1 The American Legal System

America has become a nation of laws, lawyers and lawsuits. Both the number of lawsuits being filed and the number of lawyers have doubled since the 1970s. California has about four times as many lawyers today as it had in 1975. Nationwide, there are more than a million attorneys. For good or ill, more people with grievances are suing somebody.

The media have not escaped this flood of litigation. The nation's broadcasters, cable and satellite television providers, newspapers, magazines, wire services, Internet services and advertising agencies are constantly fighting legal battles. Today few media executives can do their jobs without consulting lawyers regularly. Moreover, legal problems are not just headaches for top executives. Working media professionals run afoul of the law regularly, facing lawsuits and even jail sentences.

Million-dollar verdicts against the media are no longer unusual. In 2016, a Florida jury ordered the website Gawker to pay $140 million in damages to professional wrestler Hulk Hogan for posting a 90-second clip of a sex tape. Big national media are by no means the only targets. Individuals who post comments on Facebook, Twitter and Yelp have become targets of lawsuits. Likewise, anyone who works in journalism, public relations, advertising, entertainment or digital media may risk lawsuits, and threats of lawsuits, for anything from libel to copyright infringement to invasion of privacy.

More than ever before, a knowledge of media law is essential for a successful career in mass communications. This textbook was written for communications students and media professionals, not for lawyers or law students. We will begin by explaining how the American legal system works.

THE KEY ROLE OF THE COURTS

Mass media law is largely based on court decisions. Even though Congress and the 50 state legislatures have enacted many laws affecting the media, the courts play the decisive role in interpreting those laws. For that matter, the courts also have the final say in interpreting the meaning of our most important legal document, the U.S. Constitution. The courts have the power to modify or even overturn laws passed by state legislatures and Congress, particularly when a law conflicts with the Constitution. In so doing, the courts have the power to establish legal precedent, handing down rules that other courts must ordinarily follow in deciding similar cases.

But not all court decisions establish legal *precedents*, and not all legal precedents are equally important as guidelines for later decisions. The Supreme Court of the United States is the highest court in the country; its rulings are generally binding on all lower courts. On matters of state law the highest court in each of the 50 states (usually called the state supreme court) has the final say—unless one of its rulings somehow violates the U.S. Constitution. On federal matters the U.S. Courts of Appeals rank just below the U.S. Supreme Court. All of these courts are *appellate* courts; cases are appealed to them from trial courts.

Trial vs. appellate courts. There is an important difference between trial and appellate courts. While appellate courts make precedent-setting decisions that interpret the meaning of law, trial courts are responsible for deciding factual issues such as the guilt or innocence of a person accused of a crime. This fact-finding process does not normally establish legal precedents. The way a judge or jury decides a given murder trial, for instance, sets no prece-

precedent: a case that other courts rely on when deciding future cases with similar facts or issues.

appellate court: a court to which a finding from a lower court may be appealed.

questions of fact: resolutions of factual disputes that are decided by a jury.

remand: to send back to a lower court for evaluation based on new legal rules.

dent for the next murder trial. The fact that one alleged murderer may be guilty doesn't prove the guilt of the next murder suspect.

In civil (i.e., non-criminal) lawsuits, this is also true. A trial court may have to decide whether a newspaper or broadcaster libeled the local mayor by falsely accusing the mayor of wrongdoing. Even if the media did—and if the mayor wins his or her lawsuit—that doesn't prove the next news story about a mayoral scandal is also libelous. Each person suing for libel—like each person charged with a crime—is entitled to his or her own day in court.

Finding facts. The trial courts usually have the final say about these *questions of fact*. An appellate court might rule that a trial court misapplied the law to a given factual situation, but the appellate court doesn't ordinarily reevaluate the facts on its own. Instead, it sends the case back (*remands*) to the trial court with instructions to reassess the facts under new legal rules written by the appellate court. For instance, an appellate court might decide that a certain piece of evidence was illegally obtained and cannot be used in a murder trial. It will order the trial court to reevaluate the factual issue of guilt or innocence, this time completely disregarding the illegally obtained evidence. The appellate court's ruling may well affect the outcome of the case, but it is still the job of the trial court to decide the factual question of guilt or innocence, just as it is the job of the appellate court to set down rules on such legal issues as the admissibility of evidence.

This is not to say trial courts never make legal (as opposed to fact-finding) decisions: they do so every time they apply the law to a factual situation. But when a trial court issues an opinion on a legal issue, that opinion usually carries little weight as legal precedent.

Sometimes there is high drama in the trial courtroom, and that may result in extensive media coverage. One trial verdict may even inspire (or discourage) more lawsuits of the same kind. Still, the outcome of a trial rarely has long-term legal significance. On the other hand, a little-noticed appellate court decision may fundamentally alter the way we live. That is why law textbooks such as this one concentrate on appellate court decisions, especially U.S. Supreme Court decisions.

STRUCTURE OF THE U.S. COURT SYSTEM

Because the courts play such an important role in shaping the law, the structure of the court system itself deserves some explanation. Fig. 1 shows how the state and federal courts are organized. In the federal system, there is a nationwide network of trial courts at the bottom of the structure. Next higher are 12 intermediate appellate courts serving various regions of the country, with the Supreme Court at the top of the system.

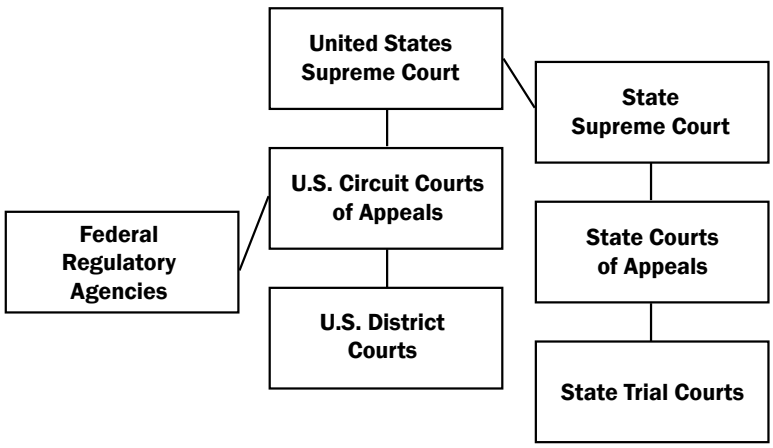

FIG. 1. Organization of the federal courts and a typical state court system.

U.S. District Courts

In the federal system there is at least one trial court called the U.S. District Court in each of the 50 states and the District of Columbia. Some of the more populous states have more than one federal judicial district, and each district has its own trial court or courts. As trial courts, the U.S. District Courts have limited precedent-setting authority. Nevertheless, a U.S. District Court decision occasionally sets an important precedent. The primary duty of these courts, however, is to serve as *trial courts* of general jurisdiction in the federal system; that is, they handle a variety of federal civil and criminal matters, ranging from civil disputes over copyrights to criminal trials of persons accused of acts of terrorism against the United States.

U.S. Courts of Appeals

At the next level up in the federal court system, there are U.S. Courts of Appeals, often called the *circuit courts* because the nation is divided into geographic *circuits*. That term, incidentally, originated in an era when all federal judges (including the justices of the Supreme Court) were required to be "circuit riders." They traveled from town to town, holding court sessions wherever there were federal cases to be heard. Each circuit court today serves a specific region of the country, and most still hear cases in various cities within their regions.

There are 11 regional circuit courts. Fig. 2 shows how the United States is divided into judicial circuits. In addition, a separate circuit court (the U.S. Court of Appeals for the D.C. circuit) exists solely to serve Washington, D.C.; it often hears appeals of decisions by federal agencies, many of them involving high-profile issues. Many "D.C. circuit" judges have been promoted to the Supreme Court. There is also a U.S. Court of Appeals for the Federal Circuit. Unlike the other circuit courts, this one serves no single geographic area. Instead, it has nationwide jurisdiction over certain special kinds of cases, including patent and customs appeals and some claims against the federal government. This court is the product of a merger of the old Court of Claims and the Court of Customs and Patent Appeals. This book will generally refer to these courts by their numbers (e.g., First Circuit, Ninth Circuit).

Some of the circuits have been divided over the years as the population grew. Until 1981, the Fifth Circuit included Alabama, Georgia and Florida, the states that now comprise the Eleventh Circuit. Legislation has been proposed repeatedly to divide the far-flung Ninth Circuit, which serves Alaska, Hawaii and the entire west coast (nine states with a total popu-

FIG. 2. Geographic Boundaries of United States Courts of Appeals and United States District Courts.

U.S. Library of Congress, http://www.uscourts.gov/uscourts/images/CircuitMap.pdf

lation of about 60 million people). Although critics say it is too large and too California-oriented because California's huge population has resulted in many of the Ninth Circuit's judges coming from one state, Congress has never agreed upon a plan to divide it. The Ninth Circuit has 29 active judges, by far the largest number of any circuit. The second largest circuit is the Fifth, which has 17 active judges. Each court also has *senior judges* who are officially retired but volunteer to continue hearing cases.

Appeals process. The losing party in most U.S. District Court trials may appeal the decision to the circuit court serving that region of the country. The decisions of the circuit courts produce many important legal precedents; on federal questions the rulings of these courts are second in importance only to U.S. Supreme Court decisions. Although each circuit court has a large number of judges, most cases are heard by panels of three judges. Two of the three constitute a majority and may issue the *majority opinion*, which sets forth the court's legal reasoning. Sometimes a case is considered so important or controversial that a larger panel of judges decides the case, usually reconsidering an earlier decision by a three-judge panel. When that happens, it is called deciding a case *en banc*. Ordinarily, an *en banc* panel consists of all of the judges serving on a particular circuit court. As the circuit courts grew larger, Congress authorized smaller *en banc* panels in some instances. The Ninth Circuit used panels of 15 judges to hear cases *en banc* for a time and now uses panels of 11.

Since these appellate courts decide only matters of law, there are no juries in these courts. Juries serve only in trial courts, and even there juries only decide factual issues (such as the guilt or innocence of a criminal defendant), not legal issues. Appellate cases are decided by judges alone, unassisted by a jury—both in the federal and state court systems.

Circuit splits. One point should be explained about the significance of the legal precedents established by the U.S. circuit courts. As long as the decision does not conflict with any U.S. Supreme Court ruling, each circuit court is free to arrive at its own conclusions on issues of law, which are then binding on lower courts in that circuit. A circuit court is not required to follow precedents established by other circuit courts around the country, although precedents from other circuits usually carry considerable weight and are often followed.

Occasionally two different circuit courts will rule differently on the same legal issue,

called a *circuit split*. When that happens, the trial courts in each region have no choice but to follow the local circuit court's ruling. Trial courts located in other circuits may choose to follow either of the two conflicting precedents, or they may follow neither. Since this kind of uncertainty about the law is obviously bad for everyone, the U.S. Supreme Court often intervenes, establishing a uniform rule of law all over the country.

