

Sources and Types of American Law

When most of us conceptualize law, we focus on statutory or constitutional law, ignoring the source of law that has had the greatest impact on our legal history—common law. The concept of administrative law is rarely discussed and equity law is virtually unknown, except among legal experts. Yet these sources of law constitute *the law* as much as statutes do.

This chapter examines the sources and categories of American law from the U.S. Constitution's Bill of Rights to equity. Traditional categories of law, such as civil versus criminal and tort versus contract, are also distinguished as a background for later chapters that analyze specific court cases. But law is only part of the equation.

Chapter 4 is devoted specifically to *ethical dilemmas, issues and concerns in mass communications*, but all of the chapters go beyond the law to include discussions on ethics, which has become as important today as the law in news gathering and reporting. The public no longer expects the mass media to simply stay within the boundaries of the law but also to be objective and unbiased in their presentation of the news and to adhere to standards of professional conduct that ensure fairness. Polls consistently show that journalists are declining in stature, no doubt, to some extent, because of editorial lapses in recent years.

These include the erroneous calls made on election night 2000 in which nearly all of the major radio and television networks mistakenly declared that Al Gore had won the state of Florida and thus the presidency. Hours later, those same news sources mistakenly said that George W. Bush had won.¹ The media had relied upon data from exit polls and vote projections gathered by Voters News Service (VNS), a consortium formed after the 1988 elections. VNS included ABC, CBS, CNN, Fox, NBC, and the Associated Press and its subscribers such as the *New York Times*.

Following the 2000 election, several members of Congress made slightly veiled threats of governmental regulation but backed away after network executives vowed during Congressional hearings not to project winners until polls had closed in a

particular state. In spite of an expensive overhaul of its computer system, VNS was disbanded in January 2003.² By the 2004 presidential election VNS had been replaced by the National Election Pool formed by the same major news organizations that had been part of the original VNS consortium. Two major polling organizations—Mitofsky International and Edison Media Research—also participated in the exit polling.³ All of the news organizations were much more cautious in their projections based on the exit polls, waiting until several hours after most of the polls had closed to declare George W. Bush's re-election victory over Senator John Kerry. Nearly all of the polls had predicted a tight race up to election eve, but the incumbent President ultimately defeated Senator Kerry by more than 3 million popular votes and by 34 electoral votes.

However, there was one glitch that cast doubt once again on the reliability of the exit polls. Although the major news organizations had agreed not to announce the results of the exit polls until after the voting booths had shut down, the Internet was rife with exit polling results showing erroneously that Kerry was leading. Fortunately, the major television networks generally held back, avoiding prematurely reporting exit polling data.

Sony Pictures apologized after a film advertising executive for the company created a fictitious film reviewer ("David Manning") and included his fake comments (all of which were favorable, of course) in advertisements for Sony movies in a Connecticut newspaper in 2001. Editors were unaware that the reviews were fabricated.⁴ Some media outlets were criticized for publishing photos or broadcasting videos showing victims leaping to their deaths or being blown out of the New York World Trade Center buildings during the terrorist attacks on September 11, 2001. In the months prior to the attacks, U.S. Rep. Gary Condit (D-Calif.) was the subject of extensive publicity, much of it tinged with sensationalism, focusing on the nature of his relationship with former 24-year-old government intern Chandra Levy, who had been missing since May 1. Her body was found in a wooded area in the D.C. area about a year later.

In early 2002, the Pentagon announced that it was officially shutting down its short-lived Office of Strategic Influence which had been set up, according to media reports, to disseminate false news stories abroad supporting the war on terrorism.⁵ Several months later, the Associated Press fired one of its Washington, D.C., reporters after it was unable to confirm the existence of experts the reporter had quoted in 40 stories.⁶ Around the same time, the nationally syndicated and *Chicago Tribune* columnist Bob Greene was asked to resign after he confirmed he had an affair 14 years earlier with a 17-year-old high school girl who had been the subject of one of his columns.⁷ Interestingly, there was virtually no criticism of media coverage of the February 2003 explosion of the Columbia space shuttle in which all seven astronauts were killed just minutes before the ship's scheduled touchdown. Most of the coverage was subdued, although there were photos and videos of space helmets and covered human remains.

A month before the 2004 presidential election, CBS Evening News TV Anchorman Dan Rather reported in a *60 Minutes* segment that certain documents cast doubt on President Bush's service when he was a member of the Texas Air National Guard during his early adulthood. A short time later, Rather apologized because the documents were apparently fake, but he vowed not to resign as anchor despite

extensive criticism, especially from political conservatives. Three weeks after the election, the anchorman announced that he would step down on March 9, 2005, 24 years after taking the reins from Walter Cronkite.⁸

Criticism of the press has not focused solely on the electronic media. A *Chattanooga Times Free Press* reporter drew considerable criticism in late 2004 when he helped a soldier with questions that led to a verbal confrontation between U.S. Defense Secretary Donald Rumsfeld and the soldier.⁹ At a town hall meeting in Kuwait, the soldier questioned Rumsfeld about the lack of armor for military vehicles in the Iraq war. Journalists were not permitted to ask questions at the meeting, but embedded reporter Edward Lee Pitts discussed with two soldiers what questions to ask and how to get the attention of the Defense Secretary. According to press reports, Rumsfeld was thrown “off balance” by a question from one of the soldiers, including the applause it received from the other troops.¹⁰ In later reports, Pitts said he had simply suggested ideas and not prepped the soldier.

