dollar amounts are also courts of limited jurisdiction.

## LAW AROUND THE WORLD

### The Court System in South Korea

Courts in South Korea:

"The Courts are provided with the power to judge all legal disputes unless otherwise provided in the Constitution. The exceptions are found where the Constitution vests the power to judge some constitutional issues with the Constitutional Court and vests the power to examine the qualifications and/or to take disciplinary measures against the lawmakers in the National Assembly.

The courts shall also exercise the power to administer and supervise extrajudicial matters such as registrations, family registrations, deposits, and the duties of the marshals. There are six types of courts in Korea, which are the Supreme Court, the High Courts, the District Courts, the Patent Court, the Family Court, and the Administrative Court.

The District Courts, the High Courts, and the Supreme Court form the basic three-tier system. Other courts exercise specialized functions with the Patent Court positioned on the same level with the High Courts and the Family Court and the Administrative Court positioned on the same level with the District Courts.

The District Court and Family Court may establish a Branch Court and/or a Municipal Court and registration office if additional support is necessary to carry out their task. The Branch Court of both the District Court and the Family Court may be established under one roof.

There are also special courts as the martial courts. The difference between martial courts and non-martial courts is that military officers who are not qualified as judges hear cases in martial courts, whereas in non-martial courts only judges may adjudicate a case. However, even in military trials, the Supreme Court has final appellate jurisdiction."

- http://www.ncsconline.org/

## What Are Small Claims Courts?

Court procedures are devised to handle a great variety of legal problems ranging from the most complex to the simplest. Not surprisingly, the usual manner of handling legal matters is inefficient for small or simple cases. If you have a legal claim for $2,000 worth of minor damage to your automobile in an accident, the cost of hiring an attorney to help you recover that amount through court action would no doubt exceed your hoped-for recovery.

*States with only one appellate court are Delaware, Maine, Montana, Nevada, New Hampshire, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming.

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**small claims court**
A court with jurisdiction to decide civil controversies of a relatively minor nature.

To promote peaceful resolution of disputes for which a conventional lawsuit is prohibitively expensive, states have created a special trial court, called the **small claims court**. Jurisdiction of this court is usually limited to disputes involving damages worth small sums of money. They are often referred to as the people's court, because an average adult with limited formal education may obtain resolution of minor civil legal disputes in a speedy, informal, and user-friendly forum.

The small claims court may be a separate court or a designated subdivision of another court. Because they are the creation of each state, particulars vary widely. The maximum amount of recoverable damages ranges from $1,500 to $25,000, depending on the state; the most common maximums are between $5,000 and $10,000. State legislatures frequently change the dollar limits of these courts in inflationary times to continue to provide inexpensive access to the courts for civil matters involving modest amounts of money.

The purpose of the small claims court is the same as any other trial court: to determine facts and apply the law. However, the dynamics of the small claims court are more relaxed, proceedings are usually faster, and procedures to use the court are less complicated than those found in other courts. This is not to say it is uncomplicated or that the small claims court is a social gathering—only that it is less intimidating to the average litigant.

Most small claims cases involve disputes over money, although some are concerned with matters such as eviction from residential rentals. Divorce actions, criminal matters, and civil cases involving *in rem* jurisdiction are examples of cases not accepted in small claims court. The procedural rules differ from those of traditional trial courts. Legal documents are kept to a minimum; often, the only formal document required of the plaintiff is a simple preprinted form with boxes for checking. There are no formal rules of evidence and no juries. In the interests of economy and simplicity, most states do not permit attorneys-at-law to represent litigants in small claims court. Corporations are artificial, legal persons, and so when they use small claims courts to collect debts they must be represented by employees. Most states will not allow attorneys to appear for litigants even in such corporate situations unless the attorney-at-law is the sole shareholder or an officeholder of the corporation.

Each party explains the dispute, calling on witnesses for corroboration or for additional facts. Each party also presents any supporting documents or other physical evidence. The judge may ask questions and then, without any elaborate commentary or research, decide the case. Sometimes the judge will rule at the conclusion of the trial, but often the judge will inform the parties of his decision later by mail. In some states, parties can appeal the case, but in many situations, the small claims court plaintiff does not have that right—use of a small claims court is deemed a waiver of the right to a jury and to appeal. The defendant, however, generally retains a right to a **trial *de novo*** (*de novo* means "new" and the term means a right to a completely new trial hearing*).[10]

**trial *de novo***
A new trial that takes place as if the first trial had not occurred.

Small claims courts help "the little people" get their "day in court" without the delays and costs that accompany use of traditional courts. However, because business firms often have a substantial number of small claims, they appear most frequently as plaintiffs in small claims court actions.

Various television programs such as *Judge Judy* popularize small claims courts. Technically, these proceedings are *arbitrations* (a private third party is selected by the

*The defendant, unlike the plaintiff, did not choose the small claims court forum and usually is not deemed to have waived the right to an appeal. In the normal appeal, the trial record is reviewed to determine whether the trial judge made an error. If a party has a right to a trial *de novo*, the prior court record is not considered (note that small claims courts do not keep a record of transcripts), and the defendant is automatically given a new day in court. Although the new trial occurs at a higher level court, the trial usually remains informal and is decided by a judge without a jury.

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parties to hear and resolve the dispute) designed to look like a small claims court trial, but they illustrate the types of disputes heard and resolved in small claims courts. What they do not do is illustrate usual judicial behavior. The cases heard are chosen for entertainment value, and the television judge's questions and decisions are often rendered in a sarcastic and condescending fashion.

# WHAT IS THE FEDERAL COURT SYSTEM?

Like the state court system, the federal court system consists of both trial and appellate courts. The two principal appellate courts are the U.S. Courts of Appeals and the U.S. Supreme Court.

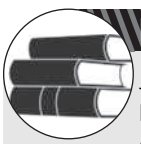
## Federal Trial Courts

The federal government has one trial court of general jurisdiction called the U.S. District Court. The country is divided into 94 districts. Each district consists of a number of judges doing business in a number of different courtrooms and even in different buildings. How many judges are "sitting" (that is, conducting the court's business) is related to the population within each district. In populous areas, the districts are geographically small; in rural areas, they are large. There is at least one U.S. District Court in every state and territory in the United States.

U.S. District Courts conduct trials concerning federal matters, such as federal crimes and enforcement of federal statutes. Most federal crimes involve crimes against the government or crimes occurring on federal property. One crime, kidnapping, is a federal crime even though it does not occur on federal land. This federal law was passed after the notorious kidnapping of the son of famous aviator Charles Lindbergh in 1932. Federal jurisdiction for the crime of kidnapping is based on taking of the victim across state or country lines, and the statute provides that the failure to release the victim within 24 hours after seizure creates "a rebuttable presumption that such person has been transported to interstate or foreign commerce."[11]

**diversity of citizenship**
A basis of jurisdiction in federal courts requiring that plaintiff and defendant be involved in an actual controversy, that they be citizens of different states, and that a minimum of $75,000 be sought in damages.

As discussed earlier, it is possible to sue in a federal court even though the claim is based on state law when the plaintiff and defendant are from different states or countries. **Diversity of citizenship** jurisdiction exists when a plaintiff is a citizen of one state and the defendant is a citizen of another state, or when one party is a foreign country or a citizen of a foreign country and the other is a citizen of the United States. The amount of claimed damages in a diversity of citizenship case must be at least $75,000.[12] In settling such controversies, the particular U.S. District Court involved applies federal *procedural law* (which involves the manner in which rights and duties are to be enforced) and the *substantive law* (which involves the defining of rights and duties) of the appropriate state, usually the state where the court is located. When a federal court hears a case because of diversity jurisdiction, an example of *concurrent jurisdiction* exists because at least one state court would also have had the power to hear the case, if the plaintiff had chosen to file the case there.



**LEGAL FOCUS—PROBLEM**

Jorge Cepada, a resident of Florida, wishes to sue Laura Alexander, an Oklahoma resident, to collect damages for injuries and losses arising from the motor vehicle accident that occurred in Florida (see page 95). If the amount of damages requested exceeds $75,000, Cepada can sue in a U.S. District Court sitting in either Florida or Oklahoma. Can he alternatively file the case in a state court?

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Yes, as noted earlier, he can. Because the accident occurred in Florida, the most convenient state court would be Florida's. Using a long-arm statute, he could get jurisdiction over Alexander through the mail. Cepada could also file the lawsuit in Oklahoma, Alexander's resident state, and obtain jurisdiction there. This accident provides an example of a legal dispute in which concurrent jurisdiction exists.

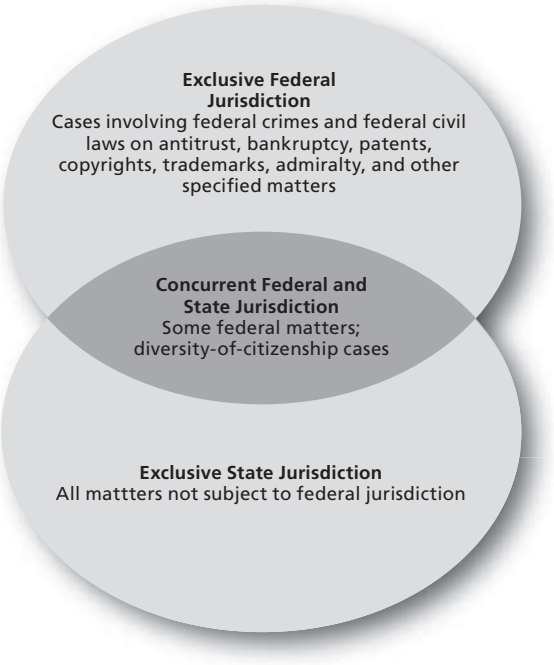
**exclusive jurisdiction** The sole power a court has over the particular subject matter of a case.

When cases can be tried only in federal courts or only in state courts, **exclusive jurisdiction** exists. A person filing for a discharge in bankruptcy, which is a constitutional legal right that releases one from the duty to pay one's debts, can file the petition (a petition is the appropriate filing to institute a bankruptcy proceeding) only in a federal court. States also have exclusive jurisdiction in certain subject matter areas—for example, in divorces and adoptions. The concepts of concurrent and exclusive jurisdiction are illustrated in Exhibit 3.2.

## Federal Appellate Courts

**U.S. Courts of Appeals** The U.S. Courts of Appeals review the decisions of the U.S. District Courts located within their respective circuits. The country is divided into 13 circuits, or geographical areas, each with a U.S. Court of Appeals. The number of judges, courtroom-building locations, and geographic size of the circuits vary greatly.* As with state appellate courts, the U.S. Courts of Appeals review cases brought to the court's

**EXHIBIT 3.2** Exclusive and Concurrent Jurisdiction




*The Washington, D.C., circuit is the smallest circuit in geographical size and is responsible only for the nation's capital. The largest geographical circuit is the ninth (Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Oregon, Nevada, the Northern Mariana Islands, and Washington). The number of judges per circuit ranges from six sitting circuit court judges in the first circuit (Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island) to 28 authorized judges in the ninth circuit.

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attention by parties contending that the federal trial judge made an error of law. The federal system also has a U.S. Court of Appeals for the federal circuit, which has nationwide jurisdiction to hear appeals from all district courts in patent cases, as well as certain claims against the federal government. This court also hears appeals from specialized courts (for example, the U.S. Claims Court and the U.S. Court of International Trade) and claims arising from decisions of federal administrative agencies.

**U.S. Supreme Court** The highest level of the federal court system is the U.S. Supreme Court. Under the U.S. Constitution, there is but one such court. The court consists of nine justices.[†] It has original, or trial, jurisdiction in rare instances. Most often, it acts as the court of final appeal for federal courts of appeals and, in less frequent situations, the highest state appellate courts when they have decided cases on the basis of federal law.

Many cases compete for the attention of the U.S. Supreme Court. The selection process is accomplished by the *rule of four*, which means that the case is selected to be heard if four of the nine justices so choose. When the Court selects a case for review, it issues an order (writ of *certiorari*) to the court of appeals, or highest state court, requesting the record of the case. A **writ of *certiorari*** (Latin: "to be informed of") is an order by which the U.S. Supreme Court exercises its discretionary power to decide which lower court cases it will hear. To be among these cases, an important federal question must be raised, such as one involving a constitutional issue (for example, freedom of speech). Also, any case where different lower federal courts have issued conflicting rulings on the same issue would be one the Court would seriously consider hearing. When the Supreme Court declines review of a case, the practical effect is an agreement with the lower court decision, which continues binding the parties. The Court is able to hear only a small percentage of the appeals filed annually, and formal opinions are delivered in only about 115–130 cases.[13]

**writ of *certiorari***
A procedural document whereby an appellate court exercises its discretionary power to accept jurisdiction of a pending case.

Exhibit 3.3 depicts the federal court structure, which, in addition to the principal courts, includes the U.S. Court of International Trade, U.S. Claims Court, and U.S. Tax Court. Each of these is a special jurisdiction court restricted to hearing particular types of cases.

# TRIAL PROCEEDINGS

American trial procedures are complex, Byzantine, and, often, expensive. The outcome of even an "open and shut" case is uncertain. Meritorious cases can be lost because of errors made in the procedures that are necessary in maneuvering a civil case through the court process. Some litigants with a strong case may pay their opponents a sum of money, often called "nuisance money," to settle a case and thus avoid the cost and risk of proceeding through a trial.

## How Is a Civil Case Started?

Recall the example in which Marya Martinez was injured in a skiing accident that she believes would not have occurred but for the carelessness of her ski instructor, Gary Graf (page 91). If Martinez decides to sue Graf, her attorney will begin the case by filing a document called a **complaint** with the county clerk. The complaint briefly states the

**complaint**
A document stating the facts constituting an alleged cause of action.

[†]The Constitution does not specify the number of Supreme Court justices, and since its inception the number has varied. However, since 1869 the number has remained at nine. In 1937, an attempt was made by President Franklin D. Roosevelt to "pack the court" with six additional justices who would presumably be sympathetic to his "New Deal" reform legislation. This maneuver was vigorously opposed and rejected by Congress.

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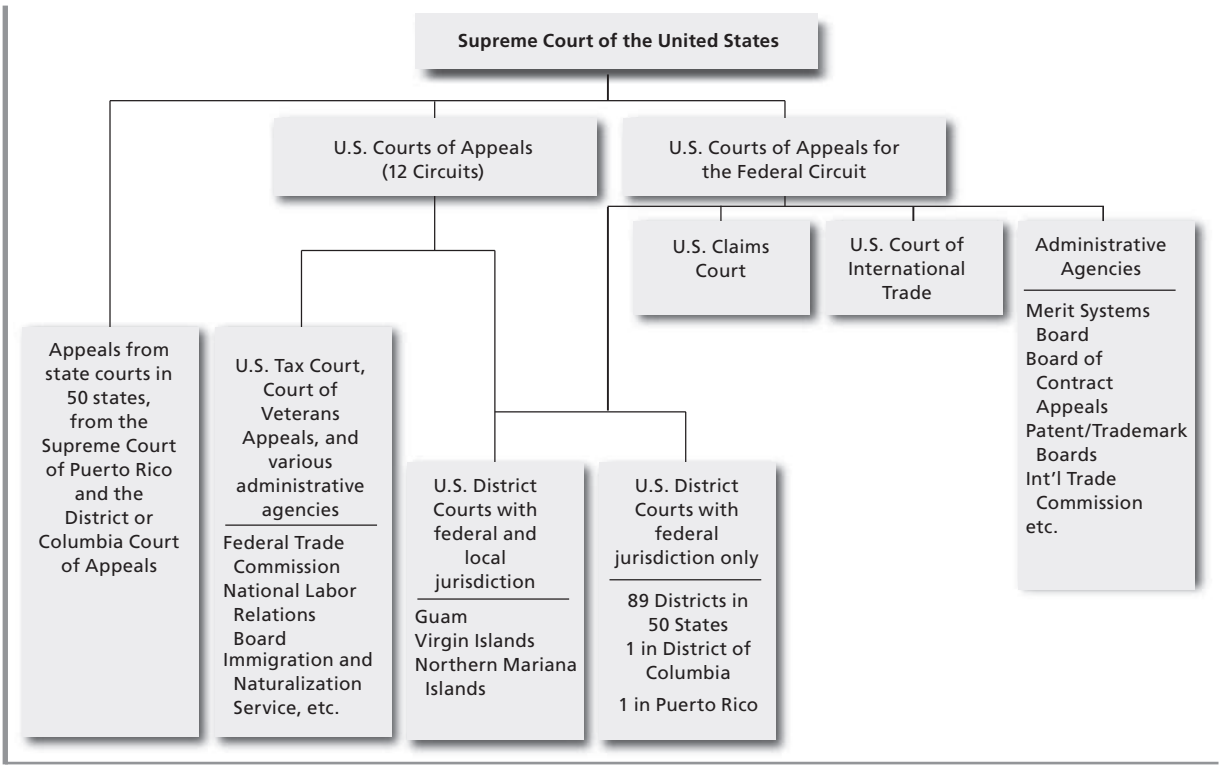
**EXHIBIT 3.3** The U.S. Court System




Source: Administrative Office of the U.S. Courts.

**cause of action**
An existing right to seek and to receive judicial relief, assuming the factual allegations of the plaintiff are true.

**summons**
A document issued by a clerk of the court inviting the defendant to respond to a complaint.

facts she believes justify her claim, the basis for jurisdiction of the court, and the request for damages or other relief she seeks. Martinez is the plaintiff, and the complaint is almost always prepared by her attorney, who is satisfied that she has a **cause of action** (legally appropriate basis for suing).

County clerks maintain files, generally in alphabetical and numerical order, of every case filed in their respective counties. These records are open to the public. A filing fee (from $100 to $250 or more) is charged at the time of filing. When the complaint is filed, the clerk issues a **summons** (prepared by the plaintiff's attorney) by endorsing it on behalf of the court. The summons is a notice of a lawsuit; it informs the defendant that a lawsuit has been filed against him in the named court and that the defendant has a prescribed time (for example, 30 days) to personally appear or respond to the complaint. You may recall the importance of the summons in obtaining jurisdiction over the defendant, as described earlier in the case involving Jorge Cepada and Laura Alexander. If the defendant fails to respond, the plaintiff may win the case by default (forfeit), and a judgment, the final decision of the court, may be awarded to the plaintiff.

Martinez's attorney will arrange with a **process server** or a local official, such as a sheriff, to have a copy of the summons and complaint personally served on the defendant, Gary Graf, to obtain *in personam* jurisdiction. As discussed earlier, a process server is in the business of serving legal documents on defendants or plaintiffs and witnesses. If Graf cannot be found, or if he evades service of the process, he may nonetheless be served by alternative methods such as "constructive service" through a notification to

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**process server**
A person who serves (delivers) a copy of the summons and complaint, or other legal document, upon a party or witness at the request of the opposing party to civil litigation.

the defendant by mail and the publication of a summons in a local newspaper. Serving a copy of the summons and complaint (or publication of summons) gives Graf notice that he has been sued and gives the proper court jurisdiction (or power) over his person to decide the controversy. The court, of course, must also be the appropriate forum (have jurisdiction) over the subject matter and type of dispute involved.

Upon receipt of the summons and complaint, Graf would typically hire a lawyer to represent him to uphold his interests. Graf's lawyer would file a responsive pleading, called an **answer**, with the county clerk and mail a copy to the plaintiff's lawyer. The answer is a document containing a defendant's denial and personal allegations of fact. In the answer, Graf may admit to any parts of the complaint that he believes are true and deny the rest. The complaint and answer together are called the **pleadings**.

**answer**
A document containing a defendant's denials, admissions, or allegations of fact in response to a complaint.

Instead of an answer, Graf's attorney might be able to file another type of responsive document, asking for a dismissal of the complaint. This is called a **demurrer** or **motion to dismiss** and is used when the complaint, even if true, is legally insufficient to justify an answer. A **motion** is a formal request to a court for some action by the judge. The demurrer or motion to dismiss is often called a "so what" motion, as its legal effect is to say that even if all of the plaintiff's allegations are true, no legal duty was breached by the defendant. To provide an example of a motion to dismiss, let us consider an illustrative dispute.

## MORALS AND ETHICS

Plaintiff Archibald Cantwell alleged in his complaint that the defendant professor "wrongfully, viciously, and wantonly pointed at and called on the plaintiff, while in class, causing great and severe mental anguish." Did Cantwell state a cause of action in his complaint? Was the professor's conduct lawful? If so, was it also morally justified?

**pleadings**
The complaint of the plaintiff and answer of the defendant in a lawsuit.

No. Even if the plaintiff's claims were admitted by the defendant, there would be no legal recovery (judgment) possible for the plaintiff, simply because it is not against the law to ask questions and point at a student. Therefore, the defendant should file a demurrer or motion to dismiss, which would be **sustained** (agreed to) by the court, and the complaint would be dismissed. If Cantwell chose instead to file an answer, the case would continue on to trial, wasting the time and money of both the defendant and the court. The dividing line between an actionable claim and a failure to state a claim is not a morally drawn line: not all morally indefensible behavior is illegal. Even if the professor had called Cantwell an offensive name, a claim would not exist without underlying harm occurring to Cantwell.

**demurrer or motion to dismiss**
A motion filed by a defendant in response to a summons and complaint alleging the complaint, even if true, is insufficient to state a cause of action.

A demurrer can also raise procedural defenses, as, for example, a claim that the action is barred by a **statute of limitations**—a statute requiring that particular legal actions be commenced within a stated period of time. Late claims are barred (that is, prohibited) by statutes of limitations even if they are otherwise meritorious. The reasoning for statutes of limitations is that memories fade and other evidence becomes scarce and less reliable, all of which diminishes the possibility of a just resolution of the dispute by a court. Such statutes also serve to eliminate what could be an ongoing threat of suit that would otherwise interfere with the defendant's life.

**motion**
A formal request by counsel addressed to a court or other tribunal for a particular decision or act.

Once Martinez's complaint and Graf's answer are filed, the factual contentions of each party are stated on the record. Plaintiffs and defendants almost always disagree with each other's version of what had happened; these factual disagreements are much of what must be resolved at trial.

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**sustained**
Agreed to by the judge at the request of an attorney-at-law.

**statute of limitations**
A statute that bars civil or criminal proceedings unless brought within a specified period of time after the act occurred.

**default judgment**
Court-awarded judgment based on the defendant's failure to answer the summons and complaint or to appear at the trial to contest the claim of the plaintiff.

***ex parte* trial**
A legal action where only one side of the dispute is heard.

**accusation**
Formal commencement of a criminal case by a specified public official such as a district attorney or by a grand jury.

**information**
An accusation of a criminal offense issued following a preliminary hearing.

**grand jury**
An appointed body of citizens formed both to investigate the operations of government and to issue indictments against persons suspected of criminal conduct.

Following receipt of summons and complaint, Graf might voluntarily or unwittingly do nothing. Doing nothing is rarely a smart choice; here it would pave the way for Martinez to obtain an uncontested judgment, called a **default judgment**. As explained earlier, a judgment is a final expression by the court telling who wins and who loses. Unlike a judgment following a trial, a default judgment may be issued by the judge following a trial in which the defendant is absent and, it is therefore assumed, does not contest the accuracy of the plaintiff's claims. The judge simply takes minimal evidence from the plaintiff to ensure that the claim is not frivolous or improper in some respect. Following such an ***ex parte*** (Latin: "with one party") **trial**, which often takes only minutes of the court's time, a judgment typically is awarded to the plaintiff. So, doing nothing can be a costly mistake. Even if he is going to concede fault and liability, Graf would be wise to file an answer to the complaint and then try to negotiate a compromise limiting the damages he must pay or providing a reasonable payment schedule. Default judgments are surprisingly common occurrences, particularly in small claim actions.

## How Is a Criminal Case Started?

In contrast to a civil case, a criminal case is formally begun by the issuance of an **accusation**, which formally charges a specified person with commission of a particular crime. An accusation is usually initiated by the district attorney (under which circumstance it is called an **information**) or by a body called the **grand jury** (under which circumstance it is called an **indictment**). The grand jury is a body composed of a number of jurors that varies from state to state, sometimes six, sometimes 12, and occasionally more than 12. It inquires into crimes committed in the city or other geographic region from which the members are drawn, makes determination of the probability of guilt, and then issues indictments against supposed offenders. Misdemeanor cases typically are initiated by the filing of a complaint. These terms and criminal procedures are discussed in Chapter 6.

## What Are Pretrial Procedures?

Once a civil lawsuit begins by the filing of pleadings, a year or more may elapse before the trial. In some crowded metropolitan areas, the volume of cases filed, together with shortages of judges and courtrooms, causes seriously congested calendars, which in turn necessitate undesirable delays in setting cases for trial. In rural and less populous jurisdictions, the trial may occur as soon as the opposing attorneys are prepared. In populous urban areas, delays of three to four years sometimes occur. Courtroom delay is one of the most serious problems facing this country's legal system. Many states experiment with new administrative methods to expedite the process and actively encourage alternatives to litigation, such as arbitration. The legal system is flexible enough to allow for alternatives to the courts in many situations. Alternatives to litigation are called **alternative dispute resolution** (ADR) and are discussed in Chapter 4.

**Discovery** One of the most time-consuming, expensive, intrusive, and sometimes frustrating aspects of going through civil trials today involves a process called discovery. **Discovery** includes the use of a group of methods to learn facts about the dispute. Nonexistent early in the twentieth century, many believe that discovery has escalated into an arsenal of weapons that is often abused by attorneys. Should discovery be streamlined to keep pace with life and times in the twenty-first century? Many business contracts today contain arbitration agreements (discussed in Chapter 4) to avoid going to court if and when disputes arise between the contracting persons. Many, perhaps most, financial businesses (for example, banks and stock brokerages) and HMOs (health maintenance

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**indictment**
An accusation of felony filed by a grand jury.

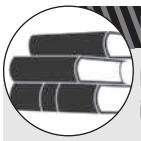
organizations) choose this judicial bypass to attempt to avoid the costs, intrusiveness, and delays associated with discovery procedures.

Although courtroom availability is the most common reason for a delay in a trial date, counsel for one or both of the parties may seek delay because more time is needed for discovery procedures. The stated goals of discovery are to

- Educate each party as to the facts surrounding the controversy.
- Promote voluntary settlement of the controversy by revealing strengths and weaknesses in the cases of each party.
- Eliminate surprises that might otherwise arise during the trial, possibly leading to a miscarriage of justice.

**alternative dispute resolution**
Any of various methods of resolving disputes through means other than the judicial process.

Depositions and interrogatories are the most common types of discovery. A **deposition** is the questioning of a witness or adverse party by the opposing attorney, long before the trial, under oath, in the presence of a court reporter and the other party's attorney. **Interrogatories** are a form of discovery in which written questions are directed to a party, who must then reply under oath with written answers.



## LEGAL FOCUS—PROBLEM

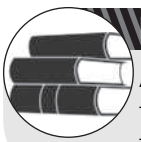
Marya Martinez hired Sally Sharpe as her attorney in the case against Gary Graf. Sharpe's complaint and summons issued by the court were personally served on Graf. He promptly hired a lawyer, Scott Sagedevan, who prepared and filed an answer. In the answer, Graf contended that he had adjusted Martinez's bindings carefully and properly and was not negligent. He also alleged that Martinez was negligent in two respects: (1) being under the influence of alcohol at the time of her injury and (2) being careless in allowing ice to form beneath her boots. The pleadings were filed, joining the issues of fact. What is the most likely next step by the attorneys?

**discovery**
A group of methods used during the period between commencement of a lawsuit and the date of trial to learn facts about the dispute.

Attorney Sharpe is seeking a money judgment against Graf to compensate Martinez for her injury on the theory that Graf was negligent. Attorney Sagedevan, on behalf of Graf, is contending that Graf was not negligent and that even if he was, Martinez was equally careless as to her own safety and so she should be denied a money judgment. Both attorneys will need more information in order to prepare for trial.

**deposition**
Questioning of a witness or adverse party to an action, under oath, by the opposing attorney before the trial.

**Depositions** Sharpe wants to know the exact setting Graf used in adjusting Martinez's bindings; then she will seek expert advice as to the proper setting. Sharpe could mail a notice of taking deposition to Graf's attorney, requesting that Graf appear in Sharpe's office at a stated time to be questioned under oath with a court reporter present. The court reporters will use mechanical shorthand to record all testimony. In many states, electronic shorthand equipment and recording machines also are used. During this deposition, which Graf must attend, Sharpe could ask him, among other things, what setting he had used on Martinez's bindings. Of course, Graf's attorney will respond by taking Martinez's deposition.



## LEGAL FOCUS—PROBLEM

At the deposition, attorney Sagedevan asked the following question: "Ms. Martinez, do you date frequently?" Attorney Sharpe immediately objected, shouting that she would not allow her client to be subjected to irrelevant questions by Sagedevan. Must Martinez answer the question?

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**interrogatories**
A form of discovery consisting of written questions directed to a party or witness who is expected to reply with written answers under oath.

At the deposition, Sagedevan cannot force Martinez to answer a question if she refuses. He could, however, seek a court order requiring her to answer the question if the question is deemed appropriate by the judge. Courts have the power to compel the parties to comply with the discovery procedures. If the order is granted and Martinez still refuses to answer, her entire case may be dismissed or another sanction (penalty) imposed. Attorney Sagedevan will need to explain to a judge why the question is appropriate because its relevance to the case is not obvious.

After the deposition, the court reporter prepares a hard (paper) copy of all questions and answers. This document is made available to the witness, who makes any necessary corrections before signing and returning it. If the witness is unavailable at the trial, or is present but changes the version of the story given at the deposition, the transcript itself may be introduced as evidence and used to **impeach** (that is, discredit) the witness. In complex cases, depositions may require several days of testimony under oath. The cost of taking depositions is a major expense of litigation and one significant reason why alternatives to litigation are often sought. As undeniably useful as discovery is, it is costly and can be subject to abuse. Litigants can request large quantities of documents based on possible relevance, and the expense of this production of documents is borne by the person producing them. The federal courts and many state court systems have experimented with discovery rules in an attempt to preserve discovery's value while limiting its excesses. Examples include requiring a party to provide relevant discovery without its being requested by the other party and harsher penalties (sanctions) available to the courts for instances where abuse of discovery rules exist. Some have suggested eliminating discovery altogether.

**impeach**
To discredit, dispute, disparage, or contradict a witness's testimony.

**Written Interrogatories** After the deposition, attorney Sagedevan thought of some additional questions that he would like to ask. He sent the following written interrogatories to Martinez through her attorney:

1. Please state the address of Luther Thomas.
2. Please state each date you visited a doctor and your total medical bill expenses.
3. Please state whether or not your medical bills are being paid by an insurance company. If so, please state the company's name and the applicable policy number.

If Martinez fails to answer the written interrogatories, Graf's attorney may seek an order from the court compelling answers. Attorneys may serve hundreds of written interrogatories in preparation of a complex case. They are less expensive than depositions because no court reporter is needed, and because they are written they tend to be more concise than the ramblings that frequently accompany oral interrogations. Furthermore, parties responding to interrogatories must search their files and records for information they "cannot recall." A disadvantage is that they allow a witness to consult with counsel and draft an answer that, although true, discloses as little as possible and states even that as favorably as possible. The questioning attorney is not present to detect signs of uneasiness and possible evasion or concealment, nor is she able to immediately pursue promising leads suggested by oral responses during depositions.

**motion to produce**
Request to a judge by counsel to compel the opposing party to provide specified evidence to the court.

**Motion to Produce** The **motion to produce** may result in an order made by a judge. It compels the opposing party to provide specified evidence that he currently controls or possesses, and that is believed to be relevant in the case.

## LEGAL FOCUS—PROBLEM

Sagedevan believed that Martinez's diary might provide important information. He therefore filed a motion to produce with the court after his request to produce it had been refused. The motion requested an order compelling Martinez to deliver her diary to Sagedevan for his inspection. Will the motion be granted?

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**subpoena**
An order directing a person to appear at a certain time and place for the purpose of giving testimony as a witness.

**subpoena *duces tecum***
A judicial order to bring specified documents or physical evidence to court.

**privilege against self-incrimination**
The right of any person, including one accused of a crime, to remain silent when what might be said could indicate criminal guilt.

**motion for summary judgment**
Request to a judge by counsel to award judgment because there are no significant questions of fact in the lawsuit.

**pretrial hearing or conference**
Hearing occurring before a trial.

Sagedevan's motion will not be granted unless he can demonstrate to the court specifically what may be contained in the diary that would be relevant to the issues in the case. That appears doubtful unless, for example, Sagedevan can offer proof that Martinez has been deceitful and he has reason to believe that the diary would confirm the deceit.

At the time of trial, either attorney may ask the court for a **subpoena** (Latin: "under penalty"), a written order directing a person to appear in court and testify as a witness. If it is believed that the witness has books or documents needed for a full disclosure of the facts, the court may issue a **subpoena *duces tecum*** (Latin: "under penalty bring with you"), requiring that identified documents or physical evidence be brought to court.

**Discovery in Criminal Matters** In a criminal case, discovery is limited because of the defendant's **privilege against self-incrimination**. (A privilege is a legal right.) This legal right, in brief, provides that defendants cannot be compelled to testify against themselves in a criminal case. The privilege is derived from the Fifth Amendment to the U.S. Constitution, and it is often referred to in slang terms as "taking the Fifth."

The government prosecutor does not have this same right, as the prosecutors are not on trial. The Sixth Amendment to the U.S. Constitution gives the accused the right "in all criminal prosecutions … to be confronted with the witnesses against him…." Therefore, the government prosecutor must allow examination of the evidence against the defendant, including names of witnesses against the defendant. However, physical evidence (such as weapons, clothing, and stolen goods) may be impounded (seized and held) by the district attorney, pending trial. The defendant does, however, have the right to inspect all such evidence before trial. The apparent advantage of one-way discovery for the criminal defendant is more than counterbalanced by the state's greater resources to independently investigate and discover facts surrounding alleged criminal activity.

**Motion for Summary Judgment** If there are no disputes over facts that need to be resolved, it is possible that the case can be decided without a trial. In a **motion for summary judgment**, the moving party argues that there are no significant questions of fact and that the applicable law requires that the moving party be awarded judgment. This motion might be made to the court after discovery, when a party believes discovery has shown that there is no real dispute as to the facts. If the motion is granted, no trial takes place. The party against whom a motion for summary judgment is granted (or any other adverse order that terminates the case) would have the right to appeal.

**The Pretrial Conference** Either party or the court can request a **pretrial hearing** or **conference**, which usually takes place after the discovery process is over. The conference consists of an informal discussion between the judge and the attorneys. Its purposes are to identify the matters that are in dispute and to plan the course of the trial. At the pretrial hearing, the judge may encourage the parties to settle without a trial (an out-of-court settlement). These "settlement conferences" are sometimes attended by the parties to the litigation, as well as by their attorneys. Possible "before trial" steps in a civil dispute are set forth in Exhibit 3.4.

## What Is a Jury?

*"Jury duty [is] a bog of quicksand on the path to justice."*

—Sidney Bernard, "The Waiting Game,"
*New York Journal-American*, 30 December 1965.

**jury**
A group of men and women sworn to declare the truth based on evidence presented to them.

A **jury** is a group of men and women selected according to established procedures to ensure lack of bias, who are sworn under oath to inquire of certain matters of fact and

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**EXHIBIT 3.4** Steps in a Civil Case—Before Trial




* In many states, nonbinding arbitration may be required in addition to or in lieu of the settlement conference.

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declare the truth based on evidence presented to them. This broad definition of a jury includes many types of juries used in the United States including grand jury, petit jury, special jury, coroner's jury, and sheriff's jury. Our discussion focuses on those juries selected to hear and decide specific legal disputes rather than investigative juries, such as grand juries.

In the United States, litigating parties often request a jury trial. Whether the request is granted will depend on whether the requesting party has a legal right to a jury trial. Many U.S. citizens believe that they have a right to a jury trial in all legal matters, but they are wrong. Litigants do, however, have a right to a jury trial in many matters. Whether they have a right to jury trial may depend on whether the trial is criminal or civil, raises matters "in equity" or "law," or takes place in state or federal courts.*

## LEGAL FOCUS—CASE

People's Bank, a Connecticut corporation, filed an action to foreclose on a home owned by William and Nadine Podd, husband and wife, alleging the Podds failed to pay their monthly mortgage payments. The Podds requested a trial by jury. People's Bank objected. Do the Podds have a right to jury trial in this lawsuit?

*People's Bank v. Podd,* 1993 WL 382514, 10 Conn.L.Rptr. 83 (Conn. Super.).

Any party to a civil lawsuit in the federal court system has the constitutional right (under the Seventh Amendment) to trial by jury in cases at law "where the value in controversy shall exceed twenty dollars." A right to a jury trial in a civil case in state courts is not guaranteed by the federal Constitution,[14] although state constitutions usually provide for this right. The case of *People's Bank v. Podd* was filed in a Connecticut state court, raising issues of state civil law. The Connecticut constitution provides for a right to a jury trial, but the Connecticut Supreme Court has held that this right exists only in those cases where a right to jury trial existed at the time of the state constitution's adoption (1812). The court concluded the action brought against the Podds was an equity action and so the state needn't provide the Podds a jury trial. We discuss equity actions in more detail later in the chapter.

The right to a jury trial is more certain in matters of criminal law. A trial by an "impartial jury" is a constitutional right (under the Sixth and Fourteenth Amendments) in any criminal matter, federal or state, where a serious penalty such as a jail sentence or imprisonment of more than six months may be the punishment.[15]

**plea bargain**
A binding agreement in which an accused agrees to plead guilty if the court agrees to a specified charge and punishment in advance.

Criminal defendants may waive their right to a jury trial for various reasons (such as a **plea bargain**, where they admit guilt to a lesser offense than they were charged with, thereby sparing the state the expense of conducting costly trials with uncertain outcomes). A judge alone then makes the necessary findings of fact and imposes a sentence.

The televised murder trial of former Hall of Fame professional football player and movie actor O. J. Simpson in 1996 provided worldwide exposure to the role of juries in the United States. In addition to issues of selection, sequestration, crime scene visitation, and evidence tampering, the trial presented viewers with the possible issue of jury

*Article III, Section 2 of the Constitution provides that "the Trial of all Crimes … shall be by Jury…." The Sixth and Seventh amendments also provide for the right to a jury trial. The Sixth Amendment, referring to criminal cases, provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial…." The Seventh Amendment states, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be persevered…."

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nullification. "Jury nullification" is the power of a jury to reject the law and evidence and acquit a defendant it believes is guilty. This concept is discussed in more detail in a few paragraphs.