As well as hearing appeals of federal trial court decisions, the circuit courts also hear appeals from special-purpose courts and federal administrative agencies. For instance, decisions of both the Federal Trade Commission and the Federal Communications Commission may be appealed to the federal circuit courts. Such cases are often heard by the U.S. Court of Appeals for the D.C. circuit, giving that court a major role in communications law.

It bears noting that even though there are many judges serving in federal courts below the Supreme Court, some empty judicial seats go unfilled for months. Sometimes appointments to these seats are politically charged. A snapshot of the current state of vacancies in the federal judiciary, on June 30, 2016, showed a total of 89 judicial vacancies and 58 pending nominees (including seven in the appellate courts). This information is tracked by the Administrative Office of the U.S. Courts (www.uscourts.gov).

ride circuit: the historic practice in which judges rode from place to place to hear appeals in person.

en banc: Latin/French for "in the bench," a session where all judges on a court participate in the hearing and resolution of a case, rather than just a small panel. Pronounced "on bonk."

circuit split: when two or more circuit courts have different rules on the same issue of law; often the Supreme Court will step in to resolve the split.

The U.S. Supreme Court

The U.S. Supreme Court is the highest court in the country. Its nine justices are the highest-ranking judges in the nation, and its decisions represent the most influential legal precedents, binding on all lower courts.

Limited caseload. Because of this court's vast authority, it is common for people involved in a lawsuit to threaten to "fight this all the way to the Supreme Court." However, very few cases have any real chance to make it that far. The U.S. Supreme Court is, after all, only one court, and it can decide only a limited number of cases each year. The Supreme Court accepts at most a few hundred cases annually for review—out of about 10,000 petitions for a hearing. In the end, the court issues formal signed opinions in no more than about 100 cases each year. In recent years the Court has produced even fewer: often only 80 or 90 per term. Obviously, some screening is required to determine which cases will get that far.

In doing the screening, the Supreme Court tries to hear those cases that raise the most significant legal issues, those where the lower courts have flagrantly erred, and those where conflicting lower court decisions must be reconciled. However, the fact that the Supreme Court declines to hear a given case does not mean it necessarily agrees with the decision of a lower court. To the contrary, the Supreme Court may disagree with it, but it may

choose to leave the decision undisturbed because it has a heavy caseload of more important matters.

The fact that the Supreme Court declines to review a lower court decision establishes no precedent: for the Supreme Court to refuse to hear a case is not the same as the Supreme Court taking up the case and then affirming the lower court's ruling. When the Supreme Court declines to take a case, the lower court ruling on that case remains in force—but it is still just the decision of a lower court. There are occasions, however, when the Supreme Court accepts a case and then affirms the opinion of a lower court instead of issuing its own opinion, giving the lower court's opinion the legal weight of a Supreme Court decision.

The nine justices vote to decide which cases they will hear of the many appealed to them. Under the Supreme Court's rules of procedure, it takes four votes to get a case on the high court's calendar (commonly called "*the rule of four.*")

Getting to the Court. Cases reach the U.S. Supreme Court by several routes. The Constitution gives the Supreme Court *original jurisdiction* over a few types of cases (the first court to hear those cases). Disputes between states and cases involving ambassadors of foreign countries are examples of cases in which the Supreme Court has original jurisdiction. Even these cases may sometimes be heard in lower courts instead—with the blessing of the Supreme Court's nine overworked justices. In disputes between states, the Court may appoint Special Masters to hear evidence and prepare factual findings prior to oral argument.

Then there are a few cases in which the losing party in the lower courts has an automatic right to appeal to the Supreme Court. For example, when a lower federal court or the highest court in a state rules an Act of Congress unconstitutional, the U.S. Supreme Court must hear an appeal if asked to do so by the government. The Supreme Court is required to accept these cases for review.

Finally, there are a vast number of cases that the Supreme Court may or may not choose to review; it is not required to hear these cases, but some raise very important questions. In these cases the losing party in a lower court asks the Supreme Court to issue a *writ of certiorari* (often abbreviated *cert*). Technically, a writ of *certiorari* is an order from the Supreme Court to a lower court to send up the records of the case. *Certiorari granted* means the Court has agreed to hear an appeal, while *certiorari denied* means the Court has decided not to hear the

FIG. 3. The Supreme Court of the United States, 2010.

Steve Petteway, Collection of the Supreme Court of the United States.

Front, L-R: Justice Clarence Thomas, Justice Antonin Scalia, Chief Justice John Roberts, Jr., Justice Anthony Kennedy, Justice Ruth Bader Ginsburg.
Back, L-R: Justice Sonia Sotomayor, Justice Stephen Breyer, Justice Samuel Alito, Justice Elena Kagan.

case. (This book will use the terms "*cert* granted" or "*cert* denied.") For the Court to grant *cert*, according to the *rule of four,* four of the nine justices must vote to hear the case.

This *certiorari* procedure is by far the most common way cases reach the Supreme Court, although many more petitions for *cert* are denied than granted. Cases may reach the Supreme Court in such appeals from both lower federal courts and from state courts. The Supreme Court often hears cases that originated in a state court, but only when an important federal question, such as the First Amendment's guarantee of freedom of the press, is involved. Most of the Supreme Court decisions on libel and invasion of privacy that will be discussed later reached the high court in this way.

The Supreme Court will consider an appeal of a state case only when the case has gone as far as possible in the state court system. That normally means the state's highest court must have either ruled on the case or refused to hear it.

The justices. It would be difficult to overstate the importance of the nine justices of the U.S. Supreme Court in shaping American law. That is why bitter battles are so often fought in the U.S. Senate over the confirmation of those nominated to be Supreme Court justices. In 2016, the U.S. Senate refused to even hold confirmation hearings for President Barack Obama's nomination of Merrick Garland, the chief judge on the D.C. Circuit Court of Appeals, leaving the Court with only eight justices following the death of Justice Antonin Scalia. As a result, one of the most anticipated Supreme Court opinions of the 2015 term was a 4-4 tie. When a tie occurs, the lower court's ruling stands. The case involved a challenge to President Obama's executive authority over immigration policy, and as a result of the tie, the Fifth Circuit Court of Appeals decision ruling against Obama was left to stand. Republicans in the Senate aimed to delay Garland's nomination hearings until after the end of Obama's second term, hoping that a Republican president, if elected, would nominate a justice more to their liking.

It was not the first time that Supreme Court nominations garnered public attention. Clarence Thomas's nomination hearings in 1991 were broadcast live on television after he was accused of sexually harassing former employee Anita Hill. President George W. Bush was forced to withdraw one his nominees, Harriet Miers, in 2005 after senators from both parties questioned her qualifications.

While Supreme Court justices are appointed through a political process, justices do not always vote in the traditional liberal-conservative mold of the presidents who nominated them. As Chapter Five explains, in 1992 the Supreme Court upheld the basic principle of *Roe v. Wade,* the landmark abortion decision, by a 5-4 vote. Three justices appointed by presidents who opposed abortions (Anthony

original jurisdiction: the first court with jurisdiction to hear a case; in the case of the Supreme Court, its findings in original jurisdiction cases are final.

writ of certiorari: the order issued by the Supreme Court when it agrees to hear a case.

rule of four: four justices must agree to grant *certiorari* to hear a case before the case is permitted to be argued before the Court.

M. Kennedy and Sandra Day O'Connor, appointed by Ronald Reagan, and David H. Souter, appointed by George H.W. Bush) formed the nucleus of the majority that upheld *Roe v. Wade*. Had any of them voted as the president who nominated them probably expected, *Roe v. Wade* would have been overturned. But no one can predict how a jurist will vote once on the high court. Souter, considered a conservative when he replaced the liberal William Brennan, has written some surprisingly liberal opinions, including a stirring defense of the free press (see Chapter Eight). In contrast, Clarence Thomas, who replaced Thurgood Marshall (the first African-American ever to serve on the Supreme Court and an avowed liberal), has taken a decidedly more conservative course as a jurist than his predecessor.

The "Roberts Court." The Supreme Court is sometimes closely identified with its chief justice, who often sets the tone for the entire court.

For example, the "Warren Court," named for Earl Warren, who served as chief justice from 1953 to 1969, had an enormous influence on the modern interpretation of the First Amendment. Later in this chapter and in Chapter Four there are references to the Warren Court's major role in reshaping American libel law. But the Warren Court did far more than that: it also rewrote American obscenity law and greatly expanded the rights of those who are accused of crimes, to cite just two examples. Since the era of the liberal Warren Court ended, more conservative justices have dominated the Court. Under Chief Justice William

Focus on...
The legacy of Justice Antonin Scalia

Justice Antonin "Nino" Scalia's 30-year legacy on the U.S. Supreme Court will last well into the future. Many scholars described Scalia as one of the most significant justices in the history of the Court.

Scalia was a leading conservative judicial voice who embraced originalist and textualist approaches to judicial interpretation and assailed those who viewed the Constitution as a "living" document whose protections change as society changes.

One of the most significant decisions Scalia authored was *District of Columbia v. Heller* (554 U.S. 570, 2008), in which the Court ruled 5-4 that the Second Amendment protected an individual's right to possess a firearm – the first time the Court had ever explicitly interpreted the Second Amendment in this way.

The Constitution did not protect a woman's right to have an abortion, according to Scalia's views. He also opposed affirmative action and ruled against gay and lesbian rights in several cases.

FIG. 4. Justice Antonin Scalia.

Steve Petteway, Collection of the Supreme Court of the United States.

Scalia's views of judicial restraint led him to criticize one of the most important First Amendment decisions in the Court's history, *New York Times v. Sullivan*, as an example of judicial activism. If the legislatures wanted to make it more difficult to sue for libel, so be it. But the Courts shouldn't have made that decision, Scalia said.

When Scalia died unexpectedly in February 2016, the 79-year-old was the longest serving member of the Court. He had been appointed by President Ronald Reagan in 1986. Surprisingly, his best friend on the Court was liberal Justice Ruth Bader Ginsburg. The two regularly attended operas in Washington, vacationed together with their spouses and spent New Year's Eves together. "We were best buddies," Ginsburg said after his death.

FIG. 5. The four female Justices in the Justices' Conference Room prior to Elena Kagan's investiture, Aug. 7, 2010.

Steve Petteway, Collection of the Supreme Court of the United States.

L-R: Justice Sandra Day O'Connor (Ret.), Justice Sonia Sotomayor, Justice Ruth Bader Ginsburg and Justice Elena Kagan.

Rehnquist, the Court began to overturn some of the precedents established by the Warren Court, particularly in such fields as criminal law.