In a 2004 Gallup poll, fewer than one-fourth of those questioned said the ethical standards of reporters were high or very high.¹¹ A survey of 1001 adults commissioned by the Pew Research Center for the People & the Press in 2004 found that credibility ratings for both the electronic media and the print media have declined over the years. Much of the decline, according to the Center, can be attributed to “increased cynicism toward the media on the part of Republicans and conservatives.”¹² The ratings dropped for CNN as well as the major television networks and even declined for the venerable *Wall Street Journal*.

Combined with the results of an earlier poll indicating that more than half (53 percent) of the people in the country felt that the press has too much freedom,¹³ these findings spell bad news for the press. In the same earlier poll, fewer than two-thirds of those questioned (65 percent) said newspapers should be allowed to publish without governmental approval of stories, and a majority said the mass media should not be allowed to endorse or criticize political candidates. The survey did find strong support for freedom of speech as well as freedom of religion, although only 49 percent could name any of the specific rights under the First Amendment.¹⁴ In a poll the following year of reporters and news executives, 40 percent said they had either intentionally avoided publishing or toned down stories to help their own news organizations.¹⁵ Another poll during the 215th anniversary of the U.S. Constitution found that almost nine of ten respondents agreed with the underlying principles of the Constitution, but more than four in ten believed the Founding Fathers made freedom of the press too strong.¹⁶ According to a Knight Foundation-sponsored poll of 112,000 American high school students in 2005,¹⁷ almost 75 percent of them either did not know how they felt about the First Amendment or took it for granted. About the same percentage erroneously thought that flag burning was illegal and almost half erroneously believed the government had the right to restrict indecent materials on the Internet. An updated 2006 survey of almost 15,000 students and more than 800 teachers found a rise in support for First Amendment protection for the media and the right to report in school newspapers without approval from school officials. However, there was a slight increase in the number of students who thought the First Amendment, as a whole,

went too far in its rights.¹⁸ Against that backdrop, let's begin our look at the law with the supreme law of the land—the United States Constitution.

Constitutional Law

The Federal Constitution

More than two centuries ago, the authors of the U.S. Constitution debated numerous proposed provisions, few of which actually survived to become incorporated into the final draft. The general consensus among the delegates indicated that only a strong central government could overcome the serious problems that quickly doomed the Articles of Confederation. Although there was some strong disagreement, the representatives as a whole felt that such a strong central government had the best chance of maintaining unity and coordination among the individual states and commonwealths.

However, the conveners felt even more strongly that no one interest or person, including the head of state, should be accorded supreme authority over the federal government. Thus, a separation of powers, similar to the structure already established in a majority of the constitutions of the 13 original states, was created.

The idea of branches of government acting as checks and balances on one another had wide support at the constitutional convention in 1787. It still can claim strong backing today, but the implementation of that concept is as controversial now as it was then. Those concerns today are expressed in the form of complaints about gross inefficiency and erosion of states' rights and individual liberties.

The seriousness with which the U.S. Supreme Court¹⁹ approaches the balance of powers was brought into sharp focus in June 1998 when the Court struck down the Line Item Veto Act of 1996 as unconstitutional. In *Clinton v. City of New York* (1998),²⁰ the justices ruled 6 to 3 that the Act violated Article I, §7 (the Presentment Clause) of the United States Constitution. Under the Presentment Clause, "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States" for approval or disapproval. If the President disapproves a bill, he has to veto it so it can be "returned" to the two houses so they can have the opportunity to override the veto by a two-thirds vote. The Court said the Constitution requires the return of the entire bill, not individual items of "new direct spending" that the Line Item Veto Act allowed. Thus, line item veto authority could be delegated to the President, according to the Court, only through an amendment to the Constitution.

The Constitution both limits and defines the powers of federal government, but it is principally an outline of the structure, powers, limitations, and obligations of government. Most of the details are left to statutory, common, and sometimes equity law. The first ten amendments to the Constitution, commonly known as the Bill of Rights, clearly have had the most significant impact on individual privileges such as freedom of speech, freedom of the press guaranteed by the First Amendment, and freedom of religion.

The academic and professional debate over any significance of the position of the First Amendment in the Bill of Rights (i.e., whether first in line means that freedom of speech, press, and religion take priority over other rights in the Constitution when there is real conflict) has been intense in the last several decades. According to the general view of the U.S. Supreme Court during the so-called Burger era (when Warren Burger was chief justice of the United States, 1969–1986) and later during William H. Rehnquist’s reign (1986–2005), First Amendment rights are not to be favored over other individual rights granted in the Constitution. That view appears to have continued under current U.S. Chief Justice John Roberts who assumed office in 2005.

The Bill of Rights did not even become an official part of the Constitution until December 15, 1791, more than three years after the Constitution became official and more than two years after the first U.S. Congress had convened, the first president had been inaugurated, and a federal court system with a Supreme Court had been created by Congress.

Under Article V of the U.S. Constitution, amendments are added through a two-stage process: the proposing of amendments and their ratification. They may be proposed in one of two ways: (a) by a two-thirds vote in each house of Congress or (b) if two-thirds of state legislatures (today that would be 34 states) petition Congress to call a convention for the purpose of proposing amendments, Congress would be required to hold such a convention. All 27 amendments to the Constitution have been proposed by Congress. This nation has held only one constitutional convention.

Moving to the next phase, amendments can be ratified by two methods: (a) by approval of three-fourths (38) of state legislatures or (b) by approval of three-fourths of state conventions. Congress selects which method of ratification will be used and has chosen state conventions on only one occasion, to approve the 21st Amendment to repeal prohibition which was ratified in 1933. Congress was concerned that state legislatures that were often dominated by rural interests would not agree to repeal prohibition. It is important not to confuse a single, national convention to propose amendments that would be called if 34 states petitioned Congress with conventions in each state to ratify amendments that Congress has the option of requiring regardless of how amendments are proposed.

