pem92171_ch01 5/4/02 8:31 AM Page 1 .
CONFIRMING PROOFS

The American Legal System

CHAPTER 1

Before a physician can study surgery, he or she needs to study anatomy. So it is with the study of mass media law. Before a study of this narrow aspect of American law is undertaken, a student must first have a general background in the law and in the operation of the judicial system. That is the purpose of this short chapter.

pem92171_ch01 5/4/02 8:31 AM Page 2 . CONFIRMING PROOFS

Probably no nation is more closely tied to the law than is the American Republic. From the 1770s, when at the beginning of a war of revolution we attempted to legally justify our separation from the motherland, to the 21st century, when citizens of the nation attempt to resolve weighty moral, political, social and environmental problems through the judicial process, and during the more than 200 years between, the American people have showed a remarkable faith in the law. One could write a surprisingly accurate history of this nation using reports of court decisions as the only source. Not that what happens in the courts reflects everything that happens in the nation; but as has been observed by 19th-century French political scientist and historian Alexis de Tocqueville and others, political and sometimes moral issues in the United States often end up as legal disputes. Beginning with the sedition cases in the late 1790s, which reflected the political turmoil of that era, one could chart the history of the United States from adolescence to maturity. As the frontier expanded in the 19th century, citizens used the courts to argue land claims and boundary problems. Civil rights litigation in both the mid-19th and mid-20th centuries reflects a people attempting to cope with racial and ethnic diversity. Industrialization brought labor unions, workers' compensation laws and child labor laws, all of which resulted in controversies that found their way into the courts. As mass production developed and large manufacturers began to create most of the consumer goods used, judges and juries had to cope with new laws on product safety, honesty in advertising and consumer complaints. In recent years Americans have gone to court to try to resolve disputes over abortion, gay rights, education and even national elections.

Americans have protested nearly every war the nation has fought—including the Revolutionary War. The record of these protests is contained in scores of court decisions. The prohibition and crime of the '20s and the economic woes of the '30s both left residue in the law. In the United States, as in most other societies, law is a basic part of existence, as necessary for the survival of civilization as are economic systems, political systems, mass communication systems, cultural achievement and the family.

This chapter has two purposes: to acquaint readers with the law and to present a brief outline of the legal system in the United States. While this is not designed to be a comprehensive course in law and the judicial system—such material can better be studied in depth in an undergraduate political science course—it does provide sufficient introduction to understand the remaining 15 chapters of the book.

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

SOURCES OF THE LAW

There are almost as many definitions of law as there are people who study the law. Some people say that law is any social norm or any organized or ritualized method of settling disputes. Most writers on the subject insist that it is a bit more complex, that some system of sanctions is required for a genuine legal system. John Austin, a 19th-century English jurist, defined law as definite rules of human conduct with appropriate sanctions for their enforcement. He added

pem92171_ch01 5/4/02 8:31 AM Page 3 . CONFIRMING PROOFS

that both the rules and the sanctions must be prescribed by duly constituted human authority.[1] Roscoe Pound, an American legal scholar, has suggested that law is really social engineering—the attempt to order the way people behave. For the purposes of this book, it is probably more helpful to consider the law to be a set of rules that attempt to guide human conduct and a set of formal, governmental sanctions that are applied when those rules are violated.

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

THE COMMON LAW

The **common law,** which developed in England during the 200 years after the Norman Conquest in the 11th century, is one of the great legacies of the British people to colonial America. During those two centuries, the crude mosaic of Anglo-Saxon customs was replaced by a single system of law worked out by jurists and judges. The system of law became common throughout England; it became the common law. It was also called the common law to distinguish it from the ecclesiastical (church) law prevalent at the time. Initially, the customs of the people were used by the king's courts as the foundation of the law, disputes were resolved according to community custom, and governmental sanction was applied to enforce the resolution. As such, the common law was, and still is, considered "discovered law." When a problem arose, the court's task was to find or discover the proper solution, to seek the common custom of the people. The judge didn't create the law; he or she merely found it, much like a miner finds gold or silver.

This, at least, is the theory of the common law. Perhaps at one point judges themselves believed that they were merely discovering the law when they handed down decisions. As legal problems became more complex and as the law began to be professionally administered (the first lawyers appeared during this era, and eventually professional judges), it became clear that the common law reflected not so much the custom of the land as the custom of the court—or more properly, the custom of the judges. While judges continued to look to the past to discover how other courts decided a case when given similar facts (precedent is discussed in a moment), many times judges were forced to create the law themselves.

This common-law system was the perfect system for the American colonies. It was a very pragmatic system aimed at settling real problems, not at expounding abstract and intellectually satisfying theories. The common law is an inductive system of law in which a legal rule is arrived at after consideration of a great number of cases. (In a deductive system the

1. Abraham, *Judicial Process.*

pem92171_ch01 5/4/02 8:31 AM Page 4 . CONFIRMING PROOFS

rules are expounded first and then the court decides the legal situation under the existing rule.) Colonial America was a land of new problems for British and other settlers. The old law frequently did not work. But the common law easily accommodated the new environment. The ability of the common law to adapt to change is directly responsible for its longevity.

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

Fundamental to the common law is the concept that judges should look to the past and follow court precedents. The Latin expression for the concept is this: "Stare decisis et non quieta movere" (to stand by past decisions and not disturb things at rest). **Stare decisis** is the key phrase: Let the decision stand. A judge should resolve current problems in the same manner as similar problems were resolved in the past. When high school wrestling coach Mike Milkovich sued the Lorain (Ohio) Journal Company in the mid-1970s for publishing the claim that Milkovich had lied during a hearing, the judge most certainly looked to past decisions to discover whether in previous cases such a charge had been considered defamatory or libelous. There are ample precedents for ruling that a published charge that a person lied is libelous, and Milkovich won his lawsuit.[2]

The Role of Precedent

At first glance one would think that the law can never change in a system that continually looks to the past. What if the first few rulings in a line of cases were bad decisions? Are we saddled with bad law forever? Fortunately, the law does not operate quite in this way. While following **precedent** is the desired state of affairs (many people say that certainty in the law is more important than justice), it is not always the proper way to proceed. To protect the integrity of the common law, judges have developed several means of coping with bad law and with new situations in which the application of old law would result in injustice.

Imagine for a moment that the newspaper in your hometown publishes a picture and story about a 12-year-old girl who gave birth to a 7-pound son in a local hospital. The mother and father do not like the publicity and sue the newspaper for invasion of privacy. The attorney for the parents finds a precedent, *Barber* v. *Time,*[3] in which a Missouri court ruled that to photograph a patient in a hospital room against her will and then to publish that picture in a newsmagazine is an **invasion of privacy.**

Does the existence of this precedent mean that the young couple will automatically win this lawsuit? that the court will follow the decision? No, it does not. For one thing, there may be other cases in which courts have ruled that publishing such a picture is not an invasion of privacy. In fact in 1956 in the case of *Meetze* v. *AP,*[4] a South Carolina court made just such a ruling. But for the moment assume that *Barber* v. *Time* is the only precedent. Is the court bound by this precedent? No. The court has several options concerning the 1942 decision.

First, it can *accept* the precedent as law and rule that the newspaper has invaded the privacy of the couple by publishing the picture and story about the birth of their child. Second, the court can *modify*, or change, the 1942 precedent by arguing that *Barber* v. *Time* was decided more than 60 years ago when people were more sensitive about going to a hospital, since a stay in the hospital was often considered to reflect badly on a patient, but that hospitalization is no longer a sensitive matter to most people. Therefore, a rule of law restricting the

2. *Milkovich* v. *Lorain Journal Co.,* 110 S. Ct. 2695 (1991).
3. 159 S.W. 2d 291 (1942).
4. 95 S.E. 2d 606 (1956).

pem92171_ch01 5/4/02 8:31 AM Page 5 . CONFIRMING PROOFS

publication of a picture of a hospital patient is unrealistic, unless the picture is in bad taste or needlessly embarrasses the patient. Then the publication is an invasion of privacy. If not, the publication of such a picture is permissible. In our imaginary case, then, the decision turns on what kind of picture and story the newspaper published: a pleasant picture that flattered the couple? or one that mocked and embarrassed them? If the court rules in this manner, it *modifies* the 1942 precedent, making it correspond to what the judge perceives to be contemporary sensibilities.