The current court is known as the "Roberts Court," named for Chief Justice John G. Roberts Jr., appointed by George W. Bush to replace Rehnquist as chief justice when Rehnquist died in 2005. Chief Justice Roberts is one of two appointees of George W. Bush, the other being Samuel A. Alito, who replaced Sandra Day O'Connor in 2006. Roberts' record during his first years as chief justice seemed to mark him more as a consensus builder than a doctrinaire conservative, while Alito's early voting record was more conservative than O'Connor's. O'Connor had wielded great influence as a centrist. Roberts, Alito and Thomas make up the "conservative" bloc on the Court. The current "centrist" on the Court is Justice Anthony Kennedy, appointed by President Reagan in 1987. His vote is often sought by the conservative and liberal blocs on the Court, and he often is the author of 5-4 decisions. President Bill Clinton's appointees include Ruth Bader Ginsburg and Stephen G. Breyer.

President Barack Obama got his first chance to appoint a justice to the Supreme Court in 2009 when Justice David Souter announced his retirement after 19 years on the Court. He appointed Judge Sonia Sotomayor, a federal judge from the Second Circuit, who is the first Hispanic justice and the third woman to serve on the Supreme Court. Obama also made history with his appointment of Elena Kagan, dean of Harvard Law School, as solicitor general, the first woman to hold that office. The solicitor general argues for the government of the United States before the Supreme Court. When Justice John Paul Stevens announced his retirement in 2010, after nearly 35 years on the Court, Obama chose Kagan as his second Supreme Court appointment.

At the time of this writing, it remains to be seen who will replace Scalia on the Court. Whoever it is will likely reshape the Court for many years to come. Stay tuned.

The State Courts

Each of the 50 states has its own court system, as already indicated. Larger states such as California, New York, Ohio, Pennsylvania, Texas, Illinois and Michigan have two levels of state appellate courts plus various trial courts, duplicating the federal structure.

In these states, the intermediate appellate courts (usually called simply "courts of

appeal") handle cases that the state supreme court has no time to consider. The state supreme court reviews only the most important cases. Worth special note is the New York system, which is structurally similar to the systems in other populous states, but with opposite nomenclature. In New York, the "supreme court" is a trial court that also has intermediate appellate jurisdiction; there are many such courts in the state. New York's highest court is called the Court of Appeals. Maryland also calls its highest court the Court of Appeals.

In smaller states, the trial courts send cases directly to the state supreme court, which may have from three to nine or more justices to hear all state appeals. As both the population and the volume of lawsuits increase, more and more states are adding intermediate appellate courts. The states tend to have a greater variety of trial courts than does the federal government, since the state courts must handle many minor legal matters that are of no concern to the federal courts. A typical state court system includes some kind of local court that handles minor traffic and civil matters and perhaps minor crimes. Such courts are sometimes called municipal courts, county or city courts, justice courts, or the like.

In some states the highest trial courts not only hear the most important trials but also perform some appellate functions, reviewing the verdicts of the lower trial courts.

residual jurisdiction: the Tenth Amendment gives all powers to the states that are not granted to the federal government or prohibited to the states by the Constitution.

federal question: an area in which the federal government has subject jurisdiction, including interpretation of the Constitution and acts of Congress and international treaties.

diversity of citizenship/ diversity jurisdiction: when one party to a lawsuit is from one state and the other is from another state; diversity jurisdiction gives the federal courts jurisdiction over such lawsuits.

complete diversity: no plaintiff in a case can be from the same state as any defendant in the same case.

federal preemption: when the federal government has sole jurisdiction over a subject area.

concurrent jurisdiction: when the federal government and the states share jurisdiction.

State and Federal Jurisdiction

It may seem inefficient to have two complete judicial systems operating side by side. Wouldn't it be simpler and less expensive to consolidate the state and federal courts that operate in each state? Perhaps it would, but one of our strongest traditions is power sharing between the federal government and the states. We'll have separate state and federal laws—and separate court systems—throughout the foreseeable future.

How then is authority divided between the federal and state courts? State jurisdiction and federal jurisdiction sometimes overlap, but basically the state courts are courts of *residual jurisdiction*; that is, they have authority over all legal matters that are not specifically placed under federal control. Anything that isn't a *federal question* automatically falls within the jurisdiction of the state courts. In addition, the state courts may also rule on some issues that are federal questions (for instance, First Amendment rights).

Federal questions. What makes an issue a federal question? The Constitution declares that certain areas of law are inherently federal questions. For instance, the Constitution specifically authorized Congress to make copyright law a federal question. And Congress, acting under the authority of the Constitution, has declared copyrights and many other matters to be federal questions. Congress

has used its constitutional power to regulate interstate commerce as a basis for federal regulation of broadcasting, for instance. Legal issues such as copyrights and broadcast regulation are federal questions because of their subject matter.

In addition, federal courts may intervene in state cases if a state court ruling conflicts with the U.S. Constitution. Much of mass communications law is based on cases of this type. In almost every area of state law discussed in this textbook, the U.S. Supreme Court has intervened at one time or another, interposing federal constitutional requirements on the states. Most often, of course, the constitutional issue is freedom of expression as protected by the First Amendment; the Supreme Court has often overruled state laws and court decisions that violated the First Amendment.

Diversity issues. In addition to these federal questions, there is another reason the federal courts will sometimes agree to hear a case: *diversity of citizenship*. This principle applies only when a citizen of one state sues a citizen of another state. For example, if a New Yorker and a Pennsylvanian are involved in a serious auto accident, each may be able to avoid a lawsuit in the other's state courts under the diversity principle. If there is a lawsuit, it may well be removed to a federal court instead of being heard in a state court.

The framers of the Constitution felt it would be unfair to force anyone to fight a lawsuit on someone else's "home turf," so they ordered the federal courts to provide a neutral forum to hear these disputes involving citizens of two different states. The theory is that a state court might be biased in favor of its own citizens and against outsiders. When a federal court hears a case that would be a state matter if it involved two citizens of the same state, the federal court's right to hear the case is based on *diversity jurisdiction* rather than *federal question jurisdiction*. In diversity lawsuits, the trial may still occur in the home state of one of the litigants, but in a federal rather than a state court.

There are limits on diversity jurisdiction. If there were not, the federal courts might be overwhelmed by minor cases. To avoid that problem, federal courts accept diversity-of-citizenship cases only when the dispute involves more than $75,000. This jurisdictional threshold has been increased repeatedly over the years. Until it was raised from $10,000 to $50,000 in 1988, the federal courts had to handle many relatively minor civil lawsuits—cases that federal judges felt should rightfully be left to the state courts.

Another limitation on diversity jurisdiction is the requirement of *complete diversity*. That is, all of the parties on one side of a lawsuit must come from a different state than anyone on the other side. That means, for instance, that a suit by a New Yorker against both an individual from Pennsylvania and an insurance company in New York would *not* usually qualify as a diversity case.

Sometimes there is considerable legal maneuvering when a case does qualify for federal jurisdiction, either because a federal question is involved or because there is diversity of citizenship. One side may want the case kept in state court, while the other prefers a federal court. Such a case may be filed in a state court, removed to federal court, and eventually sent back to a state court.

Federal preemption. One more point about federal-state relationships bears explaining. Certain legal matters are exclusively federal concerns, either under the Constitution or an act of Congress. In those areas, the federal government is said to have *preempted the field*. That is, no state law in this area is valid; the federal government has exclusive jurisdiction. Copyright law is one such area.

In certain other areas of law, Congress has enacted some federal laws without preempt-

ing the field. The states may also enact laws in these areas, providing that the state laws do not conflict with any federal laws. These are called areas of *concurrent jurisdiction.* Examples in media law include the regulation of advertising, antitrust law and trademark regulation. A typical dividing line in such an area of law is the one that exists in trademark regulation, where the federal Lanham Act protects trademarks of businesses engaged in interstate commerce, while many states have laws to protect the trademarks of local businesses.

In addition to the areas of law preempted by the federal government and areas of concurrent jurisdiction, of course, a large number of legal matters are left to the states—unless a state should violate some federal principle in the exercise of that authority. Libel and invasion of privacy are two areas of media law that are essentially state matters. Recently the U.S. Supreme Court has been refining the concept of federalism by limiting the power of Congress to curtail the traditional authority of the states, a trend that is discussed later.

Judicial Behavior

In recent years, the public has cast a far more suspicious eye on the judiciary than once it did. Because in three-quarters of the states, judges are elected rather than appointed, considerations about judicial impartiality and electoral processes have arisen.

Recusal. The Supreme Court has paid more attention in recent years to questions about whether judges should *recuse* (remove) themselves from cases. Campaign donations to judicial elections are on the rise, and in 2009 the Supreme Court said that a judge's failure to recuse himself from a case in which he received significant campaign donations from one litigant violated the due process rights of the other litigant. At issue in *Caperton v. A.T. Massey Coal Company Inc.* (556 U.S. 868) was the decision of West Virginia Supreme Court of Appeals chief justice Brent Benjamin not to recuse himself in a case in which one of the litigants, Massey Coal, had given him $3 million in campaign donations. Justice Benjamin had refused several times to remove himself from the case, and his court reversed a $50 million award against Massey Coal.

In a 5-4 decision, the Supreme Court said that the due process clause of the Fourteenth Amendment was violated by Justice Benjamin's participation in this case. Justice Anthony Kennedy wrote, "We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." Kennedy also pointed out that the extreme facts in this case would likely limit any potential of increased recusal demands or interference with judicial elections.

The Supreme Court has applied the *Caperton* holding to other cases. In 2016, the Court ruled that judges must recuse themselves if they played a significant role in the prosecution of the case before they became judges. In *Williams v. Pennsylvania* (No. 15-5040), the Court ruled that Pennsylvania Supreme Court Justice Ronald Castille should have recused himself from an appeal involving Terrence William's death penalty conviction because Castille was the district attorney at the time Williams was prosecuted. "(U)nder the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case," Justice Anthony Kennedy wrote for the Court in a 5-3 decision.

Judicial elections. Judicial elections continue to raise questions beyond recusal. How are judges to raise money for campaigning when many state bar rules forbid direct solicitations

by the candidate? In 2015, the Court took on this question of whether the state bar rules that forbid a judge from soliciting contributions passed First Amendment muster. Lanell Williams-Yulee, a candidate for judicial office, posted online and mailed a letter asking for financial contributions for her campaign. She was censured by the Florida Bar under Canon 7C(1) of the bar rules, which states that candidates "shall not personally solicit campaign funds, or solicit attorneys for publicly stated support" but allows committees formed for that purpose to do so. Yulee alleged that this canon violated the First Amendment, but the Supreme Court said no (*Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656). Writing for the Court, Chief Justice John Roberts said that there is a compelling interest for states to ensure that their judges are unbiased and fair. Judges are not politicians, Roberts said, and "[i]n deciding cases, a judge is not to follow the preferences of his supporters, or provide any special consideration to his campaign donors." Canon 7C(1), then, is appropriately tailored to protect this important interest.