The last amendment to the Constitution to be ratified was the 27th Amendment in 1992: “No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.” This amendment was one of the twelve articles proposed by Congress in 1789, ten of which were ratified by the states and became the Bill of Rights.²¹ It forbids Congress from passing any pay raise or decrease that would take effect before the next election of the House of Representatives. Michigan signed on as the necessary 38th state for ratification on May 7, 1992, more than 200 years after the amendment was originally proposed. Four other amendments without specific deadlines are awaiting ratification, including one calling for a new constitutional convention that has now been approved by 32 of the required 34 states although 3 of the 34 have rescinded their approvals.

Prior to 1992, the 26th Amendment was the last to get the nod. It forbids states and the federal government from denying any citizen 18 years of age or older the right to vote in state and federal elections. All attempts to amend the Constitution since 1971 have been unsuccessful, including the so-called Equal Rights Amendment (“Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex”), which died in 1982 when it fell 3 states short of the 38 required for ratification within the time frame (including one extension) specified by Congress.

State Constitutions

State constitutions are also important sources of U.S. law because they serve as the supreme laws in their respective states except when they are in direct conflict with the U.S. Constitution or valid federal statutes (i.e., federal statutes that do not conflict with the U.S. Constitution and fall within a power enumerated under the Constitution or permitted under the preemption doctrine that allows the federal government to preclude state and local governments from directly regulating certain activities, such as interstate commerce, considered to be national in nature).²²

What happens if a federal regulation and state common law clash? The U.S. Supreme Court has generally been divided when this question has come before the Court. For example, in 2000, the Court held in a 5-to-4 decision that auto manufacturers could not be sued in state courts for not installing air bags in cars and trucks before the Highway Traffic Safety Administration required them to do so even though there was substantial evidence that air bags saved lives.²³ Three years later, however, the Court ruled unanimously that a state tort liability lawsuit against a boat engine manufacturer for not installing a propeller guard could proceed even though the company was not required to do so under the Federal Boat Safety Act nor by Coast Guard regulations.²⁴ The key difference between the two cases appears to be that the federal government specifically decided in the vehicle case *not* to impose a requirement but in the boat engine case had simply chosen not to make a decision. All of this illustrates how subtle and complicated interpretations of the preemption doctrine can be.

Most state constitutions require that a specified percentage (usually two-thirds or three-fourths) of those voting in that election approve any proposed amendments to the state constitution that are placed on the ballot after approval by the state legislature. Most state constitutions also provide for a state constitutional convention to consider amendments. Although the U.S. Constitution has never been rewritten, several states have approved new state constitutions. For example, the Georgia electorate approved a new state constitution in 1982; it became effective in 1983.

How does one find state and federal constitutional law? Tracking down the specific constitutions is as easy as a trip to a local library; knowing their meaning is another matter. Constitutions focus on the basic issues of government authority, functions, and organization, as well as fundamental rights and limitations. Their interpretation is often a burdensome task that state and federal courts must constantly tackle. Anyone attempting to ascertain the meaning of a state or federal constitutional provision must consult appropriate statutes because they often pick

up where the constitutions stop and yet cannot conflict with the constitutions and case law, where the courts have exercised the authority granted them to interpret constitutional law.

In *Marbury v. Madison* (1803),²⁵ the U.S. Supreme Court, in a landmark decision written by Chief Justice John Marshall, established the authority of the federal judiciary to determine the constitutionality of congressional actions, thereby effectively establishing the U.S. Supreme Court as the final arbiter or interpreter of the U.S. Constitution. The highest appellate court in each state (usually called the Supreme Court, although in some states such as New York the highest court may be called by another name) is generally the final arbiter of the meaning of that state's constitution.

Statutory Law

Laws in this country fall within a hierarchy of authority, with constitutional law at the top just above statutory law. Statutes take priority over all other types of law, except constitutional law. For example, unless a federal statute is determined to conflict with the U.S. Constitution by a court of competent jurisdiction (ultimately, the U.S. Supreme Court if it exercises its discretion to decide the case), that statute is presumed valid and preempts any conflicting administrative, common, or equity law—local, state, or federal.

Although the process of altering state constitutions and the federal constitution can be long and cumbersome, enacting statutes can be a relatively simple process despite the fact that committees and subcommittees often slow down the procedures. Today most law is statutory; statutes can deal with problems never anticipated by the framers of the Constitution. They can also be considerably more flexible because they have the ability to deal with future problems and very complex issues.

Legislative bodies—the sources of all statutes and ordinances—number in the thousands and include city councils, county commissions, state legislatures, and Congress. All possess, with constitutional and other limitations, the authority to regulate social actions that range from setting the maximum fine for a particular type of parking violation (although not for a specific offender) to ratifying an international nuclear arms agreement.

All statutes, whether civil or criminal, are compiled in some official form so that affected individuals and organizations can have access to them. The typical university law library or courthouse contains myriad volumes of these written laws. The most convenient way to locate a particular statute is to consult the specific code in which that type of statute is collected. For example, federal statutes can be found in the official *United States Code* (U.S.C.) and in two commercially published codes: *United States Code Annotated* (U.S.C.A.) and *United States Code Service* (U.S.C.S.).