As a third option the court can decide that *Barber* v. *Time* provides an important precedent for a plaintiff hospitalized because of disease—as Dorothy Barber was—but that in the case before the court, the plaintiff was hospitalized to give birth to a baby, a different situation: giving birth is a voluntary status; catching a disease is not. Because the two cases present different problems, they are really different cases. Hence, the *Barber* v. *Time* precedent does not apply. This practice is called *distinguishing the precedent from the current case,* a very common action.

Finally, the court can *overrule* the precedent. In 1941 the Supreme Court of the United States overruled a decision made by the Supreme Court in 1918 regarding the right of a judge to use what is called the **summary contempt power** (*Toledo Newspaper Co.* v. *U.S.*[5]). This is the power of a judge to charge someone with being in contempt of court, to find that person guilty of contempt, and then to punish him or her for the contempt—all without a jury trial. In *Nye* v. *U.S.*[6] the high court said that in 1918 it had been improperly informed as to the intent of a measure passed by Congress in 1831 that authorized the use of the summary power by federal judges. The 1918 ruling was therefore bad, was wrong, and was reversed. (Fuller explanation of summary contempt as it applies to the mass media is given in Chapter 10.) The only courts that can overrule the 1942 decision by the Missouri Supreme Court in *Barber* v. *Time* are the Missouri Supreme Court and the U.S. Supreme Court.

Obviously, the preceding discussion oversimplifies the judicial process. Rarely is a court confronted with only a single precedent. And whether or not precedent is binding on a court is often an issue. For example, decisions by the Supreme Court of the United States regarding the U.S. Constitution and federal laws are binding on all federal and state courts. Decisions by the U.S. Court of Appeals on federal matters are binding only on other lower federal and state courts in that circuit or region. (See pages 23–24 for a discussion of the circuits.) The supreme court of any state is the final authority on the meaning of the constitution and laws of that state, and its rulings on these matters are binding on all state and *federal* courts in that state. Matters are more complicated when federal courts interpret state laws. State courts can accept or reject these interpretations in most instances. Because mass media law is so heavily affected by the First Amendment, state judges are frequently forced to look outside their borders to precedents developed by the federal courts. A state court ruling on a question involving the First Amendment guarantees of freedom of speech and freedom of the press is necessarily governed by federal court precedents on the same subject.

Lawyers and law professors often debate just how important precedent really is when a court makes a decision. Some persons have suggested what is called the "hunch theory" of jurisprudence. Under this theory a judge or justice decides a case based on instinct or a feeling of what is right and wrong and then seeks out precedents to support the decision.

5. 242 U.S. 402 (1918).
6. 313 U.S. 33 (1941).

pem92171_ch01 5/4/02 8:31 AM Page 6 . CONFIRMING PROOFS

The imaginary invasion-of-privacy case just discussed demonstrates that the common law can have vitality, that despite the rule of precedent a judge is rarely bound tightly by the past. There is a saying: Every age should be the mistress of its own law. This saying applies to the common law as well as to all other aspects of the legal system.

Finding Common Law Cases

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

Courts began to keep records of their decisions centuries ago. In the 13th century unofficial reports of cases began to appear in yearbooks, but they were records of court proceedings in which procedural points were clarified for the benefit of legal practitioners rather than collections of court decisions. The modern concept of fully reporting the written decisions of all courts probably began in 1785 with the publication of the first British Term Reports.

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

The coming of the computer age has affected the legal community in many ways. Court opinions are now available to lawyers and others via a variety of computer-mediated communication systems. In some jurisdictions, lawyers are permitted to file documents electronically with the court so long as they back these documents up with hard copies soon thereafter. Some legal authorities have argued that a new system of citations is needed, one that is suitable for printed case reporters—which will remain the standard in the judicial system at least in the early years of the 21st century—and for cases transmitted electronically. And new systems have been proposed, including an elaborate modification recommended for adoption in 1996 by the House of Delegates of the American Bar Association. But no scheme has received widespread or enthusiastic support from the judges, lawyers and court administrators who would use it.

If you have the correct citation, you can easily find any case you seek. Locating all citations of the cases apropos to a particular problem—such as a libel suit—is a different matter

pem92171_ch01 5/4/02 8:31 AM Page 7 . CONFIRMING PROOFS

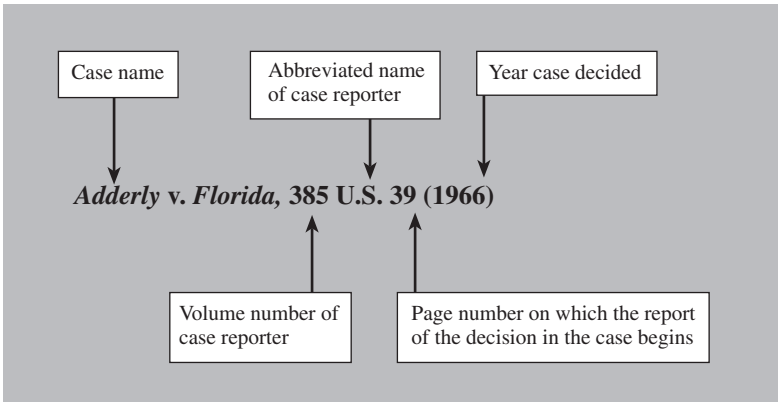


FIGURE 1.1
Reading a case citation.

and is a technique taught in law schools. A great many legal encyclopedias, digests, compilations of the common law, books and articles are used by lawyers to track down the names and citations of the appropriate cases.

There is no better way to sum up the common law than to quote Oliver Wendell Holmes ("The Common Law," published in 1881):[7]

"The life of the law has not been logic; it has been experience."

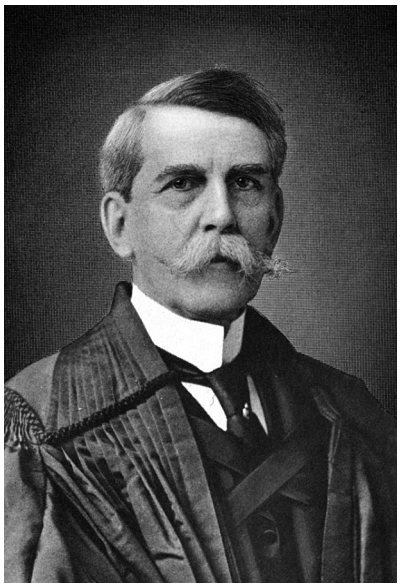
> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. . . . The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned.

THE LAW OF EQUITY

The law of **equity** is another kind of judge-made law. The distinction today between the common law and equity law has blurred. The cases are heard by the same judges in the same courtrooms. Differences in procedures and remedies are all that is left to distinguish these two categories of the law. Separate consideration of the common law and equity leads to a better understanding of both, however. The law of equity, as developed in Britain beginning in the 14th and 15th centuries, is the second basic source of the law in the United States. Equity was originally a supplement to the common law and developed side by side with the common law. During the 1300s and 1400s rulings from the king's courts often became rigid and narrow. Many persons seeking relief under the common law for very real grievances were often turned away because the law did not provide a suitable remedy for their problems. In such instances

7. Holmes, *Common Law.*

pem92171_ch01 5/4/02 8:31 AM Page 8 . CONFIRMING PROOFS



Source: Archive Photos

Oliver Wendell Holmes, the author of The Common Law, *and an associate justice of the Supreme Court of the United States from 1902 until 1932.*

the disappointed litigant could take the problem to the king for resolution, petitioning the king to "do right for the love of God and by way of charity." According to legal scholar Henry Abraham, "The king was empowered to mold the law for the sake of 'justice,' to grant the relief prayed for as an act of grace."[8] Soon the chancellor, the king's secretary or assistant, set up a special office or court to resolve the problems that the king's common-law courts could not handle. At the outset of the hearing, the aggrieved party had to establish that there was no adequate remedy under the common law and that a special court was needed to hear the case. The office of the chancellor soon became known as the Court of Chancery. Decisions were made on the basis of conscience or fairness or "equity."