Other judicial appointments. Who has say over other elements of judgeships? Often commissions or councils either make recommendations or appointments to state judicial positions (a process called *merit selection*); sometimes the governor has appointment power. In 2012, the Tenth Circuit declined to grant a group of non-lawyer citizens the power to directly affect this method in Kansas (*Dool v. Burke*, 497 Fed. Appx. 782). In Kansas, a commission, made up mostly of attorneys, gives recommendations to the governor, who ultimately makes the appointment decision. Non-attorneys filed suit, saying that the 5-4 majority of attorneys on the commission was an equal protection violation. The Tenth Circuit, in a *per curiam* (unsigned) opinion, said there was no violation.

Contempt by opinion. The Third Circuit was asked in 2013 to answer for the first time the question of whether the First Amendment protected judges from prosecution for *criminal contempt* stemming from their judicial opinions or recusals. The court said that it did: "the First Amendment protects a sitting judge from being criminally punished for his opinion unless that opinion presents a clear and present danger of prejudicing ongoing proceedings." In the case, *In re The Honorable Leon A. Kendall* (712 F.3d 814), Judge Kendall had been found in criminal contempt by the Virgin Islands Supreme Court for recusing himself from a criminal case. Earlier he had written an opinion criticizing a recent decision of the Virgin Islands Supreme Court and explaining why he had recused himself. That court thought he recused himself because he wanted to avoid complying with a *writ of mandamus* (an order to perform or not perform a particular act) from the court ordering him not to take a plea bargain from a defendant in the criminal case.

TYPES OF LAW

Although the courts play a major role in shaping the law, the other branches of government also have the power to make laws in various ways. In fact, the term law refers to several different types of rules and regulations, ranging from the bureaucratic edicts of administrative agencies to the unwritten legal principles we call the *common law*. This section explains how the courts interact with other agencies of government in shaping the various kinds of law that exist side by side in America.

The Constitution

The most important foundation of modern American law is the U.S. Constitution. No

law that conflicts with the Constitution is valid. The U.S. Constitution is the basis for our legal system: it sets up the structure of the federal government and defines federal-state relationships. It divides authority among the three branches of the federal government and limits their powers, reserving a great many powers for the states and their subdivisions (such as cities and counties).

The First Amendment to the Constitution is vital to the media. In just 45 words, it sets forth the principles of freedom of the press, freedom of speech and freedom of religion in America. The First Amendment says:

> 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 the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

What do those words mean? The job of interpreting what they mean has fallen to the appellate courts, which have written millions of words in attempting to explain those 45 words. For instance, the First Amendment sounds absolute when it says "Congress shall make no law...." However, the courts have repeatedly ruled that those words are not absolute, and that freedom of expression must be balanced against other rights. In practice, the First Amendment should really be read more like this: "Congress shall make *almost* no laws..." or "Congress shall make *as few laws as possible*...abridging freedom of speech, or of the press...." The chapters to follow will discuss the many other rights that the courts have had to balance against the First Amendment.

The First Amendment (as well as the other amendments in the Bill of Rights) originally applied only to Congress and to no one else. It was written that way because its authors did not think it was their place to tell the state governments not to deny basic civil liberties; their purpose was to reassure those citizens who feared that the new federal government might deny basic liberties. They felt that many basic liberties were so firmly rooted in the common law that no written declaration was needed to assure that the states would safeguard these liberties. However, it became clear over the years that state and local governments, like the federal government, may violate the rights of their citizens from time to time. Hence, the Supreme Court eventually ruled that the First Amendment's safeguards should apply to state and local governments as well, a concept called *incorporation* that will be discussed later.

Constitutional supremacy. The U.S. Constitution plays the central role in American law. No law may be enacted or enforced if it violates the Constitution. The courts—particularly the U.S. Supreme Court—play the central role in interpreting what the Constitution means, often in practical situations that the founders never dreamed of when they wrote the document more than 200 years ago. Perhaps the Constitution has survived for so long because the courts do adapt it to meet changing needs, and because it can be amended when there is strong support for this step. The Sixteenth Amendment, for example, was approved in 1913, authorizing the federal income tax at a time when the federal government needed to find a way to bring in more revenue. And the Twenty-first Amendment, approved in 1933, abolished prohibition (thus ending an era that began when the Eighteenth Amendment was enacted to ban alcoholic beverages). The normal procedure for amending the Constitution is for each house of Congress to approve a proposed amendment by a two-thirds vote, after which it must be ratified by three-fourths of the states.

State and local constitutions and rules. In addition to the federal Constitution, each state has its own constitution, and that document is the basic legal charter for the state. No state law may conflict with either the state's own constitution or the federal Constitution. Each state's courts must interpret the state constitution, overturning laws that conflict with it. Likewise, many cities and counties have *home rule charters* that establish the fundamental structure and powers of local government. Like the state and federal constitutions (which local governments must also obey), local charters are basic sources of legal authority. On the other hand, many local governments operate under the general laws enacted by state legislatures instead of having their own local charters.

In these circumstances, the courts must decide when a government action—be it an act of Congress or the behavior of the local police department—violates one of these basic government documents. When that happens, it is the job of the courts to halt the violation.

statute:
any law that is adopted by a legislature of a federal, state or local governmental body.

sovereign immunity:
the ability of a government to limit lawsuits against it.

stare decisis:
Latin for "let the law or the decision stand," the policy of courts to rely on precedents.

distinguishing a case:
declining to follow a precedent based on the precedential case differing from the case being decided.

reversing/overruling a precedent:
choosing not to follow precedent even if the facts of the case being decided are very similar.

The Common Law

The common law, which began to develop out of English court decisions hundreds of years ago, is our oldest form of law. It is an amorphous collection of legal principles based on thousands of court decisions handed down over the centuries. It is *unwritten* law in the sense that you cannot sit down and read it all in one place as you can with the statutory laws enacted by Congress. Starting nearly 1,000 years ago, English judges began to follow *legal precedents* from previous cases. Each new decision added a little bit to this accumulated body of law. As it grew, the common law came to include rules concerning everything from crimes such as murder and robbery to non-criminal matters such as breach of contract.

When the American government took its present form with the ratification of the Constitution in 1789, the entire English common law as it then existed became the basis for the American common law. Since then, thousands of additional decisions of American courts have expanded and modified the common law in each state.

It should be emphasized that the Supreme Court has ruled that the common law is mainly state law and not federal law. Each state's courts have developed their own judicial traditions, and those traditions form the basis for that state's common law, which may vary from the common law of other states.

Sovereign immunity. Several controversial U.S. Supreme Court decisions underscored the continuing power of the common law as a force that even Congress cannot ignore. In *Alden v. Maine* (527 U.S. 706, 1999) and several other cases, the high court looked back to the status of the common law before the Constitution was ratified in 1789 and concluded that a concept called *sovereign immunity*

Focus on...
The whole First Amendment

This book focuses on just two of the five rights enshrined in the First Amendment—the free speech and press clauses. But there are three more rights in that amendment: the religion clause (establishment and exercise), the free association clause, and the freedom to petition clause. It's sometimes hard to disentangle the clauses from each other.

FIG. 6. Canterbury Cathedral, Kent, circa 1910.

Library of Congress.

Here are a few examples: It's clear how closely freedom to speak (or to refrain from speaking) is tied to the establishment clause, which says, in effect, that government can't create a state religion. Michael Newdow, an atheist, medical doctor, and attorney most noted for repeated suits against the federal government for actions including "In God We Trust" on American currency, faced the Supreme Court in 2004 (and lost), arguing that making school children say the Pledge of Allegiance, including "under God," was an establishment of religion (*Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1). The religion clauses are also in the news with the Patient Protection and Affordable Care Act ("Obamacare"), when the Court said that family-owned companies with religious bents can't be forced to offer contraceptive services in their health care plans—although the government may step in and provide ways for employees to get them (*Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751).

was firmly entrenched in the law then—and was not abrogated by the Constitution. Sovereign immunity exempts the "sovereign" from being sued in the courts. In eighteenth-century England, the sovereign was the king or queen. In the pre-constitutional United States, the individual states had sovereign immunity.

How does sovereign immunity affect modern America? In these decisions, a 5-4 majority of the Supreme Court said the states still enjoy sovereign immunity, and Congress does not have the right to authorize lawsuits against the states either in federal courts or in state courts. The result: the Court held that states are largely exempt from various federal laws that purport to allow private parties (such as individuals and corporations) to sue a state. The Court has said the states (but not private parties) are exempt from many patent and copyright infringement lawsuits, for example, and also to some actions brought by federal regulatory agencies. These decisions were widely criticized in the media. They are based on an expansive view of common law concepts that are routinely taught in law school and that still apply today—in the opinion of the Supreme Court majority. However, the states have all *voluntarily* agreed to limit their own sovereign immunity by enacting laws to allow lawsuits against themselves under various circumstances.

Evolution of the common law. Like federal constitutional law, the common law can grow and change without any formal act of a legislative body precisely because it is based on court decisions. When a new situation arises, the appellate courts may establish new legal rights, acting on their own authority. A good example of the way the common law develops a little at a time through court decisions is the emergence of the right of privacy. As Chapter Five explains, there was no legal right of privacy until the twentieth century. But as governments and the media (and eventually, the Internet) became more powerful and pervasive, the need for such a right became apparent. The courts in a number of states responded by allow-

ing those whose privacy had been invaded to sue the invader, establishing precedents for other courts to follow.

In addition to privacy law, several other major areas of mass media law had their beginnings in common law, among them libel, slander and the earliest copyright protections.

If this all happens through judicial precedent, with the courts expected to follow the example set by earlier decisions, how can the common law correct earlier errors?

The importance of precedent. The common law system has survived for nearly a thousand years precisely because there are mechanisms to allow the law to change as the times change. Courts don't always follow legal precedent; they have other options.

When a court does adhere to a previous decision, it is said to be observing the rule of *stare decisis*. That Latin term, roughly translated, means "Let the precedent stand." However, courts need not always adhere to *stare decisis*. Instead, a court faced with a new situation may decide that an old rule of the common law should not apply to the new facts. The new case may be sufficiently different to justify a different result. When a court declines to follow a precedent on the ground that the new case is different, that is called *distinguishing* the previous case. When an appellate court does that, the common law keeps up with changing times.

Another option, of course, is for a court to decline to follow precedent altogether, even though the factual circumstances and issues of law may be virtually identical. That is called *reversing* or *overruling* a precedent; it is considered appropriate when changing times or changing conditions have made it clear that the precedent is unfair or unworkable.