These codified texts conveniently arrange statutes by subject matter (such as copyright, obscenity, criminal acts, etc.) rather than chronologically. State laws are

also codified under various names such as *[State] Revised Statutes* or *[State] Code Annotated*. Statutes can also be found chronologically by date of enactment in session laws. For example, federal session laws are compiled in *Statutes at Large*.

The role of the courts in statutory law is actually quite similar to that played in constitutional law. Contrary to popular belief, most statutes (state, federal, and local) are never challenged as unconstitutional. However, most courts have the authority to determine the constitutionality of statutes and, perhaps more significant, to interpret statutes. The federal courts, including the U.S. Supreme Court and most state courts, are prohibited from considering political questions because they can involve a usurpation of executive or legislative authority. Such disputes are characterized as “nonjusticiable” because they do not concern real and substantial controversies, but are merely hypothetical or abstract.

For instance, a U.S. District Court (the primary trial court in the federal system) could not determine in advance whether a proposed federal statute would be constitutional or unconstitutional even if Congress requested the court to do so. Even the U.S. Supreme Court, the highest appellate court in the country, could not entertain the case because there are no real parties in interest already directly affected by the proposed law.

Administrative Law

Although constitutional and statutory law prevail when they are in conflict with administrative law, administrative law is playing an increasingly important role as society grows more complex. Administrative law is quite simply that “body of law created by administrative agencies in the form of rules, regulations, orders and decisions.”²⁶ Examples of such administrative agencies at the federal level are the Federal Communications Commission (which has primary authority over nearly all forms of broadcasting and telecommunications, including commercial broadcasting, cable television, satellites, and interstate telephone communications), the Federal Trade Commission, the Interstate Commerce Commission, the Social Security Administration, the Veterans Administration, and the Homeland Security Department. Every state has similar agencies such as a department of transportation, an office of consumer protection, and an insurance commission.

Each administrative agency (whether state, federal, or local) was created by a legislative act or acts and is responsible for (a) implementing the so-called *enabling legislation* that created the agency, (b) creating rules and regulations, and (c) issuing orders and decisions to carry out the legislative intent of the statutes. Thus, these agencies typically perform both quasi-legislative and quasi-judicial functions (i.e., creating laws in the form of rules and regulations and applying the law through case decisions). Occasionally, administrative agencies lock horns with the legislatures that created them, such as the battle in the late 1970s between the Federal Trade Commission and Congress over proposed restrictions on television advertising aimed at young children

and the battle that began in 1996 over the Food and Drug Administration's proposal to regulate nicotine, and thus tobacco and tobacco products, as a drug.

Finding a specific administrative law, especially at the federal level, is a fairly simple task. If you know the approximate date a rule was promulgated, consult the *Federal Register* (Fed. Reg.), where federal administrative rules and regulations are published chronologically. Otherwise, check the *Code of Federal Regulations* (C.F.R.) under the specific topic.

Although most states publish their administrative rules and regulations in some official format, some do not. In the latter case, it may be necessary to contact the agency. Every state or local administrative agency is required, at a minimum, to make its rules and regulations available in some form so those individuals and entities it regulates will have constructive notice. In some cases, there may be a charge for the complete set of rules and regulations, although a few states provide a free set to anyone on request and many provide free copies to news organizations.

All federal administrative decisions (both interpretative and enforcement) are available from the agencies. Several agencies such as the Federal Trade Commission, the Federal Communications Commission, and the Interstate Commerce Commission publish their own rules; these are also available through commercial publishers. An excellent general source for federal administrative agency and major federal and state trial and appellate court decisions affecting mass communication is the unofficial loose-leaf service, *Media Law Reporter*, published by the Bureau of National Affairs (BNA). The BNA, Commerce Clearinghouse (CCH), and Prentice-Hall (P-H) publish a variety of loose-leaf reporters on a broad range of topics, including mass communications, copyrights, trademarks, and antitrust and trade regulations. These services are especially useful in updating the law because they are published on a regular schedule, usually weekly or monthly.

Common Law

When the United States declared independence in 1776, all of the statutory and case law of England and the colonies prior to that time became the common law. This type of law still exists today, although its significance has declined considerably over the decades.

Whereas written laws in 13th and 14th century England could handle most problems, such statutes could not deal adequately and effectively with all disputes. Gradually, with the support of the monarchy, English courts began basing some decisions solely on prevailing customs and traditions. These decisions blossomed into an expanding body of law that eventually became known as common law.

Inconsistencies naturally arose in this corpus of law because it was grounded in specific court decisions, rather than legislation. However, these conflicts were gradually ironed out as decisions by more influential courts became precedents that effectively bound other courts to follow certain recognized legal principles. As the British

colonists came to America, these precedents were generally accepted as American law as well. Thus, common law adhered to the doctrine of *stare decisis*.

Common law is often called “judge-made law” and “case law,” although these terms do not represent the total picture. At least in theory, judges do not make law; they merely decide or ascertain the appropriate law and apply it to the given situation. In other words, the role of the judge is to determine the specific legal principle or principles appropriate to the particular case at hand, whether based on constitutional, statutory, or common law. Critics sometimes characterize this responsibility as “discovering the law.” Common law is based on previous cases, if they exist, but statutory law and constitutional law are occasionally not based on prior decisions.

One way to understand the nature of the common law is to realize that this body of law fills in the gaps left by statutory and constitutional law but is *always* inferior to statutes and the Constitution. If a conflict occurs between common law and constitutional law or between common law and statutory law, common law gives way.