British common law and equity law were American law until the Revolution in 1776. After independence was won, the basic principles of common law in existence before the Revolution were kept because the cases remained acceptable precedent. After some hesitation, equity was accepted in much the same way.

The rules and procedures under equity are far more flexible than those under the common law. Equity really begins where the common law leaves off. Equity suits are never tried before a jury. Rulings come in the form of **judicial decrees,** not in judgments of yes or no. Decisions in equity are (and were) discretionary on the part of judges. And despite the fact that precedents are also relied upon in the law of equity, judges are free to do what they think is right and fair in a specific case.

Equity provides another advantage for troubled litigants—the restraining order. A judge sitting in equity can order preventive measures as well as remedial ones. Individuals who can demonstrate that they are in peril or are about to suffer a serious irremediable wrong can

8. Abraham, *Judicial Process.*

pem92171_ch01 5/4/02 8:31 AM Page 9 . CONFIRMING PROOFS

usually gain a legal writ such as an injunction or a restraining order to stop someone from doing something. Generally, a court issues a temporary restraining order until it can hear arguments from both parties in the dispute and decide whether an injunction should be made permanent. Under the common law the court can only provide a remedy (usually money damages) after the harm has occurred.

In 1971 the federal government asked the federal courts to restrain The New York Times and the Washington Post from publishing what have now become known as the Pentagon Papers (this case is discussed in greater detail in Chapter 2). This case is a good example of equity law in action. The government argued that if the purloined documents were published by the two newspapers the nation would suffer irremediable damage; that foreign governments would be reluctant to entrust the United States with their secrets if those secrets might someday be published in the public press; that the enemy would gain valuable defense secrets. The federal government argued further that it would do little good to punish the newspapers after the material had been published since there would be no way to repair the damage. The federal district court temporarily restrained both newspapers from publishing the material while the case was argued—all the way to the Supreme Court of the United States. After two weeks of hearings, the high court finally ruled that publication could continue, that the government had failed to prove that the nation would be damaged.[9]

STATUTORY LAW

Statutory law, or legislation, is the third great source of U.S. law. Today there are legislative bodies of all shapes and sizes. The common traits they share are that they are popularly elected and that they have the authority to pass laws. In the beginning of our nation, legislation really did not play a very significant role in the legal system. Certainly many laws were passed, but the bulk of our legal rules were developed from the common law and from equity law. After 1825 statutory law began to play an important role in our legal system, and it was between 1850 and 1900 that a greater percentage of law began to come from legislative acts than from common-law court decisions.

Several important characteristics of statutory law can best be understood by contrasting them with common law. First, **statutes** tend to deal with problems affecting society or large groups of people, in contrast to common law, which usually deals with smaller, individual problems. (Some common-law rulings affect large groups of persons, but this occurrence is rare.) It should also be noted in this connection the importance of not confusing common law with constitutional law. Certainly when judges interpret a constitution, they make policy that affects us all. However, it should be kept in mind that a constitution is a legislative document voted on by the people and is not "discovered law" or "judge-made law."

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

9. *New York Times Co.* v. *United States,* 403 U.S. 713 (1971).

pem92171_ch01 5/4/02 8:31 AM Page 10 . CONFIRMING PROOFS

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

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

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

Passage of a law is rarely the final word on the subject. Courts become involved in the process of determining what that law means. While a properly constructed statute sometimes needs little interpretation by the courts, judges are frequently called upon to rule on the exact meaning of ambiguous phrases and words. The resulting process is called **statutory construction** and is a very important part of the law. Even the simplest kind of statement often needs interpretation. For example, a prohibition stating "it is illegal to distribute an obscene newspaper" is filled with ambiguity. What does *distribution* mean? Can an obscene document be sent through the mail? distributed from house to house? passed out on street corners? transmitted on the Internet? Are all of these actions prohibited? What constitutes a newspaper? Is any printed matter a newspaper? Is any printed matter published regularly a newspaper? Are mimeographed sheets and photocopied newsletters considered newspapers? Should a Web site be considered a newspaper? Of course, implicit is the classic question with which courts have wrestled in this country for nearly a century: What is obscenity?

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

CONSTITUTIONAL LAW

Great Britain does not have a written **constitution.** The United States does have a written constitution, and it is an important source of our law. In fact, there are many constitutions in this country: the federal Constitution, state constitutions, city charters and so forth. All these documents accomplish the same ends. First, they provide the plan for the establishment and organization of the government. Next, they outline the duties, responsibilities and powers of the various elements of government. Finally, they usually guarantee certain basic rights to the people, such as freedom of speech and freedom to peaceably assemble.

Legislative bodies may enact statutes rather easily by a majority vote. It is far more difficult to adopt or change a constitution. State constitutions are approved or changed by a direct vote of the people. It is even more difficult to change the federal Constitution. An amendment may be proposed by a vote of two-thirds of the members of both the U.S. House of Representatives and the Senate. Alternatively, two-thirds of the state legislatures can call for a constitutional convention for proposing amendments. Once proposed, the amendments must be

pem92171_ch01 5/4/02 8:31 AM Page 11 . CONFIRMING PROOFS

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

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

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

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

The federal Constitution and the 50 state constitutions are very important when considering mass-media law problems. All 51 of these charters contain provisions, in one form or another, that guarantee freedom of speech and freedom of the press. Consequently, any government action that affects in any way the freedom of individuals or mass media to speak or publish or broadcast must be measured against the constitutional guarantees of freedom of expression. There are several reasons why a law limiting speaking or publishing might be declared unconstitutional. The law might be a direct restriction on speech or press that is protected by the First Amendment. For example, an order by a Nebraska judge that prohibited the press from publishing certain information about a pending murder trial was considered a direct restriction on freedom of the press (see *Nebraska Press Association* v. *Stuart,*[10] Chapter 11). A criminal obscenity statute or another kind of criminal law might be declared unconstitutional because it is too vague. A law must provide adequate notice to a person of ordinary intelligence that his or her contemplated conduct is prohibited by the law. An Indianapolis pornography ordinance that made it a crime to publish pornographic material was declared void, at least in part, because the law's definition of pornography was not specific enough. The law defined pornography as including depictions of "the subordination of women." It is almost impossible to settle in one's own mind upon a single meaning or understanding of that term, noted Judge Sarah Barker (see *American Booksellers Association* v. *Hudnut,*[11] Chapter 13). A statute might also be declared to be unconstitutional because it violates what is known as the overbreadth doctrine. A law is overbroad, the Supreme Court said many years ago, if it

10. 427 U.S. 539 (1976).
11. 598 F. Supp. 1316 (1985).

pem92171_ch01 5/4/02 8:31 AM Page 12 . CONFIRMING PROOFS

does not aim specifically at evils within the allowable area of government control but sweeps within its ambit other activities that constitute an exercise of protected expression. Struthers, Ohio, an industrial community where many people worked at night and slept during the day, passed an ordinance that forbade knocking on the door or ringing the doorbell at a residence in order to deliver a handbill. The Supreme Court ruled that the ordinance was overbroad, that the city's objective could be obtained by passing an ordinance making it an offense for any person to ring a doorbell of a householder who had, through a sign or some other means, indicated that he or she did not wish to be disturbed. As written, however, the law prohibited persons from distributing handbills to all persons—to those who wanted to see and read them as well as those who did not (see *Martin* v. *City of Struthers,*[12] Chapter 3). So there are many reasons why a court might declare a law to be an unconstitutional infringement upon the guarantees of freedom of speech and press.

EXECUTIVE ORDERS, ADMINISTRATIVE RULES

Government executives—the U.S. president, governors, mayors, county executives, village presidents—all have more or less power to issue rules of law, sometimes referred to as executive orders or declarations. This power is normally defined by the constitution or the charter that establishes the office, and it varies widely from city to city or state to state. In some instances the individual has fairly broad powers; in others the power is sharply confined. For example, President Bill Clinton, before he left office in 2001, issued a wide array of executive orders aimed at protecting the environment. And President George W. Bush issued numerous executive orders in late 2001 related to the nation's war on terrorism. Such declarations are possible so long as they are properly within the delegated powers held by the executive. An order from an executive who exceeds his or her power can be overturned by the legislature (the mayor's order can be changed or vacated by the city council, for example) or by a court. While such orders are not a large part of the American law, they can nevertheless be important in some circumstances.

