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The Law in Modern Society

By Cayce Myers

Headnote Questions

- What is law?
- What are the sources of U.S. law?
- What is the difference between a trial court and an appellate court?
- What are the basic steps in a court case?
- How are judges chosen?

To understand communication law or any other area of the law, students need a general introduction. That is the purpose of this chapter. Although the law is a complex subject, its basics will be presented here so readers will have a framework within which to put any particular aspect of communication law. Like the society it serves, law is dynamic. It is important to come to terms with the fundamentals of communication law, but it is also important to understand the forces that create and sustain the law – forces that inevitably will change the law – and how legal change comes about.

THE NATURE OF LAW

"Law" has a number of meanings. It is usually defined as the rules of conduct established and enforced by authority in a society. The law of a society is one of its most fundamental characteristics; the kind and amount of behavior a society prescribes and proscribes for its members reveal much about the nature of that society. It is the recognition of the law's authority that allows society to function.

The term "law" is also frequently used to refer to a variety of types of law including statutes, court decisions, administrative rulings or private contracts. When people say, "It's the law," they are referring to any sort of official policy. When they use the word "law," people may also mean jurisprudence, the theory of law. Law in this sense refers to a variety of legal philosophies including private ownership, civil liberties, government redress and human rights.

THE SOURCES OF LAW

All American law can be organized according to its sources. Any particular policy affecting communication may be categorized, roughly in the order in which the categories evolved, as common law, equity law, statutory law, constitutional law, administrative law, international law or contract law. These sources work together to inform what is "the law" in the American legal system. Virtually every law examined in this book can be categorized into one of these seven sources of law. When thinking about any particular law, you should consider where it fits in the larger scheme of the law.

Common Law

One of the most important and complex areas of law is "case law." In the American legal system case law is a body of law in which courts have applied the principles established in previous court decisions. These previous decisions are commonly referred to as "precedent." The use of these previous court decisions, or precedents, is the basis for common law.

The roots of common law are found in twelfth-century England, where local courts created a system for resolving disputes between common people. Judges assigned to these courts were charged to determine and apply local customs and values to resolve the conflicts. Consistency became a prized feature of the common law. In the name of fairness, a kind of conflict resolved one day naturally should be resolved the same way the next day, the next year and, perhaps, indefinitely. For a community to be

stable, law should be stable, too.

Thus developed the powerful common law principle known as *stare decisis*, part of a Latin phrase meaning that once established, a legal decision should not easily be changed. When a common law court makes a decision, it sets a precedent. Courts within the same jurisdiction are required to apply that precedent in deciding similar cases. Today, one of the main functions of courts is to decide which precedents are applicable. Lawyers find precedent and argue that it should be construed in favor of their clients. Judges must analyze precedent and decide how it applies to particular cases. In a common law system there is a strong preference for following precedent. In fact, when lower courts fail to follow precedent, appellate courts frequently overturn the decisions. It is not a given that *stare decisis* will always govern a court's decision. Sometimes appellate courts may decide to overturn their previous decisions because the court thinks the legal rationale for the decision was wrong.

Colonial America was subject to English common law, and a reformed system continues in modern American courts. Many American judicial precedents are rooted in older British interpretations of law. Today, several areas of law are controlled principally by common law or "judge made" law. Other branches of government generally leave the development of this law, obviously very important in society, to the courts. Other sources of law usually are not specific enough to handle each aspect of every dispute that arises in courts. Thus, judges have to make law to fill in the gaps.

The decisions and accompanying opinions — written rationales for court decisions — are recorded and maintained chronologically. The reports of some trial courts and almost all appellate courts are continuously published according to jurisdiction in consecutive volumes of books called "reports" or "reporters." These bound volumes constitute the seemingly endless rows of books on shelves in law libraries, law offices and courtrooms.

A number of these important analyses of English common law were performed near the turn of the eighteenth century. For instance, Sir William Blackstone, the first professor of law at Oxford University, collated English common law. The resulting set of volumes, which became known as *Blackstone's Commentaries*, organized the law according to subject matter, including the law of freedom of speech and the press. These scholarly collections and analyses of the law for use by lawyers and judges are referred to as legal "treatises" – authoritative books on a particular legal subject. Certain treatises, notably the American Law Institute's *Restatements*, are highly influential on lawmakers and judges, and assist them in defining what the law should be in a particular area.

Equity Law

The United States inherited the law of equity from England, where equity courts were established as early as the fourteenth century. Judges in equity courts, unlike common law judges, were empowered to use general principles of fairness, rather than custom or precedent, in resolving problems. Equity solutions to problems brought to these courts, however, were to be supplemental to the common law, not to supersede it.

It is from these equity laws that we get what is commonly referred to as court orders or "writs." The best known is the writ of *habeus corpus*, provided for in Article I of the U.S. Constitution. Extraordinary writs, most commonly in the forms of temporary or permanent injunctions or restraining orders, are judicial orders requiring people to do something that they do not want to do or stopping them from doing something that they want to do. Violation of a court order would be a serious matter that can result in severe punishment.

The term "writ" has largely been removed from the vocabulary of federal American jurisprudence. The *Federal Rules of Civil Procedure* has done away with the term. However, the writ of *certiorari* (the petition used to ask the U.S. Supreme Court to hear a case) and the writ of *habeas corpus* (a prisoner's petition to be released from illegal imprisonment) remain in use. And some state systems still use the term "writ" for a few specific areas of law.

Statutory Law

The United States is a republican democracy. A pure democracy, frequently called a "direct democracy," is a political system where citizens vote in regular elections on all governmental issues. The United States is a republican democracy in which the majority rules through officials whom the voters elect to represent them in political institutions. Representatives at the municipal, county, state and national levels meet regularly to enact legislation that reflects the will of the electorate. This legislation is called "statutory law."

Legislative bodies, city councils, county commissions, state assemblies and Congress, for example, tend to follow strict procedures to create statutory law. Students of politics have a good sense of how ideas typically become laws. In Congress, a representative or senator may propose a law in the form of a bill, which congressional leadership may refer to an appropriate committee for consideration. The committee may refer the bill to a subcommittee. The subcommittee examines the bill, perhaps by holding hearings or undertaking other studies. After this review, the subcommittee may vote on whether to recommend to the full committee that the bill be amended or not be enacted as a statute. If the majority of the subcommittee members vote in favor of the bill, the committee may conduct additional deliberations before voting on whether to recommend the bill to the full chamber of Congress.

The full chamber may have additional discussion of the bill before voting on whether to enact it as law. In a bicameral legislature, such as Congress, a similar bill has usually followed a sim-

ilar process in the other chamber. If the legislation is approved in the other chamber but in a different form, representatives of each chamber meet to work out the differences in a conference committee. Both the House of Representatives and the Senate must approve any compromises made in the conference committee. Upon adoption of these changes, a bill is referred to the president, who has the power to veto it. Article 1, section 7, clause 3 of the U.S. Constitution states that Congress can override the veto by a two-thirds vote of each chamber. Rescinding laws requires the same process. All states except Nebraska have bicameral legislatures, while local governments tend to have unicameral councils or commissions.

Other sources of law are apt to be deferential to statutory law because it is seen as the will of the people in a democracy. Statutory law, however, must be consistent with the Constitution and applied, enforced and interpreted by the executive and judicial branches of government. Statutory law sometimes leaves room for interpretation. Sometimes courts give legal interpretations of statutory law in case law. In these situations case law and statutory law work together to constitute "the law" on a particular issue. A state statute applies only to people in the state where it was adopted and must be consistent with both the federal and the state's constitutions; a federal statute applies to all people in the United States and must be consistent with the federal Constitution.

Constitutional Law

The United States' most important contribution to thought about law in society is the written constitution. From 1781 to 1789 the colonies operated under the Articles of Confederation. This document placed the colonies in a loose confederation with a weak centralized government. After the American Revolution, each of the thirteen states wrote and ratified a document that was intended to be a kind of powerful contract between the people and government. Carrying the idea of democracy to a new and original extreme, the state constitutions vested sovereignty in the people through the constitutions and designated public officials and government bodies as public servants.

Based on the model of the early state constitutions and the desire for a stronger central government, the U.S. Constitution — written in 1787 and ratified in 1789 — became a model for constitutions of other nations and for states that subsequently joined the union. The Constitution is made up of the Preamble, seven articles and twenty-seven amendments. The most important parts are the first three articles and the Bill of Rights – the first ten amendments.