Tracking down common law is sometimes difficult. The only official source is court decisions, which are generally collected in two forms: case reporters, which are organized chronologically, and case digests, which are organized by topics. Every major federal court has at least one official or unofficial case reporter for its decisions. U.S. Supreme Court cases are officially published by volumes in *United States Reports* (U.S.) and unofficially in *Supreme Court Reporter* (S.Ct.) by West Publishing and in *United States Supreme Court Reports Lawyers' Edition* (L.Ed. and L.Ed.2d) by Lawyers Cooperative Publishing Company.

Official means the reporter was published with government approval. *Unofficial* reporters are usually more comprehensive and informative than the official reporters because they typically include the complete text of a decision plus useful annotations not found in the official reporters. When attorneys argue their cases in court, they use official reporters.

U.S. Court of Appeals decisions from all 12 circuits are published in the *Federal Reporter* (F.2d) by West. Prior to 1932, U.S. District Court decisions were also reported in the *Federal Reporter*. Since 1932, these decisions have appeared in West's *Federal Supplement* (F.Supp.). Most court decisions, whether state or federal, are not based on common law, and thus these reporters serve primarily as sources for cases dealing with statutory and constitutional law. Unfortunately, the only accurate and effective way to find the common law is by sorting through the cases in the reporters or digests when they are available or by searching through an electronic legal database service such as WestLaw or Lexis.

The highest appellate court in every state has at least one official reporter and most have at least one unofficial reporter. All but a few states also report cases for their intermediate appellate courts. Reporters generally are not available for trial level courts, although more populous states such as New York and California publish at least some trial court decisions.

Most state appellate court decisions can be found in regional reporters published by West. For example, Georgia cases are in the *South Eastern Reporter* and Kentucky

cases can be found in the *South Western Reporter*. As noted earlier, reporters organize cases chronologically. Cases are also compiled by topics in digests, which are convenient to consult because they are divided into hundreds of legal subjects. For example, West uses a Key Word scheme that makes cases very accessible.

A typical court decision, whether trial or appellate, usually touches on several topics and thus, if cited, can be readily tracked in a digest. Several digests are published for the federal courts, including *United States Supreme Court Digest* by West and *United States Supreme Court Digest, Lawyers Edition* by Lawyers Cooperative. Although these two digests contain only U.S. Supreme Court cases, summaries of decisions of all federal courts can be found in a series of digests published by West.²⁷

Equity Law

Although equity law falls at the bottom in the hierarchy of laws, it plays an important role in our judicial system, especially in communication law. In this country, equity law can be traced to British courts of chancery that developed primarily during the 14th and 15th centuries. Over the decades, aggrieved individuals found that courts of law (i.e., common law) were often too rigid in the kinds of actions they could consider and remedies they could provide. For example, courts of common law adhered to the maxim that damages (money) could right any wrong. In many instances, such as disputes over land ownership, damages simply were not adequate. Parties would then appeal to the king for justice because the sovereign was above the law. Eventually, the king created special courts of chancery that could be used when a remedy at law was not available or was inadequate or unfair. One of the great strengths of equity law was that it could provide prevention.

Courts of law and courts of equity were separate in England for many centuries, whereas today they are merged procedurally in the British courts and in all federal and nearly all state courts in the United States. Thus, plaintiffs seeking equitable relief generally will file suit in the same court as they would in seeking a remedy at law. In fact, the suit could include a request for relief at law and equity or for either (e.g., for equity or, in the alternative, for damages). However, in some states lower level or inferior courts have either limited or no power of equity (i.e., authority to grant equitable relief).

There are several major differences between equity law and common law that can be confusing to the uninitiated. Reporters, editors, and other journalists who cover the courts are often unfamiliar with these crucial distinctions, leading to inaccurate and sometimes downright misleading information in stories.

First, equity decisions are strictly discretionary. In many *civil actions* (this term is defined shortly), a court of law is required (usually by statute) to hear and render a decision in a particular case. However, courts of equity are generally not bound to hear any specific case. This discretionary power sometimes frustrates parties who feel they have strong justification for equitable relief, but are nevertheless unsuccessful in

convincing a court of equity to entertain the case. For example, the equity court may simply dismiss the case as more appropriate for a court of law or even grant damages at law while denying any equitable relief when both damages and an equitable remedy have been sought.

Second, there are certain recognized principles or maxims that equity follows but that are not applicable to actions at law: (a) “equity acts in personam,” (b) “equity follows the law,” (c) “equity looks upon that as done which ought to have been done,” and (d) “equity suffers not a right without a remedy.”²⁸

“Equity acts in personam” simply means that equity courts grant relief in the form of judicial decrees rather than the traditional damages granted in courts of law. For example, a court of equity could issue an injunction (the different types of injunctions are examined in Chapter 3) prohibiting a credit bureau from disseminating further information about a particular consumer or, conversely, ordering the bureau to disclose its records to the consumer whom it had investigated. That same court could order an employer to rehire a fired employee or command an individual or company to comply with the terms of a contract (i.e., granting specific performance). An example of the use of equity in communication law is a U.S. District Court ordering the Federal Trade Commission to reveal records requested by a media organization under the federal Freedom of Information Act.

“Equity follows the law” is the idea that equity courts will follow substantive rules already established under common law, where those rules are applicable. However, this does not mean that equitable relief must be analogous to relief at law. Equity simply takes over where the common law ends.

One of the real limitations (although some litigants may justifiably perceive it as an advantage) of equity is that it will render relief, especially in contractual disputes, based on that which would be available if the final actions anticipated by the parties occurred exactly as the parties would have expected them to be executed, not as the parties would actually have performed. This principle is congruent with the notion that equity decisions are based on fairness or justice, not according to strict rules of law. Thus, “equity looks upon that as done which ought to have been done.”