A more substantial part of U.S. law is generated by the myriad of administrative agencies that exist in the nation today, agencies that first began to develop in the latter part of the 19th century. By that time in the country's history the job of governing had become much more complex. Congress was being asked to resolve questions going far beyond such matters as budgets, wars, treaties and the like. Technology created new kinds of problems for the Congress to resolve. Many such issues were complex and required specialized knowledge and expertise that the representatives and senators lacked and could not easily acquire, had they wanted to. Federal administrative agencies were therefore created to deal with these problems.

For example, regulation of the railroads that traversed the nation created numerous problems in the late 19th century. Since questions concerning use of these railroads fell within the commerce power of the Congress, that deliberative body was given the task of resolving this complex issue. To deal with these problems, Congress created the first **administrative agency,** the Interstate Commerce Commission (ICC). This agency was established by legislation and funded by Congress. Its members were appointed by the president and approved by the Congress. Each member served a fixed term in office. The agency was independent of the

12. 319 U.S. 141 (1943).

pem92171_ch01 5/4/02 8:31 AM Page 13 . CONFIRMING PROOFS

Congress, the president and the courts. Its task was (and is) to regulate commerce between the states, a matter that concerned pipelines, shipping and transportation. The members of the board presumably were somewhat expert in the area before appointment and of course became more so during the course of their term.

Hundreds of such agencies now exist at both federal and state levels. In fact, many people speculate that the rules generated by these agencies comprise the bulk of American law today. Each agency undertakes to deal with a specific set of problems too technical or too large for the legislative branch to handle. Typical is the Federal Communications Commission, which was created by Congress in 1934. Its task is to regulate broadcasting and other telecommunication in the United States, a job that Congress has really never attempted. Its members must be citizens of the United States and are appointed by the president. The single stipulation is that at any one time no more than three of the five individuals on the commission can be from the same political party. The Senate must confirm the appointments.

Congress sketched the broad framework for the regulation of broadcasting in the Federal Communications Act of 1934, and this act is used by the agency as its basic regulatory guidelines. The agency also creates much law itself in administration of the 1934 act. In interpreting provisions, handing down rulings, developing specific guidelines, and the like, the FCC has developed a sizable body of regulations that bind broadcasters.

Persons dissatisfied with an action by an agency can attempt to have it modified by asking the legislative body that created and funds the agency—the Congress, for example, when considering the FCC—to change or overturn the action. In the 1980s when the Federal Trade Commission made several aggressive pro-consumer rulings the Congress voided these actions because members disagreed with the extent of the rulings. More commonly the actions of an agency will be challenged in the courts. But courts have limited power to review decisions made by administrative agencies, and can overturn such a ruling in only these limited circumstances: (1) if the original act that established the commission or agency is unconstitutional, (2) if the commission or agency exceeds its authority, (3) if the commission or agency violates its own rules, or (4) if there is no evidentiary basis whatsoever to support the ruling. The reason for these limitations is simple: These agencies were created to bring expert knowledge to bear on complex problems, and the entire purpose for their creation would be defeated if judges with no special expertise in a given area could reverse an agency ruling merely because they had a different solution to a problem.

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

The case reporters contain some law created by the administrative agencies, but the reports that these agencies themselves publish contain much more such law. These reports are also arranged on a case-by-case basis in chronological order. A citation system similar to that used for the case reporters is used in these reports.

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

pem92171_ch01 5/4/02 8:31 AM Page 14 . CONFIRMING PROOFS

While this section provides a basic outline of the law and is not comprehensive, the information is sufficient to make upcoming material on mass media law understandable.

SUMMARY

There are five important sources of American law. The common law is the oldest source of our law, having developed in England more than 700 years ago. The law became common throughout Great Britain and reflected the customs of the people. It was easily transported to the New World, and its pragmatic philosophy was highly useful on the rapidly developing North American continent. Fundamental to the common law is the concept that judges should look to the past and follow earlier court rulings, called precedents. Stare decisis (let the decision stand) is a key concept. But judges have developed the means to change or adapt the common law by modifying, distinguishing or overruling precedent case law. The common law is not written down in a law book but is collected in volumes that contain the reports of legal decisions. Each case is given its own legal identity through a system of numbered citations.

Equity law, the second source of American law, developed because in some instances the common law was simply too rigid to fairly resolve the real grievances of British subjects. The rules and procedures of equity are far more flexible than those of the common law and permit a judge (equity cases are never heard before a jury) to fashion a solution to unique or unusual problems. A court is permitted under equity law to restrain an individual or a corporation or even a government from taking an action. Under the common law a court can only attempt to compensate the injured party for the damage that results from the action.

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

Constitutions, the fourth source of our law, take precedence over all other American law. The U.S. Constitution is the supreme law of the land. Other laws, whether they spring from common law, equity, legislative bodies, or administrative agencies, cannot conflict with the provisions of the Constitution. Courts are often called upon to interpret the meaning of the provisions of our constitutions (one federal and 50 state constitutions) and through this process can often make these seemingly rigid legal prescriptions adaptable to contemporary problems.

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

pem92171_ch01 5/4/02 8:31 AM Page 15 . CONFIRMING PROOFS

THE JUDICIAL SYSTEM

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

It is technically improper to talk about the American judicial system. There are 52 different judicial systems in the United States, one for the federal government and one for each of the 50 states, plus the District of Columbia. While each of these systems is somewhat different from all the others, the similarities among the 52 systems are much more important than the differences. Each of the systems is divided into two distinct sets of courts—trial courts and appellate courts. Each judicial system is established by a constitution, federal or state. In each system the courts act as the third branch of a common triumvirate of government: a legislative branch, which makes the law; an executive branch, which enforces the law; and a judicial branch, which interprets the law.

FACTS VERSUS THE LAW

Common to all judicial systems is the distinction between trial courts and appellate courts, and it is important to understand this distinction. Each level of court has its own function: basically, **trial courts** are fact-finding courts and **appellate courts** are law-reviewing courts. Trial courts are the courts of first instance, the place where nearly all cases begin. Juries sit in trial courts, but never in appellate courts. Trial courts are empowered to consider both the facts and the law in a case. Appellate courts normally consider only the law. The difference between facts and law is significant. The facts are what happened. The law is what should be done because of the facts.

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

Ineffective Medications Given to Ill, Injured

SANDRIDGE HOSPITAL OVERCHARGING PATIENTS ON PHARMACY COSTS

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

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

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

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

In addition, the investigation by the Sentinel revealed that patients who were sold medications manufactured by Chaos Pharmaceuticals were charged on the basis of 2001 price lists despite the fact that the company lowered prices significantly in 2002.

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

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

In an appeal, the appellate court does not establish a new factual record. No more testimony is taken. No more witnesses are called. The factual record established by the jury or judge at the trial stands. The appellate court has the power in some kinds of cases (libel suits that involve constitutional issues, for example) to examine whether the trial court properly considered the facts in the case. But normally it is the task of the appellate court to determine whether the law has been applied properly in light of the facts established at the trial. Perhaps the appellate court might rule that even with the documentary evidence it presented, the hospital failed to prove that the newspaper story was false. Perhaps the judge erred in allowing certain testimony into evidence or refused to allow a certain witness to testify. Nevertheless, in reaching an opinion the appellate court considers only the law; the factual record established at the trial stands.

pem92171_ch01 5/4/02 8:31 AM Page 17 . CONFIRMING PROOFS

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

There are other differences between the roles and procedures of trial and appellate courts. Juries are never used by appellate courts; a jury may be used in a trial court proceeding. The judge normally sits alone at a trial; appeals are heard by a panel of judges, usually three or more. Cases always begin at the trial level and then proceed to the appellate level. Although the appellate courts appear to have the last word in a legal dispute, that is not always the case. Usually cases are returned to the trial court for resolution with instructions from the appeals court to the trial judge to decide the case, keeping this or that factor in mind. In such a case the trial judge can often do what he or she wants.

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

THE FEDERAL COURT SYSTEM

The Congress has the authority to abolish every federal court in the land, save the Supreme Court of the United States. The U.S. Constitution calls for but a single federal court, the Supreme Court. Article III, Section 1 states: "The judicial power of the United States shall be vested in one Supreme Court." The Constitution also gives Congress the right to establish inferior courts if it deems these courts to be necessary. And Congress has, of course, established a fairly complex system of courts to complement the Supreme Court.