**questions of fact**
Circumstances or matters surrounding and involved in a case that is being tried by a court.

In usual cases, a jury concludes and decides the **questions of fact**—historical events that must be proved to win a lawsuit. A jury is the **trier of fact**. For example, in a dispute about a fight between two students, Williams and Suren, there probably will be a disagreement as to who started the altercation. A question of fact is presented and is generally answered by the jury. If there is no jury, the trial judge decides questions of fact and is the *trier of fact*. Legendary trial attorney Melvin Belli, never one for understatement, once said, "[A lawyer's] performance in the courtroom is responsible for about 25 percent of the outcome; the remaining 75 percent depends on the facts."[16]

**trier of fact**
Jury or judge acting as the finder of issues of fact.

**questions of law**
Principles and rules of human conduct determined by the judge to be applicable in a case being tried by a court.

**Questions of law** are the appropriate legal rules to be applied in the trial. The judge decides or answers the questions of law in the trial. For example, in the fight between Williams and Suren, the judge determines the legal rules appropriate to decide the case (for example, the definitions of *battery* and *self-defense* would probably be among the legal rules applied). The judge also makes a ruling of law when allowing or disallowing certain evidence, ruling on motions, or instructing the jury which legal principles should be applied to the facts during their deliberations. A question of law, not fact, also arises whenever the constitutionality of a statute or executive action is an issue. As constitutionality is a question of law, not fact, the judge, not the jury, decides whether a statute is constitutional.

**jury nullification**
The power of a jury in a criminal trial to disregard the law and unanimously find the defendant innocent, although there is ample evidence to support a verdict of guilty.

The amount of deference a jury must give the judge's jury instructions differs in civil and criminal cases. In a civil case, if the jury ignores the law, the judge has the duty and the power to overturn the jury verdict. The judge's power is restricted in a criminal case, although the judge can declare a defendant not guilty even if the jury decided to convict the defendant. However, in a criminal case, a judge cannot overturn a jury verdict of not guilty because she believes the jury is wrong or has ignored the law. This residual power of the jury in a criminal case is called **jury nullification**. Thus, for example, in a criminal case, although a jury could not find a law unconstitutional, it could legally refuse to convict a defendant because the jurors think the law is unconstitutional, or unfair, or for any other reason. A judge is not free to disregard the jury's verdict of not guilty unless the judge finds jury corruption or misconduct (for example, one or more jurors had been bribed).

## MORALS AND ETHICS

Defendant Anthony Edwards was charged with and admitted to committing fraud by using other people's credit cards to purchase gasoline. His defense was his self-proclaimed status as "The Black Shadow of Robin Hood." He claimed "he was motivated by the need to redistribute wealth in a system he perceived as racist." At trial, he requested that the judge issue the following jury instruction: "if collectively you decide that despite the acts of the [defendant] which you may find the government proved beyond a reasonable doubt, you believe that the [defendant's] actions should not be considered to be criminal by society, you may find him not guilty." The instruction if granted would advise the jury of its power of nullification. The judge refused. Was the judge correct? Is jury nullification illegal? Is it morally wrong?

*United States v. Anthony Edwards*, 101 F.3d 17 (E.D.N.Y., 1996).

Following legal precedent, the judge was correct to refuse the instruction, and did so stating, "While juries have the power to ignore the law in their verdicts, courts have no

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obligation to tell them they may do so. It appears that every circuit that has considered this issue agrees."[17] In a later case, another court explained this curious position as follows: "[I]n language originally employed by Judge Learned Hand, the power of juries to 'nullify' or exercise a power of lenity is just that—a power; it is by no means a right or something that a judge should encourage or permit if it is within his authority to prevent. It is true that nullification has a long history in the Anglo-American legal system, and that the federal courts have long noted the de facto power of a jury to render general verdicts 'in the teeth of both law and facts.' However … it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them, courts have consistently recognized that jurors have no right to nullify."[18]

Despite the fact that juries are not informed of their right to "nullify the law," the concept of nullification is valid. This points to a significant role for morals in the legal system. A jury that is compelled to override a law is in essence driven by an ethical sense of what is correct versus what the law says is allowable.

**Prospective Jurors** The jury is a group of persons selected from a panel of randomly designated citizens of the local region to decide a particular civil or criminal case. A jury is considered the fairest instrument of justice on the theory that it tends to neutralize individual bias from the courtroom by drawing together a number of persons of diverse interests and backgrounds. No single person—not even a highly educated, coldly analytical, scrupulously honest, professional scientist—is totally objective, so it is hoped that the combination of differing perspectives will provide the balance needed for just decisions. Judges, lawyers, witnesses, scholars—and most important, litigants themselves—generally agree that the jury system works well most of the time.

Usually, litigants in emotionally charged cases, both civil and criminal, prefer the consensus of a jury of their peers (equals) to the decision of one judge. On the other hand, many attorneys believe that in complex business litigation, for example, a jury can be overwhelmed and thoroughly confused by a flood of technical language. Thus, they often think that in such cases their clients will fare better by waiving their right to a jury trial and relying on the expertise of the judge or an arbitrator.

It is important that the jury selection process be random. Otherwise, people would justifiably question its integrity. In criminal cases especially, the jury is sometimes the sole barrier between the individual and the awesome power of the prosecuting government. The selection begins with preparation of a list or panel of prospective jurors. Most states prepare such lists from voter registrations. Because minorities, the poor, and young adults do not register to vote at the same rate as the rest of the population, these groups are likely to be underrepresented on juries. For this reason, many states use other sources of names for prospective jurors, such as driver-registration records, telephone directories, hunting and fishing license lists, utility customer lists, or census rolls. Some accept volunteers for jury duty.

The Jury Selection and Service Act regulates jury selection in federal cases. This act provides that names selected from voter registration lists should be supplemented with names from additional lists to help ensure selection of juries that better represent a diverse community.

**Exemptions from Jury Service** A few classes of people are automatically exempt, or disqualified, from jury duty in many states. In federal courts, disqualified groups include noncitizens; minors; residents of less than one year; persons unable to read, write, and understand English; persons with mental or physical infirmities that would impair their

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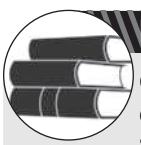
capability as jurors; and convicted felons. States have adopted similar exemptions. In addition, persons may be temporarily excused or indefinitely exempted when absence from a job or family would cause an unreasonable hardship.

It is illegal for an employer to penalize or discriminate against an employee for serving as a juror by docking vacation time.[19] Some employers continue to pay the salaries or wages of jurors, less the modest fees received from the court, but this is not compulsory. Jurors are presently paid $40 per day in the federal court[20] system and usually less in state courts. Such small sums are inadequate pay for most jurors who are not receiving any income from their employers. Consequently, jury duty that may last for weeks or longer may mean a significant financial sacrifice. Yet, jury service is a citizen's duty in a democracy. Persons refusing to serve without an acceptable excuse can be found in contempt of court, resulting in fines and/or imprisonment.

***voir dire***
Process of questioning prospective jurors to ascertain whether they have any bias that would make difficult or unlikely their impartiality in determining questions of fact during a trial.

***Voir Dire*** The French phrase ***voir dire*** (pronounced *v'wah deer* and meaning "to speak the truth") refers to the questioning of prospective jurors to find possible bias. Understandably, attorneys try to *seat* (select) jurors whom they believe to be sympathetic to their clients' position. Thus, an accountant accustomed to arithmetic precision may not be welcomed as a juror by a defendant relying on an unverified alibi in a criminal trial, or a clerk who earns a low salary may be considered undesirable by the plaintiff in a civil action where damages sought for loss of future earning power exceed a million dollars.

In large cities, private companies are available to research potential juror lists for cases in which a sizable amount of money is at stake. Such research firms provide "jury books" containing past juror voting records and other personal information. These books are sold to attorneys to assist them in identifying favorable prospective jurors. In major trials, where the stakes are high, lawyers have hired sociologists and psychologists to analyze the physical appearance, education, social status, economic condition, personality, and general cultural background of each prospective juror. The idea is to predict attitude and probable voting conduct in the forthcoming trial. Such assistance in jury selection raises many questions about the accuracy of character evaluation and the ethical propriety of this practice, especially if only one side has access to such information. Legal consulting firms provide pretrial opinion polls, profiles of "ideal jurors," mock trials, and shadow juries. They also coach lawyers and witnesses and prepare designs for courtroom graphics. When such assistance is utilized, critics suggest that the jury is not composed of one's peers.



**LEGAL FOCUS—PROBLEM**

On behalf of Marya Martinez, attorney Sharpe demands a jury trial. On the day set for trial, Sharpe and attorney Sagedevan meet with Judge Miller in chambers. Sharpe requests permission to personally *voir dire* the prospective jurors. Sagedevan does not object. Will Judge Miller grant this request?

Possibly. Historically, judges have had the power either to conduct *voir dire* themselves or to allow the attorneys to do so. Most states follow the lead of the federal court system where *voir dire* is conducted by the judge, but only after considering specific questions offered by the attorneys. Using a judge usually expedites the questioning and serves to preclude the use of inappropriate questions. Some attorneys try to argue their case in *voir dire*, which is not a valid purpose of the jury selection process.

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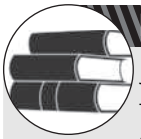

## LEGAL FOCUS—PROBLEM

Judge Miller grants Sharpe's request and orders that the two attorneys conduct the *voir dire*. One of the questions Sharpe asks prospective jurors is whether they have ever been a ski instructor. One person answers "yes." Is this sufficient evidence of juror bias? If so, what recourse does Sharpe have against it?

Prior experience or knowledge of a situation does not necessarily mean that the person is biased. Everyone possesses inclinations and opinions consistent with his culture, education, family background, experience, and so forth, but not everyone allows these to prejudice his thinking. What matters is whether a certain experience or inclination tends to make a person unable to decide fairly a particular case. Some types of experience are more likely than others to do this. If bias is evident or likely, the judge may excuse the prospective juror using a **challenge for cause** (bias or the appearance of bias is shown). In Martinez's trial, a prospective juror who was once a ski instructor would probably not be as impartial as someone without this experience. Thus, bias is likely. The judge might properly excuse that prospective juror for cause.

**challenge for cause**
Ability to exclude a prospective trial juror if bias or prejudice is indicated.

There is no limit on the number of challenges for cause, which can be granted for a showing of bias. In jury selection for a trial concerning a highly publicized Brink's warehouse robbery in Boston, some one thousand prospective jurors were excused for cause. Because of newspaper accounts over the years before the first arrest in the case, most of those excused had definite opinions as to the guilt of the defendants.[21]

Even if no bias is demonstrable, each attorney in either a civil or criminal action can challenge peremptorily (without cause) and thereby excuse from service a limited number of prospective jurors (six, for example, in civil actions, and generally more in criminal actions). The purpose of a **peremptory challenge** (dismissal of a juror for an undisclosed personal reason of the dismissing party) is to permit parties to eliminate some prospective jurors for any reason or for no reason. Some clients simply do not like the looks of a particular prospective juror. A well-known ditty goes:

**peremptory challenge**
Ability to exclude a prospective juror for any reason other than race or gender.

*I do not like thee, Dr. Fell;*
*The reason why I cannot tell.*
*But this I know and know full well,*
*I do not like thee, Dr. Fell.*

Although no reason need be stated for a peremptory challenge, such challenges cannot be used to accomplish the illegal and impermissible purpose of excluding persons on the basis of their race or gender.[22] Once peremptory challenges are exhausted or waived (given up or unused), the designated number of jurors are sworn to fulfill their duty faithfully, and the trial begins. If the trial is expected to last very long, one, two, or more extra jurors (called *alternates*) are selected and remain in the courtroom throughout the trial. In the infamous criminal trial of O. J. Simpson, for the first time in U.S. history, more alternate jurors (15) were selected than jurors (12). Alternate jurors vote only if a regular juror dies or withdraws because of illness, family hardship, misconduct, or other conflict. If, by the end of a trial, there are not enough jurors remaining to render a verdict, a mistrial results unless both parties agree to accept the verdict of the smaller panel.

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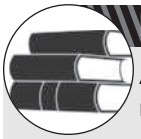

## LEGAL FOCUS—PROBLEM

A preschool molestation case in Los Angeles took more than two and a half years before the jury adjourned to consider their verdicts. By that time all six alternate jurors had replaced vacancies that occurred during trial. If the jury had lost another juror before the verdicts were rendered, a mistrial would have occurred in a trial that cost over $15 million. After three months of deliberations, the jury reached verdicts on 65 counts (separate criminal charges) against two defendants. One defendant was found not guilty on all charged counts. The other defendant was found not guilty on all but 13 counts. As to these counts, the jury was unable to reach a verdict. As the jury finished its deliberations without losing another juror, there was no mistrial.[23]

**Jury Size and Vote** Since the middle of the fourteenth century, juries in England have comprised 12 persons. Probably for that reason, laypersons as well as scholars in the United States had long assumed that the Constitution, when referring to a jury, meant a jury of 12 persons. Federal criminal court trials require 12 jurors, although criminal verdicts have been upheld with 11 jurors.[24] In civil cases, the number of jurors required has been reduced to six in many district courts. According to the U.S. Supreme Court, this reduction to six jurors in a civil case satisfies the Seventh Amendment.[25]

The U.S. Supreme Court has also held that the Fourteenth Amendment does not require that state court juries (as opposed to federal ones) be composed of 12 persons in either civil or criminal cases. As few as six members have been found constitutional in a state court,[26] although a jury of five in a criminal case has been disallowed.[27] For reasons of efficiency and economy, about one-fourth of the states have reduced the size of juries to six or eight jurors in both civil and criminal matters. Currently, no state provides for fewer than 12 jurors in cases where the death penalty could be imposed, although that may be constitutionally permissible.

The number of jurors required to agree on a verdict is an additional important question in American jurisprudence. Historically, to reach a verdict in criminal cases the jury vote had to be unanimous.[28] Thus, in criminal actions one juror has been able to block the prosecutor's attempt to convict the accused. Such power is an affirmation of the importance of each juror. The requirement of the unanimous jury is the rule in federal and most state criminal prosecutions. A few states allow for a guilty verdict without requiring a unanimous jury (for example, Oregon permits a conviction by 10 out of 12 jurors), although a unanimous vote for a verdict in a state six-person jury criminal case is required.[29] In most civil cases, however, a three-fourths majority (nine of 12 jurors) is sufficient. On the other hand, in the federal court system, civil juries are required to render unanimous verdicts.[30]

## LEGAL FOCUS—CASE

After considerable deliberation, the six-person jury informed the judge they could not reach a unanimous opinion in the criminal assault and battery case against Kevin Nobles. The Palm Beach County Circuit Court judge and the attorneys for Nobles and the state discussed the limited options available, including a suggestion from Nobles' attorney that Nobles could accept a majority verdict and waive his state right to a unanimous jury rather than begin again after a mistrial. Can a defendant waive his right to a unanimous verdict?

*Nobles v. Florida*, 786 So.2d 56 (Fla., 2001).

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Kevin Nobles agreed to waive his right and was rewarded for his impatience by the jury's finding him guilty by a vote of 4–2. Obviously, he reconsidered his waiver and on appeal argued that "the trial court erred when it accepted his request for a majority verdict because even though waivers of the right to a unanimous verdict have been accepted for super majorities of five to one, there is no authority that expressly approves a four to two majority verdict." The trial court upheld the conviction, stating, "[T]he following requirements [were] met in Nobles' trial: (1) the waiver is initiated by the defendant, not the trial judge or the prosecutor; (2) the jury has informed the court that it is unable to reach a verdict, after having had a reasonable time to deliberate; (3) the trial judge explains to the defendant his/her right to a unanimous jury verdict and the consequences of a waiver of that right; and (4) the trial judge questions the defendant directly and determines that the waiver is being made knowingly and voluntarily."

**LEGAL FOCUS—EXAMPLE**

The instructions from the judge in the Nobles case: "It is possible to waive one's constitutional rights if the waiver is a knowing waiver. It's my understanding that after conferring with counsel, and without knowing how the jury is split in this case, that it's your desire to waive or give up your right to a unanimous verdict and to agree to a, what we call a majority verdict, which means there are six jurors, if four of them or more vote one way or another as to any count, that would be the verdict in the case. Is my understanding correct?

APPELLANT: "Yes, Sir."

Clearly, a reduction in jury size together with relaxed voting percentages for a verdict will do much to change the role of the jury in our society. In addition, some states have limited the types of cases in which a jury is considered appropriate. For example, states with no-fault automobile insurance plans largely bypass the jury process in automobile-related personal injury cases. Many states have decriminalized such matters as minor traffic offenses and removed a person's right to a jury trial in such cases. In the federal system, there is a presumption that offenses punishable by incarceration for six months or less are petty offenses for which jury trials are unavailable.[31] In addition, there is an important area of U.S. jurisprudence in which the Constitution does not require jury trials and legal history has not provided them, namely all matters "in equity." Recall the Legal Focus on page 112, in which the Podds were unsuccessful in their request for a jury trial in the foreclosure action brought against them. Most laypersons are uninformed on the important subject of equity, which we address next.

## What Is an Action or Cause in Equity?

The U.S. legal system, like that of the United Kingdom, distinguishes between what are called disputes *at law* and *in equity*. The distinction between law and equity is based not on logic but on history. As discussed in Chapter 1, in medieval times, certain types of cases in England were decided by chancellors (government administrators) rather than in the king's court. The chancellors were often also religious aides to the king. In most disputes, an aggrieved person could seek and obtain monetary relief from a regular king's court. In the king's court, a judge would decide the case, sometimes with the assistance of a jury. Such were matters "at common law," and monetary damages usually were the only relief available from the king's courts.

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A person unable to obtain relief from a regular court would appeal to the king, who would refer the citizen to the king's chancellor. As a general proposition, chancellors became involved only when there was no adequate remedy at law and when monetary damages were not sought or did not satisfy the need of the party seeking relief. These actions became known as actions "at equity." The chancellors decided matters brought before them based on their conscience, community norms of conduct, and principles of equity, or fairness.

Today, all but a few U.S. courts have combined powers of law and equity. Delaware's Court of Chancery may not hear any case in which a sufficient remedy may be had by common law or statute.[32] However, differences between the two methods of relief remain in the handling of certain types of disputes, available remedies, and the procedural rules applied to the actions. For example, matters involving the family were and are matters in equity, and are an example of a type of dispute heard only as a matter in equity. Thus, if a dispute involves a divorce or dissolution of marriage, adoption, name change, or juvenile problem, a court sits in equity without a jury and usually applies different procedural rules.

Other civil cases in equity based on the claimant seeking a different remedy include the following:

- An action requesting that the court order the defendant to comply with a contract by performing as promised (for example, when the subject of the sales contract is unique, such as an original painting by van Gogh or a parcel of land), and the buyer wants performance, not monetary damages (**specific performance**)
- An action requesting the court to rescind an agreement to sell one's home, because of the undue influence of a relative (**rescission**)
- An action to bar a person from continuing to hunt unlawfully on someone else's property, or to end an unlawful strike by a union (**injunction**)

**specific performance**
An equitable remedy allowing a buyer to get possession and title to real property and to goods that are unique when the seller refuses to deliver under a valid sales contract.

**rescission**
An equitable remedy that annuls a contract and returns the parties to the relationship they had before the contract was made.

**injunction**
An order of a court of equity to someone to do or not do some act.

Note that in each example of equity, money damages are not sought. The monetary remedy at law was either inadequate or unavailable. However, today most courts, even in an equity action, strive to give full relief requested, including monetary damages if appropriate. Except in a few states, a modern court can grant both a remedy at law and a remedy at equity. For example, an aggrieved songwriter might be awarded an injunction barring the infringer (wrongful user) from using her copyrighted song without permission and also be given dollar damages for the prior illegal use. Equitable remedies contrast with remedies at law such as recovery of money for (1) injury caused by negligence of the defendant, (2) loss of earnings caused by defamation of character by the defendant, (3) money lost as the result of the defendant's fraud and deceit, and (4) profits lost due to breach of contract by the defendant. Exhibit 3.5 provides a contrast between matters at equity and at law.

Criminal cases are not matters in equity with one exception, juvenile crimes. If a juvenile commits an act that is criminal if committed by an adult, the matter will generally be considered a matter in equity. It is technically not considered a criminal matter, although a deprivation of liberty can and often does result if the minor is found responsible. Although an equitable matter, some due process protection still applies because of the potential for deprivation of liberty. However, there is no right to a jury trial. Many states provide for criminal prosecution of a minor as an adult in certain situations. If the minor is tried as an adult, the case is transferred from the court of equity to the criminal courts and all rights and jeopardy of criminal defendants apply.

There is no right to trial by jury in equity cases. The constitutional right to a jury was limited in the Seventh Amendment of the Constitution to civil matters, which are

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**EXHIBIT 3.5** Contrast between a Matter in Equity and a Matter at Law

| | Equity | Law |
|---|---|---|
| Subject Matter | Family law<br>Probate<br>Trust<br>When remedy at law is inadequate | Everything that is not a matter in equity |
| Nature of Trial | No jury | Jury |
| Remedies in Contracts | Reformation<br>Rescission<br>Specific performance<br>Injunction<br>Restitution | Money damages |

"suits at common law." The distinction between *common law* and *equity* was well known by the drafters of the Constitution. Jury trials in equity matters did not exist in England, as the chancellor relied on his own good conscience and sense of what was just. Because juries were available at law, a person who sought relief in equity waived the right to common law procedures, including the jury. In some states, a judge in equity may use an advisory jury but is not obliged to apply its verdict.

A judge sitting in a matter in equity has awesome power. The judge both is the finder of fact and law and controls the powerful remedies available only in equity. Courts of equity not only provide different remedies but also often operate using different procedures and guidelines, including what are called **equitable maxims**—propositions or statements that provide a guide to a judge's exercise of discretion. A few examples of equitable maxims are provided and explained in Exhibit 3.6.

**equitable maxims**
General rules applied by courts to cases in equity.

Defiance of a judge's order can place a person in **contempt of court** and subject her to summary arrest and imprisonment. Contempt of court is willful disobedience of a judicial order or obstruction of the work of the court. Some of the most controversial cases in the history of law have involved the exercise of a judge's equitable power.

**contempt of court**
Willful defiance of the authority of a court, affront to its dignity, or willful disobedience of its lawful orders.

**EXHIBIT 3.6** Equitable Maxims

A maxim is a proposition or general statement. Some common maxims relating to actions in equity follow:

1. Whoever seeks equity must do equity. (Anyone who wishes to be treated fairly must treat others fairly.)
2. When there is equal equity, the law must prevail. (The applicable law will determine the outcome of a controversy in which the merits of both sides are equal.)
3. One seeking the aid of an equity court must come to the court with clean hands. (Plaintiffs must have acted fairly and honestly.)
4. Equity will not suffer a right to exist without a remedy. (Equitable relief will be awarded when there is a right to relief and there is not adequate remedy at law.)
5. Equity regards substance rather than form. (Equity is more concerned with fairness and justice than with legal technicalities.)
6. Equity aids the vigilant, not those who rest on their rights. (Equity will not help those who neglect their rights for an unreasonably long period of time.)

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**LEGAL FOCUS—PROBLEM**

Dr. J. Elizabeth Morgan was a party to a legal action involving visitation rights concerning her minor female child, Hilary. She maintained that the child's father had sexually abused her daughter. Although the husband strenuously denied this allegation, Morgan refused to obey an unsupervised visitation order in favor of her husband and placed the girl in hiding. Judge Herbert Dixon held Morgan in contempt of court.

How could the court enforce its order?

Morgan was taken to the District of Columbia jail, where she spent the next 759 days for refusing to disclose the whereabouts of her child. She was finally released after a special law requiring her immediate release was passed by Congress and signed by then-President George H. W. Bush. As the court matter was in equity, no jury had been involved. Morgan had been jailed for her continuing refusal to follow the court's order, even though she had committed no crime.[33] During the late 1990s, Susan McDougal spent 18 months in jail for civil contempt for her refusal to answer questions posed by Special Prosecutor Kenneth Starr about President William J. Clinton's involvement in the Whitewater Development Corporation.

Returning to Martinez's case against Graf, we can see that because it is an action at law, either party may demand a jury trial. If neither party demands a jury, the right is waived and the trial will proceed with the judge alone determining the truth of all factual contentions.

## How Is a Trial Conducted?

**burden of proof**
The duty to produce evidence as a trial progresses.

**preponderance of evidence**
Standard of determining civil liability, that the weight of the evidence offered to prove a matter is more probable than not.

**beyond a reasonable doubt**
The quantum evidence that fully satisfies and entirely convinces the jury in a criminal trial that the defendant is guilty as charged.

After the jury has been selected in a civil case, the plaintiff's attorney proceeds first because the plaintiff has the **burden of proof**. This is the duty to present evidence that supports the allegations in the complaint (the facts). In civil cases, the burden of proof is satisfied by presenting a **preponderance of evidence**. That is, according to the evidence, it is more likely than not that the allegations in the complaint are true. If the jury agrees that the plaintiff more likely than not is right, the burden is met, and they must return a verdict for the plaintiff. In a criminal case, however, the burden of proof is much greater. The government, represented by a prosecutor, has the burden of proving the guilt of the defendant **beyond a reasonable doubt**. This means the finder of fact must be firmly convinced of the defendant's guilt.* The proof of guilt must preclude any other reasonable interpretation of the facts and be inconsistent with any other rational conclusion.

*"The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course," *Hopt v. Utah*, 120 U.S. 430, 99 S.Ct. 2781 (1887). Supreme Court Justice Kennedy referred to the following "beyond a reasonable doubt" jury instruction as "clear, straightforward and accurate" in his concurring opinion in *Victor v. Nebraska*, 511 U.S. 1, 114 S.Ct. 1239, 1253 (1994): "The government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as juror in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty."

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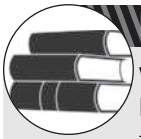

## LEGAL FOCUS—PROBLEM

While Marya Martinez was in the hospital, she told her father that Gary Graf took her wallet after she fell. This incensed Hernando Martinez, Marya's father, who demanded that Graf be prosecuted for theft. The criminal case came to trial months before the civil case, and the jury found Graf not guilty. Does this mean that Martinez will lose her civil case?

No. Martinez's civil case concerns the civil issue of negligence in adjusting her ski bindings. The criminal case dealt with subsequent independent, unrelated behavior. In some situations, however, a single act can result in civil liability and also a criminal penalty. For example, if Graf had deliberately struck Martinez in the face without legal excuse or justification, he should be found civilly liable for damages and criminally guilty of battery. Theoretically, though, the defendant Graf could win the criminal case and lose the civil case. Such a result could happen because of the different burdens of proof involved. Moreover, the trials take place at different times with different juries and different procedural rules. The law allows both victims (society at large and Martinez in particular) their "days in court"—society (the state) is hurt by the alleged public crime, and Martinez (a private party) is hurt civilly by the alleged private tort. Because one charge is civil and one is criminal, there is no **double jeopardy** (being tried twice for the same offense), which would be unconstitutional as violating the Fifth Amendment. A notorious example of this split possibility occurred after the not guilty verdict in the notorious O. J. Simpson criminal trial. The parents of Nicole Brown Simpson and Ron Goldman sued for the wrongful death of their children. The jury in the civil case found O. J. Simpson liable (legally responsible) for the deaths.

**double jeopardy**
A second criminal prosecution against a person for the same single offense, after the person has been found innocent of the crime in the prior trial.

Separate criminal trials brought by different governmental entities even upon the same set of facts are generally not considered to be double jeopardy. For example, after police officers were accused of beating Rodney King, they were found not guilty of state criminal charges. The federal government was later successful in bringing federal criminal charges against two of the officers for depriving King of his civil rights.

Procedures in a criminal trial are essentially the same as those for a civil case. However, under the U.S. Constitution (Fifth Amendment), a defendant in a criminal case cannot be compelled to testify. This is not true in a civil case, unless the testimony would tend to incriminate and possibly subject the defendant to prosecution for some crime.

**Opening Statements** The plaintiff's attorney begins the trial by making an **opening statement**—a summary of what the plaintiff expects to prove in the trial. Then the defendant's attorney may, but need not, make an opening statement telling what the defendant expects to prove in the trial. Such statements are often used to inform the jury, in broad outline, of what they can expect to hear as the trial unfolds.

**opening statement**
Summaries by counsel of plaintiff and of defendant indicating what they expect to prove in the ensuing trial.

**Evidence** After the opening statements, the plaintiff's attorney presents the plaintiff's **case-in-chief**. This involves calling and questioning witnesses and introducing into evidence documents, photographs, or other things that bear on the issues. **Evidence** is everything that the "finder of fact" (the jury, or judge when there is no jury) is entitled to consider in arriving at a determination of the facts. For example, the oral testimony of witnesses presented under oath is evidence; commentary of the attorney about that evidence is not. Attorneys are hired after the events in question have taken place and are thus not competent to testify as witnesses. Their role is to elicit evidence, comment on it, and argue about its significance. Of course, if the attorney's interpretation of the testimony of the witnesses is persuasive, the jury will be influenced by it.

**case-in-chief**
The case presented by each party in a trial.

**evidence**
Everything presented by disputing parties and witnesses that the "finder of fact" is entitled to consider in arriving at a determination of the facts.

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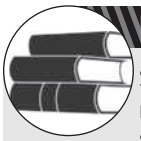
**relevant evidence** Evidence that is related to the facts in dispute.

Whether evidence should or should not be admitted is a question of law; therefore, the judge rules on all objections attorneys may make as to the admission of particular evidence. Evidence is admitted if the judge believes it will be useful in resolving issues in the case. Many rules concern what evidence is and is not admissible. For example, to be admitted, evidence must be **relevant** (related to the fact in dispute). **Irrelevant evidence** (evidence not related to the fact in dispute) is not admissible.



## LEGAL FOCUS—PROBLEM

Sharpe calls Martinez as her first witness. Martinez recites her story. Sharpe sits down and attorney Sagedevan begins his cross-examination. "Isn't it a fact, Ms. Martinez, that immediately before you fractured your leg you got drunk on wine with a gentleman, Luther Thomas, who you picked up in the bar?" Sharpe objects to the question.

Will the judge sustain or overrule the objection?

**irrelevant evidence** Evidence that does not relate to or have a bearing upon a question of fact in dispute during a trial.

The objection will be sustained (the judge will not allow the question to be answered). The question is compound; that is, it contains two or more questions, one concerning sobriety, the other concerning whether, and where and how, she met Luther Thomas. It also contains a conclusion, which is inflammatory: "drunk." Attorney Sagedevan will probably be instructed to rephrase or drop the question. The question appears to be designed more to intimidate the witness than to extract information. The ruling by the judge is a ruling on a question of law.

A better form of questioning would be as follows:

***Sagedevan:*** Isn't it a fact, Ms. Martinez, that immediately before you fractured your leg you were drinking wine?

***Martinez:*** Yes, sir.

***Sagedevan:*** With whom were you drinking wine?

***Martinez:*** Luther Thomas.

***Sagedevan:*** And did you know him previously?

***Martinez:*** No.

**expert witness** Anyone qualified by knowledge and skill, experience, training, or education to offer a credible and useful opinion upon some material issue in a trial.

Because the case may be decided based on the technical question of why Martinez's bindings did not release her skis, Sharpe may decide to include an **expert witness**. An expert witness is a witness with specialized knowledge and/or training in a field who is recognized as such by the court and allowed to testify about that topic, including giving opinion testimony. Expert testimony can be invaluable when technical or science-related questions of fact are at issue. Sharpe might decide to call an expert witness who can testify as to why the bindings failed. Ordinary witnesses are not allowed to give their opinion as that is role of the finder of fact. However, an expert witness could testify that, in that expert's opinion, an improper adjustment of the bindings was the cause of the failure of the bindings to release.

Of course, when Sagedevan presents his case, he might have an expert witness who counters Sharpe's expert. Conflicting expert witness testimony about both fact and opinion is common. Thus, the jury may simply dismiss the expert testimony or decide which expert to believe. Thus, Sharpe and Sagedevan will attempt to undermine the credibility or perceived accuracy of the opposing expert's testimony. They might do

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that by cross-examining the witness and also by eliciting testimony from their own witness. In the end, experts can make a case, but not managed well, they can distract, confuse, or worse yet, alienate a jury. They must be chosen and used wisely. After Sharpe has called all of the plaintiff's witnesses and introduced into evidence all relevant documents and other physical evidence (such as the ski boots and bindings), she *rests* (ends) the plaintiff's case. The defendant may now offer a *motion to dismiss* the case, claiming that the plaintiff has failed to establish a ***prima facie*** (Latin: "at first sight; on the face of it") case. A plaintiff is required to offer sufficient evidence of the defendant's wrongful conduct to justify an award of monetary damages or other relief. For example, if a preponderance of the evidence proved only that the defendant "thrust his middle finger in the air as an obscene gesture," the plaintiff could not win. There was no *prima facie* case and the judge would not permit the jury to return a verdict for the plaintiff. Under those circumstances, the defense need produce no evidence and can figuratively "point a finger" at the plaintiff.

***prima facie***
[Latin: "on first appearance"] Term describing facts legally sufficient to establish a fact or a case unless disproved by some contrary evidence.

If the plaintiff's motion to dismiss is denied by the judge, the defendant's attorney may make an opening statement (provided that it was not made at the beginning of the trial).

The defendant's case-in-chief also begins by calling witnesses. Of course, the plaintiff's attorney has the right to cross-examine the defendant's witnesses immediately after their direct examination, as the defendant's attorney did when the plaintiff's case was presented. After the defense rests, the plaintiff may offer additional evidence limited to rebutting the defense, but not opening new issues. And, of course, the defense has one final opportunity to rebut, limited to whatever was presented in the plaintiff's rebuttal.

**Motion for a Directed Verdict** After the parties have rested their respective cases-in-chief, either may ask the judge to decide the matter by making a **motion for a directed verdict**. This motion is a request to a judge that she enter the requested verdict instead of allowing the jury to present its verdict. It is based on the alleged absence of sufficient facts to allow any other verdict than the requested one. The judge could, for example, properly direct a verdict in favor of the plaintiff if, despite the evidence presented by the defendant, no reasonable person could agree with the defendant. Granting such a motion is unusual; even if the evidence appears to be legally conclusive for one party, the judge normally allows the jury to provide its independent opinion.

**motion for a directed verdict**
Request to a judge by counsel to enter a particular verdict instead of allowing the jury to do so because there are insufficient facts to allow any other verdict.

> *"When you have the facts on your side, argue the facts. When you have the law on your side, argue the law. When you have neither, holler."*
>
> —Albert Gore, Jr., vice president of the United States (1993–2001).

**Summation** After all the evidence has been offered, each attorney argues the case before the jury. In other words, each attorney tells the jury what she believes was proved in the trial and tries to persuade the jury to agree. The **summation** is not evidence or even a discussion; rather, it is a speech made by the attorney designed to persuade the jury. In our civil case example, the plaintiff's attorney would begin, followed by the defendant's attorney, and then the plaintiff's attorney concludes. Martinez's attorney, Sharpe, might argue as follows:

**summation**
The review of the evidence presented to the court by each lawyer in oral argument at the close of the trial.

> *Ladies and gentlemen of the jury, you have heard all the evidence. It is now your duty to determine the facts. I believe we have shown by a preponderance of the evidence that the injury was caused by Mr. Graf. I remind you that Marya's medical bills were $12,573.45. She missed one month of work, at her rate of pay of $5,195 a month. She had to wear a cast from her waist to her toes for six months. What is this worth*

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*in dollars? Put yourself in her shoes—excuse me, cast. Why all this expense and all this pain and anguish? Why? Because the defendant, this careless ski instructor, Gary Graf, fastened the bindings down on Ms. Martinez's foot with unprofessional disregard for her safety and well-being. The evidence is clear: Gary Graf was not thinking about bindings. Gary Graf did not pay attention to his serious duty. Gary Graf was clearly negligent. And so it is now your duty to lessen the harm he caused. Simple justice requires you to return a verdict in favor of Marya.*

Attorney Sagedevan might argue to the jury:

*Ladies and gentlemen, it is our duty to pierce the veil of emotion with which counsel is attempting to surround us. Let us look at the facts. Unfortunately, the plaintiff was injured. No one feels good about that, especially Gary Graf. However, the fact that Ms. Martinez was injured is not a reason to hold Gary Graf responsible. Skiing is a sport with risks. Marya cannot transfer responsibility for her own safety to another person if the risk materializes. Marya decided to ski. She failed to exercise the appropriate care that would have prevented her accident. Feeling sorry for her is natural. We all feel sorry for her. But this does not justify a verdict against Mr. Graf. The simple facts are that Ms. Martinez was not thinking about skiing; she was more interested in impressing her date after spending a good part of the day drinking wine. She was injured not because of any negligence of Gary Graf. Bindings don't work if they are icy, and had she been sober she would have seen the ice when she put her skis back on. She was negligent. Now she is trying to obtain a bonanza at the expense of my client, a hard-working, sincere, very professional gentleman. Ladies and gentlemen of this jury, you know your duty: return a verdict for Gary Graf.*

**jury instructions**
Rules of law and charges provided by the judge to the jury for guidance in reaching a verdict.

**Instructions to the Jury** After the summation, the judge will instruct the jury on the law (**jury instructions**) that must be applied to the facts that the jury decides are true. Typically, each attorney will submit proposed instructions to the judge. The judge decides what instructions to give to the jury. The instructions might include the following, but would be considerably more exhaustive:

*You are instructed that statements of witnesses, sworn to tell the truth, constitute evidence that you may consider. Comments of the attorneys are not evidence. You are instructed that if the defendant failed to use reasonable care and secured the bindings too tightly, he was negligent. You are further instructed that if the accident was caused by ice between the boot and ski, and not by the adjustment to the bindings, the plaintiff was negligent.*

**deliberate**
For a jury to review, discuss, and weigh the evidence presented at a trial.

**verdict**
The expressed decision of the jury on questions of fact submitted to it for determination, based on evidence presented during trial.

**Deliberation and Verdict** After the instructions, the jury will retire to a private room to **deliberate**, and return a **verdict** by vote, the jury's decision.

If the jury returns with a verdict deemed to be wrong as a matter of law, the judge in a civil case has the power to render a contrary judgment, sometimes called a judgment n.o.v., which is a **judgment *non obstante veredicto*** (Latin: "notwithstanding the verdict"). In effect, the judge is the thirteenth juror, with the power to veto the others' decision and to substitute a different one. (Recall that in a criminal case the judge cannot set aside a verdict of "not guilty.")