Important to understanding American constitutional law is the concept of "limited government." The colonial experience with Great Britain taught America's constitutional framers not to trust centralized power. They intended to create governments that would be explicitly excluded from almost all aspects of an individual citizen's life. Governments would be assigned only those functions in society that citizens could not perform for themselves. The Constitution was the device for assigning specific powers to government. The assumption was that government was powerless to do anything that it was not entitled to do in the Constitution.

Article I of the Constitution establishes Congress and enumerates its powers, including the powers to tax and mint money, declare war and regulate interstate commerce. Article II establishes the presidency and enumerates its powers, including leading the military, establishing foreign policy and appointing government officers. Article III establishes the federal judiciary and enumerates its powers, including hearing cases involving federal and international matters and disputes between states and between citizens of different states. According to the theory of limited government, the states retain all other powers, or no government can exercise those powers.

FEDERAL JUDICIAL POWER

Article III, Section 2 of the Constitution provides that "the judicial Power shall extend to all Cases ... and Controversies":

1. "arising under this Constitution, the Laws of the United States, and Treaties made, ..."
2. "affecting Ambassadors, other public Ministers and Consuls, ..."
3. "of admiralty and maritime jurisdiction, ..."
4. "to which the United States shall be a Party, ..."
5. "between two or more States, ..."
6. "between a State and Citizens of another State, ..."
7. "between Citizens of different States" [also known as "diversity-of-citizenship" cases], ...
8. "between Citizens of the same State claiming Lands under the Grants of different States, ..."
9. "between a State, or Citizens thereof, and foreign States, Citizens or Subjects, ..."

All other matters are reserved for state courts. Most cases in federal courts involve items 1, 4 and 7.

The framers, particularly Alexander Hamilton and James Madison, believed the federal government could not exercise any powers not enumerated in the Constitution, so they rejected efforts to include a listing of individual rights and liberties, including freedom of speech and of the press, that the government should be forbidden to abridge. Including such provisions in the Constitution was politically popular. In its first session, Congress approved twelve constitutional amendments, the first two of which were not ratified. The remaining ten became the Bill of Rights, including the First Amendment provisions for freedom of religion and expression. Madison clearly changed his mind on the protection of individual rights because he was the congressman

who introduced the original bill of rights.

The Constitution, according to Article VI, is "the supreme Law of the Land," which has come to mean that any conflicting source of law must yield to constitutional law. Because the Constitution is brief and often ambiguous, however, its provisions are subject to multiple interpretations. What one person considers an exercise of First Amendment protected "freedom of speech" may not be to another person.

Through their assertion of the power to declare statutory law inconsistent with constitutional law, the courts, especially the U.S. Supreme Court, are decisive in explaining and applying the Constitution. Perhaps the most famous decision in U.S. constitutional history is *Marbury v. Madison* (1803). In his opinion for the Court, Chief Justice John Marshall asserted the power of the U.S. Supreme Court to deem congressional enactments unconstitutional. At best, Article III of the Constitution is ambiguous as to whether the framers meant that the Court should have such power. When reviewing a challenge to the constitutionality of a government action, the Court explains what the Constitution means, thus producing constitutional law.

The Constitution details how it can be amended under the process set out under Article V. It allows the Constitution to be amended either by calling a new constitutional convention, which has never happened, or by a vote of two-thirds of each house of Congress and three-fourths of the state legislatures. Constitutional law, of course, provides the theoretical umbrella for all law. Virtually every law affecting communication is ultimately answerable in some form to constitutional law.

Administrative Law

The nature of American life changed dramatically during the Industrial Revolution. In the decades following the Civil War, the national economy became dependent less on agriculture and more on manufacturing. Business saw the introduction of large-scale manufacturing, corporations and market speculation. Large cities now had to provide public services for growing populations of workers who left farms for factory jobs. These changes occurred in tandem with increased public consumption of manufactured goods, and technological innovations in mass communication and transportation.

As the economy became centralized, industrialists and financiers came to dominate society. They amassed great wealth and used their money to influence politics and government. Farmers, small business owners and workers became increasingly agitated over monopolies that dictated wages and prices. A wealthy few seemed to control markets and governments. Political groups calling themselves "Populists" and "Progressives" emerged near the end of the nineteenth century to seek political change. Frustrated in its appeals to corrupt legislatures, executives and courts, the reform movement pushed the concept of administrative law for reforming government.

The reformers reasoned that if unregulated capital[ism] resulted in reduced competition in the marketplace of [ideas], services, then the government should regulate the [economy] sure free enterprise. Some midwestern states first experi[mented] with the idea of administrative law by regulating aspects of trastate commerce. Then, in 1887, Congress created the [first] eral administrative agency, the Interstate Commerce [Commis]sion, to regulate commerce between states. Beginning [in the] 1910s, Congress created dozens of so-called "independent" cies to regulate specific aspects of commerce. Among these cies are the Federal Communications Commission, the [Federal] Trade Commission and the Securities and Exchange [Commis]sion.

Framers of federal administrative law meant for commi[ssioners] ers to be apolitical experts in the fields they regulate. Instead being elected in a political process that the regulated indu might control, a commissioner is appointed by the president fixed term, although the Senate can veto appointments. Congressional legislation attempts to restrict politics in the appointment process by limiting the number of members of one political party on a commission. Administrative law was to be created by people trained and experienced in the frequently complex issues of finance and technology that the appointees would address. The administrative agencies proliferated during the twentieth century at both the federal and state levels.

Administrative law is a creature of administrative agencies most of which, unlike other political institutions, have quasi-legislative, quasi-executive and quasi-judicial powers. In short, an administrative agency can pass its own laws, execute those laws and adjudicate disputes over enforcement, unrestricted by considerations of the separation of powers that limit Congress, the president and the courts. The sum total of the rules, regulations, decisions and other policy-making of these agencies make up the body of administrative law.

Also important is how Congress, the president and the courts affect administrative law. Congress empowers the agencies through enabling statutes. An agency can exercise only the power the enabling statute grants. Federal agencies also are governed by the Administrative Procedures Act of 1946, codified in 5 U.S.C. § 551 (1994), which requires that agencies be fair and reasonable. In addition, congressional legislation funds the agencies and Congress sometimes threatens what it considers agency misbehavior with budget cuts. The agencies are accountable to the president most directly through the appointment of agency members. Decisions of the agencies can be appealed to federal courts which usually are deferential to the expertise of the agencies but also can rule agency actions to be unconstitutional. This deference to administrative agencies is found in the Supreme Court decision in *Chevron USA. Inc. v. Natural Resources Defense Council, Inc.* (1984). In that case, the Court held that federal courts should give great deference to an agency's interpretation of its own rules and regulations. The practical result from the

decision is federal courts rarely overt[urn] tions.

International Law

Beginning in the nineteenth centu[ry] ward creating a comprehensive int[ernational] World War II, the United Nations tional laws were created, such as t[reaties]. However, for centuries treaties h[ave] ships between independent nation establish policies for how societi[es] nomically. Designated the Comma[nder] by Article II of the U.S. Constit[ution] unilateral authority to conduct A[ffairs] tions, but Article I empowers Co[ngress] itiatives, declare war and approv[e] eral courts exclusive jurisdictio[n] eign affairs.

The United States has ente[red] gional covenants subjecting it ous multinational organizatio[ns] the United Nations. The U.N. to participate in efforts to fost[er] the world. The Universal Dec[laration] tional Covenant on Civil and tion for the Protection of Hu[man] tion on Human Rights are ex[amples] agreements that governmen[ts] as freedom of expression.

Treaties such as the Uni[ted] (which governs trade amo[ng] implications for both the a[ctions] tween nations and the prot[ection] nation. Agreements such a[s] tion of Literary and Artis[tic] Related Aspects of Intelle[ctual] lish harmonious policies lectual and creative pro[perty] in Chapter 13.)

Contract Law

One of the most commo[n] uals and businesses is c[ontract] vate law." Since ancie[nt] almost every legal sys[tem] ments between partie[s] ment contracts and th[e] legal system, case law what constitutes a le[gal] made for illegal purp[oses]

decision is federal courts rarely overturn agency rules or regulations.