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

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

While special federal courts have jurisdiction that goes beyond this broad outline, these are the circumstances in which a federal court may normally exercise its authority. Of the seven categories of cases just listed, Categories 1 and 7 account for most of the cases tried in federal court. For example, disputes that involve violations of the myriad federal laws and disputes that involve constitutional rights such as the First Amendment are heard in federal courts. Also, disputes between citizens of different states—what is known as a diversity of citizenship matter—are heard in federal courts. It is very common, for example, for libel suits and invasion-of-privacy suits against publishing companies to start in federal courts rather

pem92171_ch01 5/4/02 8:31 AM Page 18 . CONFIRMING PROOFS

than in state courts. If a citizen of Arizona is libeled by Time magazine, the case will very likely be tried in a federal court in the state of Arizona rather than in a state court. Arizona law will be applied. The case will most often be heard where the legal wrong, in this case the injury to reputation by libel, occurs. Congress has limited federal trial courts to hearing only those diversity cases in which the damages sought exceeded $75,000.

The Supreme Court

The Supreme Court of the United States is the oldest federal court, having been in operation since 1789. The Constitution does not establish the number of justices who sit on the high court. That task is left to the Congress. In 1789 the Congress passed the first judiciary act and established the membership of the high court at six: a chief justice and five associate justices. This number was increased to seven in 1807, to nine in 1837, and to 10 in 1863. The Supreme Court had 10 members until 1866, when Congress ruled that only seven justices would sit on the high tribunal. Since 1869 the Supreme Court has comprised the chief justice of the United States and eight associate justices. (Note the title: not chief justice of the Supreme Court, but chief justice of the United States.)

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

The Supreme Court exercises both original and appellate jurisdictions. Under its **original jurisdiction,** which is established in the Constitution, the Supreme Court is the first court to hear a case and acts much like a trial court. Sometimes the justices will hold a hearing to ascertain the facts; more commonly they will appoint what is called a special master to discern the facts and make recommendations. For example, in 1995 the high court was called on to decide whether a seven-mile stretch of Mississippi River frontage belonged to Mississippi or Louisiana. The property was once an island in the river, but because of changes in the flow of the river, slowly migrated to become a part of the Louisiana riverbank. The court appointed the former chief justice of the Supreme Judicial Court of Maine as the special master; he concluded that the property, known as Stack Island, belonged to Mississippi. The Justices affirmed this conclusion in October.[13] But such jurisdiction is rarely exercised. The Stack Island ruling is one of fewer than 200 decisions the court has made in exercising its original jurisdiction since 1789. Because the high court is strictly limited by the Constitution to exercise its original jurisdiction in a few specific instances, and because Congress has given the lower federal courts concurrent jurisdiction with the Supreme Court in those specific instances, few persons begin their lawsuits at the Supreme Court.

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

In some instances a litigant has an apparent right, guaranteed by federal statute, to appeal a case to the Supreme Court. This is called **direct appeal.** For example, if a federal appeals court declares that a state statute violates the U.S. Constitution or conflicts with a federal law, the state has a right to appeal this decision to the Supreme Court. But this is only an

13. Greenhouse, "Supreme Court Awards," C18.

pem92171_ch01 5/4/02 8:31 AM Page 19 . CONFIRMING PROOFS

Source: Collection, The Supreme Court of the United States, courtesy of The Supreme Court Historical Society. Photographed by Richard Strauss, Smithsonian Institution.

The U.S. Supreme Court. Back row, l. to r., Associate Justices Ruth Bader Ginsburg, David Souter, Clarence Thomas, and Stephen Breyer. Front row, l. to r., Associate Justices Antonin Scalia and John Paul Stevens, Chief Justice William Rehnquist, Associate Justices Sandra Day O'Connor and Anthony Kennedy.

apparent right, because since 1928 the Supreme Court has had the right to reject such an appeal "for want of a substantial federal question." This is another way of the court saying, "We think this is a trivial matter." Almost 90 percent of all appeals that come to the Supreme Court via the direct appeal process are rejected.

The much more common way for a case to reach the nation's high court is via a **writ of certiorari.** No one has the right to such a writ. It is a discretionary order issued by the court when it feels that an important legal question has been raised. Litigants using both the federal court system and the various state court systems can seek a writ of certiorari. The most important requirement that must be met before the court will even consider issuing a writ is that a petitioner first exhaust all other legal remedies. While there are a few exceptions, this generally means that if a case begins in a federal district court (the trial level court) the **petitioner** must first seek a review by a U.S. Court of Appeals before bidding for a writ of certiorari. The writ can be sought if the Court of Appeals refuses to hear the case or sustains the verdict against the petitioner. All other legal remedies have then been exhausted. In state court systems every legal appeal possible must be made within the state before seeking a review by the U.S. Supreme Court. This usually means going through a trial court, an intermediate appeals court, and finally the state supreme court.

When the Supreme Court grants a writ of certiorari, it is ordering the lower court to send the records to the high court for review. Each request for a writ is considered by the entire nine-member court, and an affirmative vote of four justices is required before the writ can be granted. The high court rejects most of the petitions it receives. It hears arguments in and decides only about 100 cases each year. Workload is the key factor. Certain important issues must be decided each term, and the justices do not have the time to consider thoroughly most

pem92171_ch01 5/4/02 8:31 AM Page 20 . CONFIRMING PROOFS

cases for which an appeal is sought. Term after term, suggestions to reduce the court's workload are made, but most are not popular with the Congress or the people in the nation. All citizens believe that they should have the right to appeal to the Supreme Court, even if the appeal will probably be rejected, even if the court may never hear the case.

Hearing a Case

While the operation of state and federal appellate courts varies from state to state and court to court, these courts have a good deal in common in the way in which they hear and decide a case. So by examining here how the Supreme Court operates, we can also learn quite a bit about how other appellate courts operate.

The first thing the court does is to decide whether it will hear a case, either on appeal or via a writ of certiorari. Once a case is accepted, the attorneys for both sides have the greatest burden of work in the suceeding weeks. Oral argument on the case is scheduled, and both sides are expected to submit **legal briefs**—their legal arguments—for the court to study before the hearing. The greatest burden at this point is on the party seeking appeal, since he or she must provide the court with a complete record of the lower-court proceedings in the case. Included are trial transcripts, lower-court rulings, and all sorts of other materials.

Arguing a matter all the way to the Supreme Court takes a long time, often as long as five years (sometimes longer) from initiation of the suit until the court gives its ruling. James Hill brought suit in New York in 1953 against Time Inc. for invasion of privacy. The U.S. Supreme Court made the final ruling in the case in 1967 (*Time, Inc.* v. *Hill*[14]). Even at that the matter would not have ended had Hill decided to go back to trial, which the Supreme Court said he must if he wanted to collect damages. He chose not to.

After the nine justices study the briefs (or at least the summaries provided by their law clerks), the **oral argument** is held. For a generation schooled on "Law and Order" and "The Practice," oral argument before the Supreme Court (or indeed before any court) must certainly seem strange. For one thing, the attorneys are strictly limited as to how much they may say. Each side is given a brief amount of time, usually no more than 30 minutes to an hour, to present its arguments. In important cases, "friends of the court" (**amici curiae**) are allowed to present briefs and to participate for 30 minutes in the oral arguments. For example, the American Civil Liberties Union often seeks the friend status in important civil rights cases.

Deciding a Case

After the oral argument (which of course is given in open court with visitors welcome) is over, the members of the high court move behind closed doors to undertake their deliberations. No one is allowed in the discussion room except members of the court itself—no clerks, no bailiffs, no secretaries. The discussion, which often is held several days after the arguments are completed, is opened by the chief justice. Discussion time is limited, and by being the first speaker the chief justice is in a position to set the agenda, so to speak, for each case—to raise what he or she thinks are the key issues. Next to speak is the justice with the most seniority, and after him or her, the next most senior justice. The court may have as many as 35 or 40

14. 385 U.S. 374 (1967).

pem92171_ch01 5/4/02 8:31 AM Page 21 . CONFIRMING PROOFS

items or cases to dispose of during one conference or discussion day; consequently, brevity is valued. Each justice has just a few moments to state his or her thoughts on the matter. After discussion a tentative vote is taken and recorded by each justice in a small, hinged, lockable docket book. In the voting procedure the junior justice votes first; the chief justice, last.