**judgment *non obstante veredicto***
A decision by a judge that overrules the verdict of the jury.

After a verdict, the judge may grant a motion made by the losing party for a new trial. The judge will not grant a *motion for a new trial* unless some serious mistake of law (called *error*) has occurred. Sometimes the judge may think that the damages awarded by the jury are excessive or inadequate and may therefore grant a motion for

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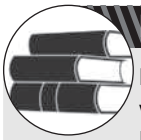
a new trial unless the plaintiff or defendant, as the case may be, agrees to a modified award. To avoid the costs and uncertainties of another trial, the parties may compromise and agree to the modified award. The steps in a jury trial are identified in Exhibit 3.7.

**judgment**
The final determination or decision of the court as to the rights and duties of the parties in a lawsuit.

## How Is a Case Ended?

The concluding pronouncement of a court is its **judgment**. A judgment may declare a status (for example, divorced), order one to do or not do something (for example, pay money damages or transfer a title to land), impose a sentence (for example, go to jail), or otherwise resolve a controversy.



**LEGAL FOCUS—PROBLEM**

In an auto accident case, the jury became convinced that the plaintiff should be compensated for harm to her left leg, which was crushed and had to be surgically removed. The accident was caused by the negligent operation of a truck by the defendant. The jury returned its verdict in the plaintiff's favor for $1,300,000. Is the verdict the voice of the court?

No. The verdict is the expressed opinion of the jury. Based on the verdict, the court will usually issue a judgment for damages. As noted earlier, if the court concludes that the jury verdict is unreasonable in the light of the evidence, it can prevent a miscarriage of justice by reducing the amount of damages, ordering a new trial, or granting a judgment notwithstanding a verdict.

In divorce proceedings, the judgment of the court will be termination of the marriage. In a paternity case, the judgment of the court will be a declaration that the defendant is or is not the natural father. In a suit to end mass picketing and violence in a strike, the judgment of the court will be an injunction. In a suit to compel someone to do something that was promised by contract, the judgment of the court will be a decree of specific performance.

In criminal cases, the verdict will be guilty or not guilty.* If it is "not guilty," the judgment of the court must correspond to the verdict. However, if the verdict is "guilty," the judge may overrule the jury and acquit the defendant, or the judge may order a new trial to avoid a miscarriage of justice. In most cases, the judge has the power to impose a sentence, then suspend it, and place the defendant on probation.

Once a party has received a judgment, the judicial branch of government has completed its work, unless the matter is appealed. Sometimes a party to the action may return to court if the order of the court is not obeyed. In divorce, for example, after support payments have been ordered, either party may return and request an increase or decrease in payments because of changed circumstances, needs, or ability to pay.

**Collecting a Judgment** If the defendant does not appeal and the time for appeal passes, a losing defendant is considered a **judgment debtor**, meaning one against whom a judgment has been entered but who has not paid the judgment. The judgment debtor may voluntarily pay the judgment, or pay the judgment after the plaintiff demands payment.

**judgment debtor**
A person against whom a judgment for payment of money has been entered but who has not yet made or completed that payment.

*Of course, it is possible that a jury will be unable to reach a decision. In 1994, a pair of criminal cases captured national media attention. Erik and Kyle Menendez were accused of the first-degree murder of their parents. At the trial, the fact that the brothers had killed their parents was admitted, but both brothers defended their action on the basis of self-defense. Two juries, one for each brother, heard the case; neither jury was able to agree on a verdict. The two brothers were retried, found guilty, and sentenced to life imprisonment without the possibility of parole.

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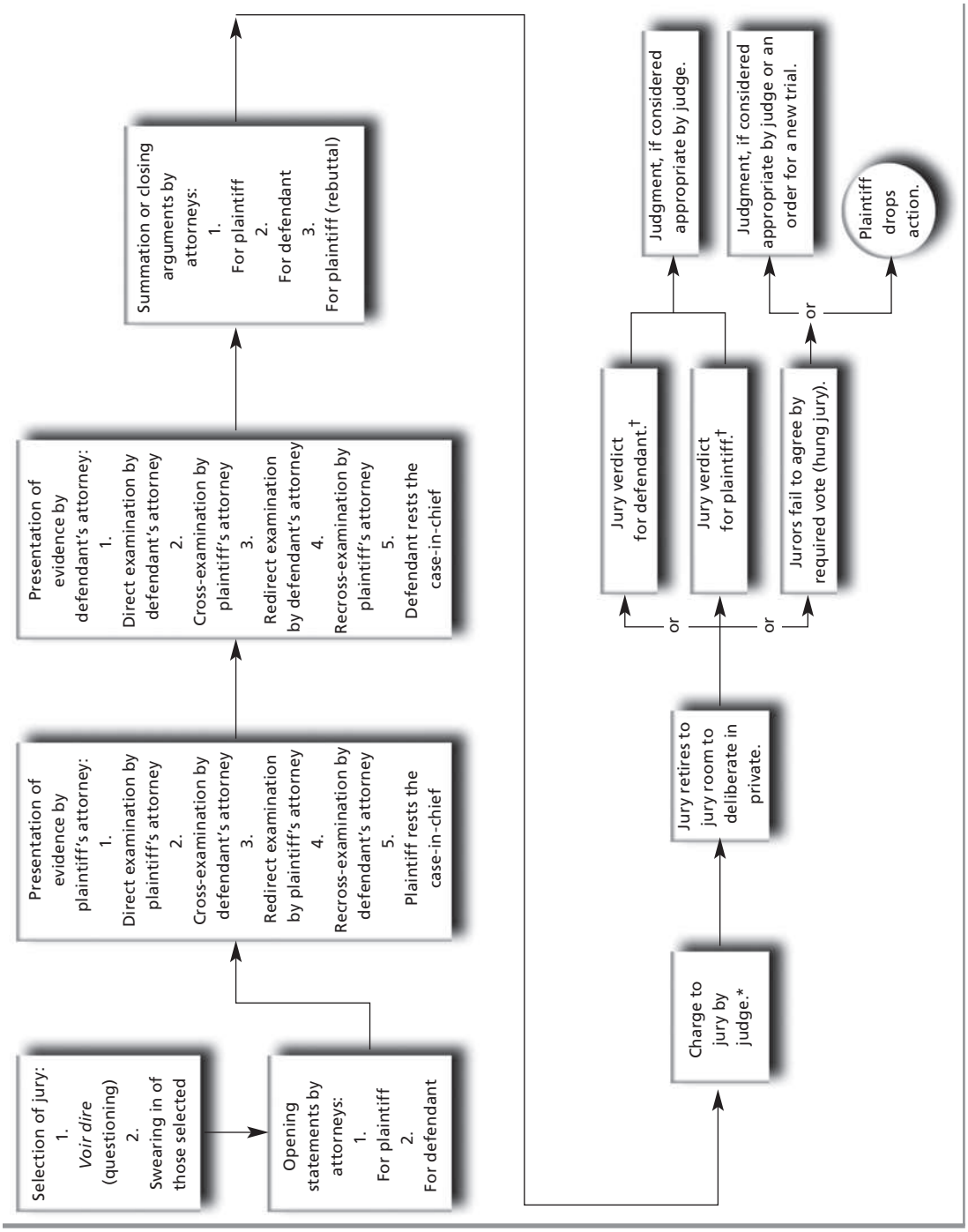
**EXHIBIT 3.7** Steps in a Civil Case—Jury Trial




* A judge may direct a jury to return a certain verdict when, if all testimony on one side were believed, the other party nonetheless would be entitled to win.
† In rare cases, a judge may grant a judgment *non obstante veredicto* (Latin: "notwithstanding the verdict"), setting aside the jury's verdict because in the judge's opinion it is wrong as a matter of law.

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**judgment creditor**
A person who has won a judgment but has not been fully paid.

**writ of execution**
Order of the court directing the sheriff to confiscate property of the defendant.

**garnishment**
A legal proceeding in which a plaintiff-creditor gets a court order compelling a third party to pay monies earned by the defendant to the plaintiff.

**order of examination**
A judicially authorized inquiry as to the assets of a judgment debtor.

**affirm**
To confirm a lower court's judgment or order because the prior decision is deemed to be correct and free from prejudicial error.

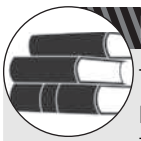
However, if the judgment debtor fails to pay, the legal system provides a method of satisfying the debt provided the defendant has assets that can be identified and seized. State statutes generally call for payment of interest (usually at an annual rate between 6 and 10 percent) to accrue on the unpaid balance of the judgment until fully paid.

Assistance in collecting the dollar amount of the judgment is provided by the executive branch of government, usually through the office of the county sheriff or federal marshal. Officials will not do anything simply because you have won a lawsuit and have not been paid. A **judgment creditor**, one who has won a judgment but is as yet unpaid, must first provide a copy of the final judgment, identify assets owned by the judgment debtor, and give specific instructions to a sheriff or marshal before he will assist in collecting the judgment. The court order directing the sheriff to confiscate property of the defendant is called a **writ of execution**. Such a writ may be used for the **garnishment** (confiscation) of part of any debt owed to the judgment debtor by others, usually unpaid wages due from the debtor's employer(s). After being paid in full, the judgment creditor must provide the judgment debtor with a signed *satisfaction of judgment* document as evidence of that fact.

Judicial means exist for compelling cooperation of the judgment debtor in identifying her assets—namely, by means of an **order of examination**, which is a judicially authorized inquiry about the judgment debtor's assets.

## What Happens if Either Party Appeals?

As previously discussed, procedures before a federal or state appellate court differ greatly from trial court procedures. Appellate courts hear appeals from trial courts and do not conduct trials. The only question on appeal, as a general proposition, is whether or not the law was applied correctly by the judge during the trial proceedings. Appellate courts do not consider new evidence or hear witnesses. An appellate court has several options when an appeal is filed, including refusing to hear the appeal. If it accepts the appeal and concludes that the law was applied correctly at the trial court or that an error was made but that the error did not affect the verdict, the court will **affirm** (uphold) the judgment. If the court determines that the law was applied incorrectly, it can **reverse**, **modify**, and/or remand the decision. A reversal turns the loser into the winner, a modification changes the result in a less drastic fashion than a reversal, and a **remand** sends the case back to the trial court with instructions for the trial court judge, such as granting a new trial.



### LEGAL FOCUS—PROBLEM

The jury found Jack Malum guilty of cocaine possession. During the trial, the judge instructed the jury, in part, as follows: "I instruct you that a crime is committed when one attends a party at which cocaine is being used, regardless of whether or not the defendant participated in such activity." Will an appeal by Malum be successful?

**reverse**
Appellate court sets aside the decision of a lower court.

Yes. An appellate court would conclude that the court's instruction to the jury was an erroneous statement of the law. Jack Malum did not receive a fair trial because mere attendance at a party is not in itself a crime, yet the jury was told that it was.

Appellate courts consist of three or more justices. Most of their work is done in private and consists of reading *transcripts* (official copies of the proceedings in the trial court) of cases on appeal. The appellate court assumes that all facts found by the trial

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court are true. In order to make the court's decision, they will study the applicable law and examine briefs filed by the attorneys for the appellant and the appellee and study the applicable law. A *brief* is a written legal argument addressed to the appellate court discussing or arguing why the judgment from below should be affirmed or reversed, modified, or perhaps remanded to the trial court for further specified action. Before the appellate court makes its decision, the respective attorneys may be allowed to make oral arguments to the appellate court, within limited allotted times. The concluding steps in a civil trial are illustrated in Exhibit 3.8.

**modify**
Appellate court alters the decision of a lower court.

## A SAMPLE ALMOST-UNEDITED STATE APPELLATE COURT DECISION

**remand**
Appellate court sends case back to a lower court to take some further action.

The case presented here is a New Jersey state appellate case. Although we provide at least one edited case at the end of each chapter, this chapter presents a virtually complete appellate case in the words of the court. Limits of space and time preclude inclusion of the full text of other cases. This is an interesting case decided on procedural grounds, and it provides an opportunity for thorough analysis.

In *Trustees of Columbia University v. Jacobsen,* a college student cross-complains when the university seeks payment of owed tuition. The student claims that the university did not provide him with wisdom and truth. He pursues his claim even after his mother paid the tuition. Consider here the function of the trial court and appellate court in this case. Also note the importance of pretrial procedures on the disposition of the case. The first part of the case identifies the pleadings made and the rulings of the trial court. The second part presents the underlying facts of the dispute. The third part presents the analysis and conclusion of the court.

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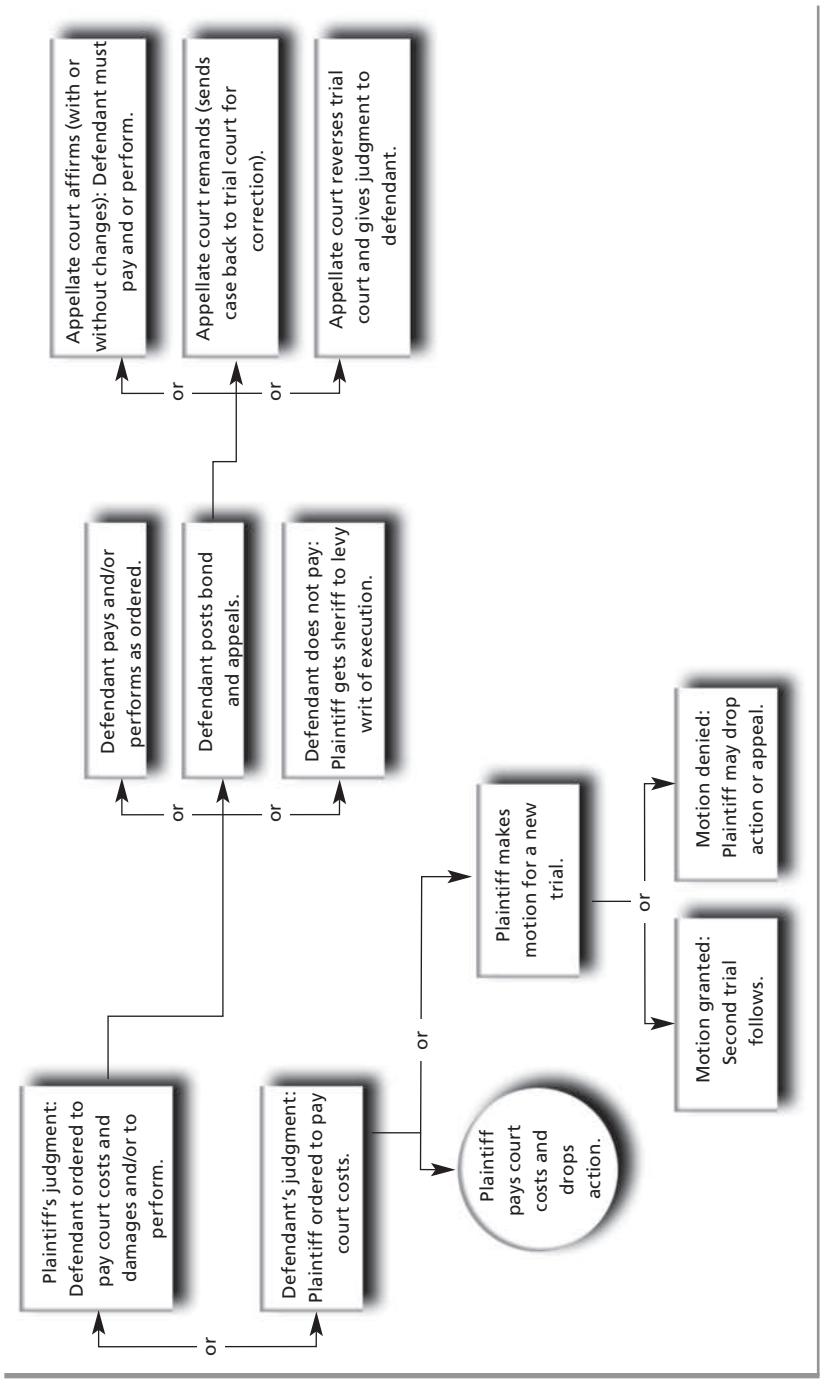


**EXHIBIT 3.8** Steps in a Civil Case—After Trial

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## CASE

### Trustees of Columbia University v. Jacobsen

53 N.J. Super. 574, 148 A.2d 63 N.J., 1959

*Columbia University brought suit against a student to recover money due on two promissory notes signed by the student in payment of the balance of his tuition owed. The student filed a counterclaim for deceit based on alleged false representations by the university as to what it would teach him.*

**Judge Goldman delivered the opinion of the court:** Defendant appeals from a summary judgment of the Superior Court Law Division, dismissing his counterclaim with prejudice and denying his countermotion for summary judgment….

**I**

Columbia brought suit in the district court against defendant and his parents on two notes made by him and signed by them as co-makers, representing the balance of tuition he owed the University. The principal due amounted to $1,049.50, but plaintiff sued for only $1,000, waiving any demand for judgment in excess of the jurisdictional limit of the court. Defendant then sought to file an answer and counterclaim demanding, among other things, money damages in the sum of $7,016. The counterclaim was in 50 counts which severally alleged that plaintiff had represented that it would teach defendant wisdom, truth, character, enlightenment, understanding, justice, liberty, honesty, courage, beauty and similar virtues and qualities; that it would develop the whole man, maturity, well-roundness, objective thinking and the like; and that because it had failed to do so it was guilty of misrepresentation, to defendant's pecuniary damage.

The district court clerk having refused to accept the pleading because of the amount demanded, defendant moved to transfer the action to the Superior Court. Plaintiff consented, but before an order could be entered defendant's mother paid the amount due and plaintiff thereupon discontinued its action. After transfer to the Superior Court defendant filed a supplement to this answer and counterclaim in which he [further demanded] Columbia … return the sum paid by his mother.

Plaintiff then moved in the Superior Court for an order dismissing the counterclaim and for the entry of summary judgment … (Defendant) appeared pro se throughout the entire proceedings below as he does here.

Following oral argument the Law Division judge … concluded that the statements attributed by defendant to plaintiff did not constitute a false representation. The judgment under appeal was then entered.

**II**

Following a successful freshman year at Dartmouth defendant entered Columbia University in the fall of 1951. He continued there until the end of his senior year in the spring of 1954, but was not graduated because of poor scholastic standing. Plaintiff admits the many quotations from college catalogues and brochures, inscriptions over University buildings and addresses by University officers cited in the schedules annexed to the counterclaim. The sole question is whether these statements constitute actionable misrepresentation.

… Although the remedy of summary judgment is admittedly drastic and cautiously granted … the remedy should not be withheld where, as here, there is no genuine issue of material fact.

The attempt of the counterclaim, inartistically drawn as it is, was to state a cause of action in deceit. The necessary elements of the action are: a false representation, knowledge or belief on the part of the person making the representation that it is false, an intention that the other party act thereon, reasonable reliance by such party in so doing, and resultant damage to him.

We are in complete agreement with the trial court that the counterclaim fails to establish the very first element, false representation, basic to any action in deceit. Plaintiff stands by every quotation relied on by defendant. Only by reading into the imagined meanings he attributes to them can one conclude—and the conclusion would be a most tenuous insubstantial one—that Columbia University represented it could teach wisdom, truth, justice, beauty, spirituality and all the other qualities set out in the 50 counts of the counterclaim.

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A sampling from the quotations cited by the defendant will suffice as illustration. Defendant quotes from a Columbia College brochure stating that

> *"… Columbia College provides a liberal arts education … A liberal arts course … has extremely positive values of its own. Chief among these, perhaps, is something which has been a principal aim of Columbia College from the beginning: It develops the whole man…. [Columbia's] aim remains constant: to foster in its students a desire to learn, a habit of critical judgment, and a deep-rooted sense of personal and social responsibility…. [I]ts liberal arts course pursues this aim in five ways. (1) It brings you into firsthand contact with the major intellectual ideas that have helped to shape human thinking and the course of human events. (2) It gives you a broader acquaintance with the rest of the world. (3) It guides you toward an understanding of people and their motivations. (4) It leads you to a comprehending knowledge of the scientific world. (5) It helps you acquire facility in the art of communication…."*

He then cites the motto of Columbia College and Columbia University: "In lumine tuo videbimus lumen" ("In light we shall see Light") and the inscription over the college chapel: "Wisdom dwelleth in the heart of him that hath understanding." He also refers to an address of the president of Columbia University at its bicentennial convocation:

> *"There can never have been a time in the history of the world when men had greater need of wisdom … I mean an understanding of man's relationship to his fellow men and to the universe … To this task of educational leadership in a troubled time and in an uncertain world, Columbia, like other great centers of learning in free societies, unhesitating dedicates itself…."*

We have thoroughly combined all the statements upon which defendant relies in his counterclaim, as well as the exhibits he handed up to the trial judge, including one of 59 pages setting out his account of the circumstances leading to the present action. They add up to nothing more than a fairly complete exposition of Columbia's objectives, desires and hopes, together with factual statements as to the nature of some courses included in its curricula. As plaintiff correctly observes, what defendant is seeking to do is to assign to the quoted excerpts a construction and interpretation peculiarly subjective to him and completely unwarranted by the plain sense and meaning of the language used….

At the heart of defendant's counterclaim is a single complaint. He concedes that

> *"I have really only one charge against Columbia: that it does not teach Wisdom as it claims to do. From this charge ensues an endless number of charges, of which I have selected fifty at random. I am prepared to show that each of these fifty claims in turn is false, though the central issue is that of Columbia's pretense of teaching Wisdom."*

We agree with the trial judge that wisdom is not a subject which can be taught and that no rational person would accept such a claim made by any man or institution. We find nothing in the record to establish that Columbia represented, expressly or even by way of impression, that it could or would teach wisdom or the several qualities which defendant insists are "synonyms for or aspects of the same Quality." The matter is perhaps best summed up in the supporting affidavit of the Dean of Columbia College, where he said that "All that any college can do through its teachers, libraries, laboratories and other facilities is to endeavor to teach the student the known facts, acquaint him with the nature of those matters which are unknown, and thereby assist him in developing mentally, morally and physically. Wisdom is a hoped-for end product of education, experience and ability which many seek and many fail to attain."

Defendant's extended argument lacks the element of fraudulent representation indispensable to any action of deceit. We note, in passing, that he has cited no legal authority whatsoever for his position. Instead, he has submitted a dictionary definition of "wisdom" and quotations from such works as the Bhagavad-Gita, the Mundaka Upanishad, the Analects of Confucius and the Koran; excerpts from Euripides, Plato and Menander; and references to the Bible. Interesting though these may be, they do not support defendant's indictment. If his pleadings, affidavit and exhibits demonstrate anything, it is indeed the validity of what Pope said in his Moral Essays:

> *"A little learning is a dangerous thing; Drink deep, or taste not the Pierian spring…."*

The papers make clear that through the years defendant's interest has shifted from civil engineering to social work, then to physics, and finally to English and creative writing. In college he became increasingly critical of his professors and his courses; in his last year he attended

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classes only when he chose and rejected the regimen of examinations and term papers. When his non-attendance at classes and his poor work in the senior year were called to his attention by the Columbia Dean of Students, he replied in a lengthy letter that "I want to learn, but I must do it my own way. I realize my behavior is non-conforming, but in these times when there are so many forces that demand conformity I hope I will find Columbia willing to grant some freedom to a student who wants to be a literary artist." In short, he chose to judge Columbia's educational system by the shifting standards of his own fancy, and now seeks to place his failure at Columbia's door on the theory that it had deliberately misrepresented that it taught wisdom.

### III

In light of our conclusion that defendant has failed to state a cause of action in deceit based on fraudulent representation, we need not deal with plaintiff's further contentions that (1) even assuming an unequivocal representation by Columbia that it would teach wisdom, this amounted to nothing more than a promise to do something in the future and therefore was not an actionable misrepresentation of fact; and (2) the counterclaim is defective for failure properly to plead the particulars of the alleged fraud.

### IV

In his motion to have the trial judge disqualify himself, defendant charged that the judge had rendered a premature judgment after hearing only plaintiff's side of the controversy; had needlessly added to defendant's difficulty in presenting his 'unusual case'; wrongfully claimed to be entirely familiar with the matter; and was partial to Columbia and overlooked misconduct by its attorney. To these reasons he added a suspicion that the assignment judge who had accepted his counterclaim was transferred away from the case in order to have it tried by the Law Division judge in question. These charges were set in a frame of intemperate, if not scurrilous, accusations.

There was no premature judgment. What happened was that at the first hearing on the motion for summary judgment, Columbia's attorney proceeded to make his argument and the trial judge then asked defendant if he wanted to reply. Defendant said that if there was any possibility of the motion being granted, he would want leave to file a brief. The judge then remarked that on the basis of what counsel for plaintiff had said and the papers the court had read, there was a strong likelihood of the motion being granted; and because defendant was a layman appearing pro se, the court would adjourn the matter for two weeks to give him an opportunity to prepare a brief and file affidavits. The motion was finally decided on the adjourned date.

As for the other reasons advanced by defendant, we find nothing in the record which lends them even the shadow of support.

### V

In view of the entirely unjustified accusations made against the trial judge and the intemperate characterization (so admitted by defendant at the oral argument) of the proceedings below, defendant's appendix and brief will be suppressed and all copies withdrawn from the clerk's files.

The judgment is affirmed.

## For Critical Analysis

1. Was there a trial in this case? Why or why not?
2. The court said the defendant appeared pro se. What does that mean, and what effect did it have on the case? Use the glossary and consult Chapter 4 for the answer.
3. What legal result was the plaintiff trying to accomplish by its lawsuit? The defendant?
4. Why did the plaintiff reduce its claim to $1,000?
5. Did either the plaintiff or defendant present evidence in the hearing discussed in the case?

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## CHAPTER QUESTIONS AND PROBLEMS

1. In regard to small claims court:
   a. Why do many states not allow attorneys to represent litigants in small claims court? (Note that in all states parties can consult counsel before and after the trial.)
   b. What should be the appropriate maximum dollar amount for small claims court (if any)? What should be the basis for determining the appropriate jurisdictional amount?
2. While driving her car in Colorado, Callie Norset, a resident of Alabama, negligently struck Jake Nguyen, a resident of Arizona. As a result of the accident, Nguyen suffered more than $22,000 in property damage, $40,000 in medical expenses, and $15,000 in lost wages. Nguyen wants to know whether he can obtain jurisdiction over Norset in the following courts:
   a. Federal District Court in Colorado
   b. Alabama State Trial Court
   c. Colorado State Trial Court
   d. District of Columbia Trial Court
   e. Federal Circuit Court of Appeals for the Ninth Circuit (includes Arizona)
3. In regard to courts and trials:
   a. Name each of the courts of your state and properly display them on an organization chart.
   b. What are the pros and cons of permitting each side in a case to exercise one peremptory challenge of the judge assigned to the case? Would your arguments be different depending on whether the case is criminal or civil?
   c. Do you believe a judge can influence a jury by such seemingly innocent conduct as smiling, eyebrow raising, grimacing, and so on, during the testimony of witnesses? How can any such effect be combated?
4. Sylvester is on trial for the assault and battery of his roommate, Arnold. Sylvester hit Arnold after Arnold refused to stop playing death metal music on his guitar. Sylvester was trying to study for a test. Sylvester intends to argue self-defense, arguing a physical noise attack. One of the prospective jurors has spiked green hair and a nose ring. Suggest a strategy that would best serve Sylvester's interests in dismissing the juror. Use the correct legal terms.
5. About jury nullification:
   a. What is it?
   b. Are jurors instructed by the judge as to existence of the power of jury nullification? Why or why not?
   c. Does the power of jury nullification exist in both civil and criminal trials?
   d. Can you think of any situation where if you were on a jury you would argue for jury nullification? No matter your answer, is it ethically correct? On what basis?
6. About trial and appellate courts:
   a. Define each.
   b. What is the purpose of each?
   c. Do juries assist both? Explain.
   d. Do both exist in state and federal systems?
   e. Do witnesses testify before each? Explain.
7. Thomas, William, and Ella McCollum were white defendants facing criminal charges of assault and battery against two African-Americans. Before the trial began, the prosecution requested that the court prohibit these defendants from exercising their peremptory challenges in a racially discriminatory manner. The prosecution claimed that the defendants' attorneys intended to eliminate African-American jurors from the panel through the use of peremptory challenges. The defendants argued that the law prohibiting the state from the discriminatory use of peremptory challenges was necessary to guarantee due process for a criminal defendant, but any restriction on defense use of peremptory challenges would deny defendants the right to a fair trial, The state argued that if it is prohibited from dismissing jurors on racial grounds, the defense should be similarly restrained. How did the court decide? [*Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348 (1992).]
8. Walter Martin brought an employment discrimination suit against the New York Department of Mental Hygiene and Dr. Stuart Keill, a regional director of the department. Although Dr. Keill knew of the lawsuit and the nature of the claim, he was not served with a copy of the complaint and a summons. Could Martin pursue the case against Dr. Keill without such service? [*Martin v. N.Y. State Department of Mental Hygiene*, 588 F.2d 371 (N.Y., 1978).]
9. Martha Anderson obtained a contested divorce from her husband, Donald. The trial court judge entered judgment of divorce. Donald asked the trial court to "vacate" (rescind or erase) the judgment, but the

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court refused his request. On Donald's appeal, the appellate court agreed that the trial court judge was erroneous in his ruling. Does this mean that Donald and Martha are married again? [*Anderson v. Anderson*, 869 S.W.2d 289 (Mo., 1994).]

10. Joshua Southard was cited for speeding and failing to yield to an emergency vehicle. He requested a trial in the Cape Girardeu County Circuit Court and was found guilty and fined. He appealed, claiming that the circuit court lacked subject matter jurisdiction. He was correct: the appropriate court was the municipal court. However, Southard, when requesting the hearing, told the circuit court that the municipal court had previously heard his case and rendered judgment. The circuit court did have the power to hold a trial *de novo*. The prosecution argued that because Southard "stated that judgment had been rendered against him in the municipal court, he should not be allowed to take advantage of an error of his own making." Did Southard win his appeal arguing that the court lacked subject matter jurisdiction? [*City of Jackson v. Southard*, 869 S.W.2d 280 (Mo., 1994).]
11. Timothy McVeigh was indicted by a federal grand jury for the planting of an explosive device in a truck next to the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, on April 19, 1995. The explosion led to the deaths of 168 men, women, and children, and injuries to hundreds of other people. As the explosion occurred in Oklahoma City, the Oklahoma Western Federal District Court was the appropriate venue. McVeigh sought a change of venue. Why did he seek a change of venue? Why was the trial to be held in a federal rather than state court? Did he succeed in obtaining a change of venue? [*United States v. McVeigh*, 918 F.Supp. 1467 (W.D. Okl., 1996).]
12. Can you provide an example of a kangaroo court proceeding? Would the use of the term *kangaroo court* be normative or factual? Is that important?

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CHAPTER 4

# Attorney–Client Relationship and Dispute Resolution

"*A law firm receptionist answered the phone the morning after the firm's senior partner had died unexpectedly. "Is Mr. Smith there?" asked the client on the phone. "I'm very sorry, but Mr. Smith passed away last night," the receptionist answered. "Is Mr. Smith there?" repeated the client. The receptionist was perplexed. "Perhaps you didn't understand me. I'm afraid Mr. Smith died last night." "Is Mr. Smith there?" asked the client again. "Madam, do you understand what I'm saying?" said the exasperated receptionist. "Mr. Smith is dead." "I understand perfectly," the client sighed. "I just can't hear it often enough.*"

**Adapted from a statement made at a U.S. Senate confirmation hearing of a Supreme Court Justice.**

## LEARNING OBJECTIVES

**After reading and studying this chapter, you should be able to:**

- Explain the adversary system.
- Explain how an attorney qualifies to practice law.
- Discuss ethics as it relates to lawyers and judges.
- Explain how attorneys are hired and fired.
- Recognize the nature of legal malpractice.
- Recognize, explain, and distinguish the various forms of alternative dispute resolution (ADR).
- Be able to discuss the pros and cons of mediation.
- Be able to discuss the pros and cons of arbitration and identify some important fairness issues related to the use of arbitration.



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An ideal legal system meets the somewhat inconsistent goals of stability and flexibility. In previous chapters, we have discussed constitutional law and the legal doctrine of *stare decisis*, both of which work toward balancing those two goals. In this chapter, we will consider the two additional goals of an ideal legal system: understandability and accessibility. Are the laws of the country known, comprehensible, and adequate? After a close look at lawyers and their role in the American legal system, we will discuss alternatives lawyers might use, alternatives to the use of lawyers, and, indeed, alternatives to the use of formal legal structures. Finally, we have included in Appendix D a reference to legal research methods.

### LEGAL FOCUS—BACKGROUND

*"The first thing we do, let's kill all the lawyers."*

—Shakespeare's Henry VI, Part II

Lawyers have been targets of criticism in the guise of humor, and otherwise, throughout history, but this is the classic quotation. The use of this quote as a pejorative is ironic because within the context of the play, the words speak well, not ill, of lawyers. In the play, the Duke of York foments revolution through the use of Jack Cade, who fancies he will be king after a peasant revolution. As king, he intends to be worshipped as a god, to require all in the kingdom to dress alike, to "be the parliament of England," and to require all women to surrender their virginity to him before any marriage. In the ramblings between Cade and one Dick the butcher, the environment for his scheme of despotism is discussed. Dick opines that to advance Cade's evil goals, "The first thing we do, let's kill all the lawyers." Cade says, "Nay, that I mean to do."

**adversarial system**
The jurisprudential system in which the parties to a legal dispute are opponents. Their attorneys advocate a great variety of theories of benefit to the cause of their clients both before and during the trial, and on any appeal.

Why is so much animosity displayed toward lawyers? In an era of sensitivity to affiliations and status, where jokes and comments about gender, ethnic origin, and sexuality are considered in bad form and even the basis of punishment (for example, public apology or resignation from office), negative comments about lawyers are still common and socially acceptable. Who are lawyers, or attorneys-at-law, and what functions do they perform in our legal system? Is it necessary to use a lawyer to access the legal system? Before addressing these issues, the first question to ask is, what is the special importance of advocacy (that is, pleading the cause of another person) within American jurisprudence? The answer: advocacy is so important partly because of the adversarial nature of the legal system.

### LEGAL FOCUS—BACKGROUND

All of us have long known that there are problems in some areas of our profession which deserve and which receive criticism not only from the public but from the bar itself. The bar is the severest and most expert critic of the profession. At the same time, most citizens will acknowledge what history shows about the courageous lawyers who have been among the staunchest defenders of liberties. Virtually every advance in the cause of civil rights came at the hands of lawyers—often serving without compensation.[1]

## WHAT IS THE ADVERSARIAL SYSTEM?

The backbone of the U.S. legal system is the adversarial method of resolving disputes. In an **adversarial system**, parties to legal actions are opponents. The judge is independent and neutral, unlike magistrates in so-called inquisitorial systems (discussed shortly). This

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fairly simple concept has enormous ramifications. Courts make decisions based on facts brought to their attention by the proponents and opponents in the legal conflict. Each party is responsible for producing evidence and rules of law that support its contentions. The competitors are openly biased and partial to their side. Each asserts every possible reason to merit victory. Every theory asserted or discovered is considered and subject to attack and counterattack. The judge acts much as a referee in a sporting contest, to ensure that the procedural rules, created to maintain civility and fairness, are followed.

Another distinguishing feature of the adversarial system is that a party must take action to get a case before the court. Legal questions are considered by a court only if a party brings a problem to the attention of the court by filing a lawsuit. Each party is independently responsible for presenting its case. Attorneys play a critical role organizing and arguing cases to the court. The moving party, or plaintiff, in a civil lawsuit must meet a required burden of proof before the defendant must respond. In a criminal case, the moving party is the prosecutor (for example, a county district attorney). He is from the executive branch of government, not the judicial branch.

## LEGAL FOCUS—BACKGROUND

He spoke to the jurors as if he were alone with them, the way two people can be alone in a crowded public park. His notes were at the counsel table … but he never paused to look at them. He told the jury about the tragedies the Woburn families had endured, and then, the tone of his voice growing harsher, about W. R. Grace and Beatrice Foods.

When Schlichtmann was done, the crowd in the gallery remained quiet for a long moment. Judge Skinner broke the spell by calling a brief recess. The crowd, elbow to elbow in their seats, seemed to let out a collective breath, and began talking among themselves as they shuffled out to the corridor.[2]

The adversarial system is the essence of what many consider to be the most just legal system the world has ever known. But it also has shortcomings and critics. The merits of a legal position are not necessarily related to one's ability to convince others, yet the adversarial system places a premium on advocacy skills. Arguments must be articulated clearly and presented in both written and oral form to convince decision makers of the merits of a case. Therefore, parties to a legal conflict generally hire advocates—lawyers—who possess the required talent.

Of course, access to the system is critically important—redress is not possible if access is denied. The means and methods used to seek legal redress are often complicated, specialized, and daunting to the casual user. Clerical personnel of courts do not assist parties to disputes. They dispense preliminary paperwork and receive new filings but do not give any advice. If they did, they could be punished for practicing law without a license. For this reason, parties may find court clerks unhelpful and sometimes even hostile. Parties who decide to file suit without representation are doubly disadvantaged; they are ignorant of the filing process (how to get a claim before the court), and they are ignorant of the rules of engagement (procedure, evidence, and advocacy).

**inquisitorial system**
A legal system used in some countries that allows the judge to investigate, question witnesses, and seek out evidence before a trial.

The contrasting **inquisitorial system**, mentioned previously, exists in many other countries as diverse as Argentina, France, and China. Under the inquisitorial system, judges need not depend on the testimony of the parties once the matter is before the court. Judges can investigate the dispute, question witnesses, and independently seek out evidence before a trial. Although attorneys are still necessary in countries with such

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systems, their role and the role of a trial are often seen as less critical to the administration of justice. In the interest of accuracy, it should be noted that in most modern legal systems the distinctions between adversarial and inquisitorial methods are not as great in practice as in theory. For example, in the adversary system judges do, within limits, ask witnesses questions and make limited suggestions to counsel about what evidence should be provided to the court. In inquisitorial systems, counsel represents parties, and the scope and degree of judicial inquiry are often limited.

## ATTORNEYS-AT-LAW

**attorney-at-law**
A person licensed to practice law, and usually called a lawyer, attorney, counsel, or counselor.

An **attorney-at-law** (also called a *lawyer*) is a person authorized by law to represent clients in legal matters. Attorneys also draft documents involving legal rights and duties and give expert advice on legal questions. Countless businesses and public organizations routinely look to lawyers for such help. More than two-thirds of the adults in the United States have consulted attorneys for assistance with personal legal problems. Most of these problems involve the preparation of wills, the purchase or sale of real property, divorce or marriage dissolution, serious personal injuries caused by other persons, consumer problems (for example, disputes with landlords or lenders), criminal matters, or difficulties with governmental agencies. Every person during his lifetime should anticipate direct or indirect involvement with an attorney. Accordingly, one should be familiar with the legal profession and learn how to select, retain (hire), and cooperate with an attorney and evaluate her performance.