International Law

Beginning in the nineteenth century there was a movement toward creating a comprehensive international law. At the end of World War II, the United Nations was formed, and new international laws were created, such as those governing human rights. However, for centuries treaties have governed formal relationships between independent nations. Treaties are agreements that establish policies for how societies interact politically and economically. Designated the Commander in Chief and head of state by Article II of the U.S. Constitution, the president has much unilateral authority to conduct American relations with other nations, but Article I empowers Congress to fund transnational initiatives, declare war and approve treaties. Article III grants federal courts exclusive jurisdiction to hear cases involving U.S. foreign affairs.

The United States has entered into numerous world and regional covenants subjecting it and its citizens to policies of various multinational organizations, the most important of which is the United Nations. The U.N. Charter commits member nations to participate in efforts to foster peace and prosperity throughout the world. The Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, European Convention for the Protection of Human Rights, and American Convention on Human Rights are examples of international and regional agreements that governments should protect human rights such as freedom of expression.

Treaties such as the United States-Mexico-Canada Agreement (which governs trade among the three nations) have important implications for both the amount and kind of communication between nations and the protection of freedom of expression in each nation. Agreements such as the Berne Convention for the Protection of Literary and Artistic Works and the Agreement on Trade-Related Aspects of Intellectual Property Rights attempt to establish harmonious policies for the international treatment of intellectual and creative property. (Intellectual property is discussed in Chapter 13.)

Contract Law

One of the most common sources of law that affects both individuals and businesses is contract law, sometimes referred to as "private law." Since ancient times, contracts have been present in almost every legal system. Contracts include a variety of agreements between parties such as purchase agreements, employment contracts and the transfer of ownership. In the American legal system, case laws and statutes have regulations that dictate what constitutes a legal contract. These laws prohibit contracts made for illegal purposes, disallow contracts that unjustly enrich one party at the expense of another and require that both contracting parties willingly enter the contract.

Modern American contract law requires three essential elements of all contracts: an offer, acceptance and consideration. Basically this means that during the formation of a contract there must be a meeting of the minds between all of the contracting parties in which one party pays the other for a good or service. Under most state laws, contracts can be written or oral; some states, however, require contracts over a certain amount, usually $500, to be written. This written requirement is commonly known as the statute of frauds.

While states have general regulations about contracts, the parties involved usually have unfettered discretion in selecting the terms of their contract. A contract can contain provisions that do not follow a specific state or federal law. In fact, contract terms can even include an election of laws that will govern any future contract disputes. Courts only become involved in contract terms when one party breaches his or her part of the contract. In that situation, the wronged party can sue the breaching party in court. Absent a breach, courts occasionally become involved with regulating or interpreting contracts.

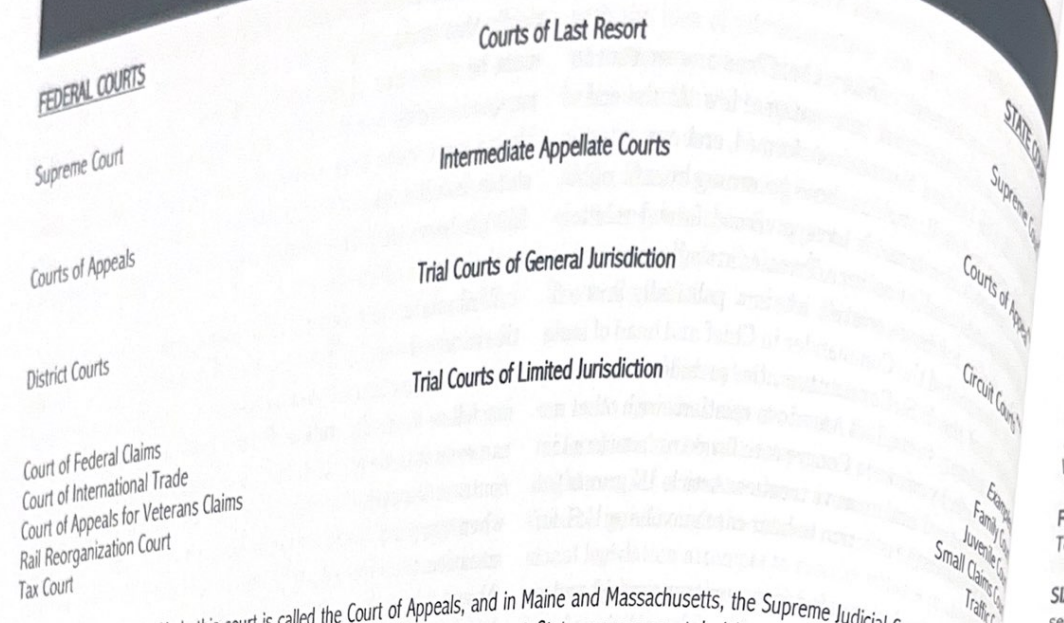
When courts become involved in contract disputes, they are frequently asked to interpret vague components of contracts. Over the years, legal conventions have developed that assist courts in determining the meaning of a contract in dispute. Courts usually resolve disputes by first examining what is written in a contract. This process is sometimes referred to as examining the "four corners" of the contract. In cases where the contract is vague or a meaning cannot be determined by the "four corners," most courts resolve the ambiguity in favor of the party with the fewest financial resources. In addition to interpreting contracts, courts sometimes are asked to issue orders requiring parties to fulfill their contractual obligation or pay the nonbreaching party money damages.

In communication law, contracts are frequently at issue because they are a part of daily management governing the sale of goods, employment and other obligations between private parties. Contract issues emerge in a variety of laws including intellectual property ownership, licensing agreements and employment contracts for journalists and public relations practitioners. When examining a contract issue, a student needs to know the terms of the contract, how the contract is to be interpreted and what remedies the law provides if there is a breach.

COURTS

Courts are at the center of the study of U.S. law for many reasons. Unlike judges of almost every other nation, American judges are vested with wide political authority. Through the power of judicial review and the ability to rule laws unconstitutional (and to have their decisions taken seriously), courts are the ultimate forums for the resolution of disputes, whether between pri-

THE AMERICAN JUDICIAL SYSTEM



* In Maryland and New York, this court is called the Court of Appeals, and in Maine and Massachusetts, the Supreme Judicial Court. Texas and Ok have both supreme courts and courts of criminal appeals as courts of last resort. State supreme court decisions can be appealed to the U.S. Supre However, as with any other appeal to the U.S. Supreme Court, the court first must grant a writ of *certiorari*.
** Eleven states do not have intermediate courts of appeal. Twelve states call these courts by variations on this name, e.g., the Maryland Court of Appeals, the Florida District Court of Appeals and the Pennsylvania Superior Court.
*** Names of state trial courts include Circuit Court (18 states), District Court (16 states), Superior Court (13 states), Court of Common Pleas (Oh Pennsylvania), Supreme Court (New York) and Trial Court (Massachusetts). Vermont has both a District Court and a Superior Court.

vate or public parties. In theory at least, even the most powerful must answer to the least powerful in courts. Congress, the president and the states have largely acceded to the courts the ability to square other laws with the Constitution. As primary guardians of the Bill of Rights, the courts are protectors of individual rights and liberties, perforce an anti-majoritarian responsibility. The courts, however, tend to be cautious in exercising judicial review. In its history, the Supreme Court has declared unconstitutional only about 170 acts of Congress and 1,200 acts of state and local governments. The courts seem sensitive to the undemocratic image of an un-elected body invalidating a law passed by elected representatives. Judges may also be aware, at least subconsciously, that their existence and funding depend on legislatures. The power of the courts is sometimes called "the judicial myth" because courts actually have few resources to require obedience to their decisions. They generally have only public esteem as political capital.

A court hearing a case is supposed to resolve a carefully framed question in a genuine dispute between two or more parties. The court should be apolitical, fair and principled in making a decision. The court is expected to follow strict legal procedure to ensure impartiality for all parties and to explain fully the rationale for the decision in a public document called the court's opinion. These decisions and opinions of American courts are not only important sources of law guiding everyday life but also of auth itative American political philosophy.