Under the United States legal system, which is based so heavily on the concept of court participation in developing and interpreting the law, a simple yes-or-no answer to any legal question is hardly sufficient. More important than the vote, for the law if not for the **litigant,** are the reasons for the decision. Therefore the Supreme Court and all courts that deal with questions of law prepare what are called **opinions,** in which the reasons, or rationale, for the decision are given. One of the justices voting in the majority is asked to write what is called the **court's opinion.** If the chief justice is in the majority, he or she selects the author of the opinion. If not, the senior associate justice in the majority makes the assignment. Self-selection is always an option.

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

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

Justices who disagree with the majority can also write an opinion, either individually or as a group, called a **dissenting opinion.** Dissenting opinions are very important. Sometimes, after the court has made a decision, it becomes clear that the decision was not the proper one. The issue is often litigated again by other parties who use the arguments in the dissenting opinion as the basis for a legal claim. If enough time passes, if the composition of the court changes sufficiently, or if the court members change their minds, the high court can swing to the views of the original dissenters. This is what happened in the case of *Nye* v. *U.S.*[15] (noted earlier) when the high court repudiated a stand it had taken in 1918 and supported instead the opinion of Justice Oliver Wendell Holmes, who had vigorously dissented in the earlier decision.

Finally, it is possible for a justice to concur with the majority in part and to dissent in part as well. That is, the justice may agree with some of the things the majority says but disagree with other aspects of the ruling. This kind of stand by a justice, as well as an ordinary concurrence, frequently fractures the court in such a way that in a 6-3 ruling only three persons subscribe to the court's opinion, two others concur, the sixth concurs in part and dissents in part, and three others dissent. Such splits by the members of the court have become more common in recent years. While these kinds of decisions give each justice the satisfaction of knowing that he or she has put his or her own thoughts on paper for posterity, such splits

15. 313 U.S. 33 (1941).

pem92171_ch01 5/4/02 8:31 AM Page 22 . CONFIRMING PROOFS

thwart the orderly development of the law. They often leave lawyers and other interested parties at a loss when trying to predict how the court might respond in the next similar case that comes along. Some chief justices, such as William Howard Taft and Earl Warren, aggressively plied their colleagues to try to gain consensus for a single opinion.

The Supreme Court can dispose of a case in two other ways. A **per curiam** (by the court) **opinion** can be prepared. This is an unsigned opinion drafted by one or more members of the majority and published as the court's opinion. Per curiam opinions are not common, but neither are they rare.

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

One final matter in regard to voting remains for consideration: What happens in case of a tie vote? When all nine members of the court are present, a tie vote is technically impossible. However, if there is a vacancy on the court, only eight justices hear a case. Even when the court is full, a particular justice may disqualify himself or herself from hearing a case. When a vote ends in a tie, the decision of the lower court is affirmed. No opinion is written. It is as if the Supreme Court had never heard the case.

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

Courts have no real way to enforce decisions and must depend on other government agencies for enforcement of their rulings. The job normally falls to the executive branch. If perchance the president decides not to enforce a Supreme Court ruling, no legal force exists to compel the president to do so. If former President Nixon, for example, had chosen to refuse to turn over the infamous Watergate tapes after the court ruled against his arguments of executive privilege, no other agency could have forced him to give up those tapes.

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

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

pem92171_ch01 5/4/02 8:31 AM Page 23 . CONFIRMING PROOFS

the Supreme Court ruled in *Brown* v. *Board of Education*[16] that segregated public schools violated the U.S. Constitution. The foundation for this ruling had been laid by a decade of less momentous desegregation decisions and executive actions. By 1954 the nation was prepared for the ruling, and it was generally accepted, even in many parts of the South. The legitimacy of a court's decisions, then, often rests upon prudent use of the judicial power.

Other Federal Courts

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

Most business in the federal system begins and ends in a district court. This court was created by Congress in the Federal Judiciary Act of 1789, and today in the United States there are 94 such courts staffed by 650 judges. Every state has at least one U.S. District Court. Some states are divided into two districts or more: an eastern and western district or a northern, central, and southern district. Individual districts often have more than one judge, sometimes many more than one. The southern district of the U.S. District Court in New York has 28 judges.

When there is a jury trial, the case is heard in a district court. It has been estimated that about half the cases in U.S. District Courts are heard by a jury.

At the intermediate level in the federal judiciary are the 13 circuits of the U.S. Court of Appeals. These courts were also created by the Federal Judiciary Act of 1789. Until 1948 these courts were called Circuit Courts of Appeal, a reflection of the early years of the republic when the justices of the Supreme Court "rode the circuit" and presided at the courts-of-appeal hearings. While the title Circuit Courts of Appeal is officially gone, the nation is still divided into 11 numbered circuits, each of which is served by one court (see figure 1.2).

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

The Courts of Appeals are appellate courts, which means that they only hear appeals from lower courts and other agencies. These courts are the last stop for 95 percent of all cases in the federal system. Each circuit has nine or more judges. Typically, a panel of three judges hears a case. In a case of great importance a larger panel of judges will hear the case. When a court hears a case in such a manner it is said to be sitting **en banc.** At one time this panel consisted of all the

16. 347 U.S. 483 (1954).

pem92171_ch01 5/4/02 8:31 AM Page 24 . CONFIRMING PROOFS

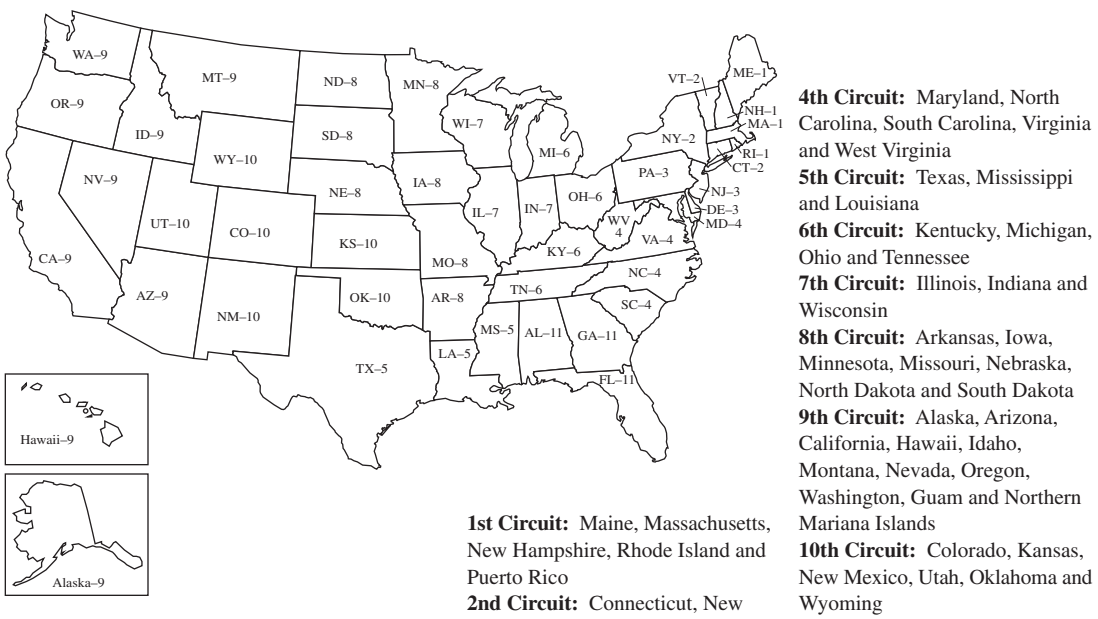

FIGURE 1.2

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

members of the court, usually 11 judges. Today the size of this panel varies. For example, the 9th U.S. Circuit Court of Appeals has 28 judges. Eleven judges are selected to hear an en banc appeal. In circuits with fewer judges, all the members of the court hear the case.