Lawyers are trained to sort through complicated descriptions of human events to determine which facts are important. They are highly skilled at analyzing the relationship of those facts to legal rules and principles. Lawyers have the special ability to advocate positions through oral and written argument. They are expected to remain unemotional or rational enough to think clearly. On the other hand, "lawyers are accused—rightfully so—of taking simple issues and making them more complicated and of finding every possible permutation, instead of looking for the relatively straightforward solution to the problem placed before them."[3]

### Who May Practice Law?

**legal assistant**
Someone with specialized training who assists an attorney. Also called a paralegal.

Generally, only licensed attorneys may perform legal services for others, their clients. Most state legislatures have created state bar associations to regulate lawyers and the practice of law. The rules of such associations, together with applicable federal and state statutes, combine with the inherent powers of the court to regulate the legal profession. Each state sets its own qualifications for admission to practice law within its borders. However, all states permit attorneys to hire nonattorneys, often called **legal assistants**, to perform legal services under their indirect supervision. A considerable number of legal services are actually performed by nonattorneys.

**fiduciary relationship**
A relationship between two persons wherein one has an obligation to perform services with scrupulous good faith and honesty.

The practice of law is a licensed profession. Technical training, a commitment to public service, and a pledge to follow standards of practice distinguish a profession from a service or trade. The practice of law is regulated in part because legal representation is fiduciary in nature. A **fiduciary relationship** is one involving a person in a position of trust who undertakes to act for the benefit of another. The attorney as a fiduciary must exercise the utmost good faith, honesty, and fairness toward that client. Licensure is designed to protect the public by seeking to ensure that every attorney is competent, honorable, and worthy of that trust reposed by the client. Offering legal services without being duly licensed as an attorney is a criminal offense. Attorneys must have a separate license from each state in which they wish to practice law. Occasionally, attorneys will represent a

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client in the court of a state other than the one where they have a license. An attorney can do so after receiving permission from the court of that state. The granting of the right is referred to as *pro hac vice* (Latin: "for this occasion"). It is customary for a court to require that the out-of-state attorney associate with a local attorney for the duration of the case.[4]

A candidate for a license to practice law must possess good moral character, complete certain minimum educational requirements, pass an examination on the law (called a *bar examination*), and take an oath to support the law and conform to rules of professional conduct of that state. The educational requirements vary depending on the state. Most states require that any person wishing to take the state bar examination must be a graduate of a law school accredited by the American Bar Association. A law school is a professional institution offering a graduate-level degree program. Today, law students must possess a baccalaureate degree to gain admission to accredited law schools. Many states also require that each attorney complete a minimum number of continuing legal education courses within a prescribed time to retain the license. A person has no inherent right to be able to practice law or to represent others in court. Only those who demonstrate moral fitness and intellectual ability are granted the privilege to practice law.

Each federal court (for example, U.S. Supreme Court, U.S. Courts of Appeals, U.S. District Court) recognizes its own separate bar or group of attorneys permitted to practice before it. Admission is granted to attorneys licensed in the state where the federal court sits. Federal court rules impose separate preconditions for admission to the federal bar, although no further legal education or additional examination is required.

**LEGAL FOCUS—CASE**

Bonnie Cord and Jeffrey Blue, an unmarried couple, bought a home and resided together in a rural area of Warren County, Virginia. Bonnie, an attorney licensed to practice law in Washington, D.C., applied for a license in Virginia. Duncan Gibb, judge of the Circuit Court of Warren County, denied her application because her living arrangement "would lower the public's opinion of the Bar as a whole." Bonnie appealed to a higher court. What should have been the result?[5]

At the time this case was heard, unmarried couples living together were uncommon and their behavior was considered by most Americans as socially unacceptable. Despite the social attitudes of the day, Bonnie won the case and her license because her conduct did not affect her fitness to practice law. The same result has been reached where an applicant disclosed a sexual preference for persons of the same sex.

***in propria persona (in pro se)***
Term meaning the person represents herself or himself in a legal action without the appearance of an attorney.

With a few exceptions, no one is required to use a lawyer in a legal proceeding. A party to a case before a trial court may appear ***in propria persona*** (Latin: "in one's own person") or ***in pro se*** (Latin: "on one's own behalf"), that is, without the services of a lawyer. Generally, though, it is not advisable to go to court without a lawyer. A common saying even among lawyers is "one who serves as his own lawyer has a fool for a client!" Thus, lawyers are usually represented by another lawyer when they are sued. All of us, even lawyers, are emotionally involved in our own cases; we need educated, experienced, and rational counsel to analyze issues dispassionately and argue them persuasively before judge and jury. It is important to have an independent advocate.

> *A defendant in Superior Court decided to be his own lawyer, which some say was mistake number one. His second mistake was the first question he asked the victim: "Did you see my face clearly when I took your purse?" The sentence: Two to ten years.*[6]

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An attorney's license can be suspended or revoked for failing to follow professional standards, including by breaking the law, or for providing services in an incompetent and unethical fashion. However, attorneys are not required to disclose to prospective clients whether they have ever been disciplined for unprofessional conduct, whether they are under treatment for any mental or addictive health problems, or whether former clients have sued them.

## Specialization

As is a license to practice medicine, a license to practice law is a broad grant of power. It permits an attorney to undertake a wide variety of legal tasks. Common sense for both lawyer and client suggests that a general-practice attorney should undertake only routine matters for a client. A complex legal problem should be referred to a specialist, who will be familiar with the intricacies, procedures, and detailed rules in that particular area of law. All areas of law practice include unwritten norms, knowledge of which allows the specialist to bring a legal problem to a faster, more satisfactory conclusion than an attorney not well versed in the particular area.

Attorneys may choose to specialize in any one or more areas, such as divorce or family law, probate and estates, criminal law, administrative law, real property law, personal injury law, small business law, and consumer law. These specialties usually correlate with the most common public needs. Other specialties include antitrust law, labor or employment law, tax law, bankruptcy law, intellectual property law, international law, workers' compensation law, water law, and elder law (a relatively new legal specialty serving America's aging baby boomers). Attorneys may also be classified as performing either transactional or litigation (court-related) services. For example, one attorney may perform transactional services such as writing wills, contracts, articles of incorporation, and so on, whereas another performs only court cases. On the other hand, criminal lawyers are strictly litigators. Clients should determine whether the attorneys they consult have a specialty.

Many states allow attorneys to identify themselves as certified specialists in a particular area of law if they have the requisite experience and have met the educational standards set by the state bar. The availability of specialized legal services is determined, in part, by geography. For example, antitrust, patent, immigration, and securities specialists are found in populous urban areas, whereas general practitioners are usually found in suburbs and rural communities. Family, small business, criminal, and probate law attorneys are found in all communities of any significant size.

### LAW AROUND THE WORLD

#### Solicitors and Barristers

Although common law countries have much in "common" (sorry), the ways in which lawyers and their services are organized in the United Kingdom differ significantly from the United States. The United Kingdom model divides lawyers into two groups: solicitors, who represent and advise clients; and barristers, who are selected by solicitors to present a client's case in adversary proceedings, namely, court. Initial legal training for both is either an undergraduate law degree (don't assume the undergraduate degree has the same requirements as a U.S. degree) or a degree in another subject followed by a one-year course called the Graduate Diploma in Law. Solicitors then study a one-year Legal Practice Course and begin a two-year training apprenticeship with a firm of solicitors. Barristers must join one of four Inns of Court (Lincoln's Inn, Inner Temple, Middle Temple, and Gray's Inn), usually during their

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undergraduate education. Whichever Inn is chosen will supply a library, an education, a place to eat, common rooms, a senior staff guide, and practice opportunities. Dining at an Inn of Court probably means participating in mandatory educational activities. Prospective barristers must successfully complete a Bar Vocational Course and be called to the bar by their Inn. They must then serve a one- or two-year pupilage (apprenticeship) before applying for a tenancy in the court. Every step is a competitive process with many more applicants than available slots.

## Associations of Lawyers

A lawyer may choose to practice alone, combine with one or more other attorneys in a law partnership, or (in most states) conduct business as a professional corporation. Law partnerships and corporations currently range in size from two to more than 3,000 attorneys. The nature of the practice of law has changed dramatically in the last 70 years. The following quotation from Erwin Griswold captures some changes that occurred during his lifetime in the law.

### LEGAL FOCUS—BACKGROUND

[G]ood openings for young lawyers were not easy to find. When I finished law school [Harvard] in 1928, I made the rounds of the New York law offices. I did receive a number of offers, but they were all at the fixed rate of $125 a month. Practically no member of my class at law school had a position at the time of our graduation. It was taken for granted that you would first take and pass the applicable state bar examination, and then knock on the doors of law offices in the city of choice and hope that some sort of an opening could be found. There was not a great deal of change until after the close of World War II.[7]

Today, it is most unlikely that a top Harvard graduate would need to go door to door to find employment. Today's starting salary would be most attractive.

Most attorneys who associate with others do so in a general partnership, a limited liability partnership, or a professional corporation. When professionals, including lawyers, form organizations, they seldom gain all the advantages that exist for other businesses. For example, there are generally no restrictions on who may be a shareholder (part owner) in the usual corporation. But in a professional law corporation or limited liability partnership, nonlegal professionals (for example, legal secretaries, legal assistants, and investigators) are not allowed to be shareholders. In addition, although many business forms protect a shareholder from all personal liability for the debts of the firm, such forms will not completely protect a professional in most states. To protect the public, most states will not shield attorneys (or other professionals) from liability for errors and omissions (malpractice).

Various statutory schemes protect clients of professional corporations. One type will not allow owners to have limited liability. Another requires professional corporations or limited liability partnerships to purchase insurance against professional malpractice (errors and omissions insurance). A third scheme requires all shareholders to personally guarantee all corporate obligations for malpractice as a condition for certification.

Lawyers in all but the smallest "boutique" firms are often assisted by legal assistants or paralegals[8] (persons qualified to perform a wide range of administrative and semilegal tasks), secretaries or personal assistants, investigators, and office managers.

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Medium to large partnerships include attorneys offering a wide variety of specialized legal services. On the other hand, some law firms limit their entire practice to a single specialty. For example, some firms specialize in the defense of automobile injury cases. These firms are employed by automobile insurance companies to represent their customers who are involved in automobile accidents.

Prestige within the legal community is often related to the size of the firm. The larger the firm, the greater its prestige and, usually, the higher the fees it charges its clients. This phenomenon is partly the result of large, well-established firms attracting top graduates from elite law schools. Members (owners, or "equity-partners") of these firms often earn high personal incomes, serve wealthy clients, and occupy luxurious offices. The solo practitioner, rightly or wrongly, is often found at the bottom of the image and income ladder.[9] The nature of the practice of law appears to be changing drastically. Although the evolution of legal practice from solo practitioners to large firms has been going on for more than 60 years,* the establishment of the megafirm with offices in different cities, states, and countries is a more recent innovation.

Certain areas of law or specialty are more prestigious than others. An example of the strong sentiments about one type of practice is expressed in the following newspaper quote from a judge (with obviously strong, but not necessarily accurate, opinions) who was contemplating his return to practice.

## LEGAL FOCUS—BACKGROUND

When he goes back into practice, Winner said he will accept any kind of case except divorce cases. "I'll represent whores, pimps, or newspaper reporters, but I'm not going to try divorce cases," he said. "There is no end to them, and no end to the calls at home. There's also no satisfactory solution to any of them. The cause of most divorces is that there isn't enough money, and if there isn't enough money to support one family, there sure isn't enough money to support two."[10]

**contingency fee**
A fixed percentage of the monetary recovery obtained by a lawyer for a client. It is agreed on in advance and accepted in full payment for services rendered.

**Legal Services Corporation (LSC)**
A federally funded corporation that distributes federal tax dollars to state programs that provide legal assistance in noncriminal proceedings to persons financially unable to afford such services.

Public attorneys (for example, district attorneys, U.S. attorneys, and county counsels) represent various local, state, and federal governments. Public defenders are also public attorneys. They are paid by local, state, and federal governments to represent indigents accused of a crime. Attorneys in public service are usually bound by the same rules of professional conduct as attorneys in private practice. In some circumstances, public lawyers are held to a higher standard. (See the following discussion.)

Generally, the government is not obligated to provide free legal counsel to low-income people in civil matters. However, many communities have established legal aid offices. They give assistance and limited legal advice in civil matters to people who cannot afford an attorney. Representation in personal injury cases is affordable because private attorneys charge on a **contingency fee** basis. The fee, a percentage of the amount recovered, is contingent on the outcome of the case. In other words, a fee is due and payable only if the client wins. (Further discussion of attorney fees appears later in this chapter.)

The federal **Legal Services Corporation (LSC)** helps states provide legal assistance to the underprivileged through grants to local legal aid offices. "LSC's mission is to promote equal access to the system of justice and improve opportunities for low-income people throughout the United States by making grants for the provision of civil legal assistance to those who would be otherwise unable to afford legal counsel."[11] Created in

*In the years immediately after World War II, approximately 65 percent of lawyers in this country practiced alone. Albert Blaustein, *American Lawyer* (Westport, CT: Greenwood Publishing, 1972).

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1964, the LSC has encountered some controversy because advocating for the poor often has unpopular political ramifications. Cases brought by the LSC grantees often name other government agencies as defendants, creating political backlash and resentment.

***pro bono publico***
When an attorney provides legal services free of charge to poor but worthy clients or causes.

Many bar associations and legal commentators urge lawyers to allocate part of their time to civil ***pro bono publico*** (Latin: "for the public good") services free of charge. Many attorneys do contribute their time and effort to serving poor people who have legal problems, but the need is far from being met to the satisfaction of all concerned. The ABA House of Delegates adopted new ethics rules requiring every lawyer to provide legal services to those unable to pay. Congress and state legislatures have enacted "fee shifting" statutes to encourage attorneys to represent the underprivileged: if the attorney wins the case, the government will pay all attorney fees. Fees are quite generous in civil rights matters and government overreaching cases. Victims who do not have to pay attorney fees in advance are more likely to proceed in vindicating their rights. To some, fee shifting is the only way to protect poor people. To others, fee shifting statutes are like adding gasoline to the fires of litigation, which many believe already to be out of control. The following vignette is about one of the many lawyers providing public service for free. He also happens to be a lawyer professor aided by his classroom students.

## LEGAL FOCUS—BACKGROUND

When an elderly couple faced eviction for amassing large amounts of clutter, Northridge professor Bruce Zucker and 10 students agreed to clean and organize the couple's longtime rent-controlled apartment to keep the pair from losing their home. And when the landlord later reneged on the agreement, Zucker took the case to trial—and the couple, who were living on a fixed income, won the right to stay put. That was just one of several recent cases in which Zucker, a full-time professor of real estate law and finance at California State University, Northridge, stepped in to assist low-income individuals in the midst of a crisis.[12]

Assistance to indigent persons accused of crimes is provided without charge through state and federal public defenders' offices. Courts appoint private attorneys when public attorneys are not available. The state pays these private attorneys standardized fees. Under the Sixth Amendment, legal assistance is a constitutional right of all persons accused of crimes punishable by imprisonment, even if they cannot afford to hire private legal counsel.

## MORALS AND ETHICS

As we examine next, many moral and ethical standards for lawyers exist as regulatory obligations. In essence, these ethics are codified. But some lawyer values exist outside of lawyers' ethical code. Serving pro bono clients is one of those values. Although lawyers are not required to perform pro bono work, they are certainly expected to do so. Law firms and judges praise lawyers who provide pro bono services to the needy, and many young lawyers are in part attracted to the profession because they expect to have the opportunity to serve clients who cannot afford their services. Still, the business pressure on private-practice lawyers is increasingly making such honorable service difficult.

Some "store-front lawyers" or "law clinics" operating out of strip malls and other such quarters provide routine legal services for reduced fees. This type of law practice began in the 1970s with the relaxation of rules prohibiting advertising. These clinics often limit

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representation to such areas as family law, criminal defense, and probate matters. To lower costs, they take on only those matters that lend themselves to simple procedures and use of standard legal forms. In recent years, many of these clinics have added other legal specialties to their services.

**legal service plans**
Insurance plans designed to make legal services available to members of unions or other organizations, such as business firms.

The cost of legal services, like the cost of medical care, has skyrocketed in recent years. For many, access to competent legal advice at an affordable rate has become elusive. Group and prepaid **legal service plans** are designed to make legal services available at reduced cost to members of associations. Increasingly, prepaid legal service plans are offered as part of employee benefits packages. These plans operate like group health insurance. Subscribers get free or reduced-fee legal services after a deductible has been met. The plans are usually limited in scope but do provide low-cost assistance for routine legal matters (for example, simple wills, document review, and warranty enforcement). Criminal matters are generally excluded from coverage. Prepaid legal service plans have been criticized for violating attorney ethical rules (discussed next) respecting client confidentiality and for interfering with attorneys' professional judgment.

**public interest law firm**
A nonprofit law firm that offers assistance in areas such as employment, minority rights, civil rights, political rights, family law, and environmental law.

**Public interest law firms** became popular in the late 1960s. These firms offer assistance in particular areas such as employment, minority rights, civil rights, political rights, family law, and environmental law. Public interest law firms are often funded by grants from private charitable organizations. Public interest firms represent opposite sides of controversial legal issues.

## WHAT ARE PROFESSIONAL ETHICS?

**professional ethics**
Written rules of conduct that are adopted by and binding upon members of a professional group.

As discussed in Chapter 1, ethics is about what is fair and just. It addresses the question, what is the right thing to do in a situation? **Professional ethics** are written rules of acceptable conduct that are adopted by and binding upon members of a professional group. They are established and enforced to protect the public and to preserve and improve the reputation of the profession. Recall that an oath to follow ethical rules is what distinguishes a profession from a service or a trade. Ethics and the law, although not identical, do go hand in hand.

**legal ethics**
Rules promulgated by lawyer-governing bodies to proscribe standards of professional behavior and regulate lawyer and judicial conduct.

**Legal ethics** is the set of rules promulgated by the governing bodies that regulate lawyer and judicial conduct. Legal ethics may embody moralistic choices, but not necessarily. *Rules of professional conduct* or *rules of professional responsibility* are more precise terms, as many of the rules do not directly concern moral issues. They relate to more practical aspects of legal practice such as prohibiting unauthorized practice of law. The states are responsible for regulating lawyer conduct.

### LEGAL FOCUS—BACKGROUND

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.[13]

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As a practical matter, the legal profession is self-regulating. The various state bar associations, under the auspices of the states' supreme courts, devise and publish the rules of ethics, determine admission eligibility and procedures, and decide who receives discipline and to what extent. These rules carry the force of law when they are codified by a legislature or cited by courts in opinions. A breach of these rules may lead to discipline. It may take the form of (1) disbarment, (2) suspension from practice for a stated period of time, (3) probation, or (4) reproval (formal private or public censure).

The American Bar Association is the preeminent source on legal ethics. Since the early twentieth century, the American Bar Association has promulgated rules of ethics for legal practitioners. The first set of rules, the Canons of Professional Ethics, was introduced in 1908. It was intended as a practice guide, not a basis for discipline. A new set of rules, the Model Code of Professional Conduct, was introduced in 1969. It had two sets of rules: one aspirational and one disciplinary. In 1983, the American Bar Association adopted the Model Rules of Professional Conduct. The aspirational component of the earlier codes was eliminated. The current major revision of the ABA Model Rules of Professional Conduct was adopted in February 2002.

Charging unconscionable or exorbitant fees, stealing a client's funds, improperly soliciting employment, neglecting a client's case, and misusing a client's funds are all examples of unethical conduct directly related to the attorney's profession. Other improprieties and bad behavior can also expose the attorney to ethics violations.

Attorneys may be disciplined for conduct involving *moral turpitude* (conduct contrary to justice, honesty, and good morals). Perjury, failure to pay income taxes, murder, larceny, participation in business fraud, child molestation, and sale of narcotics are all examples of crimes involving moral turpitude. Such acts subject the offending attorney to professional discipline, in addition to criminal charges and individual civil lawsuits. Disciplinary hearings may take place even if questionable conduct does not directly relate to the attorney's ability to practice law. For example, a former vice president of the United States, Spiro T. Agnew, was disbarred following his plea of *nolo contendere* (Latin: "I will not contest it"), a special form of guilty plea, to willful tax evasion.[14]

**LEGAL FOCUS—CASE**

Grace Akinsanya retained Pineda, an attorney, and paid him $1,500, in advance, to represent her in a real estate matter. After a few months, Akinsanya became dissatisfied with Pineda's inaction and fired him. Pineda refused to sign a substitution-of-attorney form and would not return Akinsanya's files or refund any part of the fee. Can Pineda refuse to remove himself from the case and keep the client's files?

*Pineda v. State Bar of Calif.*, 49 Cal.3d 753, 781 P.2d 1 (Calif., 1989)

An attorney-at-law has no right to continue to represent a client who no longer wants the lawyer's services. Pineda finally did withdraw from the case and returned Akinsanya's files, but only after the Superior Court sanctioned (punished) him for his actions. Based on these acts and six other similar acts of failure to perform services for clients, Pineda was suspended from the practice of law for two years and placed on probation for five years.

There is an important difference between private and public attorneys. Both are ethically bound to zealously represent a client. They are advocates, and the object is to win the client's case. In litigation, each attorney works with the record of historical events, which lawyers refer to as *facts*. Each must resolve all doubts about the facts (and law) in the client's favor. Significantly, a public attorney, such as a prosecutor or other government

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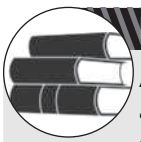
lawyer, is held to a higher standard. A government lawyer is duty bound to see that justice is carried out, not simply win the case. For example, a prosecutor must notify the defense of any obvious evidence in a criminal case that tends to show the defendant's innocence. Private attorneys are not obligated in the same way. They are not responsible for passing judgment. However, they may not destroy, nor present as true, any evidence that is known to be false, nor solicit or condone perjury in order to win a case.



## LEGAL FOCUS—PROBLEM

Attorney Tak Sharpe represented the plaintiff in an automobile accident case that was nearing trial. To encourage a compromise, Sharpe telephoned the defendant, Sandra Broderik, instead of calling Broderik's attorney. Sharpe told Broderik that $17,500 would be a fair settlement. Broderick responded that she would prefer to discuss the matter with her attorney. Has Sharpe acted ethically?

No.[15] The Rules of Professional Conduct do not allow opposing counsel to communicate directly with another attorney's client without the other lawyer's consent. Sharpe should have telephoned Broderik's lawyer. The purpose of this rule is to prevent an opponent's lawyer from intimidating the opposition or undermining the advice given by that client's counsel.

Questions of professional ethics are sometimes complex and susceptible to misunderstanding. The attorney's job is to vigorously represent the client while honoring the law. For example, a criminal attorney must attempt to persuade a judge and jury to free a client, even if he or she personally believes that the client is guilty of the offense. This is considered ethically correct because the lawyer's duty is to represent—not to judge—the client. Everyone is entitled to all available legal advantage. Even following conviction, the attorney will argue for probation rather than prison. A tax attorney will look vigilantly to find a loophole (an ambiguity in the law), allowing a client to reduce or avoid tax payments. This is proper, as a matter of legal ethics, so long as no fraudulent practice is involved. Congress often authorizes loopholes or tax shelters to encourage certain types of socially desirable investments. For example, Congress allows interest paid on home mortgages to be deducted from taxable income, reducing the income taxes paid by homeowners. (Of course, the taxpayer must request the deduction.)

## LEGAL FOCUS—CASE

Tammy Forsberg was injured in a motorcycle accident. Her attorney, John Casey, obtained a settlement, of which her portion was $23,233. Casey paid her $5,000 and refused to pay the rest. Forsberg hired a second lawyer, James Himmel, on a contingency fee basis to recover the remaining balance from Casey. Himmel sued Casey and won a judgment of $100,000 for Forsberg. Himmel did not report Casey to the state bar. What are the ethical implications of Casey's and Himmel's conduct?

*In re* James H. Himmel, 125 Ill.2d 531, 533 N.E.2d 790 (Ill., 1989).

The Illinois state bar disbarred Casey for keeping Forsberg's money. Apparently, Casey had treated the money as if it were his own. He put his desire for fees above the interests

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of his clients and the legal system. Himmel exacerbated the misconduct by not reporting it. Under ethical rules, lawyers are required to report another lawyer's misconduct to the proper authority. The Illinois Supreme Court held that Himmel, by not reporting Casey's activities, had contributed to the misappropriation of other clients' funds. Although Himmel had practiced law without complaint for 11 years, he was suspended from the practice of law for one year.[16]

The public and even some lawyers have trouble understanding the ethical rules despite the continuing effort to update and clarify them. One influential source of ethical guidance is a body of published ethics opinions written by ethics committees of the American Bar Association and state or local bar associations. An ethics committee is convened to consider how the rules of professional conduct apply in a specific circumstance. The committee debates the ethical issues and writes an opinion resolving the matter. It is important to note that although influential, the opinions do not carry the force of law. Ethics Hotlines, operated by state and local bar associations, are a source of guidance for lawyers. Lawyers may make a confidential telephone inquiry about an ethical dilemma and receive advice on how to solve the problem. Again, such advice may be helpful but is not binding on any court.

## Confidentiality and the Attorney–Client Privilege

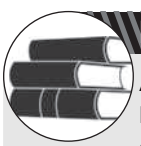
**attorney–client privilege**
The right of clients to keep communications with their attorneys confidential and free from disclosure.

The **attorney–client privilege** is a rule of evidence that protects all communications between a client and her attorney from disclosure in a legal proceeding. An attorney cannot be compelled by statute or court order to reveal such information except in a few narrow circumstances. The client may waive the privilege, but the attorney may not. The attorney–client privilege applies in all states.

**confidentiality**
A private communication with an attorney-at-law in which the attorney is under a duty to keep the information secret.

The attorney–client privilege is often confused with the broader duty of **confidentiality**. The duty of confidentiality is a lawyer's ethical obligation to protect any information learned from or about a client during the course of representation. It applies in any forum or context, not just in judicial proceedings. Whereas the duty of confidentiality protects any information a lawyer learns about the client from any source from disclosure to anyone, anywhere, the attorney–client privilege protects the client's information *only* if the attorney learns it directly from the client. Some exceptions to the confidentiality rule apply. Although there is wide variation among the states, the most common exceptions are to defend a malpractice case or fee dispute, to warn of a client's contemplated crime, and to avoid assisting with the commission of a crime.

The attorney–client privilege and the duty of confidentiality were designed to accomplish competent representation. To build a strong case, attorneys need full disclosure and open communication with their clients. Clients will share information freely with counsel only if they believe their confidences are safe.



### LEGAL FOCUS—PROBLEM

A criminal defense attorney learned from his client, Derrick Vaughn, that in addition to the present crime with which Derrick was charged, he previously had murdered two young girls, recently reported as missing. The lawyer even learned the specific location of their bodies. Yet the attorney did not report this information to the authorities, to the parents of the girls, or to anyone else. Did the attorney behave ethically?

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Yes, according to generally understood legal ethics. An attorney cannot breach the duty of confidentiality, without the client's consent. Rule 1.6 of the ABA Model Rules of Professional Conduct prohibits a lawyer from revealing "information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation…." The attorney cannot waive the privilege. However, the client may do so. Cases involving situations such as this have brought the rule to the public's attention, if not understanding, over the years.[17]

## LEGAL FOCUS—CASE

An anonymous client (referred to as J. Doe) contacted an attorney following Doe's involvement in a fatal hit-and-run accident. Doe instructed the attorney to offer a plea to the prosecutor in exchange for a reduced criminal charge while Doe remained anonymous. The prosecutor refused to bargain without revelation of Doe's identity. The victim's family sued the attorney to force disclosure of the client's name. Can the family get Doe's real name?

*Baltes v. Doe*, 57 U.S.L.W. 2268 (Fla. Cir. Ct., 1988).

No. The Florida Circuit Court held that the information was privileged, and the attorney was not required to disclose the client's name. Courts understand the natural public resentment that arises with such rulings. Nevertheless, "if the privilege is not maintained in 'hard' cases such as this, troubled individuals with legal problems will only dare to consult lawyers in 'easy' cases—where there is little to hide in any event."[18]

## LEGAL FOCUS—CASE

In 1993 Deputy White House Counsel Vincent W. Foster, Jr., met with attorney James Hamilton seeking personal legal representation. Hamilton took handwritten notes at the meeting. Nine days later, Foster committed suicide. Subsequently, a federal grand jury, at the request of Independent Counsel Kenneth Starr, issued subpoenas for the notes as part of an investigation of President Clinton and his staff. Hamilton sought to quash the subpoena, arguing that the notes were protected by the attorney–client privilege. Starr's contention was that the attorney–client privilege does not apply after the client has died, particularly if the information is relevant to a criminal proceeding. Did Starr get the notes?

*Swidler & Berlin and James Hamilton v. United States*, 524 U.S 399, 1b18 S.Ct. 2081 (1998).

No. In reversing the Court of Appeals for the District of Columbia Circuit, the U.S. Supreme Court stated, "[W]e think there are weighty reasons that counsel in favor of posthumous application [of the attorney–client privilege]. Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime."

The privilege has not, however, been held to cover all communications in all situations; for example, there is no protection if the communication is made in the presence of others, if the communication indicates an intent to commit a future crime, or if there is a statute requiring specified communications to be disclosed.

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## Conflicts of Interest

A quality attorney–client relationship depends on trust. Clients develop trust in their attorney if they believe their attorney will treat them in an honest, fair, and loyal manner. It is virtually impossible for an attorney to competently represent clients unless clients are completely candid. The natural inclination to avoid disclosing embarrassing or incriminating information cannot be overcome unless clients are confident their attorney will not use confidential information without permission. If clients believe confidences will be respected, then they will communicate openly with their attorney. A relationship of trust forms when the attorney is first engaged and continues throughout the representation and even after the representation ends.

**conflict of interest**
When a client's interests are at odds with another's because the attorney serves, might serve, or is tempted to serve the other.

Conflicts of interest breach this trust. A **conflict of interest** occurs when one client's interests are at odds with another's because the attorney either serves, might serve, or is tempted to serve the other. Any situation that compromises or has the potential to compromise an attorney's loyalty to clients is a conflict of interest. The rules of professional conduct forbid conflicts of interest. These rules are intended to foster trust in individual attorney–client relationships and to build confidence in the legal profession.[19]

Obviously, a conflict arises when an attorney seeks to be named a beneficiary in a client's will or trust. (This is called a breach of trust or breach of fiduciary duty.) Attorneys may not use financial information about a client to their own advantage. Conflicts of interest can arise between two or more clients or between a new client and a current or former client. For this reason, lawyers may not represent two defendants accused of commission of the same crime. An attorney faced with a potential conflict of interest can contact the local bar association's Ethics Hotline for guidance. An advisory opinion may be published if the bar believes the issues in the case require general guidance.

### LEGAL FOCUS—EXAMPLE

**Problem:** The inquirer asks if it is a violation of the Rules of Professional Conduct for a retired judge, now volunteering for a local legal aid office, to represent a client in an ongoing child custody/parenting dispute when that same client appeared before him in Drug Court while he was still on the Superior Court bench and when he signed an agreed order in the child custody/parenting dispute which was the result of a hearing in front of another judge when the other judge was out of town.

**The Rule:** A lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent confirmed in writing.

**Analysis:** The committee cannot comment on potential violations of the Code of Judicial Conduct. Nonetheless, if the judge did not have any substantial participation while he was on the bench in the matter in which he now wishes to represent the client, representation of that client does not appear to be a violation of RPC 1.12. The retired judge's involvement in drug proceedings involving his current client may be deemed "personal and substantial" participation in a related matter but, if so, can be addressed by the informed consent of his client. Under the facts of this case, it does not appear that the retired judge had "personal and substantial" participation in the child custody/parenting dispute so as to require the consent, after disclosure, of the other party to the child custody proceedings.

Informal Opinion 2092 issued in 2005 from the Washington State Bar Association.

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Conflicts are created when attorneys change employers, either from one private law firm to another or from government service to private practice. The magnitude of this problem has increased with the growth in law firm size. Performing detailed conflicts checks is now critical to escaping malpractice suits and ethical rules violations. When taking on new clients, attorneys must be vigilant in determining that the new representation does not conflict with obligations owed to other clients (even previous ones). To serve the best interest of clients, even the appearance of a conflict needs to be avoided.

**LEGAL FOCUS—CASE**

Judge Bennie Boles appointed Victor Haley to represent Larry Christopher, an indigent defendant charged with a crime. Haley asked to withdraw on the basis of a conflict of interest, stating his law partner was married to the county district attorney, Karren Price. Judge Boles held that no conflict of interest existed. Haley requested judicial review on the question. Did a conflict of interest exist?

*Haley v. Boles*, 824 S.W.2d 796 (Tex., 1992).

The Texas appellate court held that because indigent criminal defendants are not required to pay attorney fees, they are not free to discharge appointed counsel, even upon discovery of a conflict of interest. However, ignoring the marital relationship between the district attorney and the defense counsel would undermine public confidence in the criminal justice system. The court found this apparent conflict of interest sufficient to dismiss Haley as Christopher's counsel.

## Frivolous Lawsuits

Claims without legal justification, solely intended to retaliate or punish, are regarded as frivolous. They are costly to society. Defendants incur attorney fees and expenses. Time is wasted and minds are preoccupied unnecessarily. Courtrooms are occupied and the attention of judges is diverted from valid cases. Meritless lawsuits clog the court system. Arguably, access to justice is denied when meritorious cases cannot be tried on a timely basis. Perhaps surprising to the public, it is unethical for lawyers to file baseless lawsuits. In fact, the ABA Model Rules of Professional Conduct and states' rules prohibit attorneys from taking on any legal work of a frivolous nature.[20]

A lawyer may not write a demand letter or place a telephone call on behalf of a client if there is no validity to the claim. The costs of defending a frivolous lawsuit are recoverable under statute, case law, and court rules.[21] Federal Rule of Civil Procedure 11 permits the court to sanction attorneys and *pro se* litigants for filing frivolous lawsuits. A signature on any moving paper (motions, answers, and so on) is a certification to the court that the signer believes, based on investigation, the allegations to be true. If the courts find that the suit has no basis in law or fact, it may dismiss the case and order that the defendants be paid their litigation costs, including attorney fees. Under federal statute, defendants may even recover "excess costs and attorney fees arising from vexatious actions taken to escalate an otherwise valid case."[22] Plaintiffs beware: the court system may not be used to facilitate bad-faith attempts at seeking justice.

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# DEALING WITH AN ATTORNEY

## Is an Attorney Necessary?

Lawyers are expected to assist with a seemingly endless stream of problems for private persons, businesses, government agencies, and other organizations. Obviously, many clients consider attorneys an essential source of information, advice, and representation in numerous situations. Nonetheless, people routinely resolve some legal problems without the assistance of an attorney. Among these are simple divorces, settlement of "fender bender" car-crash cases, simple handwritten wills, consumer purchase and sale contracts (such as "pink slip" certificates of vehicle ownership), and simple real estate purchase agreements. Numerous disputes involving small sums are within the jurisdiction of the small claims court (recall that attorneys may not appear in small claims court unless they are parties in a case). The Internet is a useful tool in gathering legal information. There are excellent self-help books such as those published by Nolo Press* and legal software such as Quicken Lawyer. Unfortunately, too often persons in genuine need of legal advice or assistance fail to seek it, or delay consulting an attorney. The result may be a permanent loss of a valuable legal right. A decision about self-help should be made carefully.

The Internet has made legal information easily available, so why consult an attorney? Finding the law is only one of many critical services that an attorney performs. Attorneys have legal insights that only years of study and experience can engender. In addition, attorneys are skilled orators and writers. They are expert problem solvers, negotiators, and advocates. Not every dispute or problem ought to be taken to an attorney. Indeed, elementary economics militates against such petty litigiousness. The potential impact of events on one's life should be considered when considering the need for an attorney's services.

Some general guidelines may help you decide whether to consult an attorney for a matter. Do consult an attorney if the matter can be characterized in any of the following ways:

- The matter involves the risk of losing or possibility of obtaining a sum of money that is significant to you.
- The matter involves the risk of losing your freedom or suffering harm to your reputation.
- The matter involves actual or possible physical or mental injury, suffered or threatened, that can be characterized as significant.
- The matter seems important for any other reason (for example, a major impact on your life or that of a dependent, such as in a child custody dispute).
- The area of law is complex or you lack the time to carefully preserve or pursue your rights.

In recent years, many critics have claimed that the United States has too many lawyers. The number of lawyers in our society allegedly has a negative effect on economic productivity and has engendered dissatisfaction among citizens. Indeed, lawyers have the dubious distinction of inspiring an anti–fan club called HALT (Help Abolish Legal Tyranny), set off in part by dishonorable lawyer conduct. Such criticisms are difficult to

*We frequently cite Nolo Press in this textbook. Nolo Press began publishing self-help legal resources in the late 1960s, and in our opinion has set the standard for accurate, easy-to-understand legal materials. As their publishing philosophy has been motivated in part by social goals, the materials they provide seem reasonably priced to the authors.

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evaluate because they measure productivity as a function of the number of lawyers in a country. This measure is flawed because qualifications of legal practitioners vary significantly among countries, making comparisons unreliable. Thus, studies purporting to measure productivity as a function of the number of lawyers are at best misleading.[23]

Given that lawyer bashing is a socially acceptable form of class denigration, why do people wish to become lawyers, and why do lawyers remain in their profession? The following quotation from Harvey Rubenstein, president of the Delaware State Bar, offers one response:

> *Why, then, do so many become and remain practicing lawyers? Maybe it is because lawyers really do take seriously their obligation to represent as best they can those who need help. Maybe it is because, once in a while, a lawyer is asked to plead a great cause that may affect the course of human events or make our society work a little better. Or maybe it is because, once in a while, one lawyer may be the difference in one person's life. And to practicing lawyers, once in a while is enough.*[24]

## How Do You Find a "Good" Attorney?

Time, energy, and resourcefulness spent finding an attorney will help create a satisfactory relationship and final result. Too often, the presence of a serious problem that prompts the search also prompts great haste in the selection process. A cavalier approach to the selection process increases the chance of retaining an attorney who may not perform as well as others who are equally qualified. An exhaustive search should not be necessary in order to avoid a "bad" attorney; to the contrary, in populous areas there are a number of qualified attorneys ready, willing, and able to perform the required service.