Jurisdiction

Perhaps the most important way to distinguish between courts by their jurisdiction, that is, their power to hear and rule case. "Jurisdiction" usually refers to the subject matter (the kin of legal issues) on which a court is entitled to rule, or to geog phy, places or types of parties over whom a court has authority

There are two ingredients in a court case: the facts and th law. Trial courts find facts and apply the law. An appellate cou reviews only the trial court's application of the law; the appell court is generally powerless to seek new evidence or directly ap ply the law to the case under review. Appeals courts affirm o reverse trial court verdicts; they do not issue new verdicts. Mo American court systems consist of trial courts ("law-applying an fact-finding" courts), intermediate appellate courts ("law-review ing" courts) and courts of last resort.

Courts will have either general or limited subject-matter juris diction. A general jurisdiction court handles a wide array of crim inal and civil matters. A limited-jurisdiction court may be created to handle only, for example, tax issues, bankruptcy issues or ju venile issues.

THE U.S. COURT CIRCUITS AND DISTRICTS

FIRST CIRCUIT — The districts of Maine, Massachusetts, New Hampshire, Rhode Island and Puerto Rico

SECOND CIRCUIT — The districts of Connecticut, Eastern New York, Northern New York, Southern New York, Western New York and Vermont

THIRD CIRCUIT — The districts of Delaware, New Jersey, Eastern Pennsylvania, Middle Pennsylvania, Western Pennsylvania and Virgin Islands

FOURTH CIRCUIT — The districts of Maryland, Eastern North Carolina, Middle North Carolina, Western North Carolina, South Carolina, Eastern Virginia, Western Virginia, Northern West Virginia and Southern West Virginia

FIFTH CIRCUIT — The districts of Eastern Louisiana, Middle Louisiana, Western Louisiana, Northern Mississippi, Southern Mississippi, Eastern Texas, Northern Texas, Southern Texas and Western Texas

SIXTH CIRCUIT — The districts of Eastern Kentucky, Western Kentucky, Eastern Michigan, Western Michigan, Northern Ohio, Southern Ohio, Eastern Tennessee, Middle Tennessee and Western Tennessee

SEVENTH CIRCUIT — The districts of Central Illinois, Northern Illinois, Southern Illinois, Northern Indiana, Southern Indiana, Eastern Wisconsin and Western Wisconsin

EIGHTH CIRCUIT — The districts of Eastern Arkansas, Western Arkansas, Northern Iowa, Southern Iowa, Minnesota, Eastern Missouri, Western Missouri, Nebraska, North Dakota and South Dakota

NINTH CIRCUIT — The districts of Alaska, Arizona, Central California, Eastern California, Northern California, Southern California, Hawaii, Idaho, Montana, Nevada, Oregon, Eastern Washington, Western Washington, Guam and Northern Mariana Islands

TENTH CIRCUIT — The districts of Colorado, Kansas, New Mexico, Eastern Oklahoma, Northern Oklahoma, Western Oklahoma, Utah and Wyoming

ELEVENTH CIRCUIT — The districts of Middle Alabama, Northern Alabama, Southern Alabama, Middle Florida, Northern Florida, Southern Florida, Middle Georgia, Northern Georgia and Southern Georgia

DISTRICT OF COLUMBIA CIRCUIT — District of Columbia

FEDERAL CIRCUIT — National jurisdiction in certain cases in administrative law, intellectual property and monetary claims against the U.S. government

Federal Courts

Article III of the Constitution says little about the number and sorts of federal courts, mentioning "one supreme Court" and "such inferior courts as the Congress may from time to time ordain and establish." With the Judiciary Act of 1789, as amended, and other legislation, however, Congress has developed an elaborate federal judiciary.

When Congress creates a court under Article III, that court is called an "Article III court." When a federal court is created by way of other constitutional provisions, it is called a "non-Article III court." Article III provides that judges assigned to Article III courts have lifetime tenure, meaning they hold office until they die, are impeached and convicted, or choose to retire (at age 65 with at least fifteen years of service or age 70 after at least ten years of service). A non-Article III judge may serve a term specified in the law that established the judge's court. Examples of non-Article III courts are the Court of Federal Claims, the Court of Appeals for the Armed Forces and Administrative Law Judges. These courts have specific jurisdiction suggested by their names. Article III courts include the district courts, courts of appeals and U.S. Supreme Court.

U.S. District Courts

The ninety-four district courts are the federal courts of original jurisdiction. At least one is located in each state, Puerto Rico, the Virgin Islands, Guam and the District of Columbia. As many as four are located in each of the most populous states. The number of judges assigned to each court ranges from two to twenty-eight, depending on the amount of work in the court. Normally, one judge presides in a case, with or without a jury, but a three-judge panel may be assigned to decide a case in special circumstances.

There are 677 judgeships in the fifty states and territories and fifteen in the District of Columbia. Each district also is assigned at least one magistrate, bankruptcy judge, marshal, clerk, U.S.

attorney (federal prosecutor), probation officer and reporter. One of the judges in each district is appointed the chief judge to handle administrative matters. The district court judge is nominated by the president and confirmed by the Senate. Other judges in federal districts, such as magistrate and bankruptcy judges, are appointed by appellate and district court judges. Federal magistrate judges are appointed by a majority of the district court judges in a particular district. Bankruptcy judges are appointed for each circuit by the circuit judges. In 2020, there were more than 332,000 civil filings in the district courts and more than 93,000 for criminal cases.

U.S. Courts of Appeals

Congress established the current system of federal courts of appeal in the Everts Act of 1891. These courts take appeals of decisions of the district courts and federal agencies. Except when the Supreme Court agrees to review decisions of appeals courts, the decisions are final. Because the Supreme Court in recent years has been granting full review to fewer than 100 of about 9,000 petitions it gets each term, the courts of appeals are, as a practical matter, the courts of last resort in the federal judiciary.

There are 179 judgeships in eleven numbered multi-state circuits, the Federal Circuit, and the District of Columbia Circuit. Each circuit has one appeals court with six to twenty-nine permanent judgeships, depending on the docket size. All federal appeals court judges are nominated by the president and confirmed by the Senate.

Rather than involve all of the judges in every decision, an appeals court normally assigns a case to a three-judge subcommittee, called a "panel." When the entire court assembles to decide a case, it is said to act *en banc*. *En banc* hearings are rare. They usually are reserved for special appeals cases. While an attorney may request an *en banc* hearing, holding such a hearing is ultimately a federal appellate court's decision.

About 53 percent of the 56,000 appeals court petitions each year involve civil matters. About 23 percent are criminal cases, and 14 percent are administrative cases. Only about 15 percent result in formal hearings before the appeals courts.

A chief judge is assigned in each appeals court to handle administrative work. In addition, a Supreme Court justice is chosen to be the supervising "circuit justice" for each circuit.

U.S. Supreme Court

The Supreme Court of the United States, the federal court of last resort, is the only court specifically mentioned in Article III of the Constitution, and the Constitution says little else about how it was to be structured or how it was to conduct its work. Through legislation, Congress established the office of the Chief Justice of the United States and determined the number of justices, which was set at nine in 1869. In recent years the politicization of the U.S. Supreme Court has resulted in calls, mainly by [illegible] for expanding the number of justices. However, the [illegible] panding the number U.S. Supreme Court justices has [illegible] ically difficult with the last earnest attempt being in [illegible] President Franklin Roosevelt attempted what was [illegible] his "court packing" plan to expand the court to 15 [illegible] attempt failed marking one of the biggest political [illegible] Roosevelt administration.

A Supreme Court term opens on the first Monday in [illegible] according to statute, and usually concludes at the end of [illegible]

In the past thirty years, the annual number of petitions [illegible] ing the Court has grown from about 1,000 to about 10,0[illegible] Court gave full-dress treatment to a peak of 174 cases in [illegible] the 1982 and 1983 terms, but in recent terms it has decided [illegible] than 100 cases per term this way.

Notice that the title of the federal judiciary's chief administ[illegible] tive officer is the "Chief Justice of the United States," [illegible] "Chief Justice of the U.S. Supreme Court." The associate [illegible] do not regard the chief justice as their boss. Rather, the [illegible] tice is head of the federal judiciary, chair of the Federal [illegible] Conference (the policy-making body for the federal courts) [illegible] in charge of administrative matters for the Supreme Court [illegible] cluding its building. The chief justice chairs the conferences [illegible] the justices in deciding cases and presides at public hearings [illegible] the Court.