Federal Judges

All federal judges are appointed by the president and must be confirmed by the Senate. The appointment is for life. The only way a federal judge can be removed is by **impeachment.** Nine federal judges have been impeached: Four were found guilty by the Senate, and the other five were acquitted. Impeachment and trial is a long process and one rarely undertaken.

Political affiliation plays a distinct part in the appointment of federal judges. Democratic presidents usually appoint Democratic judges, and Republican presidents appoint Republican judges. Nevertheless, it is expected that nominees to the federal bench be competent jurists. This is especially true for appointees to the Courts of Appeals and to the Supreme Court. The Senate must confirm all appointments to the federal courts, a normally perfunctory act in the case of lower-court judges. More careful scrutiny is given nominees to the appellate courts. The Senate has rejected 22 men nominated for the Supreme Court either by adverse vote or by delaying the vote so long that the appointment was withdrawn by the president or the president left office and the new chief executive nominated a different individual. Most recently, President Ronald Reagan's nomination of Judge Robert Bork to the Supreme Court was rejected.

pem92171_ch01 5/4/02 8:31 AM Page 25 . CONFIRMING PROOFS

The appointment of associate justices to the Supreme Court of the United States became a topic of substantial public interest during the last few decades. The high court had manifested a distinctly liberal political philosophy from the late 1930s through the 1960s, and the history of the court during this era is marked by substantial enlargement of both civil rights and civil liberties via constitutional interpretation. But the presidency of Richard Nixon marked the beginning of the end of this era. A steady stream of conservative Republican presidents filled the court with justices who appeared to be much more moderate or even conservative. Many persons feared the loss of some court-given liberties if and when the members of the high court reconsidered these critical issues.

The president appoints the members of the high court with the "advice and consent" of the U.S. Senate. When the White House and the Senate are both in the hands of the same party, Republicans or Democrats, this appointment process will usually proceed smoothly. President Clinton had few problems in winning the appointment of Ruth Bader Ginsburg and Stephen Breyer while Democrats controlled the Congress. On the other hand, Richard Nixon and Ronald Reagan, both conservative Republicans, had more difficulty getting their nominees on the court when the Senate was controlled by Democrats. Some argue that the Senate's only function is to ensure that competent jurists sit on the Supreme Court. Others take a more expansive view of the term "advice and consent" and argue that the Senate is obliged to consider judicial and political philosophy as well when evaluating the presidential nominees.

Presidents and senators alike have discovered that the individual who is nominated is not always the one who spends the remainder of his or her lifetime on the court. Justices and judges appointed to the bench for life sometimes change. Perhaps they are affected by their colleagues. Or maybe it is because they are largely removed from the pressures faced by others in public life. For whatever reasons, men and women appointed to the bench sometimes drastically modify their philosophy. It is doubtful that President Herbert Hoover expected the man he appointed chief justice, Charles Evans Hughes, to become the leader of the court that sustained much of the liberal and even radical legislation of the New Deal. Republican Dwight Eisenhower appointed Chief Justice Earl Warren and Associate Justice William Brennan, two of the great liberal members of the court during the past 100 years. Liberal president John Kennedy's appointment to the high court, Justice Byron White, developed strong conservative leanings after he was confirmed. It is surely true, as writer Finley Peter Dunne's alter ego, Mr. Dooley, once remarked, "Th' Supreme Court follows th' iliction returns." But justices also sometimes follow a deeper set of beliefs as well, beliefs that aren't as obvious during the confirmation process.

THE STATE COURT SYSTEM

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

The trial courts (or court) are the base of each judicial system. At the lowest level are usually what are called courts of limited jurisdiction. Some of these courts have special functions, such as a traffic court, which is set up to hear cases involving violations of the motor-vehicle code. Some of these courts are limited to hearing cases of relative unimportance, such

pem92171_ch01 5/4/02 8:31 AM Page 26 . CONFIRMING PROOFS

as trials of persons charged with misdemeanors, or minor crimes, or civil suits in which the damages sought fall below $1,000. The court may be a municipal court set up to hear cases involving violations of the city code. Whatever the court, the judges in these courts have limited jurisdiction and deal with a limited category of problems.

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

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

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

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

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

Cases not involving federal questions go no further than the high court in a state, usually called the supreme court. This court—usually a seven- or nine-member body—is the final authority regarding the construction of state laws and interpretation of the state constitution. Not even the Supreme Court of the United States can tell a state supreme court what that state's constitution means. For example, in 1976 the U.S. Supreme Court ruled that the protection of the First Amendment did not include the right to distribute materials, demonstrate, or solicit petition signatures at privately owned shopping centers (*Hudgens* v. *NLRB*[17]—this case is discussed fully on page 109). In 1980, however, the Supreme Court refused to overturn a decision by the California Supreme Court that declared that students had the right *under the California constitution* to solicit signatures for a pro-Israeli petition at a private shopping center in Campbell, Calif. Justice William Rehnquist wrote for the unanimous U.S. Supreme Court that perhaps the free-speech guarantee in the California constitution is broader than the First Amendment. In any case, the California high court was the final authority on the state's constitution (*Pruneyard Shopping Center* v. *Robins*[18]).

17. 424 U.S. 507 (1976).
18. 447 U.S. 74 (1980).

pem92171_ch01 5/4/02 8:31 AM Page 27 . CONFIRMING PROOFS

State court judges are typically elected. Normally the process is nonpartisan, but because they are elected and must stand for re-election periodically, state court judges are generally a bit more politically active than their federal counterparts. Nearly half the states in the nation use a kind of compromise system that includes both appointment and election. The compromise is designed to minimize political influence and initially select qualified candidates but still retain an element of popular control. The plans are named after the states that pioneered them, the **California Plan** and the **Missouri Plan.** Typically either the governor nominates a candidate to be approved by a judicial commission, or a judicial commission nominates a slate of candidates, one of which will be chosen by the governor. These jurists serve on the bench until the next general election, at which time the people of the state vote to retain or reject a particular judge. If retained, the judge serves until the next general election, when he or she again must attain voter approval. If the jurist is rejected, the appointment process begins again.

JUDICIAL REVIEW

One of the most important powers of courts (and at one time one of the most controversial) is the power of **judicial review**—that is, the right of any court to declare any law or official governmental action invalid because it violates a constitutional provision. We usually think of this right in terms of the U.S. Constitution. However, a state court can declare an act of its legislature to be invalid because the act conflicts with a provision of the state constitution. Theoretically, any court can exercise this power. The Circuit Court of Lapeer County, Mich., can rule that the Environmental Protection Act of 1972 is unconstitutional because it deprives citizens of their property without due process of law, something guaranteed by the Fifth Amendment to the federal Constitution. But this action isn't likely to happen, because a higher court would quickly overturn such a ruling. In fact, it is rather unusual for any court—even the U.S. Supreme Court—to invalidate a state or federal law on grounds that it violates the Constitution. Only about 200 federal statutes have been overturned by the courts in the 213-year history of the United States. During the same period, about 1,400 state laws and state constitutional provisions have been declared invalid. Judicial review is therefore not a power that the courts use excessively. In fact, a judicial maxim states: When a court has a choice of two or more ways in which to interpret a statute, the court should always interpret the statute in such a way that it is constitutional.

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

pem92171_ch01 5/4/02 8:31 AM Page 28 . CONFIRMING PROOFS

LAWSUITS

The final topic that needs to be discussed is lawsuits. To the layman, and even those who work in the legal system, the United States appears to be awash in a sea of lawsuits. Lawyer bashing has become a popular leisure-time activity. The notion that there appears to be a lawsuit around every corner in every city can probably be blamed on the increased attention the press has given legal matters. Courts are fairly easy to cover and stories about lawsuits are more commonly published and broadcast. Also, some sensational cases are given saturation coverage, and this kind of coverage leaves the impression in the mind of the casual media consumer that the country is being swamped in a sea of legal briefs and writs.

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

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

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

To start a civil suit the plaintiff first picks the proper court, one that has jurisdiction in the case. Then the plaintiff files a **civil complaint** with the court clerk. This complaint, or **pleading,** is a statement of the charges against the defendant and the remedy that is sought, typically money damages. The plaintiff also summons the defendant to appear in court to answer these charges. While the plaintiff may later amend his or her pleadings in the case, usually the initial complaint is the only pleading filed. After the complaint is filed, a hearing is scheduled by the court.