A good example of the way this process works is the 1954 ruling of the U.S. Supreme Court in the famous school desegregation case, *Brown v. Board of Education (*347 U.S. 483). Although this case is based on an interpretation of the Constitution and is therefore an example of the development of constitutional law rather than the common law, it provides a good illustration of how law develops over time. When the Court took the *Brown* case, there was a precedent, an 1896 Supreme Court decision called *Plessy v. Ferguson* (163 U.S. 537). In that earlier case, racial segregation had been ruled constitutionally permissible as long as the facilities provided for different races were "separate but equal." But in 1954 the Supreme Court pointed out that more than half a century's experience proved that the "separate but equal" approach didn't work. The Court noted that segregated facilities were almost always unequal—and ruled that the public schools must be desegregated. As a result of that new decision, the precedent from the 1896 case was no longer binding, and a new precedent replaced it. In the end, the *Brown* case became one of the most important court decisions of the twentieth century.

Statutory Law

The third major type of law in America is the one most people think of when they hear the word *law*. It is statutory law, a sweeping term that encompasses acts of Congress, laws enacted by state legislatures and even ordinances adopted by city and county governments.

If constitutional and common law are largely unwritten (or at least uncodified) forms of law because they are the result of accumulated court decisions, statutory law is just the opposite. It is law written down in a systematic way. Statutory laws are often organized into *codes*. A *code* is a collection of laws on similar subjects, indexed and arranged by subject matter. Much federal law is found in the *United States Code*. Each title of the U.S. Code deals with a particular subject or group of related subjects. Title 17, for example, deals with copyright law, discussed in Chapter Six. On the state level, statutory law is similarly organized, although not all states refer to their compilations of statutory laws as codes.

Judicial interpretation of statutes. Although statutory law is created by legislative bodies, the courts have an important place in statutory lawmaking just as they do in other areas of law. That is true because the courts have the power to interpret the meaning of statutory laws and apply them to practical situations. For this reason, law books containing statutory laws are often *annotated*. This means each section of the statutory law is followed by brief summaries of the appellate court decisions interpreting it. Thus, one can quickly learn whether a given statutory law has been upheld or if it has been partially or totally invalidated by the courts. Annotated codes also contain cross-references to other relevant analyses of the statutory law, such as attorney general's opinions or articles in law reviews.

Why would a court invalidate a statutory law? It can happen for several reasons. First, of course, if the statute conflicts with any provision of the appropriate state or federal constitution, it is invalid. In addition, there are sometimes conflicts between two statutory laws enacted by the same state legislature or by Congress. When that happens, the differences must be reconciled, and that may mean reinterpreting or even invalidating one of the laws. In addition, courts may void laws that conflict with well-established (but unwritten) common law principles.

There is considerable interplay between the courts and legislative bodies in the development of statutory law. As already indicated, often a new legal concept is recognized first by the courts, whose decisions will make it a part of the common law. At some point, a legislature may take note of what the courts have been doing and formally codify the law by enacting a statute. The courts may then reinterpret the statute, but the legislature may respond by passing yet another statute intended to override the court decision.

We will see precisely this sort of interplay between a legislative body and the courts in several areas of media law, particularly in such areas as copyright, shield laws and broadcasting. For example, the Supreme Court once ruled that most private, at-home videotaping of television shows is legal under the U.S. Copyright Act, explained in Chapter Six. Congress then considered legislation that would have revised the Copyright Act to overturn that decision and outlaw home videotaping. That legislation was rejected because most members of Congress believed public opinion supported the court's interpretation of the law.

On the other hand, if the Supreme Court had said a constitutional principle (such as the First Amendment) protected the right to make home videotapes of TV shows for personal use, the only way to reverse that ruling would have been by amending the Constitution—or waiting for the Court to reverse its own earlier decision. Congress cannot pass a statutory law to overrule a Supreme Court decision *interpreting the meaning of the Constitution*. Congress can, of course, propose a constitutional amendment and submit it to the states for ratification. Short of that, the most Congress can do when a statutory law is ruled unconstitutional is to revise it to bring it into compliance with the Constitution.

Administrative Law

Another important kind of law in America is administrative law. Within the vast bureaucracies operated by the federal government and by the states, there are numerous agencies with the power to adopt and enforce administrative regulations, and these regulations have the force of law. The term "administrative law" may seem contradictory, but these agencies do have law-making powers.

In fact, agencies often have so much authority that it would seem to violate the traditional concept of separation of powers. They may write and enforce rules and try alleged

violators, handing out *de facto* criminal penalties to those convicted. The Federal Communications Commission is a regulatory body with that kind of authority over the electronic media. The Federal Trade Commission exercises similar authority over the advertising industry.

Checks and balances. While these agencies have considerable power, there are important checks and balances that limit their authority. For example, their decisions may be appealed to the courts, and that gives the appellate courts a veto power over the rules adopted by these agencies. In addition, many of these agencies were created by legislation, and in recent years Congress and the various state legislatures have proven that they can take back some of the authority they handed out, either directly by rewriting the enabling legislation or indirectly by making budget cuts.

Also, while the policy-making boards and commissions of these administrative agencies are rarely elected, the commissioners are usually appointed by the president or the governor of a state, who is elected. Their appointments must usually be confirmed by a legislative body. Among the thousands of agencies with administrative rule-making powers, some of the most important (in addition to the FCC and FTC) are the Interstate Commerce Commission, the Federal Aviation Administration and the Federal Elections Commission on the federal level, and the state regulatory bodies that determine rates charged by public utilities.

Actions in Equity: When Money Won't Do

One final kind of "law" that should be mentioned here is not really a form of law at all but an alternative to the law: a remedy for legal wrongs called *equity*.

History. The concept of equity is an old one: it developed in medieval times. Hundreds of years ago in England, it became obvious that courts sometimes caused injustices while acting in the name of justice. There are some circumstances in which faithfully applying the law simply does not result in a fair decision. For example, the common law has always held that *damages* (money) would right a wrong, and that the courts should not act until an injury actually occurred—and even then they could only order a payment of money to compensate the injured party. Obviously there are times when letting a court sit back and wait for an injury to occur just isn't satisfactory. The harm might be so severe that no amount of money would make matters right. In those situations, courts have the power to act in equity: they can issue an *injunction* to prevent a wrong from occurring.

In English common law, people facing irreparable injuries appealed to the king, since he was above the law and could mete out justice when the courts could or would not. As the volume of

burden of proof:
the party who has this burden must present evidence to support his/her claim.

beyond a reasonable doubt:
the level of certainty required for a criminal conviction and the highest level of proof; does not mean absolute certainty but only a remote possibility of another reasonable explanation.

preponderance of the evidence:
the level of certainty required for a civil decision, a lower burden than for criminal cases; means that the facts support one side more than the other.

tort:
a civil wrong creating a right for a victim to sue a perpetrator.

tortfeasor:
person who commits a wrong.

defendant:
the tortfeasor in a civil lawsuit or accused in a criminal lawsuit.

plaintiff:
person who brings a lawsuit.

types of damages:
general: compensation for non-monetary loss.

special: compensation that requires proof of monetary losses.

actual/compensatory: can include both general and special damages.

presumed: awarded without any proof.

statutory: damages set by statute.

treble: three times the actual damages.

punitive: damage award, often high, intended to punish a wrongdoer.

such appeals increased, kings appointed special officers to hear appeals from those who could not get justice in the courts of law. These officers came to be known as *chancellors* and their court as the *court of the chancery*. This brand of justice, based on the dictates of someone's conscience, came to be known simply as equity.

Equity today. In America, the same courts that apply the law usually entertain actions in equity, too. Unlike the law, which has elaborate and detailed rules, equity is still a system that seeks to offer fairness based on the dictates of the judge's conscience. Equity is only available in situations where there is no adequate remedy under the law, and only then if the person seeking *equitable relief* is being fair to the other parties.

A good example of an occasion when an action in equity would be appropriate is when highway builders are about to excavate and thus destroy an important archeological site. Those seeking to preserve the site cannot wait until after an injury occurs and sue for damages. The artifacts that would be destroyed might be priceless.

There are legal actions that are based on equity rather than law. Probably the most important for our purposes are *injunctions*, which are court orders requiring people to do something they are supposed to do (or to refrain from doing something that would cause irreparable harm). Chapter Three discusses several attempts by the federal government to prevent the publication of information that officials felt would cause irreparable harm to national security. When a court orders an editor not to publish something, that is ordinarily an example of an action in equity.

CRIMINAL LAW AND CIVIL LAW

Another major distinction in the law is between criminal and civil law. Although criminal and civil law are not categories comparable to statutory law, the common law or administrative law, there are important differences between civil and criminal cases.

Different standards of proof. In a criminal case, someone is accused of committing an act that is considered to be an offense against society as a whole—a crime such as murder, rape or robbery. Therefore, society as a whole ("the people," if you will) brings charges against this individual, with the taxpayers paying the bill for the people's lawyer, often called the district attorney (or U.S. attorney in federal cases). If the person accused of the crime *(the defendant)* is impoverished, the taxpayers will also pay for his or her defense by providing a lawyer from the local (or federal) public defender's office. Defendants who are more financially secure will hire their own defense lawyers, but the basic point to remember is that the legal dispute is between the defendant and "the people"—society as a whole. Moreover, because the defendant's life or liberty

may be at stake, the prosecution must prove *guilt beyond a reasonable doubt.* That is a difficult standard of proof.

In a civil case, it is a different matter. Here, one party claims another party injured him/her individually, without necessarily doing something so bad it is considered a crime against society as a whole. It's just a dispute between two individuals (or two corporations, or two government agencies, etc.). The courts simply provide a neutral forum to hear a private dispute. The burden of proof is correspondingly lower in civil cases: to win, a litigant must usually prove his/her case by the *preponderance of the evidence,* but not necessarily beyond a reasonable doubt, as in criminal cases.

Don't assume that all legal matters are either criminal or civil matters—some are both. The same series of events may lead to both civil and criminal litigation. For instance, someone who has an auto accident while intoxicated may face criminal prosecution for drunk driving as well as civil lawsuits by the victims for personal injuries and property damage, among other things.

TORTS AND DAMAGES

Two other legal concepts that should be explained here are the concepts of *torts and damages.* Most civil lawsuits not based on a breach of contract are tort actions. A *tort* is any civil wrong that creates a right for the victim to sue the perpetrator. Almost any time one party injures another, the resulting lawsuit is a tort action.

Examples of torts. For example, if you are walking across the street and you're struck by a car driven by a careless driver, you have a right to sue for your personal injuries in a tort action for *negligence.* Suppose you need surgery as a result of the accident. If the doctor at the hospital should forget to remove a sponge from your body after the emergency surgery, you could sue for the tort of *medical malpractice.*

On the other hand, if you could prove that the car struck you not because the driver was careless but because a manufacturing defect caused the steering to fail, you could sue the manufacturer for the tort of *products liability.*

Finally, you could sue for *libel* if the local newspaper falsely reported that you had just committed a crime and were fleeing from the crime scene when you were hit by the car.