State Courts

Article III gives broad authority to the federal courts to hear [illegible] legal issues, but the vast majority of American judicial work [illegible] done in the state courts. Federal jurisdiction is actually limited [illegible] leaving most matters of civil and criminal law to states. Although [illegible] the most important constitutional issues seem eventually [illegible] reach the federal courts, state courts actually produce the law [illegible] most directly affecting citizens on a day-to-day basis.

State court systems are generally organized like the federal [illegible] court system, with trial and intermediate appellate courts and [illegible] courts of last resort. Names of these courts vary in the states. [illegible] Sixteen states call their general jurisdiction trial court the "district court," but New York calls it the "supreme court." Most intermediate appellate courts are called "appeals courts," but in Pennsylvania, this court is called the "superior court." Most courts of last resort are "supreme courts," but in Maryland it is called the "court of appeals."

Each state court system is independent of other state court systems and the federal system. A state supreme court is the ultimate authority on that state's law. Just as a state court cannot correct the U.S. Supreme Court in its interpretation of federal law, federal courts cannot correct a state supreme court in its interpretation of state law. The U.S. Supreme Court can overrule a state supreme court on a state law question only when the two courts disagree over whether state law violates federal law. The

U.S. Constitution, as the supreme law of the land, p[illegible] ever a law, even a state constitution, violates it. [illegible] hand, a state constitution can provide more and d[illegible] than the federal constitution can.

State court systems have created a large numb[illegible] special subject-matter jurisdiction. Probate, traff[illegible] lations and juvenile courts are common, as are c[illegible] only minor crimes, such as justice of the peace c[illegible] nor civil matters, such as small-claims courts.

LEGAL PROCEDURE

Law is either substantive or procedural. Most [illegible] describes is the substance of communication [illegible] whether a particular communication is defam[illegible]

Procedural law, on the other hand, include[illegible] substantive law is created, administered and[illegible] sence these laws enumerate the procedures [illegible] of law. To protect against governmental ab[illegible] state constitutions require that authorit[illegible] fairly, equally and decisively. Mandating th[illegible] be represented by legal counsel and be give[illegible] peers are examples of procedural law. In fe[illegible] *of Civil Procedure* and *Rules of Criminal* [illegible] tails as specific as the cost of filing record[illegible] the paper permitted to be submitted as [illegible] have similar procedural laws. A case th[illegible] the merits may be lost for failure to foll[illegible] tiff's lawyer does not file an action wit[illegible] tions, the legal deadline that proced[illegible] court will probably dismiss the action. [illegible] client to sue the lawyer for malpractic[illegible]

The procedure for a legal action de[illegible] most fundamental of which are whet[illegible] inal or administrative and where th[illegible] action generally involves a dispute [illegible] ally over money damages. Civil due [illegible] of proof is a "preponderance of th[illegible] equity, such as an injunction, or ir[illegible] ages, are available.

An administrative action is also [illegible] cally involves a case over compliance [illegible] ministrative rule or regulation. A [illegible] sion can be appealed through the [illegible] of administrative procedure are a[illegible] bureaucracy on fines and orders [illegible] missed by an agency's judges o[illegible] commissioners, acting as a kind [illegible] administrative process is also s[illegible] only when all agency appeals a[illegible]

A criminal action is brought [illegible] against an individual for co[illegible]

U.S. Constitution, as the supreme law of the land, prevails whenever a law, even a state constitution, violates it. On the other hand, a state constitution can provide more and different rights than the federal constitution can.

State court systems have created a large number of courts in special subject-matter jurisdiction. Probate, traffic, domestic relations and juvenile courts are common, as are courts dealing in only minor crimes, such as justice of the peace courts, and in minor civil matters, such as small-claims courts.

LEGAL PROCEDURE

Law is either substantive or procedural. Most of what this book describes is the substance of communication law, for instance, whether a particular communication is defamatory or obscene.

Procedural law, on the other hand, includes the rules for how substantive law is created, administered and adjudicated. In essence these laws enumerate the procedures used in the practice of law. To protect against governmental abuse, the federal and state constitutions require that authorities treat individuals fairly, equally and decisively. Mandating that a criminal suspect be represented by legal counsel and be given an impartial trial by peers are examples of procedural law. In federal courts, the *Rules of Civil Procedure* and *Rules of Criminal Procedure* establish details as specific as the cost of filing records and the dimensions of the paper permitted to be submitted as court documents. States have similar procedural laws. A case that is likely to be won on the merits may be lost for failure to follow procedure. If a plaintiff's lawyer does not file an action within the statute of limitations, the legal deadline that procedural law establishes, the court will probably dismiss the action. That may be cause for the client to sue the lawyer for malpractice.

The procedure for a legal action depends on many factors, the most fundamental of which are whether the action is civil, criminal or administrative and where the action is brought. A civil action generally involves a dispute between private parties usually over money damages. Civil due process applies; the standard of proof is a "preponderance of the evidence"; and remedies in equity, such as an injunction, or in law, such as monetary damages, are available.

An administrative action is also a type of civil lawsuit. It typically involves a case over compliance or lack thereof with an administrative rule or regulation. An administrative agency's decision can be appealed through the agency's appeals process. Rules of administrative procedure are applied. Decisions by an agency's bureaucracy on fines and orders may be upheld, adjusted or dismissed by an agency's judges or by the agency's policy-making commissioners, acting as a kind of internal court of appeals. The administrative process is also subject to external judicial review only when all agency appeals are exhausted.

A criminal action is brought by the federal or state government against an individual for committing a crime designated in legislation. Criminal due process applies, the standard of proof is "beyond a reasonable doubt," and remedies include fines and imprisonment.

Legal procedure also depends on where an action is brought. Although procedural rules in different systems resemble each other, each state has its own specific procedures for its courts and agencies. Federal courts and agencies have separate sets of procedures. Procedures will also differ depending on whether the action is in a trial court or appellate court.

Trial Court Procedure

Courts are in the business of remedying or punishing social wrongs. Civil law was established to correct civil wrongs, such as torts or breaches of contracts, but has also become a way to achieve constitutional rights. Civil courts are intended to be places where civilized people will resolve their disputes rather than through violence or other inappropriate behavior. Criminal law was established to punish criminal wrongs, such as arson or larceny, although a major part of criminal law is devoted to protecting the constitutional rights of suspects.

Civil Procedures

The victim of a civil wrong will first consult an attorney who may specialize in a particular area of law, such as torts or contract disputes. The attorney tries to determine whether the client has a cause for action based on the facts and the law and, if so, whether the law provides a remedy in equity or damages. The two major branches of civil law are torts and contracts. A tort is a non-criminal wrong committed by one party against another. Libel and invasion of privacy are torts. However, tort law covers many different scenarios including medical malpractice, defective products and personal injuries. A contract is an agreement between two parties. If one party violates the agreement, the other may seek a remedy for breach of contract.

A typical civil case seeks monetary damages to help the plaintiff recover from various kinds of losses, for example, harm to reputation, shame and ridicule resulting from defamation. A plaintiff has to present evidence that the defendant was at fault for causing the harm to the plaintiff and that the plaintiff suffered as a result. The defendant can prevail by contradicting the plaintiff's evidence or introducing other evidence. The judge and jury decide on whether the plaintiff succeeds in the action by proving a claim by a "preponderance of the evidence."

The plaintiff's attorney, once satisfied that a client has a case, may begin to collect evidence to support the claim. An example of evidence would be affidavits — sworn statements by potential witnesses. The attorney will also conduct legal research. One initial decision will be deciding in which court to bring the case. If the case involves state law and both parties are in the state, then the case should be filed in a court in that state. If the case

involves federal law, then the case should be filed in the federal district of the legal wrong. If the parties are in different states and the case involves a controversy in excess of $75,000, the case may be brought in a court in either state or in a federal district court. If the case involves state law, the law of the state in which the case is brought prevails, including in a federal court. The law in one state might be more favorable to the plaintiff than the law in another state. These variables figure into "forum shopping," the process of picking a court for an action. The parties must have at least some connection to the court district where the case is brought.

Other initial legal issues for the plaintiff's attorney are the statute of limitations and standing to sue. The statute of limitations is the deadline for initiating a suit. A plaintiff must also establish "standing" – the right to bring the action; that is, does the plaintiff have a legally established interest in the litigation? For example, survivors of a libel plaintiff who dies generally do not have standing to sue on behalf of the deceased.