Even today, remedies at law can be harsh, unjust, inappropriate, or totally lacking, but “equity suffers not a right without a remedy.” Although generally only money damages per se are available at law, equity can be broad and flexible. For example, a client who contracted with an owner to purchase a unique or rare manuscript could seek an order for specific performance, which, if granted, would compel the owner to transfer possession and title (ownership) to the client. A court of law would be confined to awarding monetary damages even though money would clearly be inadequate.

Third, equity cases are usually not tried before juries. There are rare exceptions such as divorce cases in Georgia (remember divorces are granted in the form of decrees) and cases in which advisory juries are impaneled. For instance, in *Penthouse v. McAuliffe* (1981),²⁹ a U.S. District Court judge in Atlanta, Georgia, ruled that the X-rated version of the movie *Caligula* was not obscene because it had serious political

and artistic value and did not appeal to prurient interests. Bob Guccione, owner and publisher of *Penthouse* magazine, had purchased the rights to distribute the film in the United States. Prior to showing the film in Georgia, he sought in equity court a declaration that the film was not obscene and a permanent injunction prohibiting the county solicitor general (prosecuting attorney) from bringing criminal suit against him or anyone else involved with distributing or showing the film.

On the advice of the jury that viewed the movie and heard the evidence presented by attorneys for both sides, the judge declared the film not obscene. (The judge did not grant the request for the injunction because he felt declaring the movie not obscene was tantamount to preventing any criminal actions against it.) Obviously, Judge Richard C. Freeman was not bound by the advice of the jury (which can be impaneled in such cases under the Federal Rules of Civil Procedure). However, he apparently felt this body of citizens was in the best position of evaluating whether the work violated contemporary community standards (a finding of fact under obscenity laws). Juries may also be used in those cases in which the primary issue to be decided is one of law, although collateral issues and/or relief sought may be in equity.³⁰

Finally, court procedures in equity courts differ somewhat from those in courts of law, although equity and common law courts have been merged. Journalists must understand these distinctions when covering equity cases. A number of excellent references on equity are available, including Dobbs and Kavanaugh's *Problems in Remedies*³¹ and Shoben and Tabb's *Remedies*.³²

Civil versus Criminal Law

One of the most confusing concepts in our judicial system is civil law. The U.S. judicial system is based on common law, whereas many other Western countries such as Germany and France as well as the state of Louisiana have judicial systems based on a civil code. Most of the civil code systems can trace their origins to the Roman Empire—in particular, the Justinian Code (A.D. 529) and its successors (compiled into the *Corpus Juris Civilis*).

The civil law of France was known as the *Code Civil*, which later became the *Code Napoleon*, from which most of the Louisiana Civil Code is derived. There are other types of judicial systems, such as that of Vatican City, which is based on so-called ecclesiastical law or *religious* or *church law*. Iran's law is also primarily ecclesiastical.

The confusion over civil law arises from the fact that legal actions in our common law system can be either civil or criminal. *Civil law* or action in this sense refers to that body of law dealing with those cases in which an individual or legal entity (such as a corporation, partnership, or even governmental agency) is requesting damages or other relief from another individual or entity. Examples of civil actions are divorce, child custody, libel (except criminal libel), invasion of privacy (in most instances), and copyright infringement. The vast majority of court cases are civil, although criminal cases tend to attract the most attention in the mass media. A local,

state, or federal government can bring action against an individual or organization for the commission of a crime or crimes such as murder, burglary, rape, and assault. (Assault can sometimes be a civil action as well.) The judicial processes involved in criminal and civil cases differ substantially. Both state and federal courts have separate rules of procedure and separate rules of evidence in civil and criminal cases.

Whether a case is civil or criminal is not always readily apparent from the line-up of the litigants. Whereas the government (local, state, or federal) is always the plaintiff (the party bringing the suit) in criminal cases, the government can be a plaintiff or defendant (the party against whom the action is brought) in a civil case. One easy way to distinguish the two is to look at the possible result if the defendant loses. An individual can rarely be incarcerated in a civil action, except for civil contempt of court. In contrast, the major objectives in a criminal case are to determine guilt or innocence and then punish the guilty. Punishment can include fines, incarceration (jail and/or prison), and even execution for the commission of certain felonies. The primary purposes in civil actions are to determine the liability of the defendant and provide relief, when warranted, for the aggrieved plaintiff(s). Of course, relief in a civil case can also include equity. Punishment can be meted out in civil cases in the form of punitive damages (usually for intentional torts), but the punishment would not include incarceration (except for civil contempt).

The O. J. Simpson cases are prime illustrations of how criminal and civil law intersect and yet have major differences. In July 1995, Simpson was acquitted of the murders of Nicole Brown Simpson and Ronald Goldman. The prosecution in the case had to prove that Simpson, the defendant, was guilty *beyond a reasonable doubt*. Under California law, the jury had to render a unanimous verdict. Simpson could not be forced to testify in the criminal case because of his 5th Amendment right (“nor shall [any person] be compelled in any criminal case to be a witness against himself”), and he chose not to take the witness stand. The trial was held in Los Angeles where the crimes occurred. By contrast, in the civil case in which Simpson was tried and found liable in February 1997 for the wrongful deaths of the same two victims, the plaintiffs had to prove the defendant liable only by *preponderance of the evidence*. Although the verdict of \$8.5 million in compensatory damages for the Goldmans was unanimous, only 9 of the 12 jurors had to agree on the verdict. In fact, the award of \$25 million in punitive damages for the Goldmans and the Browns was not unanimous. Ten of the 12 jurors agreed to award the two families \$12.5 million each.