All of these legal actions and dozens of others fall into the broad category called torts. The person who commits the wrong is called the *tortfeasor;* he or she becomes the *defendant* in the lawsuit while the victim is the *plaintiff.*

Several of the important legal actions affecting the media are tort actions. Examples include libel and slander, invasion of privacy and unfair competition. To win a tort lawsuit the plaintiff generally has to show that there was some sort of wrongful act on the part of the tortfeasor, often either negligence or a malicious intent. The plaintiff also has to show that he/she suffered some kind of *damages,* although courts are sometimes permitted to presume damages when certain kinds of wrongful acts have occurred.

Types of damages. This brings us to the definition of damages, which is a central point in this introduction to media law. In many states, there are three basic kinds of damages: general damages, special damages and punitive damages.

General damages are monetary compensation for losses incurred under circumstances in which the injured party cannot place a specific dollar amount on the loss. In an auto accident where you suffer personal injuries, for instance, you may win general damages to

compensate you for your pain and suffering, which are obviously intangible. In a libel suit, the plaintiff seeks general damages for embarrassment or loss of prestige in the community.

Special damages are a little different. Here, the plaintiff must prove out-of-pocket monetary losses. In the auto accident we've been using as an example, you can show that your doctor and hospital bills came to a certain amount of money. Maybe you can also show that you were unable to work for several months or years, or maybe you needed in-home nursing care or rehabilitation. These are all things for which courts can establish specific dollar values. Special damages are intended to compensate for these kinds of provable losses.

Sometimes other terms are used to describe the various types of damages. *Actual damages* or *compensatory damages* means provable losses, including out-of-pocket losses (special damages) and, in some instances, some intangible but none-the-less real losses (i.e., general damages). *Presumed damages* are damages that a court assumes occurred without any proof. For many years, libel plaintiffs were awarded presumed damages without having to prove the defamation actually caused any injury. In some kinds of lawsuits such as copyright infringement cases, *statutory damages* may be awarded by a court without proof of a tangible or intangible loss. Instead, the damage award is based on legal rules set forth in a statutory law such as the Copyright Act. In some areas of law, *treble damages* (three times the actual damages) are awarded as a means of discouraging improper behavior. For example, federal antitrust and advertising fraud laws allow treble damages.

In contrast to general and special damages, *punitive damages* are not based on any tangible or intangible loss. Instead, they are intended as a punishment for a person (or company) that commits a maliciously wrongful act. For the victim, they constitute a windfall profit—and the Internal Revenue Service taxes them as such. For the wrongdoer, they're a form of non-criminal punishment, imposed by the court to deter such wrongful actions.

Punitive damages are only awarded in those tort actions where the victim can prove there was malice on the part of the tortfeasor. As we'll see in Chapter Four, the term *malice* has more than one meaning in law. For the purpose of winning punitive damages in most tort actions, it means ill will or evil intentions toward the victim. In libel cases, it usually has a different meaning, but either way, it is difficult to show malice—unless the tortfeasor actually set out to injure someone deliberately.

In recent years, juries have awarded millions (or billions) of dollars in punitive damages to victims of alleged corporate misconduct who could only prove that they were entitled to modest general and special damage awards. The Supreme Court has responded to this trend by overturning large punitive damage awards as a violation of the corporate defendant's due process rights. In a 2003 decision, the Court ruled that punitive damages should not ordinarily exceed 10 times the general and special damages (*State Farm v. Campbell,* 538 U.S. 408).

This decision is likely to benefit the media by reducing the tendency of jurors to impose very large punitive damage awards in libel cases. It also brings U.S. law closer to the law in other countries. Even in countries with a common law heritage, such as England, courts generally limit punitive damages to relatively small sums. In many other countries, punitive damages are not allowed at all. The highest courts in Italy and Germany, for example, have refused to enforce judgments of American courts that involved a punitive damage award.

As we'll see later, keeping track of the various kinds of damages is important in several areas of media law. Sometimes one type of damages is available but not another. It is not unusual for a plaintiff in a libel suit, for example, to be denied a right to sue for anything but special damages because a newspaper has printed a retraction.

THE STORY OF A LAWSUIT

Perhaps the best way to illustrate how the legal system works is to follow a lawsuit through the courts, step by step. We'll trace a civil case called *New York Times v. Sullivan* (376 U.S. 254), a libel suit that is usually remembered for the very important legal precedent it established. Its effect on libel law is discussed in Chapter Four. However, it is also an excellent case to illustrate court procedures, since the case was carried through almost every step that occurs in civil lawsuits.

Anyone who thinks a newspaper story has injured his/her reputation has a right to sue the newspaper for monetary damages. This case involved a lawsuit between an individual named L. B. Sullivan and the company that publishes the *New York Times*.

The case began after the *New York Times* published an advertisement from a group of African-American civil rights leaders that described instances of alleged police brutality in the South. Some of the incidents occurred in Montgomery, Alabama. The ad was accurate for the most part, but it did contain several errors of fact. It did not name any individual as responsible for the alleged police misconduct. Nevertheless, Sullivan, who was one of three elected commissioners in Montgomery and the man in charge of police and fire services there, contended that his reputation had been damaged by the ad, so he hired a lawyer and sued the *New York Times* for libel. He contended that to criticize the police was to criticize the city commissioner who oversees the police department. The result was a lawsuit that went all the way to the U.S. Supreme Court after a variety of intermediate steps.

Initiating the Lawsuit

When Sullivan's lawyer filed the papers required to initiate the lawsuit (a document called the *complaint*), the clerk of the trial court assigned the case a number for record-keeping purposes, and the case became known as *Sullivan v. New York Times*. In our legal system, court cases are identified by the names of the parties to the dispute, with a little "v." (for versus) between the two names. When there are multiple parties on either side, the case is popularly identified by the name of the first person listed on each side. The name of the party bringing the lawsuit (the *plaintiff*) appears first, followed by the name of the party defending (the *defendant*). When the defendant loses the case in the trial court and then appeals, the two names are sometimes reversed. Hence, this case later became known as *New York Times v. Sullivan*.

As the plaintiff, Sullivan was seeking an award of monetary damages. The *New York Times*, of course, wanted to convince the court it had done nothing to injure Sullivan and that damages

complaint:
the document that initiates a lawsuit.

answer:
the defendant's response to the complaint; no answer results in *default*, where the court rules for the other side.

serve:
to deliver a copy of the complaint to the appropriate party.

to quash:
to invalidate or void.

liability:
responsibility for an alleged wrong.

demurrer/motion to dismiss:
a pretrial motion that requests that the case be dismissed based on the lack of legal basis to support it.

summary judgment:
a pretrial motion in which the parties agree on the facts and one party is entitled to a judgment as a matter of law.

discovery:
the pretrial process by which the parties share information and evidence, including *depositions* and *interrogatories*.

should therefore not be awarded.

Sullivan could have chosen to sue the *New York Times* in the New York state courts or even in the federal courts (based on diversity of citizenship). However, at that point in history many southerners bitterly resented northern efforts to promote the civil rights of African-Americans in the South. To many in Alabama, the *New York Times* symbolized all that they disliked. Thus, Sullivan's lawyer knew his client would have a much more sympathetic jury in Alabama than in New York. Besides, it would certainly be more convenient for them (but not for the *Times*) to try the case there.

Serving papers. Having filed the complaint in the Alabama trial court, the next step was to *serve* the *New York Times*. That is, a *process server* had to deliver a copy of the papers announcing the lawsuit to an appropriate representative of the paper. Some states permit the plaintiff to simply mail a copy to the defendant, depending on the nature of the case. Serving the *New York Times* was a bit of a problem for Sullivan, since the paper didn't have any offices or regular employees in Alabama. Shortly after Sullivan initiated his lawsuit, a *Times* reporter visited the state to cover a civil rights demonstration, but *Times* lawyers in New York advised the reporter to leave the state before Sullivan's process servers could catch him, and he did so. Sullivan ultimately served the papers on an Alabama resident who was a "stringer" (a part-time correspondent) for the *Times*. The *Times* immediately filed a motion in the Alabama courts to *quash* (invalidate) the service of process. Anxious to gain jurisdiction, the Alabama court denied the motion—and then found a technicality in the *Times'* legal petition that enabled Alabama courts to hear the case.

Given the sentiments of many Alabama residents toward the *New York Times*, this would seem to have been an ideal case to be tried in federal court on a diversity of citizenship basis. However, the Alabama courts ruled that the *Times* had voluntarily consented to Alabama jurisdiction by the manner in which the motion to quash the process service was worded. Although it had a daily circulation of only 390 in the entire state and about 35 in the Montgomery area, the *New York Times* was forced to submit to the jurisdiction of the Alabama state courts due to a legal technicality.

Once the Alabama court established jurisdiction, the paper was obliged to respond. The *Times* filed a reply (called the *answer*), denying Sullivan's claims. If no answer had been filed, the *New York Times* would have *defaulted*. That means the court would have been free to award Sullivan whatever he asked for, without the paper having any say in the matter. But the *Times* did file an answer, denying any *liability* (responsibility for the alleged wrong).

Pretrial Motions

The *Times* also initiated a series of legal motions designed to get the case thrown out of court before trial by saying, in effect, "Look, this is nothing but a harassment lawsuit, and we shouldn't be put to the expense of a full trial."

Motions to dismiss. Two kinds of pretrial motions can lead to a dismissal of the case before trial. One is called a *demurrer* (or simply a *motion to dismiss*) and it contends that there is no *legal basis* for a lawsuit, even if every fact the plaintiff alleges is true. The other kind is a motion for *summary judgment,* and it is often based on the defendant's contention that there is no *factual basis* for the lawsuit to proceed further even if all the facts that the plaintiff alleges are completely true. A summary judgment motion may also be made when either side contends that there is no real disagreement between the parties about the facts, and that the judge should simply decide the case without further proceedings. The *Times* filed

a series of demurrers to argue that, among other things, the ad in no way referred to Sullivan and thus there was no legal basis for Sullivan to sue. (Someone must be identified and defamed before he/she can sue for libel, as Chapter Four explains.)

Demurrers and motions for summary judgment are particularly important for the media, because the media are often sued by people who may be embittered over unfriendly coverage but who have no valid basis for a lawsuit. The media may be entitled to a dismissal without the expense of a full trial. However, pretrial dismissals deny plaintiffs their day in court. Thus, a court reviewing such a request must give the plaintiff the benefit of every doubt. A pretrial dismissal is improper if there is any reasonable possibility the plaintiff could win at a trial. This point is important because a number of Supreme Court decisions affecting the media have come on appeals of motions to dismiss a case before trial. When a newspaper or television station, for instance, is denied a pretrial dismissal and the U.S. Supreme Court affirms the denial, that does not mean the Court thinks the plaintiff will eventually win the lawsuit. Rather, it merely says that the plaintiff might have some slight chance to win and, in our system of justice, has a right to try.