The legal system tries to encourage litigants to settle the case out of court. After the initial investigation, the plaintiff's attorney may ask the defendants for an amount of money to settle the case before legal action is filed. A defendant may also volunteer to settle at any stage of the process. Settlements account for a much larger proportion of the dispositions of civil actions than do trials. Part of the reason for this is the expense of a trial. As attorney's fees, expert witness fees, and the length of time it takes to prepare for trial have increased, settlement in civil cases sometimes is the most cost-efficient option.

The pre-trial process consists of two stages: pleadings and discovery. The basic pleadings are the complaint and answer. The first formal document filed in a case is the complaint, in which the plaintiff states the grounds for the action and jurisdiction of the court and demands judgment. Upon receipt of the complaint and a filing fee, the clerk of the court puts the case on the docket. The clerk issues a summons to be served on the defendant, notifying the defendant of the action. This step is called "service of process." The defendant is given a deadline within which to respond to the summons.

The defense attorney analyzes the complaint and researches other facts and law that may be relevant. If the defense does not challenge the complaint on the grounds of lack of jurisdiction or specificity, a document called an "answer" is prepared. The defendant's answer can admit, deny or neither admit nor deny the facts in the complaint. The defendant's attorney strategically selects these possible answers to the complaint. The answer may deny the allegations in the complaint and establish the defense, even if the defendant denies the plaintiff has a cause of action. The answer is delivered to the clerk of court and sent to the plaintiff. At this stage and in subsequent pre-trial stages, the defendant can ask the court summarily to dismiss the case on the grounds that the plaintiff's case is insufficient as a matter of law.

The next stage of the civil process is discovery, during which each side of a case obtains information from the other [illegible]. civil discovery, the parties have wide latitude in seeking [illegible] formation. Refusal to cooperate can result in a citation [illegible] tempt of court. Discovery includes interrogatories, [illegible] and requests for documents or other evidence.

An interrogatory is a list of written questions by one [illegible] the other party. The answers are admissible as evidence in [illegible]. A deposition is a transcript of a formal interview by an [illegible] of a witness who answers questions under oath. The transcript [illegible] prepared by a court reporter, and the deponent is allowed to [illegible] it before signing it as an accurate account of the interview. A [illegible] ponent, as a potential witness in a case, is served a subpoena [illegible] court order that the person appear at a time and place to [illegible] evidence. A subpoena *duces tecum* requires that the person [illegible] produce any documents or other evidence relevant to the [illegible] in the case. All of this evidence, filed at court, is available to [illegible] parties.

After completion of the discovery stage, the attorneys for [illegible] sides meet to discuss where the case stands and whether a [illegible] tlement is possible. If a settlement isn't possible, they will try [illegible] produce a stipulation, an agreement on which facts both [illegible] consider settled and which facts are still at issue. After reaching [illegible] ing a trial, the attorneys meet with the judge in the case. [illegible] judge may review the record of the case, encourage settlement [illegible] and request that the attorneys file briefs on legal issues. A hearing [illegible] date is scheduled.

The first step in the trial stage of civil procedure is *voir dire*, [illegible] the selection of the jury, assuming a jury is used. In certain kinds [illegible] of cases, a jury may not be used, perhaps at the request of [illegible] parties to the case. A case without a jury is called a "bench trial." [illegible] When used, a civil jury's job is to determine the facts, that is, [illegible] determine from the competing versions of the events exactly [illegible] what happened. If a jury is not used, the judge determines the [illegible] facts as well as applies the law. Otherwise, the function of the [illegible] judge is solely to apply the law to ensure a fair trial.

Juror selection usually follows a standard procedure. Court [illegible] clerks select potential jurors from drivers' registration or voter [illegible] lists. Failure to report for a call for jury duty can result in a citation [illegible] tion for contempt of court. In *voir dire,* the judge and attorneys [illegible] may question the members of the preliminary *venire,* seeking information [illegible] formation that might prevent them from being fair and effective [illegible] After this questioning, the attorneys can ask the judge to remove [illegible] some of the jurors "for cause," that is, for a reason that the judge [illegible] finds acceptable. In addition, the attorneys are given an opportunity [illegible] tunity to remove a set number of jurors through "peremptory [illegible] challenges," or without justifying the removals.

After the jury is impaneled, the trial begins. The judge normally gives preliminary instructions to the jury about the conduct [illegible] of the trial. The plaintiff's opening statement and then the defendant's opening statement follow. They are presentations by the attorneys of what they intend to show.

Next is the presentation of evidence, first by the plaintiff and

then by the defendant. The lawyer who ca[illegible] ducts direct examination. The opposing law[illegible] amination. Throughout the presentation [illegible] neys may invoke various rules of evidence [illegible] rules are directed at the judge, not the [illegible] questions of law, not facts. One side ma[illegible] side is violating some rule of evidence. F[illegible] not allowed to ask leading questions du[illegible] (although they can on cross-examinati[illegible] questions in such a way as to encourage [illegible] yer also may not use hearsay evidence – [illegible] made out of court and, therefore, of qu[illegible] termining the proper application of th[illegible] tain or overrule an objection. The side [illegible] may use them as bases for an appeal [illegible] the law.

At the conclusion of the plaintiff's p[illegible] the defense may move that the judg[illegible] grounds that the plaintiff failed to sh[illegible] a *prima facie* case, that is, a case tha[illegible] a reasonable jury. This is called a "d[illegible] case ends at that point and does not [illegible] plaintiff has not failed to present a [illegible] presents its evidence and witnesses [illegible] by the plaintiff. Since the burden o[illegible] defendant is not required to produ[illegible] do so. When the defense rests, th[illegible] closing arguments, followed by th[illegible] guments. Like the opening statem[illegible] include presentation of evidence [illegible] dence and arguments as to how [illegible] preted.

After the closing arguments, t[illegible] on the law as it applies to the ca[illegible] are carefully written, sometime[illegible] neys in the case. The judge expl[illegible] evidence, the plaintiff's burden [illegible] sary for the defense and any [illegible] deliberations.

The jury retires to the jury [illegible] called a "foreman" or "forepers[illegible] a verdict in favor of one of the [illegible] on the jurisdiction, a party to t[illegible] the jurors be unanimous in th[illegible] jority vote is necessary for on[illegible] asked not only to rule for o[illegible] determine how much in dam[illegible] if the plaintiff wins. A jury is[illegible]

After the jury decision is a[illegible] given a deadline within whi[illegible] jury's verdict should be set [illegible] risdictions, a judge has the [illegible]

then by the defendant. The lawyer who calls the witnesses conducts direct examination. The opposing lawyer conducts cross-examination. Throughout the presentation of evidence, the attorneys may invoke various rules of evidence. Arguments over these rules are directed at the judge, not the jury, because they are questions of law, not facts. One side may object that the other side is violating some rule of evidence. For example, lawyers are not allowed to ask leading questions during direct examination (although they can on cross-examination) — that is, to frame questions in such a way as to encourage specific answers. A lawyer also may not use hearsay evidence — evidence of a statement made out of court and, therefore, of questionable validity. In determining the proper application of the rule, the judge may sustain or overrule an objection. The side that loses the arguments may use them as bases for an appeal that the judge misapplied the law.

At the conclusion of the plaintiff's presentation of the evidence, the defense may move that the judge dismiss the case on the grounds that the plaintiff failed to show with sufficient evidence a *prima facie* case, that is, a case that would likely prevail before a reasonable jury. This is called a "directed verdict" because the case ends at that point and does not go to the jury. Assuming the plaintiff has not failed to present a *prima facie* case, the defense presents its evidence and witnesses, subject to cross-examination by the plaintiff. Since the burden of proof is on the plaintiff, the defendant is not required to produce evidence but generally will do so. When the defense rests, the plaintiff's attorney presents closing arguments, followed by the defense attorney's closing arguments. Like the opening statements, closing arguments do not include presentation of evidence but are summaries of the evidence and arguments as to how the evidence should be interpreted.

After the closing arguments, the judge orally instructs the jury on the law as it applies to the case. These instructions to the jury are carefully written, sometimes in consultation with the attorneys in the case. The judge explains how a jury is supposed to use evidence, the plaintiff's burden of proof, the requirements necessary for the defense and any other law applicable to the jury's deliberations.