If the defendant fails to answer the charges, he or she normally loses the suit by default. Usually, however, the defendant will answer the summons and prepare his or her own set of pleadings, which constitute an answer to the plaintiff's charges. If there is little disagreement at this point about the facts—what happened—and that a wrong has been committed, the plaintiff and the defendant might settle their differences out of court. The defendant might say, "I guess I did libel you in this article, and I really don't have a very good defense. You asked for $100,000 in damages; would you settle for $50,000 and keep this out of court?" The plaintiff might very well answer yes, because a court trial is costly and takes a long time, and the plaintiff can also end up losing the case. Smart lawyers try to keep their clients out of court and settle matters in somebody's office.

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

pem92171_ch01 5/4/02 8:31 AM Page 29 . CONFIRMING PROOFS

If there is disagreement, the case is likely to continue. A common move for the defendant to make at this point is to file a motion to dismiss, or a **demurrer.** In such a motion the defendant says this to the court: "I admit that I did everything the plaintiff says I did. On June 5, 2001, I did publish an article in which she was called a socialist. But, Your Honor, it is not libelous to call someone a socialist." The plea made then is that even if everything the plaintiff asserts is true, the defendant did nothing that was legally wrong. The law cannot help the plaintiff. The court might grant the motion, in which case the plaintiff can appeal. Or the court might refuse to grant the motion, in which case the defendant can appeal. If the motion to dismiss is ultimately rejected by all the courts up and down the line, a trial is then held. It is fair play for the defendant at that time to dispute the plaintiff's statement of the facts; in other words to deny, for example, that his newspaper published the article containing the alleged libel.

Before the trial is held, the judge may schedule a conference between both parties in an effort to settle the matter or at least to narrow the issues so that the trial can be shorter and less costly. If the effort to settle the dispute fails, the trial goes forward. If the facts are agreed upon by both sides and the question is merely one of law, a judge hears the case without a jury. There are no witnesses and no testimony, only legal arguments before the court. If the facts are disputed, the case can be tried before either a jury or, again, only a judge. Note that both sides must waive the right to a jury trial. In this event, the judge becomes both the fact finder and the lawgiver. Now, suppose that the case is heard by a jury. After all the testimony is given, all the evidence is presented, and all the arguments are made, the judge instructs the jury in the law. Instructions are often long and complex, despite attempts by judges to simplify them. **Judicial instructions** guide the jury in determining guilt or innocence if certain facts are found to be true. The judge will say that if the jury finds that *X* is true and *Y* is true and *Z* is true, then it must find for the plaintiff, but if the jury finds that *X* is not true, but that *R* is true, then it must find for the defendant.

After deliberation the jury presents its **verdict,** the action by the jury. The judge then announces the **judgment of the court.** This is the decision of the court. The judge is not always bound by the jury verdict. If he or she feels that the jury verdict is unfair or unreasonable, the judge can reverse it and rule for the other party. This rarely happens.

If either party is unhappy with the decision, an appeal can be taken. At that time the legal designations may change. The person seeking the appeal becomes the **appellant,** or petitioner. The other party becomes the **appellee,** or **respondent.** The name of the party initiating the action is usually listed first in the name of the case. For example: Smith sues Jones for libel. The case name is *Smith* v. *Jones.* Jones loses and takes an appeal. At that point in most jurisdictions Jones becomes the party initiating the action and the case becomes *Jones* v. *Smith.* This change in designations often confuses novices in their attempt to trace a case from trial to final appeal. If Jones wins the appeal and Smith decides to appeal to a higher court, the case again becomes *Smith* v. *Jones.* In more and more jurisdictions today, however, the case name remains the same throughout the appeal process. This is an effort by the judiciary to relieve some of the confusion wrought by this constant shifting of party names within the case name. In California, for example, the case of *Smith* v. *Jones* remains *Smith* v. *Jones* through the entire life of that case.

The end result of a successful civil suit is usually the awarding of money **damages.** Sometimes the amount of damages is guided by the law, as in a suit for infringement of copyright in which the law provides that a losing defendant pay the plaintiff the amount of money

pem92171_ch01 5/4/02 8:31 AM Page 30 . CONFIRMING PROOFS

he or she might have made if the infringement had not occurred, or at least a set number of dollars. But most of the time the damages are determined by how much the plaintiff seeks, how much the plaintiff can prove he or she lost, and how much the jury thinks the plaintiff deserves. It is not a very scientific means of determining the dollar amount.

A **criminal prosecution,** or **criminal action,** is like a civil suit in many ways. The procedures are more formal, are more elaborate, and involve the machinery of the state to a greater extent. The state brings the charges, usually through the county or state prosecutor. The defendant can be apprehended either before or after the charges are brought. In the federal system persons must be **indicted** by a **grand jury,** a panel of 21 citizens, before they can be charged with a serious crime. But most states do not use grand juries in that fashion, and the law provides that it is sufficient that the prosecutor issue an **information,** a formal accusation. After being charged, the defendant is arraigned. An **arraignment** is the formal reading of the charge. It is at the arraignment that the defendant makes a formal plea of guilty or not guilty. If the plea is guilty, the judge gives the verdict of the court and passes sentence, but usually not immediately, for presentencing reports and other procedures must be undertaken. If the plea is not guilty, a trial is scheduled.

Some state judicial systems have an intermediate step called a preliminary hearing or preliminary examination. The preliminary hearing is held in a court below the trial court, such as a municipal court, and the state has the responsibility of presenting enough evidence to convince the court—only a judge—that a crime has been committed and that there is sufficient evidence to believe that the defendant might possibly be involved. Today it is also not uncommon that **pretrial hearings** on a variety of matters precede the trial.

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

SUMMARY

There are 52 different judicial systems in the nation: one federal system, one for the District of Columbia, and one for each of the 50 states. Courts within each of these systems are divided into two general classes—trial courts and appellate courts. In any lawsuit both the facts and the law must be considered. The facts or the factual record is an account of what happened to prompt the dispute. The law is what should be done to resolve the dispute. Trial courts determine the facts in the case; then the judge applies the law. Appellate courts, using the factual record established by the trial court, determine whether the law was properly applied by the lower court and whether proper judicial procedures were followed. Trial courts exercise original jurisdiction almost exclusively; that is, they are the first courts to hear a case. Trial courts have very little discretion over which cases they will and will not hear. Appellate courts exercise appellate jurisdiction almost exclusively; that is, they review the work done by the lower courts when decisions are appealed. While the intermediate appellate courts (i.e.,

pem92171_ch01 5/4/02 8:31 AM Page 31 . CONFIRMING PROOFS

courts of appeals; the appellate division) have limited discretion in the selection of cases, the high courts (supreme courts) in the states and the nation generally have the power to select the cases they wish to review.

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

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

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

A criminal case is normally an action in which the state brings charges against a private individual, who is called the defendant. A defendant who loses a criminal case can be assessed a fine, jailed or in extreme cases, executed. A jury can be used in both civil and criminal cases. The jury becomes the fact finder and renders a verdict in a case. But the judge issues the judgment in the case. In a civil suit a judge can reject any jury verdict and rule in exactly the opposite fashion, finding for either plaintiff or defendant if the judge feels the jury has made a serious error in judgment. Either side can appeal the judgment of the court. In a criminal case the judge can take the case away from the jury and order a dismissal, but nothing can be done about an acquittal, even an incredible acquittal. While a guilty defendant may appeal the judgment, the state is prohibited from appealing an acquittal.

As stated at the outset, this chapter is designed to provide a glimpse, only a glimpse, of both our legal system and our judicial system. The discussion is in no way comprehensive, but it provides enough information to make the remaining 15 chapters meaningful. This chapter is not intended to be a substitute for a good political science course in the legal process. Students of communications law are at a distinct disadvantage if they do not have some grasp of how the systems work and what their origins are.

The United States legal and judicial systems are old and tradition-bound. But they have worked fairly well for these last 213 years. In the final analysis the job of both the law and the men and women who administer it is to balance the competing interests of society. How this balancing act is undertaken comprises the remainder of this book. The process is not always easy, but it is usually interesting.

pem92171_ch01 5/4/02 8:31 AM Page 32 . CONFIRMING PROOFS

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