**Paid Advertisements** In the not-so-distant past, lawyers were prohibited by law and professional rules from advertising their services. Marketing legal services in this manner was considered not only unethical but also unbecoming. Many in the legal profession feared that advertising would lead to false and misleading claims. Promotional practices were thought to foster rather than resolve conflict. Many attorneys also believed that advertising tarnishes the general reputation of the profession.*

Rules of conduct regarding publicity and advertising were dramatically changed in the last quarter of the twentieth century. In 1977, the U.S. Supreme Court ruled that the public had a right to information as to the availability and cost of routine legal services, and attorneys had a right to furnish that information.[25] The Supreme Court has also held that lawyers cannot be prohibited from sending direct mail solicitations[26] and communications informing potential clients of their certification as specialists.[27]

The ABA Model Rules of Professional Conduct concerning advertising have been liberalized.[28] States have also reformulated rules regarding advertising, although many issues are still debated. In the legal profession, claims made concerning an individual's competence or ability to achieve results are still considered unethical.

National law firms with outstanding reputations traditionally declined to advertise, but in recent years even they have begun to do so. Still, they avoid commercial television in favor of simple announcements, news releases, brochures, public television sponsorship, newsletters, and advertisements in magazines targeted to special audiences. Legal

*"… [M]arketplace lawyer advertising, using all the sights, color, sounds, subliminal messages and not-so-hidden persuaders of commercial television, adversely affects not only the public's perception of those court officers, but also of the courts and the total judicial system." Justice Reynoldson, retired chief justice of the Iowa Supreme Court, "The Case against Lawyer Advertising," *ABA Journal* 75 (January 1989), p. 60.

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directories have been available for many years and have never been considered advertising. Bar associations, private organizations, and law firms maintain lists of attorneys, often with detailed information about each individual and areas of practice. These lists are easily accessed over the Internet. Most public libraries maintain directories of attorneys with biographical information, including practice specialties and lists of representative clients. Finally, group legal services relieve clients of the burden of finding a qualified attorney. In this sense, they serve a marketing function for member lawyers.

**Word-of-Mouth Advertising** Generally, the most reliable advertising is word of mouth. However, an attorney's reputation is more than simply "good" or "bad." Better questions concerning the reputation of a particular attorney include the following:

- What is the attorney's specialty?
- How long has the attorney been in practice?
- Does the attorney have a reputation for being a problem solver? Thorough? Expensive? Aggressive? Sincere? Or any other quality thought to be appropriate or inappropriate for the case?
- Do judges and attorneys generally think highly of the individual or firm?
- Is the attorney active in the community?
- Has the attorney been disciplined by the bar or been a defendant in malpractice cases?
- Is the attorney in good health?
- Does the attorney have a reputation for consuming alcohol to excess or taking harmful drugs?
- Does the attorney usually win cases?
- Does the attorney make the fee arrangement clear?
- Does the attorney have a reputation for communicating with the client, returning phone calls promptly, keeping the client informed on case progress?
- Does the attorney work on the case personally or delegate the work to others?

The selection of an attorney should be accompanied by some introspection by the client. Clients should consider their own attitudes, goals, and objectives, and, as dispassionately as possible, the nature of their claims. Some attorneys are problem solvers and others are "gladiators" (problem winners). A problem solver might complete the task in a short period of time, but the resolution may require considerable compromise on the part of the client. The gladiator might be victorious and provide more of what the client wanted (or less), but may take considerably more time and require a different emotional commitment by the client. (Fewer than 5 percent of all civil cases actually go to trial, so even gladiators typically compromise; they just do it later in the process.) The problem solver may preserve a friendly, mutually profitable relationship for the client with the other party. This is seldom possible with a gladiator who may embarrass, anger, or even humiliate the opposing party.

Most attorneys are listed somewhere on the Internet and in the Yellow Pages, sometimes with large ads. Such listings do not guarantee competence, however. A person with a legal problem should ask friends, family, and neighbors to recommend an attorney. Business managers, bankers, title company officers, educators, merchants, stockbrokers, insurance executives, real estate personnel, and, of course, lawyers are likely to have direct communication with and know of attorneys by their reputation. Employers and government officials are also good sources.

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**Meeting with the Attorney** Once a prospective client gets the name of one or two attorneys as possible selections, an office appointment should be made with each by telephone. Many attorneys will consult with a prospective client for a modest fee or at no charge. It is prudent to ask how long the initial appointment will last and if there is a charge. A prospective client will have many questions about which laws apply to her case. Several laws may be relevant to the case, so the attorney will necessarily be noncommittal. This is to be expected because no attorney is capable of explaining all the legal ramifications of a situation without careful research and preparation; nor is any attorney capable of predicting with certainty the outcome of any complex case.

No commitment to hire needs be made at the first meeting; a simple "Thank you, I would like to consider the matter for a couple of days" permits a graceful departure. During the initial meeting, much can be learned by asking the attorney a few questions:

- Do you frequently handle cases like mine?
- Is this your specialty? If not, how many cases of this type have you handled?
- Will you be doing all the work, or will other persons be involved?
- Will you refer my case to another attorney in the firm or handle it yourself?
- Will this case conflict with any of your other obligations, court calendars, or appointments?
- Is it best to settle this matter now, even at a loss, rather than to be embroiled in a lengthy legal battle?
- May I have a copy of your standard retainer agreement?
- Can you give me an estimate of my likely trial costs and fees for handling this matter to its conclusion?
- How will I be kept informed about the progress of the matter in your office?

Much can be learned about the prospective attorney by arriving for your meeting early and observing the law office in operation. Confusion and disorganization often suggest a lower quality of service. An office cluttered with files, papers, and books does not engender confidence. After you leave, will your file simply be part of the mess?

You should be aware that not all attorneys will appreciate being asked all of the questions listed above. Some will interpret your inquiries as an indication that you will be a "problem" or malcontent client. However, consumers of any service, including legal services, have the right to be informed and assured of the nature of the service they are to receive. If in the process of protecting your interests you are reasonable and courteous, a responsible attorney should not resent your questions. And if the two of you decide to do business together, you will be off to a good start, with mutual respect for each other.

**Attorney Referral Services** Referral services are a means of indirect advertising. Bar associations in some communities administer attorney referral services. They are listed in telephone directories and on websites. The association maintains a list or panel of attorneys in various specialties. Referrals are made alphabetically or by type of case. No special qualifications are required to get on the list. Newer members of the bar, in particular, may join the panel, and possibly charge reduced rates for their services, to gain clients.

Some attorney referral services are operated by private businesses. These are quite similar to the bar panels. The service places advertisements seeking a particular kind of client; for example, a personal injury victim. Responses to the advertisement are then referred to panel members. Attorney members pay a registration fee to participate on the panel.

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**Public Defenders** As noted earlier, a defendant accused of a serious crime (that is, one for which the possible punishment is incarceration) has a constitutional right to be represented by a competent attorney at all stages of legal proceedings. If a defendant is indigent (unable to afford the services of a private attorney), the court will appoint an attorney, often called a **public defender**, to represent the accused without charge. Contrary to some popularly held views, attorneys in public defender roles generally are competent and zealous advocates. They are specialists. They handle a heavy caseload, develop vast experience in a short time, spend much time in court, and know the judges and court staff. Because they handle many criminal matters, they know the probable results of a plea negotiation or plea bargain. Records of numerous convictions reflect not incompetence on the part of the public defender but rather the fact that these lawyers are unable to choose their clients. Public defenders by inclination fight for the underdog, and they usually fight well. On the negative side, public defenders are often given too many cases to be able to devote the time and attention to any one case that a client accused of a crime might wish.

**public defender**
A lawyer provided by the community for a person who is accused of a serious crime (felony) and cannot afford to hire counsel.

**Solicitation** Most methods of solicitation, in which lawyers aggressively seek clients, are considered unethical. Public policy frowns on efforts to promote litigation, such as "ambulance chasing." There, an accident victim is coerced to sign a retainer agreement at a time of great vulnerability. More sophisticated forms of solicitation, through "cappers" or "runners" who frequent places such as hospitals and police stations in search of potential clients, are likewise unethical. Investigators, as well as nurses in emergency wards, have been used as cappers. They may receive an illegal referral fee from the attorney. Such payments are frequently made in cash in an attempt to prevent detection of the conspiracy and evade taxes. In most cases, direct solicitation by an attorney is unethical and should be reported to the local or state bar association.[29] Schemes involving cappers are illegal and should be reported to law enforcement and the appropriate bar association.

## LEGAL FOCUS—CASE

David Barrett, the managing partner of a Tallahassee, Florida, law firm, hired Chad Cooper, an ordained minister, as a "paralegal." Barrett told Cooper to "do whatever you need to do to bring in some business" and "go out and … get some clients." To assist Cooper in finding personal injury clients, Barrett paid Cooper to attend a hospital chaplain's course. In March of 1994, Molly Glass's son was critically injured by an automobile while riding a bicycle. At the hospital, Cooper identified himself as a chaplain and consoled Molly Glass, prayed with her, and gave her the business card of the firm. Barrett's firm ultimately represented Glass and received a settlement. Cooper was paid a salary and bonuses for this case and other similar referrals. Was it ethical and legal to use Cooper to attract potential clients?

*The Florida Bar v. Barrett*, 897 So.2d 1269 (Fla., 2005).

This arrangement was neither legal nor ethical. Citing violations of several ethical rules regarding professional behavior and solicitation of clients, the Florida Supreme Court stated: "This type of violation brings dishonor and disgrace not only upon the attorney who has broken the rules but upon the entire legal profession, a burden that all attorneys must bear because it affects all of our reputations. Moreover, such violations harm people who are already in a vulnerable condition, which is one of the reasons these types of solicitations are barred. Therefore, this Court will strictly enforce the rules that prohibit these improper solicitations and impose severe sanctions on those who commit

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violations of them…. Molly Glass, infuriated that someone would attempt to take advantage of her while in the midst of such a tragedy, turned to somebody she thought she could trust to help her, an attorney that was recommended to her by a hospital chaplain, only to realize years later that her attorney also exploited this same vulnerability in order to obtain her business." The court approved the referee's findings of fact and recommendations as to guilt and went beyond the referee's recommendation of a more lenient suspension and chose to disbar Barrett.

## HOW DO YOU HIRE AND FIRE AN ATTORNEY?

The attorney–client relationship is determined by contract. The attorney promises to represent the client in exchange for a promise of compensation. The ABA Model Rules and many states require that contingent fee agreements be in writing and signed by the client.[30] Whether or not the law requires an agreement, the client should request a written agreement and ask that it be fully explained. Attorneys have an ethical obligation to reject a frivolous case or a case raising issues where they lack competence. Filing of frivolous and defamatory litigation justifies disciplinary action. The attorney is also vulnerable to a civil lawsuit for malicious prosecution, although such actions are seldom successful. See the previous discussion concerning frivolous lawsuits.

The agreement will necessarily have limitations. It cannot guarantee any particular result or any particular completion date, and will usually not detail the step-by-step procedures the attorney will ultimately take. This lack of detail is not sinister but instead realistic. Even the most common legal problem or case may entail many unpredictable complications. The client should carefully ask questions until all ramifications of the problem or case are at least generally understood.

Examples of questions a prospective client might ask include the following:

1. On what basis is the fee calculated? If hourly, is the "meter" running at the same rate while junior attorneys or paralegals are working on the case? How much library or computer research is anticipated, and at what cost? Will the fee statement be itemized as to hours spent and tasks accomplished? How often will a bill be issued?
   a. If the fee is contingent (client and attorney share in any recovery), are costs to be deducted from the award before or after computation of the attorney's share? If the matter is settled quickly (and so the attorney's involvement is less than was anticipated) is the fee division altered commensurately?
   b. What happens if the lawyer's work increases greatly—for example, when a new trial is granted or an appeal must be initiated?
   c. If a flat fee is charged, how will costs be paid? What does the fee include? What happens if there is an appeal? There should be a careful delineation of the work to be performed.
2. Specifically, what important actions and events does the attorney predict, and when are they most likely to happen?
3. What are the possible outcomes of the action, good and bad? Is there any point of no return; that is, a point beyond which the client cannot practically withdraw from the matter?
4. Will there be a need to refer all or any part of the case to another attorney? If so, how will the fee and work be affected and divided?
5. What will be the means (telephone, e-mail, and letter) and frequency of communications with the attorney or secretary? Will copies of all documents and correspondence routinely be sent to the client?

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A client generally has the right to dismiss an attorney at any time for any reason. Difficulty may arise with respect to how much of the fee, if any, has been earned at the time of the discharge. The rule is easy to state but difficult to apply: the attorney is entitled to be paid the reasonable value of work done before discharge. In a contingent fee case, the attorney is entitled to be paid the agreed amount or proportionate share only if and when a recovery is obtained.

If the client is unable to pay all fees the attorney has earned up to the time of discharge, a serious conflict may arise. The attorney demands payment and the client demands return of all documents (the file) connected with the case. The attorney pressures the client for payment of accrued fees by refusing to release the file. In the absence of a statute giving the attorney the right to do so (called a *statutory or common law retaining lien*), such conduct is illegal and probably unethical. However, many states do authorize such a lien.

A client may have difficulty hiring a new attorney for the case if one or more attorneys have been fired or have withdrawn. An attorney considering whether to accept such a case is usually suspicious of its merits and the client's emotional stability.

**LEGAL FOCUS—EXAMPLE**

Shortly after beginning practice, a new attorney may be approached by a potential client who, with thick and tattered files, spins a tale of conspiracy, malevolence, and grievous harm. Believing she has found the case that will make her reputation, the young lawyer begins an investigation. Within a short time, she finds out every attorney in town is already familiar with this client. Also, occasionally a lawyer might find a client whose passion to win the case overshadows good sense. A Missoula, Montana, divorce attorney reported a client who "wanted to freeze a dirty disposable diaper as evidence that her ex-husband couldn't properly care for their infant daughter." The client contended the diaper he used was too small. But, being fastidious herself, she wanted the lawyer "to store the frozen poopsicle until the next court date."[31]

As a general rule, an attorney can terminate representation of a client if there is a reasonable basis for the withdrawal. For example, the client's failure to pay the agreed fee is grounds for withdrawal. However, an attorney must (1) give reasonable notice to the client of intention to withdraw, (2) obtain court permission to withdraw if pleadings have been filed, (3) return the client's papers, and (4) refund any unearned fees. An attorney *must* withdraw from the employment when continued representation would require the attorney to violate a disciplinary rule. Other good reasons for withdrawal include failure of the attorney's health, materially affecting his ability to continue, or an awareness that a conflict of interest exists.

## Attorney Fee Arrangements

Fees are earned based on an hourly rate (for example, $250 per hour), a flat fee for a service (for example, $15,000 payable in two installments), a contingency fee (for example, 35 percent of net recovery), or a combination of these methods. Tradition, business practice, and law tie certain types of fee arrangements to certain types of legal matters. For example, the contingency fee is common in personal injury actions but is considered an unethical method of billing in a family law matter.

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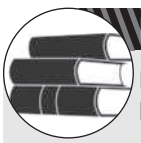
**retainer fee**
(a) A sum of money paid to an attorney for a promise to remain available to the client for consultation when needed and requested. (b) Fees paid in advance that are held in a trust account to be drawn down (taken) by the attorney as work progresses.

A **retainer fee** is an advance payment for legal services on a flat or continuing basis. A lawyer may require advance payment on any fee and is obliged to return the unearned portion.[32] A common form of retainer is a monthly or yearly fee paid in exchange for the lawyer's promise to remain available to the client for consultation. Such agreement should be in writing and clearly define the services it covers, the term it covers, and the hourly rate at which additional services will be billed. Group legal service plans may be understood as a type of retainer. If the client seeks legal advice through the plan, minor, specified legal services will be rendered without charge. If requested services are complicated or time-consuming (such as conduct of a trial), additional charges are billed as "earned" fees. At universities and colleges, it is common for the student government association to enter a retainer contract with an attorney to be available for a certain number of hours a week to assist students with minor legal problems.

Many attorneys simply will not take a case without a retainer. They are reluctant to sue a client to collect a fee because they believe doing so will create bad publicity. So they require payment up front.

Some attorneys include arbitration clauses in their fee agreements. This allows them to go after clients for unpaid fees without the negative publicity associated with a public trial. This is so because arbitration proceedings are private and arbitration awards are confidential. (See the discussion of arbitration later in this chapter.)



## LEGAL FOCUS—PROBLEM

Elaine Taylor's husband, Buck, a young doctor, was killed in the crash of a commercial "commuter" airplane. Buck was not in the airplane; he was in his medical office in San Luis Obispo, which was destroyed by the crash. Attorney Ian Page offered to represent Taylor on a contingent fee basis for one-third of any net recovery. Page indicated no fees would be charged "unless and until" a recovery was made. Should Taylor hire Page?

It depends. Charging contingency fees in matters where liability is clear and some recovery expected is not an ethical violation *per se*.[33] The real issue is whether the fee is reasonable and the client has been fully informed of the availability of alternative billing arrangements. In most calamitous events, there is no issue of "if" as to liability. Recovery is assured because defendants in such cases are held strictly liable. Only the amount is arguable. Obtaining a settlement will require negotiations, but one-third of, for example, a $3 million settlement is excessive for the perhaps 100 hours necessary to represent Taylor. Competent attorneys would undoubtedly take her case for an hourly fee with payment deferred. It could be argued that contingent fees in calamitous personal injury or death cases where liability is certain (or even probable) are unethical because clients don't fully understand the arrangement or its alternatives and the fees are excessive. It is not uncommon for personal injury attorneys to refer to such cases as "jackpots" or "retirement" cases.

Several states impose maximums on the percentage that may be charged in contingency fee contracts. In New Jersey, a maximum graduated scale is used in tort cases: An attorney "shall not contract for, charge, or collect a contingent fee in excess of the following limits: 33⅓ percent on the first $500,000 recovered; 30 percent on the next $500,000 recovered; 25 percent on the next $500,000 recovered and 20 percent on the next $500,000 recovered."[34] In California, a special limitation exists for medical

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malpractice cases: 40 percent of the first $50,000 recovered; 33⅓ percent of the next $50,000 recovered; 25 percent of the next $500,000 recovered; and 15 percent of any amount to which the recovery exceeds $600,000.[35] Similar statutory limitations exist in matters processed by administrative agencies rather than by courts (for example, veterans' benefits, Social Security claims, and workers' compensation cases).

The flat fee is common for certain types of routine matters such as family law, criminal law matters, real estate title searches, trusts, and wills. Business clients request competitive bidding by two or more firms, or a flat fee for matters that in the past were billed by the hour.[36] However, the hourly fee is still the dominant form of attorney billing and is used for all types of legal services.

Attorney fee agreements should describe how the fee will be calculated (hourly, flat rate, and so on) and, when feasible, specify the total amount of the fee. Attorneys are free to negotiate fee arrangements with clients, so long as they are reasonable. In some instances, attorney fees are limited by statute or by the courts. Furthermore, when fee disputes arise, courts tend to give the benefit of any doubt to the client because of the usual bargaining superiority of the attorney.[37] In some states, the law presumes overreaching by the attorney if representation is begun before the fee is negotiated and the client signs a written fee agreement.[38] In such instances, the attorney is hard pressed to justify and collect more than a minimal reasonable fee.

Although attorneys are free to charge their "going rate," the client's case must not be deliberately delayed for the purpose of coercing payment of a delinquent installment,[39] nor may an attorney charge an unconscionable or clearly excessive legal fee. The attorney is subject to discipline for making such an attempt.[40]

Actual fees charged for legal services are difficult to compare because of the many factors used in setting fees in specific cases. Different fee rates exist in different parts of the country. Hourly fees are higher in large cities than in rural areas. Fees change over time and are at least somewhat related to the general economy. A flat fee for a simple divorce, with no significant property or child custody dispute, may be $1,000; complex divorces for wealthy clients, on the other hand, may command fees in the tens of thousands of dollars. Contingency fees are rarely less than 25 percent of the net recovery or more than 50 percent. Astronomical fees may be charged in celebrated cases involving **class actions**. In a class action lawsuit the plaintiff represents the interests of a group (persons who are similarly situated) that is otherwise too unwieldy for courts to handle on an individual, case-by-case basis. Overhead costs prevent large firms from profitably handling legal matters in which small sums (less than $25,000–$50,000) are in dispute.

**class actions**
When all members of a group of persons who have suffered the same or similar injury join together in a single lawsuit against the alleged wrongdoer. The group must be so numerous that it is impracticable to bring all members before the court individually.

The following important factors are normally taken into consideration in setting an attorney's fee:

- The time required
- The degree of legal skill needed and novelty of the legal question presented
- The customary fee charged in the locality for similar services
- The experience, reputation, and ability of the attorney
- The amount of money involved in the case
- The result obtained for the client
- Whether or not the case precluded the lawyer from accepting other legal work
- The nature and length of the attorney's relationship with the client
- Time constraints imposed by the client
- Whether the fee is fixed or contingent

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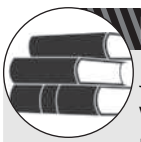
The client should understand the possible conflicts inherent in various fee arrangements. With a contingency fee arrangement, depending on how it is structured, either the attorney or the client "wants" a quick settlement, whereas the other would be better off by proceeding through trial. In a flat fee arrangement, the lawyer may have an incentive to dispose of the case as quickly as possible. An attorney paid by the hour might be tempted to overwork the case (that is, with exhaustive research and discovery).

In addition, a fee charged by an attorney may be set by, or subject to the approval of, the court. An example of this would be fees of attorneys appointed to represent indigents or minors. When a fee limitation is applicable (by statute or court order), the client should ask whether the fee is prescribed or is a maximum allowed by law. In many cases, the statutory fee is a maximum, and the client is free to negotiate payment of a lower fee (for example, a probate fee).

Many countries, including Great Britain, provide that attorney fees (as well as court costs) are to be paid by the loser in a case.* In contrast, in the United States, parties usually responsible for their own attorney fees, unless they agreed otherwise. For example, a landlord suing a renter for past-due rent might benefit from a lease providing that the renter is to reimburse the landlord for any attorney fees incurred in collecting rent or enforcing the lease (this clause is commonly found in rental agreements). Many state statutes provide that if such a provision exists in the contract it will be construed to give the victor in the legal dispute, be it the landlord or the tenant, the right to reimbursement of legal fees. Even if a contract states that it only protects the landlord, the tenant will be awarded attorney fees upon winning the lawsuit. The statute trumps the contract provisions.

The loser always pays the court costs. Who pays the attorney fees, however, can end up having important ramifications.

A person who is unable to settle a fee dispute with an attorney through direct negotiation should contact the local bar association. Many state or local bar associations sponsor attorney fee arbitration programs. Often a mutually satisfactory result can be achieved without further legal action. In California, for example, arbitration is voluntary for the client and mandatory for the attorney if commenced by the client.[41]



## LEGAL FOCUS—PROBLEM

John Tyson, owner of a Burger King franchise, wanted to fire Jason Yohn. He suspected Yohn of repeatedly failing to wash his hands after using the bathroom. A posted policy required all employees to wash their hands after using the bathroom. Tyson hired attorney Lisa Beck to advise him. Beck explained that the law had to be researched and that a written opinion would be prepared. Convinced of Beck's self-proclaimed expertise, Tyson left her office. Unbeknownst to Tyson, Beck assigned the Tyson file to a summer law student intern. The intern did all the research and prepared an opinion as to whether Tyson could fire Jason based upon the firm's database of hundreds of letters to previous clients on the subject of when employees may be fired. Beck glanced at the report and asked her secretary to send it to Tyson under her signature with a bill showing seven hours at $250 per hour for a total of $1,750. Beck's law firm paid its summer interns $20 per hour. Has Beck violated any ethical rules?

*Like most things, what appears simple at first blush is not quite so. In the United Kingdom, the general rule is that the loser is responsible for reasonable attorney fees (and costs) of the prevailing party. However, many low-income persons in Great Britain are eligible for a government-funded legal aid program. Such persons are not subject to the cost-shifting rule.

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Tyson would have no basis to suspect that anything was out of the ordinary. Oftentimes, the lawyer with whom a client meets does not perform all the legal services for the client. As far as the billing is concerned, attorneys are free to charge whatever they choose for their services and do not routinely disclose the names of persons to whom the work is delegated. The point is that you should enter into a legal service agreement like any other service agreement, understanding your rights and being vigilant in protecting your interests.

## Financing Attorney Fees

In some instances, a client may need to borrow money to pay attorney fees. A loan may be procured from a lending institution, a third person (for example, a relative), or the attorney. If the attorney finances the debt, the client must sign a promissory note. This arrangement may create a conflict of interest, because the attorney becomes both a creditor and an agent of the client. An attorney may not use unreasonable collection methods; such conduct is unethical. Some attorneys refuse to extend credit to clients for the same reason that attorneys take cases only on retainer: they do not want to sue their client.

## Financing the Client's Case

As a legal case progresses, costs often are incurred long before any recovery is possible. The following are costs in a typical personal injury case:

- *Medical examination*. The physical and sometimes mental condition of the victim is an issue in an injury case. Before trial, a physician will probably make one or more medical examinations. Some physicians specialize in examination of injury victims (and later provide testimony in court) rather than the treatment of patients, for a fee.
- *Court costs*. The court charges fees (for example, $300) to cover at least some administrative costs of processing the paperwork connected with litigation. Other court charges are made for items such as daily fees paid to each juror in a jury trial (for example, $20).
- *Investigation*. Most attorneys lack the time, skill, or inclination to personally inspect the accident scene, photograph it, and talk to potential witnesses. These and similar tasks are often performed by a professional investigator.
- *Discovery*. Sworn testimony is taken before a court reporter, usually in the office of the attorney who made the request. The session may be recorded, either in audio or video form. Discovery is usually expensive, involving transcription costs as well as attorney fees.
- *Expert witness fees*. Court testimony from experts is often necessary, and they are well paid for their time.

These expenses can total many thousands of dollars. Most of these expenses are incurred whether or not—and certainly long before—any recovery is awarded and received.

Under the ABA Model Rules of Professional Conduct, an attorney is permitted to "advance" litigation costs even though she or he is arguably invested in the outcome of the client's case. The attorney might be tempted to suggest an early settlement not because it is in the client's best interest, but rather to recapture costs advanced as well as to participate in the recovery.[42] In the past, American Bar Association rules permitted this practice only if the client was ultimately responsible for reimbursing the attorney.

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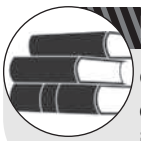
The reimbursement requirement was believed to militate against possible conflict of interest between the attorney and the client. The requirement that the client remain ultimately liable for such expenses has been eliminated.[43] The attorney's duty to require reimbursement raises interesting ethical questions. Strictly speaking, payment of court costs for the client is **maintenance**, which is maintaining, supporting, or promoting the litigation of another. Maintenance is considered unethical and illegal because it encourages litigation.

**maintenance**
Assisting a party to a lawsuit with money or otherwise, to prosecute or defend the lawsuit.

Assuming the fee is contingent and the lawsuit is successful, litigation costs may be shared by the plaintiff and plaintiff's attorney. For example:

| | | |
|---|---|---|
| Gross recovery (in damages or settlement) | | $200,000 |
| Less net litigation costs incurred by plaintiff's lawyer | | |
| Total out-of-pocket litigation costs incurred (for example, filing fees, investigation costs) | $(35,000) | |
| Portion of court costs recovered from unsuccessful litigant (for example, jury fees reimbursed by defendant) | 5,000 | (30,000) |
| Net recovery | | $170,000 |
| Less attorney's fee (35 percent of net recovery) | | (59,500) |
| Client recovery after deduction of all expenses | | $110,500 |

Litigation costs may be modest in some types of cases, such as a simple divorce, whereas litigation costs in antitrust cases may be hundreds of thousands or even millions of dollars in celebrated cases involving major corporations.



### LEGAL FOCUS—PROBLEM

Charles Hall brought a lawsuit against several defendants, alleging patent infringement regarding his waterbed innovations. To finance the lawsuit, he syndicated interests in the possible outcome of the suits. He raised $750,000.[44] May he finance his lawsuit in this fashion?

**champerty**
An illegal agreement with a party to a suit for a portion of any recovery in exchange for paying the litigant's lawsuit expenses.

No. The doctrine of **champerty** forbids one from financially participating in the lawsuit of another. Champerty is defined as "… a bargain by [another] with a plaintiff or defendant for a portion of the matter involved in a suit in case of successful termination of the action, which the [other] undertakes to maintain or carry on at his own expense."[45] Society's concern is that investment in cases by outsiders encourages gambling and litigation.

## WHAT IS LEGAL MALPRACTICE?

**legal malpractice**
Violation of a duty of due care by a professional person.

**Legal malpractice** is a civil cause of action that may be brought by a client against an attorney for negligence or intentional wrongdoing. Negligence arises, in this context, out of attorney carelessness or professional misconduct. A wrongful act is not sufficient to

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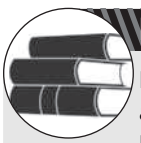
prove malpractice. The client must have suffered a loss as a consequence of the bad act. The remedy for negligence is money damages. The tort of negligence, of which legal malpractice is but one example, is discussed in detail in Chapter 7. In all states, attorneys have a legal duty of care to the client. The standard of care has been described in various ways, but generally an attorney is required to possess legal knowledge and skill and exercise due care and diligence. Attorney specialists are held to higher standards than other attorneys. If the attorney fails to meet the standard of care and this failure has caused the client to suffer a loss, legal malpractice has occurred.

To recover damages for attorney malpractice, the client will probably hire a second attorney to pursue the case against the first. This is undoubtedly an unpleasant prospect for a client who has already suffered a loss. A malpractice suit must be initiated within the applicable statute of limitations. This is usually within one to three years from the time of the negligent act(s).

At trial, the plaintiff must prove that, but for the attorney's negligence, the result in the earlier matter would have been more favorable to the client. The accused may deny the charge or contend, "Yes, I may have been negligent, but the result was fair, adequate, and reasonable." Legal malpractice cases are difficult to prove. Even when clients win a case, they still face the problem of collecting the judgment. Attorneys who commit serious malpractice may also be the least able to pay a sizable judgment and the least likely to have purchased adequate malpractice insurance. In many states, lawyers are not required to carry malpractice insurance, although many do. When selecting an attorney, it is reasonable and prudent to ask whether the attorney carries malpractice insurance.

It is important to distinguish between legal malpractice and disciplinary actions against an attorney. Legal malpractice actions are brought in civil court by the client seeking compensation for loss caused by the attorney's failure to exercise due care. Professional misconduct actions are brought by the state disciplinary authority, usually the state bar, seeking punishment of the attorney for ethical rules violations. The client does not normally receive any compensation as a consequence of a disciplinary action. An ethical rule violation is relevant to show failure to meet the standard of care, but it is not conclusive.



**LEGAL FOCUS—PROBLEM**

Mike Kline could not decide whether to consult an attorney about the neck injury he suffered when Dora Carson's car sideswiped him while he was skateboarding in a crosswalk. He had medical insurance, and he expected his pain would soon stop. However, after nine months of continued distress and intermittent suffering, he consulted attorney Jules Doeshire about a suit for damages. Doeshire assured him he had a good case and prepared a contingency fee retainer agreement, which Kline signed. Several months later (13 months after the accident), attorney Doeshire contacted Kline and said that after further study he concluded that Kline really did not have a good case after all. "But don't worry; I won't charge you a cent," Doeshire told Kline. What should Kline do?

Mike Kline should be suspicious and request a complete explanation of why the matter should be dropped. Kline should consult another attorney, as it appears that Doeshire committed malpractice by failing to file the complaint within the statute of limitations.

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Once attorneys accept cases, it is their obligation to comply with procedural requirements. Failure to file documents within statutory time limits is one of the most common acts of malpractice.

An attorney is not guilty of malpractice just because a case is lost. In every case with two or more adversaries, someone must lose and someone must win. A strategic decision that subsequently turns out to be disastrous is not necessarily malpractice. The attorneys representing Texaco in the *Pennzoil Co. v. Texaco, Inc*. case were considered to be among the most able attorneys in Texas, yet Texaco lost the case at trial and suffered damages of $10.53 billion.[46]

Attorney malpractice encompasses a wide variety of negligent acts and omissions: failure to apply settled principles of law to the case, failure to protect the right to appeal, failure to draft pleadings (court-related documents) properly and promptly, failure to appear and defend, failure to assert all possible claims or defenses, failure to act in accordance with professional ethical standards, failure to present relevant evidence, lack of diligence in prosecuting a case once initiated, and improperly drafting a will. An ounce of prevention in the careful selection of an attorney is worth a pound of cure.

## UNAUTHORIZED PRACTICE OF LAW

Practicing law without a license is a crime, just as practicing medicine or dentistry without a license is a crime. Contracts for legal services by a nonattorney are void as matter of law and are unenforceable. A nonlawyer may not use the courts to collect a fee for legal services. Any payment made by the client is recoverable.

As discussed earlier in the chapter, licensure is a prerequisite to practice in all states. A person who does not have, or who fails to maintain, a license to practice law is forbidden to practice. It is sometimes difficult to decide whether a given act constitutes the practice of law or simply the performance of related activities. Different states provide different answers. For example, in some states it is common for title companies to conduct title searches when real property is sold (albeit with the aid of in-house staff attorneys). In other states, independent attorneys perform this activity. Nonlawyers (such as real estate brokers) are generally permitted to complete blanks on forms that may affect legal rights. However, these must be standard forms, and no legal advice may be offered with the forms. Accountants prepare tax returns and suggest probable tax consequences but must be careful not to interpret tax statutes, rules, or cases or render tax planning legal advice.

Today there is popular support for relaxing the historical prohibition against the unauthorized practice of law arguing that legal assistants, paralegals, and legal technicians should be permitted to handle routine legal matters. Legal assistants under the direction of lawyers already often perform such work. Lawyer supervision adds to the cost of such services, causing some consumers and nonlawyer providers to question whether the public is being protected or exploited. Routine matters usually include uncontested divorce pleadings, simple wills, eviction notices, simple bankruptcy filings, and probate of small estates. Exhibit 4.1 identifies the "practice of law" and other related legal work done by legal assistants under supervision of lawyers.

Some critics contend that routine legal services can be delivered to the consumer at lower cost, with higher pay for the legal service technician, by eliminating a superfluous middle person—the attorney. There is, however, strong opposition to the relaxation of unauthorized-practice laws. The concern is that the dividing line between what is and what is not the practice of law will become even more confused and risky for consumers.

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**EXHIBIT 4.1** Legal Work Requiring a Law License and Legal Work that Can Be Performed by Nonlawyers under Lawyer Supervision

| Practice of Law | Work that May Be Done by Nonlawyers When Supervised by Lawyer* |
|---|---|
| Accept a case | Obtain facts from client and other sources |
| Negotiate a fee agreement | Communicate information to client |
| Evaluate a case and determine strategy | Interview witnesses |
| Provide legal analysis | Perform legal research to assist lawyer with legal analysis |
| Give legal advice | Obtain documents (for example, police reports, medical records, photographs, employment records, deeds, plans, probate records, weather records) |
| Represent a client in court (for example, depositions, hearings, trials) | |
| Supervise legal assistants | Prepare chronologies and summaries |
| Appear at administrative hearings | Prepare itemization of claims |
| Select, explain, draft, or recommend the use of any legal document to any client | Prepare outlines for lawyer to use in deposing witnesses |
| Contract with a client to provide paralegal services | Prepare drafts of judicial documents such as pleadings or discovery |
| | Index deposition transcripts and prepare summaries of the evidence |
| | Prepare exhibit lists |
| | Analyze collected information and make an independent decision and recommendation to a supervising attorney |
| | If permitted by state statute, court rule, or administrative rule, represent clients before a state or federal administrative agency |

*But performed under the supervision of a lawyer.

Sources: Adapted from American Bar Association, Section of Law Practice Management, "Leveraging with Legal Assistants" (Chicago: ABA, 1993), 20.

Many do not know or appreciate the difference in the educational backgrounds of legal assistants and attorneys. Others disregard the difference and hire nonattorneys because their fees are lower. These choices can and often do compromise the consumer's ability to succeed at law. Furthermore, it is difficult if not impossible to predetermine what is simple and routine. Every attorney has been told by a client, "I just want a simple will," only to discover that either the client's circumstances or more detailed desires make that impossible.

Do-it-yourself probate kits (designed to assist the personal representative, executor, or administrator with necessary procedures following death) and divorce kits are not considered to be the practice of law because the information is generalized and not tailored to the needs of a particular client.[47] In recent years, many self-help books and software in a variety of legal areas have become available.

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## ALTERNATIVE DISPUTE RESOLUTION

*Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man.*

—Abraham Lincoln (1809–1865), U.S. president

These words of Abraham Lincoln remain true. They suggest that persons who are considering litigation should think twice and consider alternatives to litigation such as negotiation, mediation, and arbitration whenever possible. **Alternative dispute resolution (ADR)** is a broad term used to describe methods of resolving disputes through means other than the traditional judicial process. Today, it is prudent to include an ADR clause in all contracts, giving parties the option to use alternative dispute resolution. Or, when a dispute arises, one party may suggest an alternative to the courts to which the other party may be only too happy to agree. When clients seek the advice of counsel in a civil matter, attorneys have an obligation to inform them about the availability and appropriateness of ADR. Failure to do so may be a violation of ethical rules or the basis for attorney malpractice.

**alternative dispute resolution (ADR)** Various methods of resolving disputes through means other than the judicial process.

As stated earlier, courts are available to resolve all manner of disputes, be they complicated or simple. Our courts seek to protect the fundamental liberties of free speech, press, assembly, and religion, and they are available to decide such trivia as who gets to keep the dog in a dissolution of marriage. The traditional justice system requires parties to delegate resolution authority to a judge or jury who considers the issue of law. Typically, one side wins, and the other loses. Often, neither side is truly satisfied.

Litigation is complicated and burdensome. It is costly in terms of time, money, goodwill, peace of mind, and lost productivity. Small claims courts provide relief from complicated and costly legal procedures, but only in matters involving small sums of money. There are times when it is not feasible or desirable to seek justice through the courts. Sometimes, the law fails to recognize rights or wrongs. (Recall from Chapter 1 the killing of Kitty Genovese.) These are times to consider ADR.

In the latter years of the twentieth century, significant developments in ADR occurred in response to lengthy court delays. Efficiency-conscious business managers have been active in the search for effective dispute resolution methods for just this reason. Businesses can suffer financial losses from delays.