During the civil trial, Simpson had to testify because he could no longer assert his 5th Amendment rights. (These rights apply only in criminal cases.) Also, in the civil case, Simpson faced no criminal punishment *per se*; he merely had to pay damages for the wrongful deaths.

Because of his 5th Amendment right not to have to face double jeopardy (“nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb”), Simpson’s acquittal in the criminal trial meant that he could not be imprisoned even when found liable for the wrongful deaths in the civil case, but the double jeopardy rule does not prevent a defendant from being tried in a civil case that involves the same set of facts for which he or she has been found not guilty of criminal liability. Furthermore, acquittal in the first case did not mean that new evidence could not

be introduced in the second trial, as witnessed by the 30 photos presented in the wrongful death trial that showed Simpson wearing Bruno Magli shoes. There were other differences between the two trials, including the sites for the trial (Los Angeles versus Santa Monica) and the status of cameras in the courtroom (present in the criminal case but banned in the civil trial), but these were not due to the fact that one action was criminal and one was civil.

The Simpson criminal trial apparently had a particularly negative impact on public perceptions of the criminal judicial system. An estimated 5 to 15 million people watched at least some of the trial each day on one of the three cable networks carrying the trial live—Cable News Network, E! Entertainment, and Court TV (now known as truTV). An *American Bar Association Journal* poll in April 1995 revealed that the percentage of individuals who had no confidence in the criminal judicial system increased from 28 in 1994 to 45 percent in 1995.³³ Almost three-fourths of the respondents predicted the trial would result in a hung jury, and only 5 percent said Simpson would be found guilty.³⁴

The Simpson criminal trial has had an impact on subsequent, highly publicized trials such as the Scott Peterson trial in 2004 in which Peterson was found guilty of first-degree murder in the death of his pregnant wife and of second-degree murder in the death of their unborn son. Peterson was sentenced by the judge to death after a jury recommended the punishment. The judge barred cameras in the case, but he did allow a live audio feed of the jury's verdict.

In a case with many parallels to the Simpson trials, 72-year-old Robert Blake (a child actor in the *Our Gang* TV series and later an adult actor in *Baretta* on network television) was acquitted in 2005 of the murder of his wife four years earlier. Later in the same year, Blake was found liable to the tune of \$30 million by a jury in a civil lawsuit filed on behalf of his wife's four children. Neither Simpson nor Blake testified at their criminal trials, although both had to testify at their civil trials.³⁵

Simpson wrote a book in 2006 entitled *If I Did It* in which he discussed hypotheticals how he would have committed the murders if he had been the murderer. After an intense uproar over the announcement that the book would be published and an interview with Simpson would be broadcast on Fox television, Fox and the publisher cancelled the book's publication and the interview. In 2007 the Goldman family purchased the rights to the book from a court-approved trustee handling Simpson's bankruptcy proceedings. The Goldmans purchased all rights to the book, including the copyright and media and movie rights.³⁶

Under a bankruptcy settlement reached in 2007, a federal judge awarded Nicole Brown Simpson's family, the Browns, a portion of the first 10 percent of gross proceeds from the book, and the Goldmans the rest. The Browns had won a \$24 million wrongful death case against O. J. Simpson in the past.³⁷

Torts Versus Contracts

Civil actions (as defined earlier) are generally classified as arising either *ex contractu* (breach of contract) or *ex delicto* (tort). For example, a publisher who failed to properly (i.e., in good faith) market an author's work after making a binding promise to

do so could be held liable for damages at law to the author or, if warranted, ordered to perform the terms of the contract (specific performance). Such actions would be classified as *ex contractu* (breach of contract). A newspaper that published false and defamatory information about an individual could be held liable for harm to the person's reputation. Such an action would be *ex delicto* (tort).

A *tort* is simply "a private or civil wrong or injury, other than breach of contract, for which the court will provide a remedy in the form of an action for damages."³⁸ The three basic elements of any tort action are (a) a legal duty owed a plaintiff by the defendant, (b) infringement on a legal right of the plaintiff by the defendant, and (c) harm resulting from that infringement.

Summary

There are five major categories of law under our common law judicial system that form a hierarchy of authority: *constitutional law* is at the top, followed by *statutory law*, *administrative rules and regulations*, *common law*, and, finally, *equity*. The courts play a major role in the development of each type of law. Two of the most important roles are interpreting constitutional and statutory law and determining the constitutionality of statutes and administrative law.

The task of tracking down a particular law can range from simply reading the U.S. Constitution or a state constitution to getting a copy of a local ordinance. It is also important to check an official or unofficial reporter or digest and read the case law, especially that of higher appellate courts such as the U.S. Supreme Court and the highest appellate court in a particular state.³⁹

Civil cases are generally those in which a *plaintiff* (an individual, organization, or government agency) requests damages and/or equitable relief from a *defendant*. Such cases can be either *ex contractu* (breach of contract) or *ex delicto* (tort). When the state (government) brings action against an individual or organization for the commission of a crime or crimes, the case is known as a *criminal suit*; penalties can range from a small fine to incarceration or even death for certain felonies.