Returning to the *Sullivan* case, the Alabama court denied all of the *Times*' motions to dismiss the case before trial, and a trial was eventually scheduled.

Discovery

After the legal maneuvering over motions for summary judgment and demurrers, there is another very important pretrial procedure: the process of *discovery*. It is a process that allows each side to find out a great deal about the strengths and weaknesses of the other side's case. *Subpoenas*, or court orders compelling testimony or information, can be part of this process. Each *litigant* (party to the lawsuit) is permitted to ask the opposition a variety of oral questions (at *depositions)* and written questions *(interrogatories)*. During depositions, each side is permitted to meet and question hostile witnesses who are under oath (i.e., the witness has taken an oath promising to tell the truth).

As a result of discovery, a defendant might find out how substantial the plaintiff's losses really were, for instance. A plaintiff who says the wrong thing during a deposition can devastate his or her own case. And each litigant can size up the other's witnesses to see whether they will be credible in court. Much important information is revealed during discovery.

Why do courts allow discovery? Allowing discovery encourages many out-of-court settlements of lawsuits that would otherwise clog up the courts. If you find out that your opponent has a good case against you, you'll be much more likely to make a generous settle-

appellant: party that appeals a case to a higher court.

respondent: party on the other side of an appealed case.

subpoena: Latin for "under penalty;" an order to an individual to appear before a body at a particular time to give testimony.

majority opinion: the opinion of the court that gets the most votes and carries the weight of legal precedent.

dissenting opinion: an opinion written by a judge disagreeing with part or all of the majority or another judge's opinion.

concurring opinion: an opinion written by a judge agreeing with part or all of the majority or another judge's opinion.

ment offer. Taking a case to trial costs time and money, so it is in everybody's interest to see cases settled out of court whenever possible. The more each side knows about the other's case, the more likely they are to reach an agreement on their own.

However, Sullivan and the *New York Times* were hopelessly far apart; no settlement was possible. Sullivan was suing for half a million dollars, and the *Times* was contending that this was ridiculous. With a circulation of only 35 in Sullivan's county, and with him never mentioned either by name or title, the *Times* felt there was simply no way the ad could have done $500,000 worth of damage to the man's reputation.

The Trial

Sullivan and the *New York Times* faced off in a courtroom for trial. The first step in the trial was the selection of a jury, a process that raises an interesting point about civil cases.

Juries. Jury rights in civil cases differ somewhat from those in criminal cases. A defendant's right to a trial by a jury is one of the cornerstones of our criminal justice system, but no such stringent constitutional safeguards are involved in civil cases. There is a growing trend toward reducing the size of civil juries from the traditional panel of 12 to as few as six persons, and to allow verdicts to be rendered by nonunanimous civil juries. Only a few states allow nonunanimous juries or juries of fewer than 12 persons to decide major criminal cases.

In fact, many civil cases are tried without any jury because the losing side could be stuck with a bill for the jury, a risk neither side wishes to take. (By contrast, the defendant never has to pay for asserting his constitutional right to a jury trial in a criminal case.) Moreover, some civil litigants avoid jury trials because they feel they will fare better if a judge decides the facts as well as the law. But on the other hand, there are instances where a civil plaintiff may insist on a jury trial in the hope that the jurors will become emotional and award a big judgment. That happened in the *Sullivan* case. Sullivan's lawyers were not unaware of the hostility many white southerners felt toward both the civil rights movement and the *New York Times* in the early 1960s when this case was tried. Blacks were still rare on Alabama juries at that point. The lawyers felt—correctly—that their client would do well before a jury.

Process of the trial. Thus, the trial began. Sullivan, as the plaintiff, presented his evidence first, and then the *New York Times* responded. The plaintiff always goes first, the defendant last. A variety of witnesses testified for each side, with Sullivan's witnesses saying that they indeed associated him with the actions of the Montgomery police, and that they would think less of him if they believed the charges in the *New York Times* advertisement. Other witnesses testified about what they claimed were inaccuracies in the ad. In its response, the *Times* contended that publishing the ad was protected by the First Amendment and that the ad in no way referred to Sullivan. The significance of these arguments will become more clear in Chapter Four, which discusses what one must prove to win a libel suit and what the media can do to defend such a lawsuit.

After all of the evidence was in, the judge instructed the jury on the law. He told the jurors the material was libelous as a matter of law. Thus, their job was to decide only whether the *Times* was responsible for the publication and whether, in fact, the ad referred to Sullivan. The judge ruled that Sullivan did not need to prove any actual monetary losses due to the ad, since damages could be presumed from any libelous statement under Alabama law.

Eventually the jurors adjourned to a private room and arrived at a verdict: a judgment of half a million dollars (the full amount requested) for Sullivan. They would see to it that the *Times* would pay for its decision to publish an ad alleging police brutality in Montgomery.

After that verdict was rendered, the *New York Times* took two important procedural steps.

The first was to file a motion for a new trial, citing what it claimed were errors and irregularities in the original trial. That motion was promptly denied in this case, but that doesn't always happen. If a trial court judge feels the jury improperly weighed the evidence or was not impartial, or if improper evidence was presented at the trial, or if various other procedural errors occurred during the trial, the losing side may be entitled to a new trial. In this case, the motion for a new trial was denied. Then the *Times* exercised its other option, appealing the verdict to the Alabama Supreme Court.

The Appeals

When a case is appealed, the nomenclature changes a little. The party that appeals the case becomes the *appellant,* while the other party becomes the *respondent.* When the losing side at the trial level appeals, the names may be reversed, as we already suggested would happen in this case. Hence, the *New York Times* became the appellant and Sullivan the respondent: the case became known as *New York Times v. Sullivan.*

The Alabama Supreme Court agreed to hear the *New York Times v. Sullivan* case. When an appellate court grants an appeal such as this one, several things occur. First, each side submits a *brief* which is an elaborate argument of the legal issues involved in the case: a brief is not always brief. The appellant's brief must argue that the trial court erred in applying the law to the facts at hand, while the respondent must defend the trial court's decision.

Process of the appeal. After the briefs are filed and read by the appellate justices, oral arguments are usually scheduled. At oral arguments the lawyers for each side are given a short period of time to highlight their main points. The justices may ask them questions, sometimes on obscure points, perhaps forcing the lawyers to use up their time allotment without ever getting to their most important arguments. Sometimes the lawyers (and knowledgeable spectators such as journalists who regularly cover the court) can guess which side will win from the kind of questions the justices are asking. Appellate court justices sometimes reveal their own sympathies by the nature of their questions.

After the oral arguments, the justices informally vote on the case to see how they will rule. Once the positions of the various justices are clear, one justice will be assigned to write the *majority opinion*—the opinion that will prevail and become a legal precedent. If other justices disagree with this opinion, they may write *dissenting opinions* in which they argue that the majority is in error. Or a justice may agree with the result reached by the majority but disagree with some of the reasoning. When that happens, the result is a *concurring opinion.* A justice may also concur with another's concurring or dissenting opinion. Dissenting and concurring opinions are important, because as times change it is not unusual for a new majority to coalesce around what was once a minority viewpoint. A dissenting opinion may become the foundation for a later majority opinion.

When the appellate opinion is then *published*—that is, printed in a law book that provides a verbatim record of all published decisions of the particular court—that decision officially becomes a legal precedent, adding a little more to the ever-growing body of law.

Not all appellate opinions are published in law books. Many courts publish only their most important opinions. For many years the unpublished ones had little or no weight as legal precedents. But because appellate court opinions are usually accessible via computer databases today, more and more appellate courts are allowing all of their decisions to be treated as legal precedents, largely eliminating the legal distinction between published and

unpublished decisions. There are other occasions when an appellate court decision will lose its significance as a legal precedent. For instance, that occurs when a higher court decides to review the decision and issue its own ruling on the case.

Outcome and appeal to high court. In *New York Times v. Sullivan*, the Alabama Supreme Court affirmed the judgment of the trial court in full, upholding the half-million-dollar libel award to Sullivan. In an elaborate legal opinion, the Alabama Supreme Court defended the trial court's finding that it had jurisdiction over the *New York Times*. Then the court upheld the trial judge's controversial jury instructions, in which he told the jurors Sullivan didn't need to prove any actual losses to win his case. Finally, the state supreme court affirmed all other aspects of the decision, including the large award of damages.

After this setback, the *New York Times* had one hope left: the chance that the U.S. Supreme Court might agree to hear the case in spite of the fact that civil libel had traditionally been purely a matter of state law. The *Times* petitioned for a *writ of certiorari,* contending that this kind of a libel judgment violated the First Amendment because it would inhibit public discussion of controversial issues such as civil rights.

To the amazement of some legal experts, the Supreme Court agreed to hear the case.

The U.S. Supreme Court Ruling

When the *New York Times v. Sullivan* case reached the U.S. Supreme Court, all of the steps just described happened again. Elaborate briefs were filed by both sides, and oral arguments were heard by the nine Supreme Court justices. Then the justices conferred privately and Justice William J. Brennan was selected to write a majority opinion in what was destined to become the most famous court decision of all time on libel law.

Chapter Four describes the legal reasoning of the Supreme Court in this landmark decision. At this point, we'll simply say the *New York Times* won. The decisions of the Alabama courts were *reversed and remanded.* That means the Supreme Court invalidated the lower court decisions and ordered the Alabama trial court to reconsider the facts of the case under new legal rules set down by the Supreme Court. As a practical matter, sometimes a decision like this one terminates the case. Sullivan's lawyers knew they could not win a trial conducted under the new legal ground rules. When the U.S. Supreme Court reversed and remanded the Alabama court's decision, this case was terminated—in fact if not in legal theory.

Other Options

In addition to reversing and/or remanding a lower court ruling, there are several other options open to an appellate court. The decision can be upheld (*affirmed*) or it can be affirmed in part and reversed in part. Then a new trial may be scheduled later. But whatever the ultimate outcome of the case at trial, often *the most important aspect is the precedent-setting ruling of an appellate court.* In the study of media law, you will encounter cases where the discussion centers on a major legal issue—and the final disposition of the lawsuit isn't discussed at all. After a landmark appellate ruling, it may take many more years to complete all of the various legal maneuvers at the trial court level and conclude a lawsuit—or the matter may be terminated as soon as a high appellate court rules.

Certainly valid criticisms of the American legal system are the time and money it takes to get a case to trial, up through the appellate courts and then back to trial again if necessary. If "justice delayed is justice denied," as critics of the system suggest, the expensive route through the American court system often includes enough detours to deny justice to many.