One of the primary causes of court delay has been increased court filings coupled with a shortage of judges and other court personnel. Population growth, too much crime, too many persons wanting to sue, too many laws, and complex government regulations have contributed to increases in filings. Budget deficits have made it difficult to hire more judges. The number of criminal matters brought to court has grown faster than civil cases. Because criminal matters take priority over civil matters, judges who otherwise would be available to hear civil cases are hearing criminal cases. The increased volume of filings has greatly extended the time necessary to resolve civil disputes, especially in major metropolitan areas. The courts and legislatures have acted in response to the enormous economic, social, and emotional costs that delay imposes. A myriad of statutes and court rules at the state and federal levels expressly encourages or requires the use of alternative dispute resolution. Fast-track programs designed to streamline the litigation process and bring cases to trial quickly have been implemented in many court systems. They have not completely relieved the problem, however.

Although delay has provided the motivation for government to encourage the use of ADR, many believe that a common sense approach to resolving disputes suggests its use

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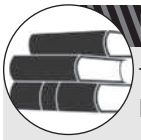
as well. Not all disputes are best resolved using litigation, which raises the important question of which methods are best for what disputes. A common saying among ADR proponents is, "The forum should fit the fuss."



## LEGAL FOCUS—PROBLEM

Tanda Holden not only liked rap music, she liked it loud and late. Occupying her first house, she really appreciated freedom from repeated parental insistence that she "turn that thing down." Evan and Juanita Jenkins lived next door in the house they had lived in for 40 years. After one week of 3 A.M. concerts, Evan Jenkins was unable to hide his anger. Dressed in his robe, he stormed over to Holden's house and shouted, "Turn the blessed thing off!" Holden was annoyed and shouted back, "I didn't move to get new parents. Anyway, it's a free country!" Then she turned the volume even higher. How do the Jenkinses get some sleep?

The Jenkinses have a number of legal options. They can phone the police, who will ask Holden to show more consideration for her neighbors. Holden is probably disturbing the peace, and the Jenkinses could file a criminal complaint against her. They can also seek civil redress by suing Holden and claiming nuisance—a tort. In such an action, the Jenkinses can claim money damages for past harm and request an injunction (equitable relief) prohibiting the loud music as a continuing nuisance.

The practical problem with all of these remedies is that they are costly in time, money, and tranquility. The Jenkinses could go to small claims court, where the cost of litigation is minimal, but it still will be time-consuming and a drain on their peace of mind. Moreover, courtroom resolution ignores the fact that the parties will still live next door to each other after legal actions conclude. The root of many problems referred to the courts is a defective human relationship, and such a relationship may continue and worsen after judicial intervention. The adversarial nature of a trial usually aggravates and exaggerates existing hard feelings. Neighboring parties thus often find new reasons to argue and land in court again.

Likewise, court resolution of business-related disputes may not be in the best interest of the contesting parties. Examples include consumer product disputes that affect company public relations and product reception, disputes over medical care in health maintenance organizations (HMOs), and environmental disputes that will affect community–government relations for years. With increasing frequency, business and government agencies are using ADR techniques in such cases instead of and in addition to the courts. Not only are such techniques usually easier and cheaper to use than the courts, they are more likely to lead to improved long-term understandings and harmony.

The most common types of ADR are:

- Negotiation
- Mediation
- Arbitration
- Med-arb
- Private judging
- Ombudsperson
- Expert fact finding
- Early neutral evaluation
- Mini-trial

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**EXHIBIT 4.2** Comparison of Alternative Dispute Resolution Methods with a Lawsuit

| Characteristic | Negotiation | Mediation | Arbitration | Court Trial |
|---|---|---|---|---|
| Private or public process? | Private | Private | Private | Public |
| Who decides? | Parties | Parties | Arbitrator | Judge or jury |
| Adversary or cooperative? | Cooperative | Cooperative | Adversary | Adversary |
| Elapsed time to conclusion? | As long or short as it takes | As long or short as it takes | Usually 2 to 18 months | Usually 1 to 5 years (plus appeal, if any) |
| Cost of process? | Low | Low | Medium to high | High |
| Appeal? | Unnecessary | Unnecessary | Few grounds | Full right of appeal |
| Procedural rules? | Decided by parties | Decided by parties | Few and simple | Complex |
| Need attorney? | No | No | Yes | Yes |
| Discovery process? | No | No | Minimal allowed | Extensive allowed |
| Right to jury? | Unnecessary | Unnecessary | No | Yes, in most cases |
| Permanent record in files? | No | No | No | Yes |

- Summary jury trial
- Collaborative law practice
- Partnering

Exhibit 4.2 compares the three most common types of ADR with a lawsuit.

**negotiation**
Communication between disputing parties for the purposes of persuasion and settlement or resolution.

## Negotiation

**Negotiation** is defined as two-way communication for the purpose of persuasion. It is a bargaining process in which parties plan the future, structure a transaction, or fix a problem. It is voluntary and informal. Parties communicate directly with each other or through representatives and agents. All manner of agreements and disagreements are negotiated. It is a common, everyday occurrence. Lawyers constantly negotiate on behalf of clients. Typically, by the time a dispute is referred to a lawyer, negotiation is thought to have failed. Negotiation that continues after a lawsuit is filed is then considered part of litigation strategy. There, negotiations are premised on adversarial objectives and tactics. As an ADR process, negotiation is based on a collaborative or problem-solving viewpoint. When parties approach negotiations from a collaborative perspective, the process is more pleasant, the agreement more satisfying, and the commitment to the agreement more solid.

Although we all negotiate, most people can substantially improve their negotiation skills by observing a few rules. In recent years, several books (perhaps the most significant is Fisher, Ury, and Patton's *Getting to Yes*[48]) have stressed the importance and art of negotiation. Because the point of negotiation is to persuade, careful consideration of how best to present your views and seek acceptable results is important. Thus, effective negotiation requires preparation.

Negotiation, like most skills, can be improved. Indeed, it can be continually improved. Skilled athletes do not stop trying to improve when they reach a certain level; in the same manner, one can always refine one's negotiating skills. Many effective negotiation techniques can be learned, including using supportable arguments, avoiding

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personalizing the dispute, giving as well as taking, and attempting to establish a relationship with the other party. The skills can be utilized in legal disputes or everyday matters. Using even a few such techniques can improve most people's success rates.

There is utility in characterizing negotiation as a form of ADR. It legitimizes informal problem solving in the eyes of clients and lawyers. It may encourage the lawyer to negotiate earlier in the dispute, perhaps even prior to filing. Doing so enhances the possibility of success.

In contentious situations, parties often begin by demanding recognition of rights and a remedy of grievances by the other side. The response is generally a counter, demanding similar recognition. At this point, neither party is really negotiating with the other. Neither is attempting to persuade; instead, they are talking at, not with, each other, though attempts at persuasion may follow.

In our hypothetical problem, Evan Jenkins did not try to persuade Tanda Holden to turn down the volume of her music; he issued an ultimatum. Negotiation might have been more successful. If Jenkins tried negotiating, with or without the assistance of a neutral party, and failed, he could still complain to the authorities (criminal action) and bring suit (civil action). Only if Jenkins and Holden agreed to arbitrate the claim would Jenkins irrevocably substitute ADR for the traditional trial process. In other words, Jenkins, like most persons with legal problems, would have had little, if anything, to lose by attempting to negotiate a resolution to the dispute.

## Mediation

**mediation**
The use of a neutral third party to assist parties in voluntarily resolving their dispute(s).

**Mediation** is a facilitative process in which contending parties negotiate their own resolution to a problem with the assistance of a third-party neutral. The process and the resolution are confidential unless the parties agree otherwise. To encourage settlement, statements made in the course of mediation are inadmissible in a subsequent adjudicative proceeding. The neutral may be an individual (mediator) or a panel of two or three members (panel). The defining feature of the mediation process is that the parties themselves determine how to structure their interactions (procedural matters) and decide the outcome (settlement).

Mediation works best when the parties participate voluntarily and in good faith. (There is precedent for mandatory mediation, but most agree that the process is less satisfying and compliance with settlements more elusive.) The mediator convenes a meeting of the parties and helps them get started. When negotiations break down, the mediator encourages the parties to keep at it. Unlike judges, who are assigned to cases at random, mediators are carefully selected by mutual agreement of the parties. Mediators are chosen for their skills in facilitating conflict analysis, bargaining, and consensus building. A mediator is not necessarily trained as a judge or even as a lawyer. In commercial cases, it is not uncommon to find architects, engineers, and general contractors serving as mediators. In family law cases, the mediator may have training as a social worker or psychologist. The individual must be a good listener and an effective communicator. The parties' perception of the individual's integrity, fairness, and subject-matter expertise is critical. Significantly, the mediator has no power to impose a resolution to a dispute. This feature distinguishes mediation from trials and arbitrations. In practice, different mediators apply varying amounts of pressure to get parties to settle.

**conciliation**
Use of a third party to lower tensions, improve communications, and explore possible solutions to a conflict.

Sometimes, mediation is confused with conciliation. **Conciliation** is an ADR process, similar to mediation, in which the neutral actively attempts to get acceptance of proposals for settlement. In both conciliation and mediation, the third party attempts to lower tensions, improve communications, and explore possible solutions to a conflict.

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In mediation, the neutral is less involved in finding the resolution to the conflict. The mediator helps the parties develop, communicate, and bargain for solutions on their own. Theoretically, the mediator does not advocate a position. In practice, conciliation and mediation are difficult to discern because the terms are often used interchangeably.

**caucus**
A private confidential meeting between disputants and a third-party neutral.

Some mediators meet with the parties separately in a private meeting called a **caucus**. Others do not. A caucus is a safe place for parties to disclose information that they would be reluctant to reveal in a joint session. It's an opportunity for parties to avoid confrontation and save face, and a way for the mediator to do a reality check—all in confidence. The mediator can act as a messenger—in a sort of shuttle diplomacy—to convey one party's concession(s) and offer to the other side. Sometimes, the parties permit the mediator to divulge secrets or proprietary information. Service providers and professional organizations have developed standards of practice in an effort to ameliorate some differences in form and to gain wider acceptance of the process.[49]

**American Arbitration Association (AAA)**
A private nonprofit organization with the purpose of providing education, training, and administrative assistance to parties who use nonjudicial methods—that is, alternative dispute resolution (ADR)—for resolving disputes.

Parties generally split the cost of mediation. Mediators usually charge an hourly rate for their services, although some charge a flat rate or *per diem*. Service provider organizations, such as the **American Arbitration Association (AAA),** charge an additional administrative fee, which may either be a flat amount or be tacked on to the mediator's hourly rate. In major metropolitan areas, it is possible to engage the services of a mediator at no or low cost through community-based organizations known as neighborhood dispute centers. These centers provide mediation training and services in neighbor–neighbor, landlord–tenant, and family conflicts. Although mediation has been used in labor and insurance disputes for many years, its acceptance in commercial and other types of disputes has grown significantly only since the 1980s.

The most serious barrier to use of mediation is ignorance of the features and benefits of the process. It's a challenge to get parties to agree to mediation when they have been socialized to believe that the only way to resolve a dispute, once and for all, is to let a judge or jury decide it. Attorneys are sometimes reluctant to mediate a case. They believe they are at a disadvantage if they mediate and later proceed to trial, because their trial strategies will be discovered during the mediation process.

The mediation process usually involves some compromise, and people are often stubborn. They either do not want to compromise or believe no compromise is possible. This also stops parties from trying mediation. The dispute between Tanda Holden and the Jenkinses is the type that is usually best solved through mediation. A local neighborhood dispute center could be the resolution forum for a neighbor–neighbor conflict like loud nighttime music. The mutual understanding that is required for a long-term solution is seldom achieved through a criminal or civil court process. The record of neighborhood mediation on such cases has been excellent—substantially more effective than court resolution.[50] As observed before, the most difficult task in mediation is getting both parties to agree to use the process.

## Arbitration

**arbitration**
An alternative to litigation whereby conflicting parties select a neutral third party (or parties) to hear and decide their dispute. Arbitration can be binding or nonbinding.

Arbitration is the most formal of the ADR processes. **Arbitration** is a process of dispute resolution in which one or more impartial third persons (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard. Whereas mediation is facilitative and conciliatory, arbitration is adjudicative and adversarial, like a court proceeding. Notably, arbitrators have the power to impose a resolution; they are private judges. The arbitrator conducts a hearing and acts as finder of both law and fact (as both judge and jury). Attorneys usually present their clients' case: the claimant first and then

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**award**
The final decision of an arbitrator or other nonjudicial officer in the resolution of a dispute.

the respondent. Then, the arbitrator decides the case and issues a written disposition, known as an **award**, usually within 30 days. There is little direct negotiation between the parties.

Compared to other forms of ADR, arbitration is formal, but it is less formal than a court trial. Arbitration rules are more flexible than court rules. Procedural rules are determined by the parties. Discovery is limited, and the rules of evidence are dramatically relaxed. Virtually any commercial matter can be submitted to arbitration. It is commonly used to resolve complex cases, including international commercial disputes. The number of businesses that use arbitration grows every year.

In its pure form, arbitration is a voluntary process that concludes with a final resolution of the dispute, outside the public court system. So long as there is mutual assent, the parties have wide discretion in deciding when arbitration is appropriate, who will hear and decide the case, the time and location of the hearing, what arbitration rules will apply, and whether the decision will be binding. Parties typically agree to arbitrate before a claim arises by including an arbitration clause in their contract. Parties may also agree to arbitrate after a claim arises. (*Note:* Arbitrations are convened less often in tort cases because parties usually don't have a prior contractual relationship.) Exhibit 4.3 shows some sample arbitration clauses. Most arbitration clauses provide for binding arbitration, meaning the award is final. All state and federal courts have the power under statute to enforce an arbitrator's award, if that becomes necessary. A losing party may appeal an arbitrator's decision to a court. However, courts seldom overturn arbitration awards, except in cases of serious arbitrator misconduct, for example, fraud or oppression. Even a clear mistake of law is not grounds for overturning an arbitration award. Parties who have agreed to binding arbitration are not allowed to change their minds if they lose the case—not for any reason.

The parties generally are free to set the rules in arbitration. The American Arbitration Association and other service provider organizations have created procedural rules and provide administrative assistance for parties seeking arbitration. Parties are free to incorporate these standardized rules into their contracts or adopt them when a dispute arises. Parties may also modify the rules or develop their own.

Unlike judges, who are assigned to cases at random, arbitrators are carefully selected by mutual agreement of the parties. Arbitrators are chosen for their integrity, fairness, and subject-matter expertise. Arbitrators are not all necessarily trained as judges or even lawyers, but most are. Parties may agree on any number of arbitrators; it is common to have one arbitrator in a small dispute and three arbitrators when dollar damages are high. Because arbitration awards can be binding and appeals are seldom successful, the choice of arbitrator is critical.

**EXHIBIT 4.3** Sample Arbitration Clauses

**Predispute Clauses**

Any controversy or claim arising out of or related to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

**Postdispute Clause**

We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules the following controversy: (cite briefly).

We further agree that the above controversy be submitted to (one) (three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrator(s), and that a judgment of the court having jurisdiction may be entered on the award.

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In common usage, the term *arbitration* means binding arbitration. However, there are forms of nonbinding arbitration. In addition, there are hybrids that use arbitration in conjunction with other processes. One needs to be familiar with the hybrid to discern whether the component arbitration process is binding. ADR terms are used interchangeably by practitioners, in part because the processes are so adaptable. To avoid confusion, it is important to ask if the process is binding and to watch your language.

**court-annexed arbitration**
A type of nonbinding arbitration required by some courts before the parties may proceed to trial.

**med-arb**
An alternative dispute resolution (ADR) process that combines mediation and arbitration.

Two common types of arbitration are court-annexed arbitration and med-arb. **Court-annexed arbitration** is a mandatory, usually nonbinding process, required by statute prior to trial. Awards may be appealed and a *trial de novo* granted. Nonbinding awards may become binding if neither side appeals. For example, the Hawaii court system has adopted a program of mandatory, nonbinding arbitration for disputes involving less than $150,000. **Med-arb** combines mediation and arbitration in one proceeding. A neutral is appointed to mediate the dispute. If mediation fails, the neutral is authorized to resolve the dispute with a binding award. Med-arb is utilized when parties who prefer to bargain directly want assurance that if they reach an impasse, a third-party neutral will decide the case. Some believe that the possibility of proceeding to the arbitration phase of the process changes the dynamics of the mediation. Parties are thought to be less candid for fear that disclosures made during the mediation will be used against them in the arbitration. However, statements made in the course of mediation are confidential and thus protected under law.

## LEGAL FOCUS—CASE

Greene agreed to construct a residence for homeowners Hundley and Butt. The construction contract provided that "[a]ny controversy relating to the construction of the residence or any other matter arising out of the terms of this contract shall be settled by binding arbitration … conducted pursuant to the Rules of the American Arbitration Association with regard to the Construction Industry Arbitration Rules." A construction dispute arose and was submitted for arbitration. After a two-day hearing, the arbitrator found for both parties and awarded $17,000 to the homeowners and $20,400 to Greene. The award lacked any explanation, and the homeowners contested the award. Must the arbitrator provide support for his or her award?

*Greene et al. v. Hundley et al.,* 266 Ga. 392, 468 S.E. 2d 350 (Ga., 1996).

No. "[T]he Arbitration Code does not require that an arbitrator enter written findings of fact in support of an award; nor does the Code require an arbitrator to explain the reasoning behind an award." Of course, the terms of the parties' agreement to arbitrate or the applicable arbitration rules may require the arbitrator to give a reason for the decision. Some arbitrators will issue a reasoned award upon request, but they are rare.

To summarize, parties agree to arbitrate for the following reasons:

- Arbitration proceedings are private, whereas court actions are public. Court records are a matter of public record; arbitration awards are confidential. Sometimes parties want to handle their disputes in private.
- Arbitration is usually speedier. Rather than wait for a courtroom, the parties can schedule an arbitration to take place within a short time. Awards are typically issued within 30 days after the close of the hearing.
- Arbitrations are usually less expensive, even though parties pay the arbitrator's fees. The less formal process requires less preparation, so attorney fees are lower.

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- Arbitrations are more flexible. Parties can determine the issues to be decided and set the rules.

**Legal Issues in Arbitration** Binding agreements to arbitrate raise important legal issues. When parties agree to binding arbitration, parties may unwittingly waive their right to some critical traditional due process (fairness) protections. We address these issues in a question and answer format below.

**An agreement to arbitrate exists but a party files a lawsuit rather than beginning arbitration. What are the responding party's options?** The responding party could file an answer and proceed with the litigation. If both parties agree to litigate, they are free to do so. The right and obligation to arbitrate is created by contract and not imposed by law. Parties may thus waive the right to arbitration. The respondent is more likely to respond by filing a motion to compel arbitration. The court will decide whether a valid agreement to arbitrate exists. If so, the court will stay the litigation and order the plaintiff to proceed to arbitration. Statutes exist in all state and federal jurisdictions to permit such removal of cases from courts to arbitration. The underlying purpose of these rules is to require parties to comply with their agreement to arbitrate and to encourage the use of arbitration.

**You believe you have been discriminated against on the basis of religion in violation of Title VII of the Civil Rights Act of 1964. You work at a nonunion company, but the employment contract provides for arbitration of all employment-related disputes. Must you arbitrate your Title VII claim? Are federal or state agencies with independent investigatory powers bound by your arbitration agreement?** For many years, the courts held that statutory employment discrimination claims could not be heard by an arbitrator. This is no longer the law. Today, an arbitrator can decide disputes created by common law or statute. If a claim is recognized by statute, a party's agreement to arbitrate does not waive the right of an administrative agency to pursue remedies on that person's behalf. An administrative agency may pursue a claim on behalf of a party, even if the party signed a contract or otherwise agreed to waive the right to an administrative remedy. See *Equal Employment Opportunity Commission v. Waffle House, Inc.*, 534 U.S. 279, 122 S.Ct. 754 (2002) at the end of the chapter.

**Can you conduct discovery in an arbitration process?** The answer depends on whether the agreement to arbitrate provides for discovery. Most arbitration clauses are silent with respect to discovery. Sometimes, the right to perform discovery is incorporated into an agreement to arbitrate by reference to the arbitration rules of a specific provider (for example, the American Arbitration Association). Some state statutes provide that discovery must be allowed in certain types of claims, such as employment claims. If the agreement does not provide for discovery and it is not required by statute, it cannot be compelled.

**Can witnesses be compelled to appear at an arbitration?** In most states, arbitrators have the power to subpoena witnesses. State statutes that authorize judicial enforcement of arbitration awards also grant subpoena power to arbitrators.

**Will the arbitrator provide a reasoned, written decision?** The standard award states who the prevailing party is and the amount of damages. It does not explain how or why the arbitrator reached the decision. As with discovery, whether an arbitrator will write a reasoned decision depends on the terms of the agreement to arbitrate. If the agreement to arbitrate requires a reasoned award, then the arbitrator is bound to provide one. By tradition, reasoned decisions are usually provided in labor arbitrations but not in commercial arbitrations.

**The arbitrator has decided the case, the award has been issued, and it is good news. You won a handsome sum. The losing party is not a good sport and refuses**

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**to pay. What do you do?** The prevailing party may file a motion to confirm the award in all state and federal courts. If the motion is granted, the prevailing party may have the award entered as a final judgment. Entry as final judgment permits the prevailing party to enforce the award just as if the case had been decided by a court.

**Can an arbitrator's award be appealed?** Final arbitration awards may be appealed on limited grounds, under statute. Whereas most court decisions are challenged because the trial judge made an error of law, appeals of arbitration awards are rarely successful on these grounds. To successfully appeal an arbitration award, the losing party must allege and prove that the arbitration process was unfair (for example, the arbitrator committed fraud or oppression). For example, a successful appeal could be based on the failure of an arbitrator to disclose a conflict of interest (prior dealings with one of the parties).

In recent years, predispute arbitration agreements have been subject to special scrutiny by the courts. Because arbitration is a creature of contract, parties to arbitration are free to devise the arbitration process in any way they see fit. Parties with greater bargaining power draft agreements that change the dispute resolution forum from a court to arbitration and present it to the weaker party on a "take-it-or-leave-it" basis. What appears to be a mere change in venue is a critical waiver of the weaker party's right to due process. Agreements like these favoring the interests of the stronger party are called adhesion contracts (see Chapter 8).

## LEGAL FOCUS—CASE

Marybeth Armendariz filed a lawsuit against her employer, Foundation Health Psychcare Services, Inc. ("Foundation"), for wrongful termination under a state civil rights statute. Foundation responded by filing a motion to compel arbitration. The employment contract Armendariz had signed included a provision that required Armendariz to arbitrate any employment claims. Armendariz claimed, among other things, that the arbitration provision was not enforceable because it lacked mutuality (arbitration was compulsory if she brought a complaint against Foundation but not if Foundation brought a complaint against her), limited her ability to use discovery, limited her available remedies, and did not require a reasoned written opinion by the arbitrator. Was the arbitration clause enforceable?*

Armendariz argued she would be denied a fair process if the above arbitration clause was enforced, and the California Supreme Court agreed. The court found fault with an adhesion contract that lacked mutuality, did not provide for important discovery, limited the available remedies, and did not require a reasoned award.[51]

*The arbitration clause read in part: "I agree as a condition of my employment, that in the event my employment is terminated, and I contend that such termination was wrongful or otherwise in violation of the conditions of employment or was in violation of any express or implied condition, term or covenant of employment, whether founded in fact or in law, including but not limited to the covenant of good faith and fair dealing, or otherwise in violation of any of my rights, I and Employer agree to submit any such matter to binding arbitration pursuant to the provisions of title 9 of Part III of the California Code of Civil Procedure, commencing at §1280 et seq. or any successor or replacement statutes. I and Employer further expressly agree that in any such arbitration, my exclusive remedies for violation of the terms, conditions or covenants of employment shall be limited to a sum equal to the wages I would have earned from the date of any discharge until the date of the arbitration award. I understand that I shall not be entitled to any other remedy, at law or in equity, including but not limited to reinstatement and/or injunctive relief."

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"[A]n arbitration agreement imposed in an adhesive context lacks basic fairness and mutuality if it requires one contracting party, but not the other, to arbitrate all claims arising out of the same transaction or occurrence or series of transactions or occurrences. The arbitration agreement in this case lacks mutuality in this sense because it requires the arbitration of employee—but not employer—claims arising out of a wrongful termination. The unconscionable one-sidedness of the arbitration agreement is compounded in this case by the fact that it does not permit the full recovery of damages for employees, while placing no such restriction on the employer." Many of the issues raised by Armendariz are still unsettled in other states. Not all courts have considered these issues and if they have, not all have followed the California lead.[52] Where parties have similar bargaining power and mutually negotiate the terms of the contract, the waiver of due process protections is likely to be allowed by the courts. However, the leading providers of arbitration services (JAMS and AAA) require minimum standards of procedural fairness before they will provide arbitrators to hear a claim.

## Private Judging

**private judging**
The use of a legally trained arbitrator who follows formal judicial procedures in hearing a case outside a court.

**Private judging**, also called *rent-a-judge*, allows parties to bypass the formal court system and take their cases to a private court. The proceedings have all the formalities of a public court. Private judging is permitted in many but not all states. Cases are tried before a referee who is selected and paid by the parties. Referees are often retired judges. In some states, including California, any member of the state bar can be a referee. Jurors can be selected from the public jury rolls to participate in such trials. State statutes authorize the referee to enter the decision in the trial court as a final judgment, if the parties choose. If so entered, the final judgment can be appealed to a state appellate court.

Private judging, much like arbitration, provides more flexibility and privacy than a court trial. With private judging, parties do not need to wait for a court date—if a referee is available, they can schedule the trial immediately. Parties are free to determine the procedural rules, but usually agree to apply the formal rules used in the public courts, including the rules of evidence. However, unlike with arbitration, parties have the right to appeal adverse rulings to the appellate courts.

The use of private judging is widespread, yet is the most controversial of the ADR processes. The rent-a-judge system has been disparagingly referred to as "Cadillac justice." Because the referees are paid entirely by the disputants, private judging allows disputants to bypass the public trial calendar only if they can afford to pay the judge. Parties who cannot afford it must wait their turn in the public courts. Justice delayed is justice denied.[53] Private courts are also criticized because it is feared they may lure judges away from the public courts through early retirement. Judges are paid substantially more in fees by private clients than they earn as salaried public servants. Furthermore, hearings in private courts are not open to the public or the press. Wealthy corporations and other parties can shield their activities from the public eye and keep judgments confidential. Finally, some observers believe that this private justice system may delay or even relieve the legislature and the courts from making needed legal reforms.

## Ombudsperson

**ombudsperson**
A proactive neutral party who investigates and determines facts and suggests resolutions to disputes.

An **ombudsperson** or **ombud** is a consultant or permanent employee of an organization hired to resolve conflicts that arise within the organization. This concept was developed in Scandinavia. There, an ombudsman was a public official appointed to investigate and hear citizen complaints against the government. In the United States, ombuds are present in both public and private institutions. The ombuds investigate, propose, and advocate solutions and often make public their independent findings and

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recommendations. The role of the ombud, like the mediator, is to facilitate resolution through better communication among the members of the group. Neither has authority to impose a settlement. Ombuds are distinguishable from mediators in that the ombud becomes actively involved in determining the facts and advocating solutions. Whereas mediators are expected to maintain neutrality throughout their service, ombuds start out neutral but are not required to remain so. Usually, the ombud is selected by one of the disputing parties and paid solely by that party. In contrast, mediator fees are generally shared by the disputants.

## Expert Fact Finding

**expert fact finding**
A nonbinding process in which an appointed expert investigates or hears facts on selected issues. At the conclusion, he or she makes findings of fact.

**Expert fact finding** is a process by which a neutral with subject-matter expertise is appointed to conduct an independent investigation or take evidence on selected factual issues in highly technical matters. The expert does not decide the case. The sole object is to determine what happened. Like other adjudicatory processes, attorneys present evidence to the neutral. At the conclusion, the expert makes an evaluation and issues findings of fact. The findings can be binding or nonbinding. Parties may adopt them in a subsequent conciliatory process or even admit them in arbitration or at trial. In a similar process, a special master, selected for his or her legal expertise, will determine the factual issues in cases set for trial. Negotiated settlements are more likely once the factual issues have been settled.

## Early Neutral Evaluation

**early neutral evaluation**
An ADR process providing disputing parties with an early and candid evaluation by an objective observer of the merits of a case.

**Early neutral evaluation** is an evaluative process and typically nonbinding. The objective of the process is to facilitate negotiations, not to decide the case. A third-party neutral conducts a hearing and issues an opinion as to the merits of the case and the strengths and weaknesses of evidence and assesses the likely outcome at trial. The proceeding is not unlike a trial, but it is brief. Oral presentations are limited to a summary of the key issues in the case. Written submissions are extremely limited in length. The attorney plays a critical role in this process. Because the proceeding is expected to be brief, the attorney must be skilled in oral advocacy. Early neutral evaluation is appropriate for cases in which parties have valued a case unrealistically and in which fault has been established but damages are hotly contested.

## Mini-Trial

**mini-trial**
A private, voluntary, informal form of dispute resolution in which attorneys for each disputant make a brief presentation of their best case before officials for each side who have authority to settle.

A **mini-trial** is a voluntary, nonbinding process used primarily by large business organizations to better inform themselves of the merits of a case. A trial-like proceeding is conducted with high-ranking company officials who have settlement authority acting as jurors. The sides agree on rules of procedure and exchange of information and select a neutral advisor. Attorneys for each side present a case summary to the jury. There is no examination of witnesses. As jurors, the officials hear both sides and gain insight about the dispute. Now well informed, the parties can negotiate a settlement with or without the assistance of the neutral advisor and avoid an actual court trial. Because preparation and presentation of a case, even in summary form, can be expensive, mini-trials are used when large amounts of money are at stake.

## Summary Jury Trial

**summary jury trial**
A nonbinding alternative dispute resolution (ADR) process in which parties present their cases to a private mock jury, which then gives the parties an advisory verdict.

The **summary jury trial** is similar to both the mini-trial and early neutral evaluation. The object is to facilitate settlement in lawsuits that have been filed but not yet tried by

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**mock jury**
A panel of lay citizens selected and paid to mirror the role of an actual jury.

providing parties with a realistic jury reaction. An abbreviated case is presented to a **mock jury**. The jury returns its verdict quickly. After the verdict, attorneys for each side are permitted to query each juror about how and why they reached their decision. Parties then negotiate a settlement, each equipped with insights gained from the jury. The process is nonbinding: If a settlement is not reached, both sides have the right to a full trial.

Procedurally, a summary jury trial is more relaxed than an actual trial. Because attorneys for the parties put on an abbreviated case, including examination of the parties as witnesses, it is more formal than a mini-trial. Summary jury trials are also more expensive than mini-trials. The presentation of a case, although abbreviated, requires more attorney research and preparation than presentation of a case summary. Also, it costs more to compensate a number of jurors as contrasted with a single third-party neutral.

## Collaborative Law Practice

Minnesota lawyer-mediator Stu Webb became dissatisfied with the acrimony resulting from lost love and the adversarial nature of family law practice. Rather than continue to do what he disliked, he challenged the status quo and introduced a practice innovation called **collaborative law practice**. Since its development in the early 1990s, it has evolved to include these attributes:

**collaborative law practice**
A method whereby the parties agree to resolve their disputes without court intervention using interest-based negotiation practices.

1. A participation contract between a client and the attorney where they agree to resolve issues in contention without resort to using courts.
2. Agreement that if resolution requires going to court the attorney will cease representation of the client who will then need to get a new lawyer.
3. Commitment to candor including early and full disclosure to the other party of all important information.
4. Agreement to advocate interests of the clients not positions.
5. Agreement that all information obtained and conversations made in the process are confidential and cannot be used in contentious proceedings.

To work, the process requires that the other side's client and attorney must commit to this process and sign a collaborative practice participation contract. For this dance, it takes at least four to tango. It began in family law (that is, divorce, child custody), but proponents believe it has benefits in other areas of civil law practice. The converts of collaborative practice have taken its principles to most states, Canada, Australia, and some European countries.

**partnering**
A team-building process designed to improve contract performance and reduce or eliminate contract litigation through common understanding of goals and improved communication. The process is used in large, complicated, and expensive contracts and has its roots in the construction industry.

## Partnering

**Partnering** is a dispute prevention process. Parties to complex undertakings such as large construction projects, land use planning, or agency rulemaking meet before commencement of the project. The objective of the meeting is to identify potential sources of conflict and design a system to resolve problems at the earliest stage possible. Partnering is similar to mediation and other dispute resolution processes as discussions are facilitated by a third-party neutral. The key difference is that the partnering meeting is convened before, rather than after, any conflict has arisen. Attorneys typically participate in negotiations as advisors rather than as advocates.

## Conclusions Regarding ADR

"The notion that most people want black-robed judges, well-dressed lawyers, and fine paneled courtrooms as the setting to resolve their disputes is not correct. People with

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problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible."[54] People tend to accept and live more graciously with a voluntary agreement than with a court-imposed solution, which will often rankle for years. Litigation is risky because the outcome is uncertain. It is time-consuming for attorneys and clients, and it is costly. Participants are also likely to suffer stress from drawn-out litigation. In the end, most lawsuits are settled before trial, but often after years of waiting. Litigation is necessary to vindicate rights or clarify the law, but litigation is not required to resolve all disagreements. A trial usually aggravates and exaggerates existing hard feelings. A decision to sue or defend a suit through trial should be carefully thought out. In addition to the obvious costs associated with litigation such as attorney fees, court costs, witness expenses, and discovery costs, there are indirect or hidden costs that must be taken into account. Finally, the cost for the state to provide justice must not be overlooked.

**LEGAL FOCUS—EXAMPLE**

Kevin Banks rejected a settlement offer of $22,500 in his breach of contract and tort action against eight former associates. He believed he was entitled to $500,000 in punitive damages. The case went to trial. The "good news" was that Banks won a jury verdict of $50,000. The "bad news" was that it took three years to resolve, during which time he was unemployed. His single-minded concern with the case alienated friends and relatives. The case cost him $105,000 in litigation expenses. During the prolonged dispute, he employed seven different lawyers, one at a time—six of them quit. Despite winning at trial, he continued to be consumed by the case. He accused the judge, defendants, defense attorneys, and his own attorneys of a conspiracy against him.

Often, the nominal winner is the real loser. Banks won his case, so one could assume he had been wronged. Had he accepted the settlement offer, he would have had a positive net recovery, rather than a negative victory with an out-of-pocket loss of at least $55,000 (litigation recovery of $50,000 minus litigation costs of $105,000). Was his pursuit of "justice at any price" too high a personal price to pay? Some who win at trial feel vindicated despite a negative net recovery. Was the public harmed in any way?

For certain purposes, access to our public courts may be wholly inappropriate. Banks sought more than justice. He sought vengeance through the public court system in a civil matter. The civil courts are designed to shift the burden of compensating victims to the wrongdoer, not to mete out punishment. Use of our civil courts for vengeance is a breach of public trust and a squandering of public resources.

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## CASE

### New Hampshire v. Gordon

141 N.H. 703, 692 A.2d 505 (N.H., 1997)

*In the fall of 1991, the victim, an administrator and teacher at New Hampshire Technical College in Nashua, began a consensual sexual relationship with the defendant, a student at the college. In July 1992, the victim informed the defendant that their relationship was over. In response, the defendant came to the victim's home and, after promising that he just wanted to talk to her, sexually assaulted her.*

*In September 1992, the defendant telephoned Judith Parys, a lawyer and his paralegal instructor at the college, and, crying, told her that he had had a relationship with the victim and "that things had gone wrong and that it was a mess." He told Parys that he was afraid the victim would have him removed from the college. Later the same day, the defendant called Parys again. He told her that "he had called [the victim] and, much to his surprise, that she had agreed to talk to him on the phone, … and that he didn't have to tie her up."*

*In October 1992, the defendant, who was shaking and looked like he had been crying, approached Parys after she finished teaching a class and told her that he had looked up the definition of rape in the New Hampshire statutes. He said that, based on the definition, "he was sure that he had raped [the victim] in the past."*

*The defendant was later charged with four counts of aggravated felonious sexual assault and one count of attempted aggravated felonious sexual assault. Before trial, he filed a motion in limine* to bar Parys from testifying against him, asserting that his communications with her were protected by the attorney–client privilege. The trial court denied the motion. The defendant was convicted on one count of aggravated felonious sexual assault.*

**Justice Broderick delivered the opinion of the court:** The defendant, Steven Gordon, was convicted of aggravated felonious sexual assault after a jury trial in Superior Court. In separate but consolidated appeals, the defendant argues that the trial court erred in admitting into evidence allegedly privileged statements he made to an attorney instructor …. We affirm.

The defendant argues that the trial court erred in denying his motion to exclude Parys' testimony based on the attorney–client privilege. It is generally recognized that "[a]n attorney–client relationship is created when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance." Here, the burden of proving the existence of an attorney–client relationship lies with the defendant. The defendant conceded at oral argument that he sought no legal advice in the September 1992 phone conversations. Consequently, we need look only at the October 1992 conversation at the college to determine whether an attorney–client relationship was established and, hence, whether the attorney–client privilege applies to that conversation.

At the hearing on the motion *in limine*, the trial court heard conflicting testimony on the question of whether the defendant's conversation with Parys at the college established an attorney–client relationship. The defendant maintained that Parys told him "to go look in the [code] and, when he returned, she advised him to "back off and give [the victim] her space." Additionally, he contended that Parys offered to "make some phone calls and get back to [him]."

Parys' version of the conversation was quite different, however. She contended that the defendant informed her that "he had gone to the [code] in the law library, had looked up the definition of 'rape,' and believed that he had raped [the victim]." Rather than offering legal advice, Parys testified that because of the defendant's "rambling," she "didn't have a chance to get a word in edgewise."

The credibility of witnesses is a factual determination within the sound discretion of the trial court. "[U]nless we find that no reasonable person could have come to the same conclusion," we defer to the trial court's credibility determination. *State v. Crotty*, 134 N.H. 706, 711, 597 A.2d 1078, 1082 (1991).

*Latin: "at the threshold"; preliminary. A motion *in limine* may be made (usually at the outset of a trial) to exclude or limit the admissibility of evidence. Juries may not hear or see inadmissible evidence.

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The trial court's determination that the defendant "did not … seek advice from Parys in her legal capacity" is adequately supported by the record. Parys testified that the defendant sought "absolutely no legal advice" and that she gave none. Additionally, she testified that she informed her classes—some of which the defendant attended—that she did not give legal advice and that she believed to do so could violate the Rules of Professional Conduct.

Even the defendant's own testimony does not support his argument that he sought legal advice from Parys in her capacity as an attorney. At the hearing on the motion *in limine*, the defendant read into the record his testimony from an earlier proceeding that when he spoke to Parys, he thought he was "talking to somebody in confidence. You tell somebody that you trust or that you're friendly with things that you wouldn't just openly stand out there and say…." Speaking in confidence is not enough; "where one consults an attorney not as a lawyer but as a friend or as [an] … adviser … the consultation is not professional nor the statement privileged."