The jury retires to the jury room, selects a chairperson (often called a "foreman" or "foreperson") and deliberates until reaching a verdict in favor of one of the parties. In civil actions, depending on the jurisdiction, a party to the case sometimes can request that the jurors be unanimous in their decision. Sometimes only a majority vote is necessary for one side to prevail. The jury is usually asked not only to rule for one side of a civil action but also to determine how much in damages should be given to the plaintiff if the plaintiff wins. A jury is not expected to explain its decision.

After the jury decision is announced, the losing side is normally given a deadline within which to file a petition arguing that the jury's verdict should be set aside as a matter of law. In most jurisdictions, a judge has the power to order a judgment as a matter of law. The judge is expected to explain any decision that contradicts a jury's determination.

Criminal Procedure

The legal system sees crimes as wrongs committed against society, not just against the victims of those crimes. As a result, an elaborate criminal justice system, including police, prosecutors, defense attorneys, judges and jailers, has been constructed with tax money to deal with crime. Crimes are usually categorized as felonies or misdemeanors. Felonies are serious crimes — such as treason, murder and rape — with penalties of capital punishment, lengthy prison terms and large fines. Misdemeanors are less serious crimes — such as reckless driving, marijuana possession and disorderly conduct — that carry penalties of lower fines and shorter jail terms.

Some assumptions of criminal law procedure resemble those in civil law procedure, but because the liberty and perhaps life of the criminal defendant may be at stake, criminal law procedure tends to be much more strict and specific than those of civil law. Criminal rights in the Fourth, Fifth, Sixth and Eighth amendments of the U.S. Constitution have been the subject of great interest to the Supreme Court and other courts whose decisions on criminal procedure have had a great impact on the work of police, prosecutors, courts and prisons.

Criminal law procedure includes a police investigation, arrest, complaint, initial appearance, preliminary hearing, prosecutorial investigation, indictment, arraignment, plea, defense investigation, discovery, trial, verdict, sentencing and punishment.

Police must follow certain procedures when investigating a crime. They must find and preserve physical evidence and question witnesses and others with information relevant to the crime. They are restricted by the Fourth Amendment prohibition against unreasonable search and seizure. They can obtain a search warrant by satisfying a judge that they have probable cause to believe that evidence related to a specific crime can be obtained at a location specified in the warrant. Before an interrogation police must be careful to "Mirandize" suspects, that is, to advise them of their rights to have attorneys and not to speak to the police. (The applicable case is *Miranda v. Arizona* (1966)). Police must know when to discontinue custodial interrogation and arrest a suspect.

An arrest occurs when a person suspected of a crime is taken into custody. An arrest is usually made with an arrest warrant, which is based on reasonable evidence that the suspect committed a crime. The suspect is taken before a judge for an initial appearance and further advised of his or her rights. The suspect, who is legally presumed innocent until proven guilty, may ask to be released from custody until required to appear at subsequent proceedings. The judge considers whether to grant bail and, if so, how much the bail should be, based on the seriousness of the charge and the likelihood the suspect will appear at future court

proceedings.

A criminal defendant has the right to an attorney. If the defendant is indigent, the court will assign one, probably a public defender. The defense attorney represents the defendant at the preliminary hearing before a judge to determine whether there is probable cause to believe the suspect committed a crime. Depending on evidence presented, a judge can dismiss the case or "bind it over" for further proceedings. Note there is no right to an attorney in civil lawsuits.

Next, the prosecution is expected to file an accusation or seek a grand jury indictment. An accusation, normally used in a less serious case, is a document read at a public hearing outlining the charges and evidence. Accusations do not require the presentation in front of a grand jury. More commonly, especially in serious cases, an indictment is issued by a grand jury, a panel of citizens assembled in secret to determine whether there is sufficient evidence to support further prosecution. Accusations are typically used to charge defendants with misdemeanor crimes. A grand jury indictment is used to charge defendants with felonies.

The arraignment is another court hearing at which the defendant is expected to enter a plea to the charges filed by the prosecutor, generally guilty or not guilty. A suspect may also plead *nolo contendere*, which essentially means that the defendant will not contest the charges. If the defendant pleads guilty, the judge will set a date for sentencing. If the defendant pleads not guilty, the judge will set a date for trial.

The criminal discovery process differs from that of a civil case. Depositions are rare in criminal discovery; they are used only when a witness is unable to appear at a trial. Defendants have the Fifth Amendment right not to make any statements to law enforcement officers or prosecutors, but if they do, they probably will be required to respond under oath at the trial to a cross-examination by the prosecutor. In addition, the criminal record of a defendant may be suppressed as evidence against the defendant if it would unnecessarily prejudice the jury against the defendant. The police and prosecutor are required to share evidence they obtain that may help the defendant. Each side is free to ask the other for evidence, but not all evidence is required to be presented before trial. Each side is required to reveal to the other a list of witnesses expected to be called and exhibits to be presented.

The prosecutor will develop a theory about the criminal case and explain how the crime was committed. In response, the defendant develops a defense strategy. To have enough time to gather evidence and otherwise develop a sound strategy, the defense may ask for additional time through a motion for a continuance. Other pretrial motions might include a motion to suppress evidence illegally obtained, a motion to change the place of the trial because of adverse publicity and a motion to remove the judge because of prejudice.

Prosecution and defense strategies are often dependent on what are called "aggravating" and "mitigating" circumstances. Aggravating circumstances are often named and defined in legislation as factors that must be shown in order to convict a defendant of a certain crime. In a death penalty case, for example, the prosecutor might be required by state law to show that the defendant killed a police officer or a minor, had previously been convicted of a violent crime or was unusually cruel in committing the murder. Mitigating circumstances may be argued by the defense attorney to convince the jury to convict a guilty defendant of a lesser crime or to decide on less punishment than the death penalty the prosecutor seeks. For example, evidence may show that the defendant played a small role as an accomplice to the principal perpetrator of the crime, that the victim consented to the conduct leading to the murder or that the defendant felt the murder was justified.

TYPICAL STAGES OF LEGAL PROCEDURE

CIVIL CASE

Complaint filed • Answer • Discovery • Hearings and motions • Settlement conference • Trial • Appeal

CRIMINAL CASE

Investigation • Arrest • Arraignment • Complaint • Preliminary hearing • Grand jury indictment • Hearings and motions • Trial • Sentencing • Appeal

Voir dire in criminal cases works the same as with civil cases. In trials involving felonies, twelve jurors are typically empaneled. In an attempt to avoid mistrials, additional jurors may be chosen as alternates in the event regular jurors, once seated, become ill or are disqualified. Lawyers usually get more peremptory challenges in criminal cases than in civil cases. Jury selection in criminal cases can be lengthy and complicated. Behavioral experts may be hired as consultants to the lawyers in choosing jurors.

At trial, the prosecutor makes an opening statement, followed by one by the defense attorney. The prosecutor presents the state's evidence with cross-examination by the defense. When the prosecution rests, the defense may ask the judge to dismiss the case on the grounds that as a matter of law, the prosecution failed to present evidence that the defendant was guilty "beyond a reasonable doubt." If the motion fails, the defense may present evidence attempting to raise serious doubts about the defendant's guilt. The prosecutor and defense attorney then give closing statements. Who goes last is determined by the circumstances of the case and the jurisdiction.

After the judge gives the jury instructions, the jurors retire to the jury room and, in almost all jurisdictions, must reach a unanimous vote on a verdict of guilty or not guilty. If a unanimous vote cannot be achieved, the judge generally declares a mistrial. The jury forewoman or foreman announces the verdict in court. The defendant is free of custody from the moment of a verdict of not guilty. If found guilty, the defendant will be held for sen-

tencing, which is normally a separate volving the jury. The judge may reque officer on the defendant's background on sentencing from witnesses, the pr Ranges of possible sentences for conv lished in legislation. Once sentenced law enforcement and later prison aut

Plea bargaining in criminal proceed vast majority of the dispositions of p are reached between the defense and is used in about 95 percent of cases in for pleading guilty to a crime, a defe a lesser offense or be offered a lesser fendant pleads not guilty and is fou must approve a plea bargain.