Endnotes

1. Bush was ultimately declared the winner but not until December 12 when the U.S. Supreme Court ruled in a *per curiam* opinion in *Bush v. Gore*, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388, that a hand recount ordered by the Florida Supreme Court in Miami-Dade County was unconstitutional.
2. Jim Rutenberg and Felicity Barringer, *Joint Service for Exit Polls Shuts Down*, New York Times, Jan. 14, 2003, at A23.
3. David Bauder, *PTV News Subtly Leaves the Exit Polls to the Internet*, Lexington (Ky.) Herald-Leader (Associated Press), Nov. 3, 2004, at A13.
4. See *Sony Apologizes to Paper for Fake Movie Critic*, 89 QUILL 43 (July/Aug. 2001).
5. Matt Kelly, *Pentagon Closes New 'Misinformation' Office*, Lexington (Ky.) Herald-Leader (Associated Press), Feb. 27, 2002, at A3.
6. *Reporter Who Quoted 'Experts' Fired*, Lexington (Ky.) Herald-Leader (Associated Press), Oct. 22, 2002, at A5.

7. Amanda Ripley, *Bob Greene Gets Spiked*, Time, Sept. 30, 2002, at 58.
8. See Jill Vejoska, *Rather to Sign Off in March*, Atlanta Journal-Constitution, Nov. 24, 2004, at A1.
9. See John Cook, *Reporter Planted Soldier's Question*, Lexington (Ky.) Herald-Leader (Chicago Tribune), Dec. 10, 2004, at A1.
10. *Id.*
11. See Kelly McBride, *Journalists: More Ethical Than People Realize*, Poynter Ethics Journal (at Poynteronline), Dec. 19, 2004.
12. *News Audiences Increasingly Politicized*, Pew Research Center for the People and the Press Biennial News Survey, June 2004, at 40.
13. See Marta W. Aldrich, *Americans Say Press Has Too Much Freedom, Survey Shows*, Lexington (Ky.) Herald-Leader (Associated Press), July 4, 1999, at A15, and Paul McMasters, *A First Amendment Survey Brings Bad News for the Press*, 23 Brechner Rep. 4 (Oct. 1999).
14. *Id.*
15. *Poll: 4 Out of 10 Journalists Admit Avoiding Stories or Softening Tone*, Lexington (Ky.) Herald-Leader (Associated Press), May 1, 2000, at A5.
16. The poll was conducted in July 2002 for the National Constitution Center. See Steven Thomma, *Most People Vague on Constitution's Content*, Lexington (Ky.) Herald-Leader (Knight Ridder), Sept. 17, 2002, at A6.
17. *Future of the First Amendment: What America's High School Students Think About Their Freedoms*, The John S. and James L. Knight Foundation, Jan. 2005 (study conducted by David Yalof and Kenneth Dautrich).
18. *Id.* September 2006 survey update.
19. The official name of the Supreme Court is "Supreme Court of the United States." To save space and make for easier reading, the generic name, "U.S. Supreme Court," is used throughout this textbook, but be aware that this is *not* the official name.
20. *Clinton v. City of New York*, 524 U.S. 417, 114 S.Ct. 2091, 141 L.Ed.2d 393 (1998).
21. *DeBenedictis, 27th Amendment Ratified*, 78 A.B.A. J. 26 (Aug. 1992).
22. Preemption is a U.S. Supreme Court doctrine derived from the supremacy clause of Article VI of the U.S. Constitution, which reads: "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 notwithstanding."
23. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000). See also David G. Savage, *Tort Lawsuit Cruises Along*, 89 A.B.A. J. 28 (Feb. 2003).
24. See *Sprietsma v. Mercury Marine*, 122 S.Ct. 2585, 153 L.Ed.2d 776 (2002). See also Savage, *supra*, note 14.
25. *Marbury v. Madison*, 5 U.S. 137, 2 L.Ed. 60, 5 Cranch 137 (1803).
26. Henry Campbell Black and Brian A. Garner (eds.), *Black's Law Dictionary* 43 (7th ed. 2000).
27. An excellent resource on how to conduct legal research in media law is Carol Lomicky and Geertruida's *A Handbook for Legal Research in Media Law* (Blackwell Publishing, 2005). This comprehensive text covers in clear detail how to gather and analyze facts, identify and organize legal issues, find the law, update the law, and conduct computerized legal research.
28. *Black's Law Dictionary*, 484–485.
29. 610 F.2d 1353.
30. In *Ross v. Bernhard*, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970), the U.S. Supreme Court held that a jury trial is required under the Seventh Amendment when the underlying nature of the issue at hand is one of law. Earlier (1959) the court ruled, in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988, that when there is a legal issue that involves both relief at law and in equity, the legal issue must be tried first with a jury before the judge can decide the equitable issue.
31. Foundation Press (2nd ed. 1995).

32. West Wadsworth (2nd ed. 1993).
33. See Steven Keeva, *Storm Warnings*, 81 A.B.A. J. 32 (June 1995).
34. *Id.*
35. See Andrew Blankstein, *Civil Trial Jury Finds Robert Blake Liable for Wife's Murder*, Lexington (Ky.) Herald-Leader (Los Angeles Times), Nov. 19, 2005, at A3.
36. See Kell: Kennedy, Goldman Family Buys Rights to O.J. Book, Associated Press, July 3, 2007.
37. See Curt Anderson, Goldmans Awarded Rights to Simpson Book, Associated Press, July 31, 2007.
38. *Black's Law Dictionary*.
39. 28 U.S.C.A. §§1251 *et seq.* specifies the scope and extent of federal court jurisdiction. Under the U.S. Constitution, Congress possesses the authority to define and limit the jurisdiction of the federal courts, except those matters specifically mentioned in the Constitution as within either the original or appellate jurisdiction of the U.S. Supreme Court. See Article III, §2.