Moreover, the defendant's conduct at two earlier proceedings, which the trial court considered in its ruling, does not support the existence of the privilege he now seeks to invoke. Prior to the defendant's trial, Parys twice testified—at a hearing on a domestic violence petition filed by the victim against the defendant and at a judicial review board hearing at the college—about the conversations she had with the defendant in September and October 1992. According to the defendant's testimony at the hearing on his motion *in limine*, at the domestic violence hearing Parys indicated that she did not represent either party; the defendant apparently did not object. At the judicial review hearing, the defendant remarked about Parys: "I realize she's an attorney, but she's here as a witness. If she wants to play attorney, then she should represent somebody."

"A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client …." N.H. R. Ev. 502(b). Because the defendant never established an attorney–client relationship with Parys, however, he cannot now assert the privilege as a shield against the admission of Parys' testimony.

Affirmed. All concurred.

### For Critical Analysis

1. The authors of this book are attorneys. And though we are writing about the law, we do not intend to give specific legal advice to any students or other readers. Your class instructor is also likely to be an attorney. If you ask a question in class about a legal problem, or if you discuss a legal dilemma you are currently facing in a conversation with your instructor, does the attorney–client privilege arise?
2. Who holds the attorney–client privilege—the attorney or client or both? Why?
3. What additional facts might have led the court to believe a privilege existed?

## Equal Employment Opportunity Commission v. Waffle House, Inc.

534 U.S. 279, 122 S.Ct. 754 (2002)

*Waffle House fired Eric Baker when he suffered a seizure on the job within a month of being hired. He filed a discrimination complaint with the Equal Employment Opportunity Commission (EEOC) alleging that his discharge violated the Americans with Disabilities Act of 1990 (ADA). The EEOC pursued the claim and filed suit in federal court requesting injunctive relief to prevent Waffle House from discriminating against other employees now and in the future, to get Baker reinstated on the job, to collect damages on behalf of Baker, and to punish Waffle House for discriminating against Baker. Waffle House moved to stay the EEOC's suit and compel arbitration based on Baker's employment contract that required employment disputes to be settled by binding arbitration. The district court denied Waffle House's request for relief. The Fourth Circuit Court of Appeals also held for the EEOC but limited the EEOC to injunctive relief against Waffle House and precluded the agency from seeking victim-specific relief. The court held that the Federal Arbitration Act (FAA), which favored enforcement of private arbitration agreements, outweighed the EEOC's right to enforce private, rather than public, interests. In other words, EEOC could proceed but Baker's arbitration agreement limited Baker's recovery to that which would be determined in an arbitration.*

**Justice Stevens delivered the opinion of the Court:** The question presented is whether an agreement between an employer and an employee to arbitrate

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employment-related disputes bars the Equal Employment Opportunity Commission (EEOC) from pursuing victim-specific judicial relief, such as backpay, reinstatement, and damages, in an enforcement action alleging that the employer has violated Title I of the Americans with Disabilities Act of 1990 (ADA).

In his application for employment with respondent, Eric Baker agreed that "any dispute or claim" concerning his employment would be "settled by binding arbitration." As a condition of employment, all prospective Waffle House employees are required to sign an application containing a similar mandatory arbitration agreement. Baker began working as a grill operator at one of respondent's restaurants on August 10, 1994. Sixteen days later he suffered a seizure at work and soon thereafter was discharged. Baker did not initiate arbitration proceedings, nor has he in the seven years since his termination, but he did file a timely charge of discrimination with the EEOC alleging that his discharge violated the ADA.

After an investigation and an unsuccessful attempt to conciliate, the EEOC filed an enforcement action against respondent in the Federal District Court for the District of South Carolina. Baker is not a party to the case. The EEOC's complaint alleged that respondent engaged in employment practices that violated the ADA, including its discharge of Baker "because of his disability," and that its violation was intentional, and "done with malice or with reckless indifference to [his] federally protected rights." The complaint requested the court to grant injunctive relief to "eradicate the effects of [respondent's] past and present unlawful employment practices," to order specific relief designed to make Baker whole, including backpay, reinstatement, and compensatory damages, and to award punitive damages for malicious and reckless conduct.

Congress has directed the EEOC to exercise the same enforcement powers, remedies, and procedures that are set forth in Title VII of the Civil Rights Act of 1964 when it is enforcing the ADA's prohibitions against employment discrimination on the basis of disability.

The FAA directs courts to place arbitration agreements on equal footing with other contracts, but it "does not require parties to arbitrate when they have not agreed to do so." Because the FAA is "at bottom a policy guaranteeing the enforcement of private contractual arrangements," we look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement. Although ambiguities in the language of the agreement should be resolved in favor of arbitration, we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated. "Arbitration under the [FAA] is a matter of consent, not coercion." Here there is no ambiguity. No one asserts that the EEOC is a party to the contract, or that it agreed to arbitrate its claims. It goes without saying that a contract cannot bind a nonparty. Accordingly, the proarbitration policy goals of the FAA do not require the agency to relinquish its statutory authority if it has not agreed to do so.

[T]he statutory language is clear; the EEOC has the authority to pursue victim-specific relief regardless of the forum that the employer and employee have chosen to resolve their disputes. Rather than attempt to split the difference, we are persuaded that, pursuant to Title VII and the ADA, whenever the EEOC chooses from among the many charges filed each year to bring an enforcement action in a particular case, the agency may be seeking to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief. To hold otherwise would undermine the detailed enforcement scheme created by Congress simply to give greater effect to an agreement between private parties that does not even contemplate the EEOC's statutory function.

It is true, as respondent [has] argued, that Baker's conduct may have the effect of limiting the relief that the EEOC may obtain in court. If, for example, he had failed to mitigate his damages, or had accepted a monetary settlement, any recovery by the EEOC would be limited accordingly. As we have noted, it "goes without saying that the courts can and should preclude double recovery by an individual."

But no question concerning the validity of his claim or the character of the relief that could be appropriately awarded in either a judicial or an arbitral forum is presented by this record. Baker has not sought arbitration of his claim, nor is there any indication that he has entered into settlement negotiations with respondent. It is an open question whether a settlement or arbitration judgment would affect the validity of the EEOC's claim or the character of relief the EEOC may seek. The only issue before this Court is whether the fact that Baker has signed a mandatory arbitration agreement limits the remedies available to the EEOC. The text of the relevant statutes provides a clear answer to that question. They do not authorize the courts to balance the competing policies of the ADA and the FAA or to second-guess the agency's judgment concerning which of the remedies authorized by law that it shall seek in any given case.

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Moreover, it simply does not follow from the cases holding that the employee's conduct may affect the EEOC's recovery that the EEOC's claim is merely derivative. We have recognized several situations in which the EEOC does not stand in the employee's shoes. And, in this context, the statute specifically grants the EEOC exclusive authority over the choice of forum and the prayer for relief once a charge has been filed. The fact that ordinary principles of *res judicata,** mootness, or mitigation may apply to EEOC claims does not contradict these decisions, nor does it render the EEOC a proxy for the employee.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

**Justice Thomas, with whom the Chief Justice and Justice Scalia join, dissenting:** Because Congress has not given the EEOC the authority to usurp the traditional role of courts to determine what constitutes "appropriate" relief in a given case, it is necessary to examine whether it would be "appropriate" to allow the EEOC to obtain victim-specific relief for Baker here, notwithstanding the fact that Baker, by signing an arbitration agreement, has waived his ability to seek such relief on his own behalf in a judicial forum. For two reasons, I conclude it is not "appropriate" to allow the EEOC to do on behalf of Baker that which Baker is precluded from doing for himself.

To begin with, when the EEOC litigates to obtain relief on behalf of a particular employee, the Commission must take that individual as it finds him. Whether the EEOC or an employee files a particular lawsuit, the employee is the ultimate beneficiary of victim-specific relief. The relevance of the employee's circumstances therefore does not change simply because the EEOC, rather than the employee himself, is litigating the case, and a court must consider these circumstances in fashioning an "appropriate" remedy.

As a result, the EEOC's ability to obtain relief is often limited by the actions of an employee on whose behalf the Commission may wish to bring a lawsuit. If an employee signs an agreement to waive or settle discrimination claims against an employer, for example, the EEOC may not recover victim-specific relief on that employee's behalf.

Not only would it be "inappropriate" for a court to allow the EEOC to obtain victim-specific relief on behalf of Baker, to do so in this case would contravene the "liberal federal policy favoring arbitration agreements" embodied in the FAA.

By allowing the EEOC to pursue victim-specific relief on behalf of Baker under these circumstances, the Court eviscerates Baker's arbitration agreement with Waffle House and liberates Baker from the consequences of his agreement. Waffle House gains nothing and, if anything, will be worse off in cases where the EEOC brings an enforcement action should it continue to utilize arbitration agreements in the future. This is because it will face the prospect of defending itself in two different forums against two different parties seeking precisely the same relief. It could face the EEOC in court and the employee in an arbitral forum.

I respectfully dissent.

## For Critical Analysis

1. Waffle House requested a stay and a motion to compel arbitration. What was it asking for?
2. Do you agree with Waffle House's argument that although the EEOC was not a party to the arbitration agreement, it is still effectively bound by it (Justice Thomas's dissent)? Or do you agree with the EEOC that Waffle House is free to pursue all remedies without regard to whether an employee has signed an arbitration agreement (Justice Stevens's majority opinion)? Explain which position you agree with and why.
3. When Baker was given the pre-employment agreement with the arbitration clause, do you think he understood what he was signing? Does it matter?
4. If Baker had refused to sign the employment agreement, would he still have been hired? If he had simply struck the clause and then signed, would he have been hired?
5. Why did Waffle House require the arbitration clause in its employment contracts? Why might an employee be concerned about such a clause? Why might an employee be pleased with such a clause?

*Latin: "a matter [already] adjudicated." A party may not sue again on a matter that has been settled by judicial decision.

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## CHAPTER QUESTIONS AND PROBLEMS

1. The legal profession is in the process of change. Following are some questions involving changes that have impact on the public interest:
   a. Should attorneys who participate in formal courtroom trials be trained differently from other lawyers?
   b. Should charges concerning the unprofessional conduct of an attorney be heard and decided by attorneys, by nonlawyers, or by both?
   c. What limitations, if any, should be imposed on the right of attorneys to advertise for and to solicit legal business?
   d. Should there be limits to the fees charged by attorneys for legal services?
   e. Should current rules requiring all partners or owners in law firms to be lawyers be changed? Should lawyers be allowed to associate and share fees with nonlawyer professionals? Would such multidisciplinary associations benefit the general public?
2. Contingent fee arrangements are said to make legal services available to persons who otherwise would be unable to pay, but contingent fee arrangements are also said to promote litigation unnecessarily because potential plaintiffs (victims) have nothing to lose by suing. What do you think of these contentions?
3. Our founding fathers adopted (or, more correctly, retained) the English common law after the American Revolution. However, we have consistently refused to adopt the so-called English Plan for the payment of legal fees. The English Plan requires the losing party to pay the plaintiff's and the defendant's attorney fees (as well as court costs). Presently, losers in the United States always pay court costs and their own attorney fees (unless otherwise agreed by contract), but do not pay the attorney fees of their opponents. Some observers strongly recommend we adopt the English Plan. Do you agree?
4. Liability insurance is available to cover potential attorney malpractice. As with most liability insurance, the premiums charged have increased significantly in recent years. Malpractice insurance coverage for attorneys is usually not required either by law or by the Professional Rules of Conduct. As in many other liability situations, those who can most afford a major loss carry ample insurance, whereas those who have little financial ability are more likely to be without insurance. Should malpractice insurance or other proof of financial responsibility be required as a condition for the practice of law? Discuss.
5. The typical arbitration clause requires binding arbitration. That means that the arbitrator's decision cannot be appealed except for limited reasons. What are the negative and positive aspects of arbitration because of this lack of appeal? Assume that during arbitration the attorney representing one party becomes angry, screams obscenities at the arbitrator, and finally throws the exhibits onto the floor. Can the arbitrator hold the attorney in contempt?
6. In January 1991, Gail P. Carr-Williams, an attorney licensed to practice law in Michigan, applied for admission, without examination, to the State Bar of Ohio. After an initial recommendation that Carr-Williams's application be approved, the Board of Commissioners on Character and Fitness of the Supreme Court of Ohio appointed a panel to investigate Carr-Williams's application. The panel concluded that Carr-Williams had not satisfied her federal income tax obligations for several years and owed the Internal Revenue Service approximately $98,000 in taxes, interest, and penalties. She also owed state taxes of $14,000. Should the Board of Commissioners recommend she be licensed to practice law in Ohio? [*In re* Application of Carr-Williams, 63 Ohio St.3d 752, 591 N.E.2d 693 (Ohio, 1992).]
7. Attorney Edward M. Cooperman was retained to represent a client in a criminal matter. The client signed Cooperman's fee agreement: "My minimum fee for appearing for you in this matter is fifteen thousand dollars ($15,000). This fee is not refundable for any reason whatsoever once I file a notice of appearance on your behalf." One month later, the client discharged Cooperman, but Cooperman refused to refund any portion of the fee. In the past, Cooperman had been told by the local bar association grievance committee to stop using nonrefundable fee agreements. The attorneys' Code of Professional Conduct and Responsibility provides that an attorney "shall not enter into an agreement for, charge or collect an illegal or excessive fee" and upon withdrawal from employment "shall refund promptly any part of a fee paid in advance that has not been earned." Did Cooperman's fee arrangement violate the code? [*Grievance Committee for the Tenth Judicial District*

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*v. Edward M. Cooperman*, 83 N.Y.2d 465, 633 N.E.2d 1069, 611 N.Y.S.2d 465 (N.Y., 1994).]

8. John E. Mallard, an attorney who practiced bankruptcy and securities law, was selected by the U.S. magistrate to represent indigent inmates who were suing prison officials for maltreatment. He was compelled to represent the inmates under a federal statute authorizing federal courts to "request" an attorney to represent any person claiming poverty status. Claiming that he was not competent to handle complex trial matters, Mallard filed a motion to withdraw. The magistrate denied his request, and his appeal to the district court and court of appeals was unsuccessful. Can the court compel attorney Mallard to represent an indigent civil litigant? [*Mallard v. U.S. District Court for Southern Dist. of Iowa,* 490 U.S. 296, 109 S.Ct. 1814 (1989).]
9. Richard Shapero, a Kentucky attorney, applied to the state Attorneys' Advertising Commission for approval of a letter that he proposed to send "to potential clients who have had a foreclosure suit filed against them." The letter advised the clients that federal law may prevent creditors from taking immediate action and that the recipients of the letters could call Shapero's office for free information on how to keep their homes. The commission would not approve the letter because Professional Conduct Rules prohibited direct-mail solicitation by lawyers if the mail was directed to *specific recipients* rather than to *a general group of persons* known to need the particular kind of legal services offered. The Kentucky Supreme Court affirmed the commission's finding. Shapero appealed to the U.S. Supreme Court, claiming that the rule violated attorneys' rights to free speech. Did Shapero succeed in his claim? [*Shapero v. Kentucky Bar Association*, 486 U.S. 466, 108 S.Ct. 1916 (1988).]
10. The Hembrees purchased a home. The purchase contract included the following clause: "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in the city of contract origin, in accordance with the rules of the American Arbitration Association." A claim that the home they purchased had a defective roof was arbitrated and the arbitrator found for the Hembrees on the theory of implied warranty. An implied warranty is a guarantee imposed by law that the seller will stand behind the item even though the contract is silent with respect to warranties. The seller and seller's real estate agent challenged the arbitrator's award in state court. They claimed the arbitrator exceeded his authority because the contract did not expressly provide for a remedy based on warranty. They argued the arbitrator's finding was a clear error of law. Is the arbitrator's authority strictly limited to the terms of the contract? If the arbitrator is clearly wrong as to the application of law, will the award be overturned by the court? [*Hembree v. Broadway Realty Trust Company, Inc.*, 151 Ariz. 418, 728 P.2d 288 (Ariz., 1986).]
11. Edward Kuhnel, a correctional officer for the New York Correctional Services Department ("Department"), flew a Nazi flag from the front porch of his home commemorating the 55th anniversary of Hitler's declaration of war against the United States. His actions received a great deal of media attention. The Department suspended Kuhnel from his job for violating two sections of the Department's employee manual. Kuhnel contested his suspension, and the claim was submitted to arbitration under a collective bargaining agreement. Both parties agreed that the arbitration procedure would be final and binding. The arbitrator concluded that Kuhnel was not guilty of the charges and reinstated Kuhnel with full back pay and benefits. The Department appealed. May the courts revisit the evidence and consider whether the arbitrator erred in determining the facts or applying the law? [*New York State Correctional Officers and Police Benevolent Association, Inc. v. State of New York*, 94 N.Y.2d 321, 726 N.E.2d 462, 704 N.Y.S.2d 910 (N.Y., 1999).]
12. Florida lawyer Shane Stafford arranged for Roy Blevins, a West Palm Beach police officer, to solicit personal injury cases for him. In an 18-month period, Blevins referred 10 or 11 cases to Stafford, including three automobile accident cases he investigated as a police officer. Stafford gave 15 percent of his legal fees to Blevins, who received approximately $11,000 total. Is such a referral arrangement legal and ethical? [*The Florida Bar v. Stafford*, 542 So.2d 1321 (Fla., 1989).]
13. Weaver agreed to buy a house from builder McGill Homes for $181,900. The contract provided "that all claims arising out of or related to the purchase agreement would be settled by arbitration in accordance with the commercial arbitration rules of the American Arbitration Association." After moving into the home, Weaver was dissatisfied with the builder and claimed the home was worth less than the agreed-upon price. He petitioned for an arbitration to hear

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his claim of defective construction. He received an award of $12,755.50 for defective and incomplete construction from the arbitrator. McGill Homes moved to vacate the arbitration award, claiming that the arbitrator manifestly disregarded the law. To support its contention, it attached affidavits of its construction foreman and a project worker. Do you expect the court to overturn the arbitrator's award? [*McGill Homes, Inc. v. Weaver,* 278 Ga.App. 622, 629 S.E.2d 535 (Ga., 2006).]

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CHAPTER 5

# Administrative Law

*"The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values are affected by their decisions than by those of all the courts…."*

**Justice Robert H. Jackson, U.S. Supreme Court Justice, 1941–1954.**

## LEARNING OBJECTIVES

**After reading and studying this chapter, you should be able to:**

- Define and explain the term *administrative law*. Distinguish between the two different ways in which the term is used.
- Explain what an administrative agency is, how an agency gets its authority, and what the general purposes of administrative agencies are. Describe the importance of the Administrative Procedure Act and the enabling statute relative to agency authority and purpose.
- Explain the importance of agency procedures.
- Distinguish between an independent administrative agency and an executive department.
- Identify leading administrative agencies and the areas they regulate.
- Explain what a regulation is and identify the major rule-making steps required by the Administrative Procedure Act.
- Describe the major investigatory methods and powers of administrative agencies.
- Briefly explain the degree and type of control that each branch of the federal government has over independent administrative agencies.
- Identify and explain some methods by which the public may scrutinize agency action.



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Most of us have seen re-creations of dramatic courtroom showdowns and perhaps even viewed video of grand oratory in Congress. You have probably also seen a live broadcast of a speech by the president. Courts, Congress, and the presidency are the three faces of law. The fourth important face of the law, the one you are most likely to encounter on a daily basis, is administrative agencies. For some, this fourth face of government conjures up images of a powerful agency able to both make and execute law, and one subject to less oversight or review than a court, legislature, or police officer might have. **Administrative law** is the body of law that governs what administrative agencies are allowed to do, how they can do it, and what they cannot do. Most of us have already encountered administrative law in our lives with both positive and negative consequences. This chapter prepares you to better understand administrative law and its place in American governance.

**LEGAL FOCUS—EXAMPLE**

On August 24, 2009, a Sun Country Airlines flight waited on the tarmac for more than six hours with passengers and crew trapped on the hot plane. Earlier that month, on August 8, a Continental Express Airlines flight kept passengers on a plane overnight under terrible conditions of overflowing toilets, no water, and no food. Congressional inquiries and public outrage led the Department of Transportation to adopt new rules that took effect in 2010, setting three hours as the maximum time that passengers can be kept on a locked airplane.[1] Many airlines claim that this rule will hurt passengers more than it will help them as the time period is too short, that it will result in cancelled flights and unnecessarily stranded passengers. Passenger advocates claim otherwise.

**administrative law**
The body of law concerned with the power of administrative agencies. Administrative law consists of rules, regulations, orders, and adjudications. Also the composite body of substantive law created by the various administrative agencies in the performance of their assigned tasks.

Do you agree with the airlines or the passenger advocates? What gives the Department of Transportation the authority to decide what is too long a stay in an airplane on a runway? The answer is "administrative law," specifically in this case, the federal laws creating the Department of Transportation and authorizing it to regulate the airline industry. We will present the structure and processes of administrative law, both in the federal government and in several states. Our particular focus will be on the power wielded by agencies and the constraints on this power. You should come to understand why administrative law is a unique and important topic. Hopefully, you will be better prepared to solve problems of governmental involvement (perhaps interference) in your life and better able to obtain the services, rights, and benefits you seek from the government.

A final word before our discussion of administrative law: This chapter is mostly about process, the process that agencies use when enforcing the law, presented earlier as procedural law. That process can deny a right or grant a privilege just as surely as any substantive law. To understand its importance, you need only speak with someone who has just dealt with a governmental process and felt confused and powerless to help shape the outcome. Like trying to survive in a courtroom without understanding the complex rules for evidence and procedure, dealing with an agency without understanding how it makes decisions is an effort likely to result in frustration, anger, and long-lasting disappointment.

## WHAT IS ADMINISTRATIVE LAW?

Often, the term *administrative law* is used to describe two very different subjects of law. One is the law governing agency process and procedure. The other type is the law that agencies create and apply, the "substantive law" of agencies. In this chapter, we focus on the process and procedure of agencies rather than on the subject matter of the laws

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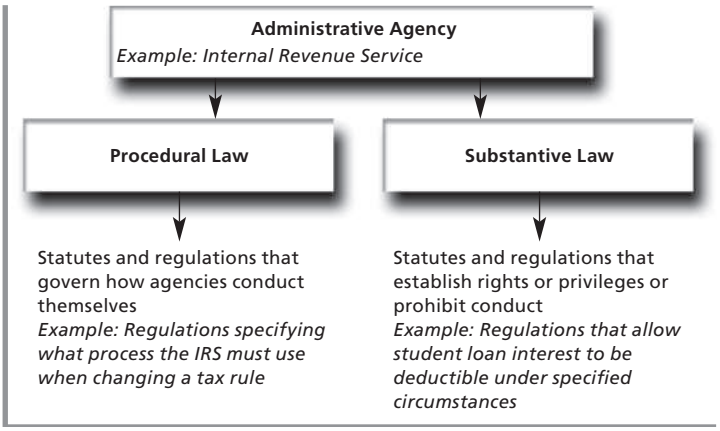
**EXHIBIT 5.1**
Types of Agency Law




agencies create or of the statutes that agencies enforce. Exhibit 5.1 provides examples of procedural and substantive administrative law.

## Agency Process

A body of law governs how agencies can or must conduct themselves and their processes. As you will learn, policies of fairness and constitutional principles have established significant restraints and limits on agency power, particularly on the way in which an agency may act. Agencies, however, are often given significant authority to independently execute laws, make decisions, and otherwise do their business. Collectively, laws and rules governing how agencies can or must conduct themselves can be referred to as the *procedural law* of agencies.

Some laws and regulations that appear procedural in nature really directly control the rights, privileges, or benefits of others. Consider the following regulation of the U.S. Department of Education.

**LEGAL FOCUS—EXAMPLE**

### Obtaining a loan

(a) *Application for a Direct Subsidized Loan or a Direct Unsubsidized Loan.* (1) To obtain a Direct Subsidized Loan or a Direct Unsubsidized Loan, a student must complete a Free Application for Federal Student Aid and submit it in accordance with instructions in the application….

A strict reading of the regulation above shows that a student could be denied a loan for merely failing to follow instructions in the application! Thus, this regulation and those instructions in the loan application, although procedural, have substantive effect. In any case, this is the realm of administrative law, where rights and benefits such as these are affected every day through the creation and application of the laws and regulations of agencies.

## Substantive Law of Agencies

Every agency has a purpose, usually to enforce and/or apply a particular set of laws. For instance, the U.S. Securities and Exchange Commission (SEC) is tasked with enforcing,

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**regulations**
Rules promulgated by an administrative agency under authority given to the agency by the enabling statute.

among other laws, the Securities Act of 1933. Besides that federal statute, the SEC has established **regulations** that further explain and apply the broader statute they are under, the Securities Act of 1933. The 1933 Securities Act and its associated regulations are one example of the substantive law of the SEC. The term *substantive law* here refers to the laws and regulations enforced by the SEC that describe or proscribe conduct, that allow or limit behavior. Rule 10b-5 of the Securities Exchange Act of 1934 is an example of substantive regulation.

## LEGAL FOCUS—EXAMPLE

### Rule 10b-5—Employment of Manipulative and Deceptive Devices

It shall be unlawful for any person….

a. To employ any device, scheme, or artifice to defraud,
b. To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
c. To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Rule 10b-5 is the so-called "Securities Fraud" regulation that some believe should proscribe the type of conduct alleged to have occurred in the 2001 Enron Corporation collapse. It is a great example of a substantive regulation that has had a colorful and rich history of enforcement. Its reach goes beyond brokers and traders and touches, theoretically, every person who buys or sells a stock or bond.

## LEGAL FOCUS—CASE

In December of 2001, Martha Stewart sold 3,928 shares of ImClone Systems Incorporated. The SEC later accused her of insider trading in relation to that sale, alleging that she had been told of a pending denial of approval of an important new drug being developed by ImClone. Though the Department of Justice sought criminal "securities fraud" charges against her, the court rejected the charge. Martha Stewart was convicted of crimes related to attempting to hide the circumstances of the sale. While serving a sentence for her crimes, the SEC brought civil charges of "insider trading," a form of securities fraud. Though she initially fought the charges, Martha Stewart eventually settled with the SEC, agreeing to pay approximately $195,000 and to not serve as an officer or employee of a public company for five years.[2]

## Focus on Agency Process

In this chapter, we do not focus on the substantive law of agencies for several reasons. First, the substantive law of a particular agency is usually a particular topic or type of law. For instance, the SEC enforces "securities" laws. Second, the substantive law of administrative agencies is a topic as broad as law itself. This is because nearly every statute, state or federal, involves at least one agency in its application. In this chapter, we focus on understanding agency process. Along the way, we will discuss what administrative agencies are, how they are created, what they do, what they cannot do, how they affect our lives, and what we can do when we disagree with their decisions.

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## MORALS AND ETHICS

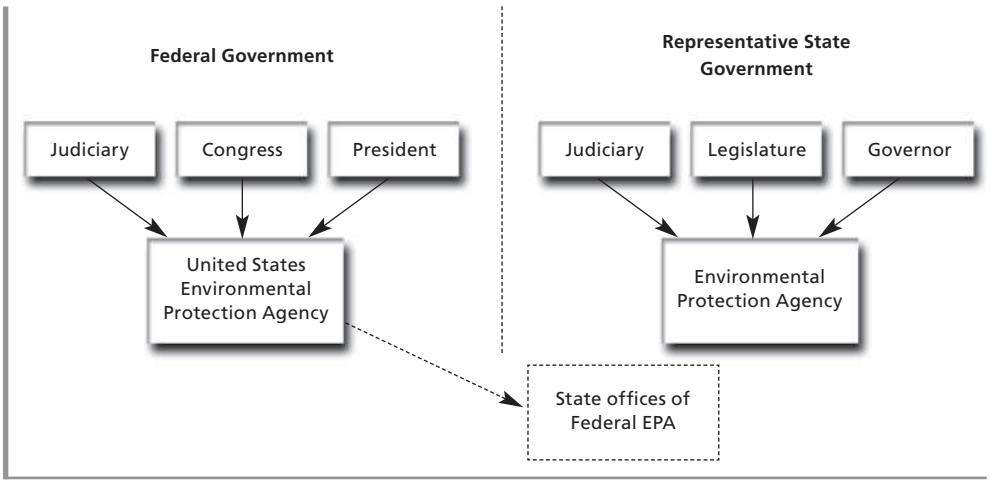
Dan and Linda Dixon bought a parcel of land on which to build their dream home. Upon retirement, they met with an architect and commissioned plans. They found a contractor to build their home. Unfortunately, the land they owned had been rezoned, and they were told by the city planning commission that they had to apply for a conditional use permit (CUP), which they did. The planning commission denied their CUP application, stating that the Dixons' proposed house did not reflect the values intended for the land. The Dixons felt it would be a waste of time to appeal the decision to the city council and engaged an attorney to file a lawsuit. Their attorney advised them that there was really nothing they could do.

The Dixons have just participated in an administrative process. Local governments also have agencies such as city planning commissions that must apply the law. The limits and powers of agencies that we study in this chapter reach down to the city level. In many cases, the power held by a local or administrative agency is much greater than that of a single branch of government. Many would probably feel that the Dixons were morally wronged, that the outcome should have been different. Administrative agencies affect people much more often, for the good or the bad, than courts. That is one reason why understanding administrative law may be far more important than understanding trial procedures.

## What Is an Administrative Agency?

Understanding administrative law and how it affects your life requires that you first understand what an administrative agency is and what the various types of agencies are. Recall that the United States is a federal form of government, meaning it is made up of numerous governments that coexist; namely, a federal government and 50 state governments. Each of those governments has its own body of administrative law complete with numerous agencies. In the case of the federal government, the number of agencies is too vast to cover in this chapter, even summarily. The supremacy of federal law over state law adds a layer of complexity to this as well. In any given state, there are offices of federal agencies as well as those of the state's agencies. Some state agencies may serve similar purposes to federal agencies, such as environmental protection or public health. Exhibit 5.2 depicts a simplified version of this federal/state structure of administrative law.

**EXHIBIT 5.2** Federal and State Administrative Law

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**administrative agency**
Collectively, sub-branches of the executive branch of federal, state, and local governments. Administrative agencies may possess legislative, executive, and judicial powers in specialized technical areas where appropriate regulation requires action by experts.

An **administrative agency** is a sub-branch of the executive branch of the federal, a state, or a local government. Usually, federal agencies are used as examples to explain and teach administrative law. States are usually organized in a similar, if less complex, structure as the federal administrative governmental system. So it is useful to use the federal government as an introductory tool. To fully understand administrative law requires a review of state structures as well.

Two important categories of federal agencies are executive departments and independent administrative agencies. Exhibit 5.3 shows a sampling of administrative agencies within the federal government system. It also outlines offices of the judiciary and the legislative branches, but those are not normally defined as agencies. The main constitutional and policy concern arises with agencies that have powers of the other branches in addition to executive power.

## Executive Departments

**executive departments**
Generally, administrative bodies headed by single persons ultimately answerable to one person, the chief executive.

Some agencies are nothing more than departments of the executive branch of the federal government. Congress created these **executive departments** to allow the president to better execute the laws of the United States. Examples include the Department of the Interior, the Department of Justice, the National Security Council, and the Department of Defense. These agencies are controlled more directly by the president and thus exist as an arm of the executive department. The Department of Homeland Security is a recent addition to the list of executive department administrative agencies. The executive departments that are part of the cabinet of the president of the United States are headed by a secretary appointed by the president with the advice and consent of the Senate. The president may remove department heads at will.

## Independent Administrative Agencies

**independent administrative agency**
An administrative body empowered to regulate some policy area led by officials who cannot be dismissed by the president of the United States except for good cause.

Most of the agencies referred to in this chapter are not executive departments. Instead they are independent administrative agencies. **Independent administrative agencies** are governmental units with delegated powers commonly found in the other branches of government. Applying the Separation of Powers doctrine, the Supreme Court of the United States has generally allowed agencies to collect the powers of multiple branches of the federal government only when there is some guarantee of independence.[3]

Independence is established by making term appointments of the persons in charge of the agency. During the stated term, the officials or commissioners are removable only by a finding of misconduct or failure to do their job. As with executive department heads, the appointment of independent agency leadership generally is made by the executive branch (governor or president). But the executive branch's ability to remove agency heads at will (fire) is restricted by the statute creating the agency generally to reasons related to misfeasance. Moreover, a determination by the executive of good cause to dismiss is subject to judicial oversight, whereas a dismissal of an executive department head is not.

### LEGAL FOCUS—CASE

President Herbert Hoover appointed William Humphrey to the Federal Trade Commission for a seven-year term. Two years into the term, President Franklin D. Roosevelt, Hoover's successor as president, requested that Humphrey resign, stating, "I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission…." Humphrey declined to resign, whereupon Roosevelt wrote Humphrey, "Effective as of this date you are hereby removed from the office of Commissioner of the Federal Trade

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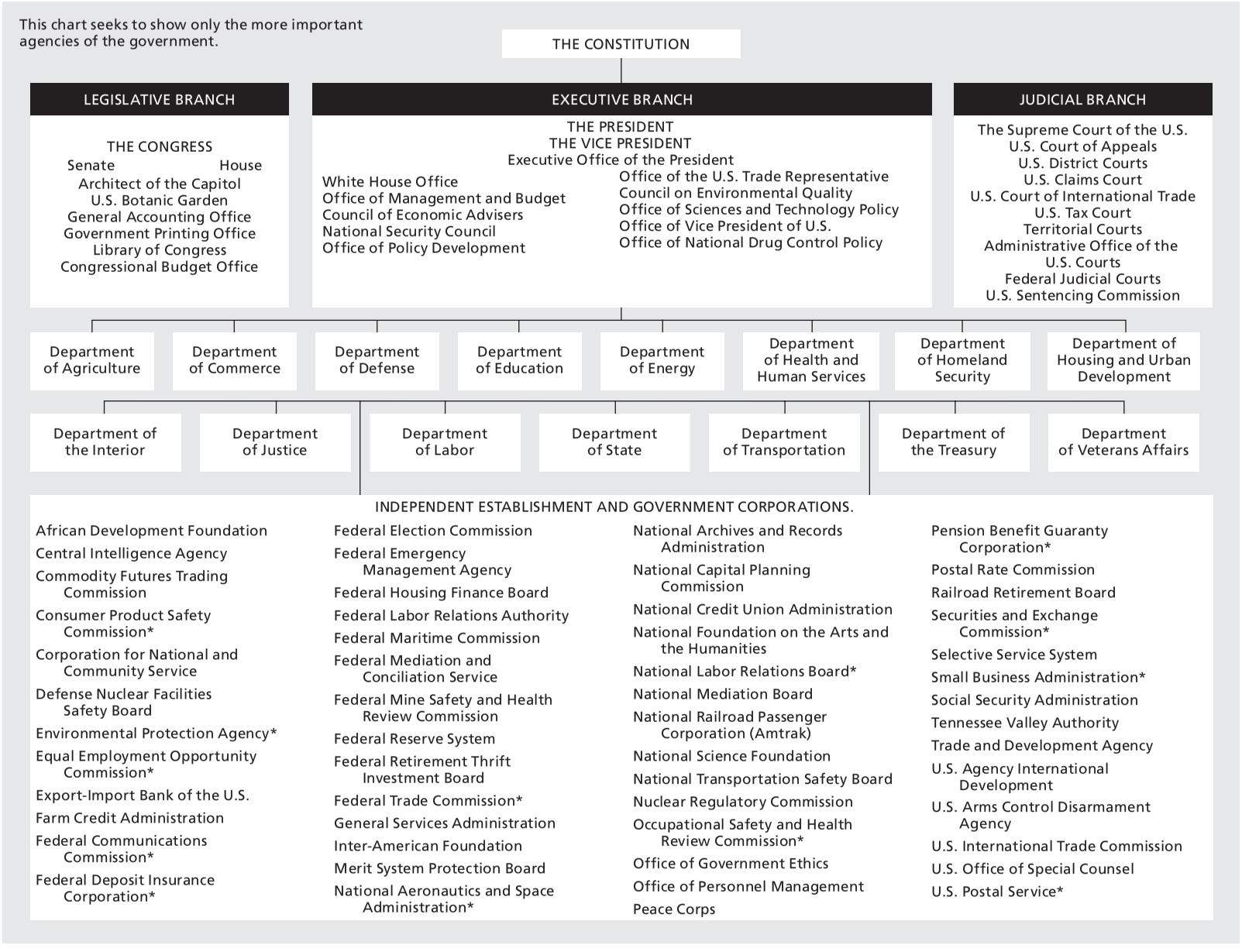
**EXHIBIT 5.3** The Government of the United States




* Major administrative agency.
Source: U.S. Government Manual, 2002-2003.

Commission." Humphrey refused to vacate his office, claiming the Federal Trade Commission Act allowed removal of commissioners only for reasons of "inefficiency, neglect of duty, or malfeasance in office." Roosevelt maintained that as president of the United States he had the inherent power to remove members of the executive branch in whom he lacked confidence. Was Humphrey allowed to remain a commissioner?

*Humphrey's Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869 (1935).

Yes. The Supreme Court agreed with Humphrey. The court ruled that the president lacked the power to fire Humphrey, who could serve his appointed term unless found guilty of a failure to perform his job.

### State Agencies

Each state has its own collection of agencies and its own rules governing them. State agencies collect the powers of one or more branches of the state's government much as federal agencies do in the federal government. Each state has its own constitution as well as statutes governing the rules for independence of and oversight of its administrative agencies. In this chapter, we will touch on two state examples of administrative law, California and Iowa.

## A BRIEF HISTORY OF U.S. ADMINISTRATIVE LAW

The first administrative agencies were executive departments created by the first Congress to allow the president a structure to begin executing the laws of the United States. They included the Departments of State, Treasury, and War, as well as the Post Office and the Office of the Attorney General. Then, mostly in three distinct time periods, Congress added more executive departments and many independent administrative agencies. Those three time periods were characterized by significant policy dilemmas facing the United States.

In the 1880s, when big business and abusive business practices surfaced as a significant problem, independent administrative agencies emerged as a new solution. The first major independent agency, the Interstate Commerce Commission, was created at that time to address problems in the railroad industry. This marked a significant step in the evolution of administrative law in the United States, as Congress experimented with powerful agencies holding multiple powers to solve regulatory problems in the growing economy and society of the United States. The Federal Trade Commission followed in 1914 to deal with business abuses, primarily anticompetitive and monopolistic behavior.