HOW TO FIND THE LAW

Once you understand the various kinds of law and how the American legal system fits together, it isn't difficult to learn the law on any given subject. Legal research (i.e., the process of finding out what the law is on a subject) involves nothing more than knowing how to use some basic online reference tools or books that every well-stocked law library keeps on its shelves. Most larger county courthouses either have a law library or are located near one since judges need ready access to the laws on which to base their decisions. Also, every accredited law school has an extensive law library. Most of these law libraries are open to the public. You can go in and look up the law for yourself.

More than ever before, it is also possible to use the Internet, or a computer database such as Lexis-Nexis or Westlaw, to do legal research. These computer databases, once so costly that only the best-heeled law firms could afford them, are now accessible online via many university libraries. The amount of legal information available on the Internet is enormous and growing daily—a trend that is revolutionizing legal research.

Free legal research tools. The Internet itself has become a powerful legal research tool, as state and federal courts, as well as other government agencies, have begun posting the full text of their decisions, regulations and other documents on their websites. For example, there is a wealth of regulatory information about advertising on the Federal Trade Commission's website (www.ftc.gov) and about the electronic media on the Federal Communications Commission's website (www.fcc.gov). Popular general online legal resources include Thomas (thomas.loc.gov), the Library of Congress legislative information website; FindLaw (www.findlaw.com), a comprehensive privately maintained website; the Cornell Legal Information Institute site (www.law.cornell.edu), widely regarded as one of the best law sites; and Oyez (www.oyez.org), Chicago-Kent College of Law's U.S. Supreme Court site that has audio of oral arguments before the Court. The official website of the federal court system (www.uscourts.gov) has the full text of most recent federal court decisions, including those of the Supreme Court (www.supremecourt.gov) and the U.S. Courts of Appeals. Many specialty law firms have websites and electronic newsletters highlighting important cases or legal developments. Google Scholar (scholar.google.com) contains legal documents and patents.

Court Decisions: Citations

Precedent-setting appellate court decisions are not difficult to look up, because there's a citation system that will tell you where to find each case. Throughout each chapter in this book you'll find citations to important court decisions in that area of media law. After the names of the two parties in the case, you'll see the case *citation* (a series of numbers and letters). We've already discussed the landmark libel decision *New York Times v. Sullivan*. When you look up that case in this or any other law-oriented book, you'll see this legal citation after the name of the case: 376 U.S. 254. The letters and numbers tell you exactly where to find the full text of the Supreme Court's ruling in a law book.

The "U.S." in the middle tells you which court ruled on the case because it stands for *United States Reports,* a series of books carrying the official text of Supreme Court decisions. Thus, to find the decision in print, you'd ask the law librarian where the "U.S. Supreme Court Reports" are kept. When you find this large collection of identical-looking volumes, the rest is simple. The first number in the citation (376) refers to the volume number of the law book in which the *New York Times v. Sullivan* case appears. You would look down the row,

find the volume labeled "376" on the binding and pull it out.

Now you're there. The number after the "U.S." is the page number where the text of the case begins. Turn to page 254 in volume 376 of the *United States Reports*, and there's *New York Times v. Sullivan*. Before the actual text, there are introductory notes explaining the decision, designed to facilitate a quick review of the case highlights. Some citations end with the year of the decision. For example, *New York Times v. Sullivan* is cited as 376 U.S. 254, 1964.

When doing online research using Lexis-Nexis or Westlaw, for example, it's possible to search by the case name, the citation, or both—or to search for key words in the text of the case. Many case citations have letters in the middle such as "F.2d" or "F.3d." "F.2d" means *Federal Reporter, second series,* which is a set of law books containing decisions of the various U.S. Courts of Appeals. Why *second series?* The publisher of these books began producing them many years ago, and after a time the original editorial treatment and even the style of the binding seemed old-fashioned. Thus, the publisher modernized the book and started a second series, beginning again with volume number one in the new series. In 1993, the publisher launched a *third series,* once again starting with volume number one. If you see a citation to "F.3d," the case is a 1993 or later decision of a U.S. Court of Appeals.

In this textbook you will see a variety of legal citations to court decisions, and in each instance the letters in the middle tell you which court decided the case. Those decisions of the federal district courts published as legal precedents (many are not) appear in the *Federal Supplement* (abbreviated "F.Supp."). There is also a second series for the Federal Supplement.

The citation system works much the same way in the state courts. Chapter Eight cites a case on reporter's privilege named *Zelenka v. Wisconsin,* 266 N.W.2d 279. It's a decision of the Wisconsin Supreme Court, but the citation refers to the *Northwestern Reporter, second series.* That series carries important court decisions from a number of midwestern states. It is a part of the *National Reporter System,* one publishing house's collection of regional reports that cover all 50 states. Most law libraries have the National Reporter system and other sets of volumes reporting major cases of the state appellate courts around the country. Lexis-Nexis and Westlaw both have the full text of cases from all 50 states.

In many instances, law libraries have more than one set of law books reporting the most important court decisions. This is true in part because there are competing legal publishing houses, each offering a full set of reports of major appellate cases. To illustrate by returning once again to *New York Times v. Sullivan*, here is a more complete set of citations to that case: 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964). Don't be intimidated by all those numbers. You already know what "376 U.S. 254" means. But suppose that volume is unavailable when you visit the law library. No problem. Just go to the next citation. "S. Ct." means *Supreme Court Reporter,* and if you pull down volume 84 and look on page 710, there's your case. Or you could go to "L.Ed.2d", which means *Lawyer's Edition, U.S. Supreme Court Reports, second series,* and pull down volume 11 and look on page 686. The text of the decisions is exactly the same, but the introductory matter and editorial treatment may vary in these privately published books. Many law libraries keep all three sets of Supreme Court rulings, because the privately published versions are in print long before the official *U.S. Reports.*

In the mass communications field, another convenient way to look up court decisions is to check the *Media Law Reporter.* One volume is published each year, and it carries the full text of most precedent-setting court decisions on media law, including Supreme Court decisions, lower federal court rulings and state cases. In this book there are several citations to the *Media Law Reporter* (abbreviated in citations as Media L. Rep.).

"Shepardizing" cases. The courts frequently interpret and reinterpret previous decisions. You should make sure the key cases in any given topic are still *good law* and have not been reversed by a higher court or a later decision of the same court. A good way to do that is to consult a cross-reference index called *Shepard's Citator.* Most law libraries have *Shepard's* covering state and federal appellate courts, and many online databases let you perform this function with a few clicks. By "Shepardizing" cases before citing them, you can avoid writing 10 pages about a court decision that has been overturned.

Legal Encyclopedias

What happens if you don't know the names of any court decisions and you want to learn something about the law on a particular topic? One place you might look is a legal encyclopedia. These are just like regular encyclopedias—except that they discuss only legal subjects. There are two leading legal encyclopedias in America, produced by different publishing houses: *American Jurisprudence,* or "Am. Jur." for short, and *Corpus Juris Secundum,* or "CJS."

Legal encyclopedias are not difficult to use. The many legal topics they treat are listed in alphabetical order with brief summaries of the major legal principles in each area. The only trick is knowing where to look for a particular subject, and for that there's a comprehensive index at the end of each set. If you want to know more about libel law, for instance, you would look up the word "libel." It's not always that straightforward, because the name you have in mind may not be the key word under which that subject is indexed; you may have to think of some synonyms. Once you find the right word, the index will lead you directly to a summary of the law, whether it's bankruptcy or crimes, unfair competition or medical malpractice. Some of these encyclopedias are available online as well. There are also legal encyclopedias that specifically summarize the laws of one state. Most of the populous states have such encyclopedias, such as Florida, California, Texas and New York.

One thing you need to be aware of when you consult a physical legal encyclopedia is the existence of *pocket parts.* What a legal encyclopedia says in its main text is supplemented by annual updates that are tucked into a pocket at the back of each volume.

Because there have been thousands of important court decisions, and because many have reached inconsistent conclusions, the American Law Institute has commissioned groups of legal scholars to write summaries of the law as it has developed over the years. These are called *Restatements* of the law, and the courts give them considerable weight. The *Restatement of Torts* summarizes libel, privacy and other areas of tort law and is an important reference work in these fields. The *Restatements* carry far more legal weight than legal encyclopedia, although they might seem less user-friendly to those doing their first legal research.

Annotated Codes

Once you have read a survey of your subject in a legal encyclopedia, you might want to learn more about the subject by reading some of the decisions and statutory laws summarized in the encyclopedia. We've already described the method of finding court decisions by working from the case citations. Looking up the text of a statutory law is often even easier.

Many important state and federal laws are organized by subject matter. To look up a statutory law, locate the appropriate book of state or federal statutes: a legal encyclopedia will refer you to statutory laws as well as court decisions that pertain to your subject. If you wanted to read the federal Copyright Act, for instance, you would use its legal citation, which is "17 U.S.C. § 100 *et seq.*" That means Title 17 of the *United States Code,* Section

100 and following sections. To find the text of the Copyright Act, you would ask the law librarian where the U.S. Code volumes are kept, and then look up Section 100 in Title 17. The number before the name of a state or federal code is always the title, book or volume number, and the number after the name will lead you to the correct chapter and section.

There are two things to remember in looking up statutory laws. One is that the most complete sets are annotated; they contain brief summaries of court decisions interpreting the statutory laws as well as the text of the laws themselves. It's important to make sure the law you're learning has not been overruled by a court decision. And be sure to check the pocket parts if you're using physical volumes of the law. Second, like encyclopedias, the annotated collections of statutory laws are extensively indexed. If you want to learn what the law of libel is in West Virginia, for instance, you can simply look up libel in the index to the *West Virginia Code* and turn to the appropriate sections to find statutes and case summaries.

Administrative Regulations

Administrative law is such a vast and amorphous thing that we will not devote much space to it here. However, students with interest in broadcasting, for instance, should be aware that the regulations of the Federal Communications Commission are organized to facilitate research. Title 47 of a legal work called *The Code of Federal Regulations,* or "CFR" for short, contains the FCC's rules and regulations. Working from the table of contents, you can quickly look up the rules on a particular point of broadcast regulation in CFR. CFR is updated frequently, since administrative agencies constantly change their rules.

There are also published summaries of actions taken by major administrative agencies. Major law libraries keep complete sets of specialized legal reference materials such as *Pike & Fischer's Communications Regulation*, and these are now available online by subscription. And, of course, regulatory agencies have their own websites that include compilations of their regulations, news releases and reports.

WHAT SHOULD I KNOW ABOUT MY STATE?

- What federal circuit is my state in?
- Where is my closest federal district court?
- How is my state judicial system structured?
- Where is my closest state trial court?
- How are my state's judges chosen (elected, appointed)?
- What does my state constitution say about free speech and press rights?
- How do criminal and civil procedures work in my state?