New agencies continued to appear over the next several decades. Then, during the 1930s, President Franklin Roosevelt's response to the Great Depression led to a significant addition to the ranks of administrative agencies. That era also brought an increased governmental role in providing support and services to its citizens as well as in regulating business and business transactions. Agencies created in this era include the Securities and Exchange Commission (SEC), the Federal Communications Commission (FCC), and the National Labor Relations Board (NLRB). The New Deal era embodied more than just an increase in government; it was a paradigm shift of the role of the government in regulating the economy and business and supporting workers. Administrative agencies were the workhorses for government expansion in that era.

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The third wave of administrative agencies occurred during the 1960s and 1970s. Many of these agencies focused on protecting and managing the environment and its resources (for example, the Environmental Protection Agency), ending racial discrimination (for example, the Equal Employment Opportunity Commission), or establishing safe and stable working conditions (for example, the Occupational Safety and Health Administration).

As the United States entered the twenty-first century, the U.S. government had evolved into a vast labyrinth of administrative agencies making up a bureaucracy that most citizens encounter on a regular basis. During the later decades of the twentieth century, **deregulation** swept through numerous industries. Deregulation symbolically means reducing the extent to which the government regulates an industry. In practice, nearly all efforts to deregulate have, in fact, simply been re-regulation, that is, a change in the way industry is regulated.

**deregulation**
A process of eliminating, reducing, or restructuring the regulation of an industry.

### LEGAL FOCUS—BACKGROUND

A recent, notorious experiment in deregulation swept through the electricity industry at the close of the 1990s. It began in California in 1997, as the largest state economy removed the utility monopoly over the generation of electricity. Left unchanged was the manner in which electricity was distributed and delivered to customers, which stayed in the hands of large investor-owned utilities. Within a few years, the wholesale price for electricity soared, mysterious shortages appeared, and controversial marketing, accounting, and sales practices came to light. Other states followed suit in deregulation, but not all. Though government and business press releases and media accounts usually referred to the events as the "deregulation experiment," it was, in fact, a change in the way the electricity industry was regulated. As part of California's supposed deregulation, two new agencies were created, the California Independent System Operator and the California Consumer Power Financing Authority.

## CREATION OF ADMINISTRATIVE AGENCIES

**enabling statute**
A statute that creates an administrative agency and typically also authorizes it to perform specified actions.

An administrative agency is usually created by a statute, known as the **enabling statute**. The enabling statute typically will name the agency and specify its purpose, powers, limits, and structure. The statute may call for a board or commission, or it might call for a single individual to head the agency. Some agencies are required by a state constitution. Those are usually called "constitutional agencies." Even then, the agency may be described only briefly in the state constitution, allowing the state legislature the ability to better define it and modify it over time. When dealing with any particular agency, the first step should be to understand its powers and limitations, as well as its structure. Studying the enabling statute and/or constitutional authority for the agency is critical to understanding any agency.

### Administrative Procedure Act (APA)

**Administrative Procedure Act (APA) of 1946**
Law that mandates procedures for federal administrative agencies.

In 1946, the **Administrative Procedure Act (APA)** established a set of rules governing most federal agency conduct.[4] The APA was enacted in response to numerous charges of inconsistent or reckless procedures and inconsistent standards being used by the numerous federal agencies created before World War II. The APA created a structure that categorized various kinds of agency conduct and set rules for each category. Agency conduct that was defined as either "rulemaking" or "adjudication" was given basic

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minimum requirements to ensure a fair and accurate action. Rulemaking and adjudication are explored later in this chapter. Most states have enacted laws similar to the federal APA to govern state administrative agencies.

## Delegation of Power

When an enabling statute grants a power to an agency that is otherwise a power assigned to Congress in the U.S. Constitution, there is a legitimate question as to whether Congress and the president have made a constitutional delegation. The U.S. Supreme Court has ruled on this issue several times, usually allowing delegations. The most often cited case arose during the Great Depression as the New Deal sought to create numerous new administrative agencies.

### LEGAL FOCUS—CASE

In the midst of the 1930s depression, Congress enacted the National Industry Recovery Act (NIRA). The NIRA authorized the president of the United States to approve codes of fair competition that had been prepared and submitted to him by trade and industry associations or had been created upon the president's own initiative. The act provided that violations of these codes would be punishable as crimes. The Schechter Poultry Corporation was held criminally liable for violation of one such code, the "Live Poultry Code." Schechter challenged the code by challenging the constitutionality of Congress's delegating to the president the power to approve codes. How did the Supreme Court rule?

*Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837 (1935).

A unanimous Supreme Court held that the delegation by Congress to the president in the NIRA was too broad, because it allowed the president to impose any regulation he chose. This "unfettered" power was "an unconstitutional delegation of legislative power." *Schechter* is a rare overturning of a delegation by Congress, but it helped define how and when Congress could delegate its power without running afoul of the U.S. Constitution.

### LEGAL FOCUS—BACKGROUND

The creation of the Federal Trade Commission (FTC) is an example of a lawful delegation by Congress. The FTC was created by the Federal Trade Commission Act of 1914, which prohibits unfair and deceptive trade practices. The act describes the procedures the agency must follow to charge violators, provides for the judicial review of agency actions, and grants the power to investigate and to make rules and regulations. The FTC may force a company to stop an advertising campaign if it considers the advertisements to be "unfair or deceptive" to consumers. The FTC may even require a company to make announcements or advertisements to correct the false statements made in earlier advertisements.

## State Administrative Agencies

**California** The state of California has an administrative bureaucracy that many argue rivals the federal government's. In a state famous for its protective statutes, numerous agencies exist to carry out those laws. California also has its own Administrative

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Procedure Act (CAL-APA). Yet another administrative agency was created just to enforce the CAL-APA, the Office of Administrative Law (OAL). Like the federal government, California has an Environmental Protection Agency (CAL-EPA), numerous other environmental protection agencies, health and welfare agencies, business and trade regulation agencies, and consumer protection agencies. In California, there is a state-equivalent agency for nearly every federal agency. In many cases, California law more strictly regulates economic transactions than federal law does. For instance, the U.S. Environmental Protection Agency might allow a particular chemical to be discharged into the ground whereas the California Environmental Protection Agency might prohibit it. Such duplicative state law is generally allowed by federal statute when it does not unduly interfere with federal regulation of interstate commerce.

**Iowa** California's administrative law contrasts greatly with Iowa's. Iowa has its own version of the APA, but it has a simpler and smaller labyrinth of administrative agencies. Less duplication exists with federal agencies. Still, there is a significant administrative law system within the Iowa state government. Iowa regulates business, protects the environment, and regulates its professional trades. It also has administrative agencies for building code development, organized labor, and employment disputes.

# LEADING AREAS OF ADMINISTRATIVE LAW

Administrative law touches upon nearly every aspect of government; moreover, administrative agencies of the federal and state governments do the majority of the work of enforcing the law in several major areas. This section introduces several substantive areas of administrative law. Every agency was created in response to a specific need. Gradually, as government regulation became more common, and perhaps more expected, the *laissez-faire* (French: "allow to act") capitalism conceived by the early economist Adam Smith was gradually replaced with a regulated economy.

## Business Finance

By definition, in a free economy, the government does not interfere in business at all. But the health and function of business can greatly affect the economy and the general welfare of the United States; left unregulated, business practices have shown themselves to be highly vulnerable to abuse and exploitation with drastic consequences for the economy as well. Since the Great Depression of the 1930s, the United States has maintained a strong regulatory oversight of the financial sector, including investment, banking, securities, accounting, and trading. Three large and important agencies in this arena are the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), and the Federal Reserve Board.

The SEC (1934)[5] regulates organized securities markets and the securities traded there. It also thus regulates every company that uses securities for finance purposes. Because *security* is defined broadly, the SEC reaches many investments beyond traditional securities like stocks and bonds. The SEC controls and regulates the dissemination of information by regulated companies and investigates and prosecutes violations of securities laws and regulations. Traders, brokers, and other professionals who work in securities are regulated by the SEC as well. The CFTC (1974)[6] is similar to the SEC but focuses on the commodity futures and options markets. The Federal Reserve Board (1913)[7] supervises and regulates most of the nation's banks and helps to ensure a stable money currency to hedge against inflation and to control the flow of money in the economy.

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**LEGAL FOCUS—BACKGROUND**

In 2001, Enron, a large energy and technology company, collapsed under admissions of manipulating debt and hiding losses of billions of dollars. MCI, a communications company, followed suit in 2002. HealthSouth was next in 2003. Eventually, the senior officers of Enron and MCI were convicted of securities crimes, but the CEO of HealthSouth, Richard Scrushy, escaped criminal liability. The political and economic fallout from these collapses has been tremendous. A new law, the Sarbanes-Oxley Act, was created, which requires CEOs and CFOs to certify periodic disclosure reports filed at the SEC.[8]

## Communications

The roaring economic growth of the 1990s was fueled in part by tremendous growth in the communications sector, from cell phones to the Internet, from radio to cable. The Federal Communications Commission (FCC) is the agency in the center of this sector. Created in 1934[9] to regulate the then-stressed radio communications business, the FCC regulates the companies that own, operate, or trade capacity in wire and radio communication systems. These include common carriers such as the telephone and telegraph services. Much regulation of the communications business deals with the dividing up of the limited electromagnetic spectrum in the bands used for communication. In that sense, cellular telephone systems are the latest growth industry that the FCC has managed. Without a regulating central agency, the communication industry would be chaos at best and at war at worst. Currently, the Internet is not directly regulated in the United States. By virtue of regulating the telephone industry and cable industries, the FCC is the closest any governmental office comes to regulating the Internet.

A key function the FCC performs is the issuance of licenses to radio, telephone, and cellular telephone systems. The FCC assigns operating frequencies, where appropriate, and investigates and enforces regulations covering, for example, the use of unauthorized frequencies. In the context of Janet Jackson's "wardrobe malfunction," you learned of the FCC's efforts to regulate the content of radio and television and establish and enforce minimum decency standards.

## Employment Practices

Employment law is substantially affected by administrative law. The government regulates working conditions, pay, hiring and firing of employees, health, pension and retirement benefit plans, and organized labor and its relationship with employers. Many disputes involving the employer–employee relationship are resolved through state or federal labor boards.

The National Labor Relations Board (NLRB) was created in 1935[10] to supervise the union–employer relationship. Among other functions, the NLRB is charged with preventing unfair labor practices.

Some state labor boards focus on labor disputes such as overtime pay. Employees are often surprised to find out they can file a complaint with the local labor board and have their matter heard in an administrative hearing rather than file a lawsuit.

The Equal Employment Opportunity Commission (EEOC) was created in 1964[11] to investigate and resolve complaints of discrimination filed by employees. The Employee Retirement Income Security Act (ERISA) was enacted in 1974 to regulate pension and retirement benefit plans following the prominent failure of numerous plans. The Pension and Welfare Programs Office of the Labor Department enforces ERISA.

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**EXHIBIT 5.4** EPA Statement of Purpose

The EPA's purpose is to ensure that:

- All Americans are protected from significant risk to human health and the environment where they live, learn, and work.
- National efforts to reduce environmental risk are based on the best available scientific information.
- Federal laws protecting human health and the environment are enforced fairly and effectively.
- Environmental protection is an integral consideration in U.S. policies concerning natural resources, human health, economic growth, energy, transportation, agriculture, industry, and international trade, and these factors are similarly considered in establishing environmental policy.
- All parts of society—communities, individuals, businesses, state and local governments, tribal governments—have access to accurate information sufficient to effectively participate in managing human health and environmental risks.
- Environment protection contributes to making our communities and ecosystems diverse, sustainable, and economically productive.
- The United States plays a leadership role in working with other nations to protect the global environment.

*Source:* See http://www.epa.gov/history/org/origins/mission.htm.

## Environment

Government protection of the environment began with agencies such as the Environmental Protection Agency (EPA), established in 1970.[12] Numerous laws protect the environment and restrict what individuals, property owners, and businesses can and cannot do that might affect the health of the environment. The Endangered Species Act, the National Environmental Protection Act, the Clean Air Act, and the Clean Water Act are just a few of the many statutes that obligate numerous agencies to work vigorously to protect the environment. Besides the EPA, other agencies that work to enforce these and other environmental laws include the U.S. Fish and Wildlife Service, the Bureau of Land Management, and the National Forest Service. Many state agencies are delegated authority to enforce federal environmental protection laws.

The EPA is the single agency at the core of environmental protection. Exhibit 5.4 is the formal statement of the EPA's purpose. Through the EPA and affiliated federal and state agencies, the government strives to reduce water and airborne pollution, clean up contaminated land, reduce destruction of habitat, and save species from extinction. Most of this work is accomplished by controlling development and enforcing regulations against violators. Nearly every environmental protection statute requires a tremendous amount of detail in the form of regulations to make it effective. For instance, to enforce the Clean Air Act, the EPA had to establish standards for healthy air. Today, a hot political topic is global warming. One question is whether the EPA has the authority to and will directly regulate carbon dioxide emissions, the largest contributor to global warming.

### LAW AROUND THE WORLD

#### Environmental Law

Environmental law is primarily managed in the United States by administrative agencies. This is true in other countries as well. Environmental issues, however, often know no boundaries. Air and water pollution, in particular, cross international borders constantly. The concern over global warming and its potential cause, greenhouse gases, represents the epitome of this international issue. Once produced, greenhouse gases proceed into the atmosphere where they mix with greenhouse gases from all countries. Action taken by an environmental administrative agency to attempt to control a

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national environmental issue may be futile if a significant cause of the issue is located outside of its jurisdiction. International cooperation is thus necessary, but not all countries have environmental agencies like the United States.

In China, where rapid economic growth with little regulation is beginning to take a toll on environmental qualities, numerous environmental laws have been enacted. The administrative agency tasked with enforcing many of these laws is the State Environmental Protection Administration (SEPA). In December 2004, SEPA stopped construction at 30 large industrial projects to require changes and reforms to reduce the environmental effects of those projects. Stories abound, however, of rampant defiance of environmental laws because of a lack of administrative resources to enforce them.[13]

## Energy

The United States consumes more energy per capita than any other nation. It relies primarily upon fossil fuels (oil, natural gas, and coal) and to a smaller extent on hydroelectric dams and nuclear, geothermal, solar, and wind power. The United States is highly dependent on foreign sources of fossil fuels such as oil from the Middle East and natural gas from Canada and Mexico. About one-third of the oil consumed in this country is used in the transportation sector. This foreign dependency, combined with the core economic need for an adequate, safe, and reliable supply of energy, has led to the creation of agencies at both the federal and state levels. Further complicating the situation is that nearly all energy consumed in the United States has environmental impact considerations, thus drawing federal and state environmental agencies into the energy sector.

The Federal Energy Regulatory Commission (FERC), created in 1977,[14] is responsible for regulating electricity generation and transmission, numerous federally owned large hydroelectric facilities, and natural gas and oil production and transmission. Nuclear energy is regulated by the Nuclear Regulatory Commission (NRC), established in 1974.[15] The NRC licenses and supervises all nonmilitary nuclear power plant, research, test, and training reactors. It is also responsible for regulating all medical, academic, and industrial uses of nuclear materials.

## Free Enterprise and Healthy Competition

The United States was founded on the modern economic thought of Adam Smith. Adam Smith promoted the idea that the invisible hand of the market would naturally guide a capitalistic economy far better than the artificial efforts of government ever could. That model survived intact only briefly, as the United States steadily found circumstances where the economy was not functioning adequately. In every instance, the solution involved new laws or regulations designed to protect competition from itself.

The chief federal administrative agency tasked with protecting competition is the Federal Trade Commission (FTC), established in 1914.[16] Another agency that regulates in this area is the Securities and Exchange Commission, with its supervision of the financing of business. The primary concern of the FTC is controlling unfair competition by administering various antitrust statutes. *Antitrust* describes government efforts to control the collusion of businesses to manipulate markets and also the development and wielding of market power by gaining monopoly status. The FTC shares responsibility with the Justice Department in this area.

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**LEGAL FOCUS—CASE**

The Superior Court Trial Lawyers Association of Washington, D.C., (SCTLA) went on a one-month strike for higher wages (higher hourly rates). SCTLA members are criminal defense lawyers in private practice. They are registered with courts, indicating their availability to represent indigent defendants in cases assigned by the court.

After an investigation and hearing, the FTC ruled that the SCTLA boycott was illegal and barred any future similar action. The SCTLA appealed. A federal appeals court ordered the FTC to reconsider its decision and determine whether the SCTLA had sufficient control of the market to make its boycott anticompetitive. The FTC appealed to the U.S. Supreme Court. Should the FTC be compelled to reconsider its ruling?

*FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 110 S.Ct. 768 (1990).

No. The Supreme Court said, "The social justification[s] proffered for [this] restraint of trade … do not make it any less unlawful." The Court applied the toughest antitrust rule, the *per se* (Latin: "in itself") rule. This means that the Court recognized that some business activities, such as price fixing, are so anticompetitive that they are automatically (*per se*) prohibited. Thus, these activities do not require proof that conspirators (in this case, SCTLA members) had a motive, or the power, to control the market. The Supreme Court overturned the appeals court order and upheld the FTC ruling that the SCTLA strike was inherently illegal. Therefore, evidence of SCTLA power to control the market was not required.

### Other Areas of Administrative Law

Recall that administrative law is as vast as the subject of law itself. Thus, the foregoing discussion identifies only some major leading areas of administrative law. The transportation sector, medical facilities, and the licensing of the professional trades are all handled with administrative agencies. Welfare programs and other governmental benefits such as unemployment and disability insurance are supervised by administrative agencies. Suffice it to say that administrative law touches nearly every subject of law.

## AGENCY POWER, PROCESS, AND ACTION

You have learned that administrative law is vast and pervasive and the agencies that create and apply the law numerous. Now we study the basic ways in which agencies perform their duties and functions. As mentioned earlier, our focus is on the federal system. Most states have similar structures, processes, and rules.

Generally speaking, important agency actions are classified as rulemaking, investigation, or enforcement. Adjudication can be part of an enforcement proceeding. Exhibit 5.5 illustrates the relationship between agency actions and agency products. Rulemaking and adjudication are the two significant and powerful tools that an administrative agency wields to accomplish its purposes.

### The Independence of Agencies

It can be said that agencies act as "judge, jury, and prosecutor," a description that well describes the independent power and action of many agencies. It also illustrates what happens when powers from all three branches of the government are placed within one

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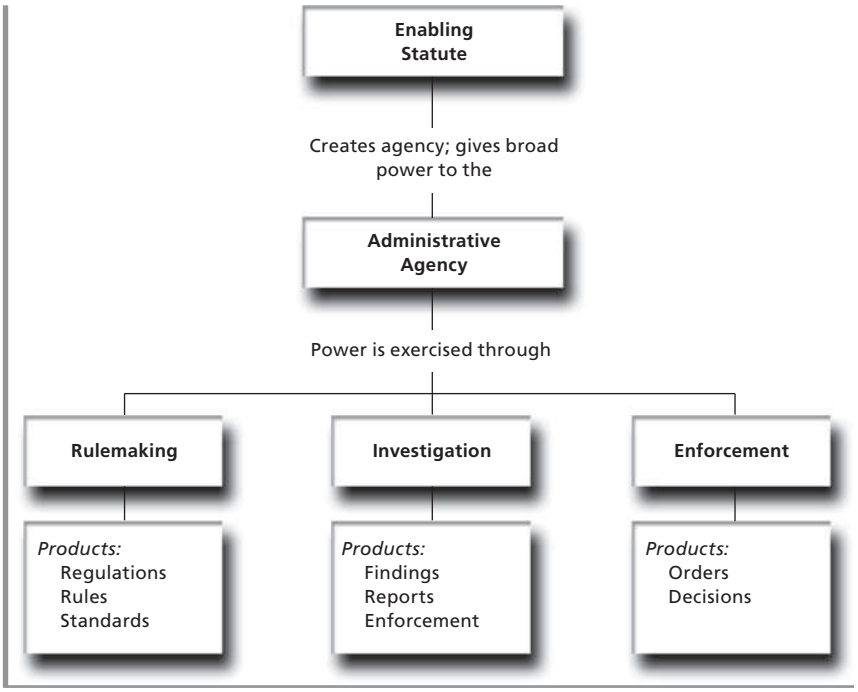
**EXHIBIT 5.5**
Agency Authority, Purpose, and Action




agency. Most independent administrative agencies and some executive departments make regulations to enforce statutes, choose how and to whom to apply those regulations, and then apply them. Agencies can fine, take property, issue permits, and give benefits to businesses and individuals. They do much of this without leaving the confines of their own buildings. Hence, they operate independently. Congress can do little to stop or control an agency's action. The president has some control over executive departments but little if any direct control over independent administrative agencies. The judiciary exercises some oversight/review of agency conduct, but as we will see later, that review is deferential. Thus, successful interaction with administrative agencies requires good working knowledge and management of agency structure and procedure.

## Regulations and Rulemaking

Rulemaking is, obviously, the making of rules or regulations. Rules and regulations are the laws made by agencies that "implement, interpret, or prescribe law or policy."[17] Historically, rules and regulations represented two distinctly different types of law. *Rules* are procedural laws that describe agency processes, such as the conduct of hearings. *Regulations*, on the other hand, are the laws that guide agency decision making, that determine rights and duties. Today, the distinction between rules and regulations has blurred significantly in many agencies, federal and state. Agencies often create a type of regulation known as a *standard.* Standards are regulations designed to establish norms or guidelines. Another type of regulation is an *interpretive rule*, which explains how an agency interprets a rule or intends to apply it. Interpretive rules do not have the force of law that other regulations do. They do, however, have considerable weight in court, should someone challenge an agency action or decision. Courts give significant deference to agency expertise. When interpretive rules are published, courts seldom apply a different interpretation.

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Below is a regulation passed by the EPA that prohibits ring carriers (the plastic that holds six-packs of soda together) unless they will degrade in accordance with specified testing standards.

**LEGAL FOCUS—EXAMPLE**

No processor or person shall manufacture or import, in bulk, ring carriers intended for use in the United States unless they are designed and manufactured so that the ring carriers degrade to the point of 5 percent elongation at break, when tested in accordance with [testing standards].[18]

Rulemaking has essentially the same effect as the enactment of a law by Congress and the president. For that reason, the process by which agencies establish regulations is similar to enactment of legislation, including meeting minimal constitutional requirements of due process. As regulations often affect personal rights, minimum standards of fairness apply, such as requirements of notice to affected parties. Numerous other requirements apply to agency rulemaking as well. Some of these are found in the APA and apply to most agencies, whereas some are specific to a particular agency and found in the enabling statute or other statutes.

Generally, the rulemaking process contains these fundamental elements.

1. **Notice.** Agencies must inform the affected public of the intended rulemaking. The APA requires that notice be provided in the *Federal Register* including the time, place, and manner of the rulemaking proceedings.[19] The *Federal Register* is a federal government publication, usually issued daily, that administrative lawyers and researchers subscribe to and scan for matters pertinent to their clients' or their own interests. The notice must also describe the interests being affected.
2. **Public comments.** Agencies must allow for public comments, usually orally at public meetings and in writing.[20] Sometimes a statute dictates that rules cannot be enacted without a public hearing. Hearings are often conducted around the country to receive comments. If a hearing is not required, the agency usually provides an address to which written comments can be sent.
3. **Publishing of the regulation.** Final federal regulations are printed in the *Federal Register*, taking effect 30 days after publication. After the 30-day period, the regulations are published in the Code of Federal Regulations (CFR). The CFR is a huge, growing document that includes all federal regulations. States often have an equivalent to the CFR for state regulations, though they are often organized differently. States may have an equivalent to the *Federal Register* as well.
4. **Response to comments.** Sometimes, agencies are required to respond in writing to significant comments made by other parties. When this is the case, the agency publishes a comprehensive explanation of how each comment was addressed.
5. **Written record.** An agency may be compelled to maintain a rulemaking record in case a regulation is challenged in the courts. The regulation process results in numerous written documents including the initial rulemaking notice, comments by parties and the agency, and a final rule, sometimes with an explanation.

Exhibit 5.6 provides a general outline of the rulemaking process for the Federal Communications Commission. The specific process in each federal agency varies slightly but stays within the requirements of the APA. Each state has its own version of the rulemaking process as well. The above components represented in Exhibit 5.6 are nearly always

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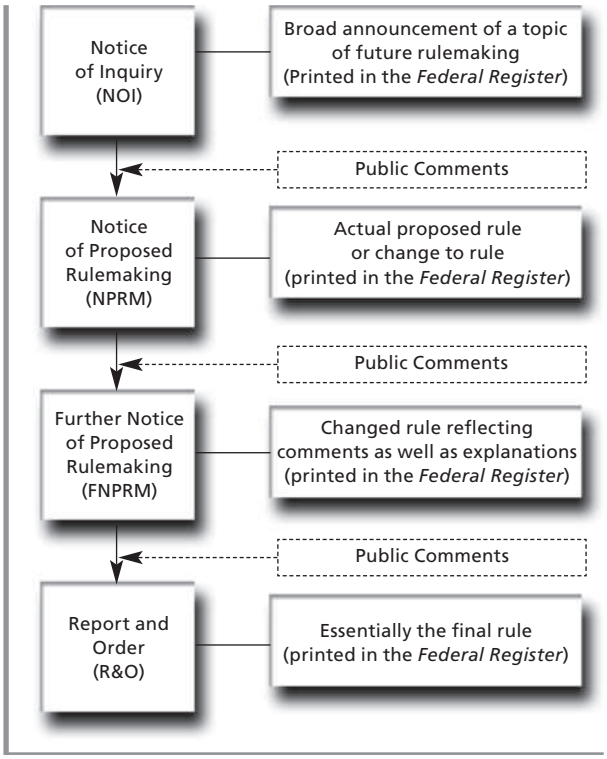
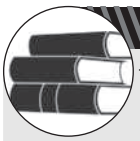
**EXHIBIT 5.6**
FCC Rulemaking Process




present, however, though perhaps with different names. Notice that public comments are invited after each step in the FCC's process. Note also the extensive use of acronyms (NOI, NPRM, and so on). Administrative agency rulemaking, like many governmental activities, uses acronyms liberally.



## LEGAL FOCUS—PROBLEM

The Internal Revenue Service decides to create a new regulation to discourage tax evasion. The new regulation, published in the latest edition of an IRS publication, requires any taxpayer who is selected for an audit to pay the IRS $10,000. Failure to do so will be considered an admission of illegal tax evasion. An enraged taxpayer challenges the regulation in the courts. Is it an enforceable regulation?

No. A court will conclude that the regulation was not properly created. The IRS did not provide public notice and did not receive and reflect on public comments. The IRS did not tailor the regulation to reflect legitimate public concerns or respond to comments. The alleged regulation was not published in the CFR. Even if the IRS had done all of these things, a court would likely conclude that the regulation exceeded the authority and power granted to the IRS. Judicial review of agency action is covered later in this chapter, but this is an easy case.

**Negotiated Rulemaking** Even with notice protections, the rulemaking process is often unsatisfactory to the agency or the interested parties. In some cases, the overwhelming

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amount of written information frustrates participants. Sometimes, the formulaic process of publish-comment-publish leaves interested parties feeling ignored. Often, different interests make comments reflecting opposite viewpoints on numerous issues. This leaves agencies in a difficult position: they cannot satisfy all parties. The formal rulemaking process limits give-and-take dialogue that might help find common ground. The Negotiated Rulemaking Act (NRA)[21] allows an alternative method for creating regulations that is designed to increase public involvement. Under the NRA, agencies can conduct a process of **negotiated rulemaking** wherein interested parties are invited to participate in the drafting of the rule. Thus, before the proposed rule is even published, the concerns of parties are already reflected in the regulation.

**negotiated rulemaking**
A process that brings together representatives of a rulemaking agency and stakeholders to jointly prepare the text of a proposed rule in a consensus-seeking negotiation before the agency formally submits the rule to the rulemaking process.

## Investigation

The work of an administrative agency is to execute its administrative tasks. That may involve the use of investigation, prosecution, negotiation, and any number of other administrative chores. Administrative agencies frequently respond to information regarding violations of regulations. Sometimes agencies conduct inspection programs wherein all registered or licensed individuals, businesses, or facilities are systematically and regularly inspected. Often agencies simply need information in order to fulfill their administrative tasks. When agencies seek information and engage in fact-finding activities, the term *investigation* is often used. Investigations often follow accidents or disasters that, in theory, the agency was tasked with preventing.

### MORALS AND ETHICS

In 2006, several mining accidents occurred, resulting in the death of many miners. One high-profile incident involved an explosion that took place during a night shift on January 2, 2006, at the Sago coal mine in West Virginia. Thirteen miners were trapped, and all but one died of exposure and suffocation. Following the disaster, a federal agency responsible for mine safety, the Mine Safety and Health Administration (MSHA), initiated an investigation into the causes of the accident. Some became openly critical of how effective MSHA had been in routinely investigating mine safety and assessing fines. Some called for the immediate closure of all mines until mine safety could be established. The Sago mine reopened, partially, on March 11, 2006.[22] Could MSHA have ordered all mines to shut down temporarily? If MSHA has such power, when should it exercise it?

Yes, even though the losses could have been significant.* Many safety-related agencies are given the power to act in emergencies with less procedure than in normal routine circumstances. The ability of an agency to suddenly and so drastically affect the rights of a business owner with little or no process is obviously restricted to areas involving public safety. An agency is often faced with a moral dilemma of choosing between injuring one person's business interests and protecting another person, often a worker, from possible harm. Uncertainty about the probability of harm frequently makes the decision difficult.

*As this edition was being prepared in early 2010, new mining incidents, including an explosion that killed many miners, brought attention upon the mining industry and its oversight again. It appeared that MSHA had indeed increased safety violation citations but that few had been resolved yet because the mining industry was routinely appealing each one and the review panel had been overwhelmed for several years.

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**subpoena**
An enforceable order for a witness to appear at a particular time and place to testify and/or produce documents in the control of the witness.

When parties fail to cooperate with an agency, or when an agency believes it is necessary, subpoenas can be used. A **subpoena** is an order to produce a witness or a thing. Using a subpoena, the administrative agency can compel testimony or production of documents, papers, records, and physical objects. Failure to comply with a subpoena can lead to a contempt citation punishable by fine or imprisonment.

**Search and Seizure by Administrative Agencies** Administrative agencies, like police authorities, have the power to search and seize property. Searches can be part of an investigation for an enforcement proceeding. Some inspections are used in place of formal processes, as when a person being inspected is shown a problem and allowed to fix it. Nevertheless, the search and seize power is useful, but it clashes with a person's right to privacy, due process, and freedom from self-incrimination under the U.S. Constitution. Because of that, the Supreme Court has ruled that administrative agencies must comply with the search and seizure provisions of the Fourth Amendment.[23]

The requirements for agencies are less stringent than those for criminal warrants, and warrants are not always required. Some agencies are not required by statute to obtain a warrant. Such warrantless searches have been challenged in courts. The Supreme Court has held that commercial property can be searched by an administrative agency without a warrant in certain situations involving heavily regulated businesses such as mining, liquor, or weapons.[24]

## LEGAL FOCUS—CASE

Craig and Marilyn Lessor of Union Grove, Wisconsin, were licensed dealers of long-eared, short-tailed lagomorphs—that is, rabbits. Their rabbitry was subject to regulation and inspection under federal law by government agents. They were found to have unlawfully refused to allow inspections of their rabbitry on five occasions and were fined by the department secretary. The Lessors sought judicial review of the sanction, claiming that by inspecting and attempting to inspect their rabbitry without a warrant, their right to be free from unreasonable searches guaranteed by the Fourth Amendment was violated. Was a warrantless inspection of their rabbit farm lawful?

*Lessor v. Epsy*, 34 F.3d 1301 (7th Cir., 1994).

The inspections were held to be lawful. Although the U.S. Supreme Court has yet to articulate clear guidelines for warrantless searches, generally these three guidelines apply:

1. Administrative searches of heavily regulated industries are less likely to require a warrant.[25] Industries such as nuclear power or mining fall in this category.
2. A warrantless search might be reasonable, or not even considered a search but merely an inspection.[26] In that case, it is lawful. When searches are narrowly tailored to minimize the invasion of privacy or not connected to enforcement-specific efforts, they are likely to be allowed.
3. A reasonable expectation of privacy increases the need for a warrant.[27] This last guideline is the most difficult. The privacy of one's home requires the highest protection from warrantless searches, but what if a regulated business is run from one's home? Most farmers would be among those so classified.

It should be clear that these general guidelines fall far short of covering all the possible situations involving warrantless searches. For that reason, warrantless searches often

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create the risk for the agency that an enforcement action may be overturned. The best way to avoid the issue is to get permission to search, something the Lessors refused to grant in the preceding example.

## Enforcement

After concluding an investigation, the agency may start an administrative action. These actions may be brought against individuals or organizations. Enforcements are used to gain compliance with the law. Sometimes, enforcement does not follow an investigation. Sometimes, private citizens and organizations are allowed under statute to initiate complaints precipitating the enforcement action. Usually, the agency has discretion to decline a complaint or dismiss it. In any case, the enforcement is brought by the agency itself.

In enforcement actions, the agency acts as prosecutor, judge, and jury. To protect persons subject to administrative investigations, there are procedural safeguards against possible abuse of power by the agency. When procedural safeguards are found inadequate, Congress may hold hearings and pass new laws constraining administrative powers.

Enforcement can take one of several paths. The problem might be resolved through negotiation between the accused and the agency. It might go to a hearing before an administrative law judge (ALJ). Finally, the full commission might review the ALJ's decision or act as the decision maker itself. Every agency has its own procedures, and enforcement processes vary significantly from agency to agency. The APA is silent on this topic, addressing only the adjudication aspect of enforcement.[28] As a result, when an individual faces enforcement proceedings, the first step is to seek assistance from a lawyer or consult the agency's regulations, or both. In any case, the individual should become knowledgeable about the agency's procedures.

Exhibit 5.7 shows a map of a generic agency enforcement process. Many administrative law practitioners advise that someone subject to administrative action attempt to negotiate an agreement in a cooperative manner early on in the process. As agencies have huge workloads, cooperative individuals can often obtain a reasonable negotiated settlement. If that fails, most agency enforcement processes will lead to adjudication, that is, a hearing. Sometimes, alternative dispute resolution programs are offered.

## Alternative Dispute Resolution

In the federal system, several statutes have authorized alternative dispute resolution (ADR) methods in agency processes. The 1990 Administrative Dispute Resolution Act was renewed by passage of the Administrative Dispute Resolution Act of 1996.[29] The ADR Act of 1996 expressly authorizes agencies to utilize ADR methods to supplement existing procedures. The act gives discretion to the agencies to choose how to use ADR but does require that all federal agencies develop an ADR policy, appoint and train a senior "dispute resolution specialist," and train key employees in ADR.[30] The ADR Act of 1996 added binding arbitration as a dispute resolution method available to agencies. In the future, it is likely that agency enforcement proceedings will offer negotiation, mediation, or even binding arbitration as an optional or perhaps mandatory step in the resolution processes. In any case, should ADR (if offered) fail to resolve a matter, the next step is adjudication.

## Adjudication

Most agencies provide a hearing as an alternative to a court action when a person is threatened with the loss of denial or some license, right, entitlement, or privilege.

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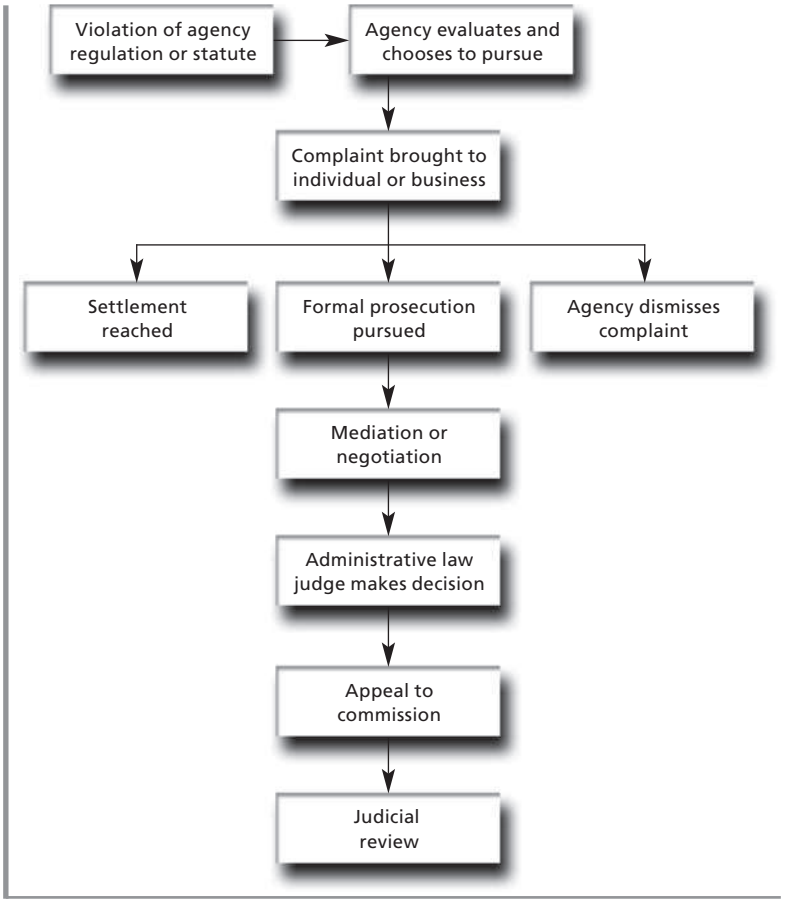
**EXHIBIT 5.7**
Administrative Agency Enforcement




**administrative law judge (ALJ)**
A government employee appointed to hear and decide matters in administrative agency hearings.

The agencies not only create rules consistent with their task but also enforce their rules through trial-like proceedings before an **administrative law judge (ALJ)**. An ALJ is a government employee, usually an attorney, appointed to hear administrative cases.* Sometimes, the appointed heads of the agency hear the cases instead of, or on appeal from an earlier decision by, the ALJ. At the state level, similar quasi-judges are often called *hearing officers* as well as ALJs.

The APA specifies minimum requirements for these hearings but does not mandate any particular procedure. Statutes and agency regulations usually specify hearings for proceedings involving rights, privileges, entitlements, or licenses. Constitutional due process requirements can often apply, requiring, at a minimum, notice and opportunity to be heard. A hearing helps ensure that those requirements have been met. Citizens, too, may request adjudication; for example, to appeal an agency's denial of their claim for government benefits (such as social security).

*Some ALJs are employees of the very agency prosecuting the case. When such is the case, safeguards are in place to separate the ALJ from the investigative and prosecutorial staff. Private communication between the ALJ and anyone who is a party to an agency proceeding while the matter is pending is forbidden.

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