Appellate Court Procedure

New Hampshire, West Virginia and where appellate courts have virtua the kinds of cases they accept. In r are required to consider appeals in s discretion in accepting appeals in ot

In most jurisdictions, a notice of thirty days of a trial court's decisi bringing the appeal, must take res appeals court with the entire record appellant must also satisfy the app tains a legal issue that can be appe only questions of law, not fact, and trial court erred in applying the la prejudicial, that is, an error that ac ability to win the trial.

An appeals court will require th ment, called a "brief," within thirty lant delivers the trial court record due thirty to sixty days after the a an appeals court cannot overturn facts, the goal of the appellant is court that the record on which th inadequate or unfair.

Appeals courts do not re-try cas arguments, allowing the parties t briefs with public presentations usually ask questions of the attorn

The appeals court can affirm or sion. If ruling in favor of the ap nevertheless find that the error w altered the outcome of the case. F in favor of an appellant is less lik than to remand the case to the low to handle the legal issue that was

tencing, which is normally a separate proceeding, sometimes involving the jury. The judge may request a report from a probation officer on the defendant's background and seek recommendations on sentencing from witnesses, the prosecution and the defense. Ranges of possible sentences for convictions of crimes are established in legislation. Once sentenced, a convict is turned over to law enforcement and later prison authorities.

Plea bargaining in criminal procedure is important because the vast majority of the dispositions of prosecutions end when deals are reached between the defense and prosecutor. Plea bargaining is used in about 95 percent of cases in pretrial stages. In exchange for pleading guilty to a crime, a defendant may be charged with a lesser offense or be offered a lesser punishment than if the defendant pleads not guilty and is found guilty at a trial. A judge must approve a plea bargain.

Appellate Court Procedure

New Hampshire, West Virginia and Virginia are the only states where appellate courts have virtually complete discretion over the kinds of cases they accept. In most states, appellate courts are required to consider appeals in some kinds of cases and have discretion in accepting appeals in other kinds of cases.

In most jurisdictions, a notice of appeal must be filed within thirty days of a trial court's decision. The appellant, the party bringing the appeal, must take responsibility for providing the appeals court with the entire record of the lower court case. The appellant must also satisfy the appeals court that the case contains a legal issue that can be appealed. The appellant can raise only questions of law, not fact, and must show not only that the trial court erred in applying the law but also that the error was prejudicial, that is, an error that actually harmed the appellant's ability to win the trial.

An appeals court will require that the appellant file its argument, called a "brief," within thirty to sixty days after the appellant delivers the trial court record. The brief of the appellee is due thirty to sixty days after the appellant's brief is filed. Since an appeals court cannot overturn a jury's determination of the facts, the goal of the appellant is often to convince the appeals court that the record on which the jury based its decision was inadequate or unfair.

Appeals courts do not re-try cases but sometimes conduct oral arguments, allowing the parties to the case to supplement their briefs with public presentations before the judges. The judges usually ask questions of the attorneys during the arguments.

The appeals court can affirm or reverse the lower court decision. If ruling in favor of the appellant, an appeals court may nevertheless find that the error was not serious enough to have altered the outcome of the case. Further, an appeals court ruling in favor of an appellant is less likely to reverse the lower court than to remand the case to the lower court with directions on how to handle the legal issue that was appealed. This may require a new trial.

In most state systems and in the federal system, losers of court decisions get a second opportunity to appeal to a court of last resort, usually called a supreme court. Cases may arrive in the form of what are called appeals, but often they are technically petitions to the court to have the court review the lower court decision. As a result, many parties bringing the cases are called petitioners rather than appellants and those responding to the petitions are called respondents rather than appellees.

Appellate jurisdiction is sometimes subdivided into categories of mandatory and discretionary jurisdiction. Mandatory jurisdiction means the constitution or legislation requires the court to take cases, either all cases brought to the court or cases addressing certain matters. Discretionary jurisdiction means the court can make the decision itself about whether to take a case.

U.S. Supreme Court Procedure

A brief overview of procedure at the U.S. Supreme Court can foster understanding of the law for three reasons: (1) the Court is an example of a court of last resort, (2) the Court's procedures are models for lower appellate courts, and (3) the Court is the most important of all courts in shaping law in the United States. Although the Court does not enact or carry out laws, it is an important national policy maker through its interpretation of law. The Supreme Court has been the most influential source of constitutional law.

The Court receives more than 7,000 petitions a year granting and hearing oral argument for approximately 80 cases. There are a number of different ways of obtaining permission to have the Court review a lower court decision. One famous way, though it is rarely accepted by the Court, is through an *in forma pauperis* affidavit, a "pauper's petition." Even when an individual may not be able to afford a lawyer or use a formal process to get the Court's attention, the petitioner might be able to bring the case forward with a simple letter to the Court and no filing fee.

The Court is also required by Article III of the Constitution and by congressional legislation to hear certain cases. For example, when state or federal laws are declared by lower courts to be unconstitutional, the Court has mandatory jurisdiction. Over time, however, the justices have successfully sought more and more discretion over what cases are put on the docket. Almost every case the Court decides is accepted by grant of a petition for a writ of *certiorari*, an order to a lower court requiring that the records of the case be brought to the Supreme Court.

The clerk, using guidelines established by the Court, sorts the petitions into groups called "frivolous" and "nonfrivolous." Both groups are transmitted to the office of the chief justice, whose law clerks screen the petitions, agreeing or disagreeing with the clerk. Petitions deemed frivolous by the chief justice are "deadlisted." Nonfrivolous petitions are put on the agenda for discussion by the justices and a vote on acceptance. Clerks for all the

justices review all the petitions, even those deadlisted.

Members of the Court have established criteria for granting or denying certiorari. For example, the Court will reject a petition unless the petitioner has exhausted all other legal remedies. In short, if it is possible to take the case to another court, the petitioner must do so before the Supreme Court will consider hearing the case. Unlike some state supreme courts, the U.S. Supreme Court will not give advisory opinions to anyone, including other branches of government. It deals in only *bona fide* disputes between real parties, not hypothetical situations or moot cases. The Court, however, has an exception to its mootness doctrine: When an important issue repeatedly arrives before the Court but cannot be decided because of mootness, the Court may agree to hear the case. The Court also rejects what it calls political questions, that is, issues presented in the form of cases when they should be resolved in the political branches of government. Some issues are not resolvable in the courts. Many disputes between branches of government and between the federal and state governments, according to the Court, should be solved in the political process, not the legal process.

Also influential in shaping the Court's docket is the Office of the Solicitor General in the U.S. Department of Justice. The solicitor general, representing the federal government when it is a litigant before the Supreme Court, is given considerable independence by the president and attorney general in deciding which cases the government should ask the Court to review. Since the federal government — the most frequent and important litigant in the federal courts — loses dozens of cases in U.S. appeals courts each year, the solicitor general has recently asked the Court to hear only about thirty cases. The Court, respecting this advice and the restraint shown by the solicitor general, usually grants review to most of these cases.

Only about 10 percent of all of the petitions survive to be formally presented by the chief justice at regular meetings of the nine justices in the conference room of the Supreme Court building. At this conference, the justices may agree that some cases can be decided summarily, for example, simply affirming or reversing a lower court decision with a brief explanation or with no explanation. Most of the cases are dismissed without explanation. The justices may agree to decide a case without an oral hearing. This is usually done when the justices are unanimous or nearly so on what they see as a fairly straightforward question. Normally, a short unsigned opinion — called a *per curiam* — accompanies such a decision.

If at the conference four of the nine justices agree that a case should be heard, then the case is accepted for review. Commonly referred to as the "rule of four," granting certiorari in only about 80 cases a year. Written briefs by each side addressing the merits of the case are submitted to the Court within 45 days. The Court may also accept briefs from other parties interested in the case — *amici curiae*, or "friends of the court." Political scientists call these parties "judicial lobbies." State governments, corporations and political organizations frequently file *amici* briefs.

The Court also holds a public oral argument for each case before the justices hear a case, they meet in the cloak room to the hearing room. In a ceremonial tradition, they other don their robes, shake hands with each other, order of seniority and walk into the courtroom. At bench in the courtroom, the chief justice — who is sidered the senior-most justice, no matter how long his sits in the middle. The senior-most justice sits to the tice's right, the next most senior justice sits to the left and so forth, so that the junior-most justices are outer wings of the bench.

The chief justice presides at the hearing, calling the argument and controlling a red light that, when lit, mea yer representing one side may speak. When the light the lawyer's time has ended. Each side is normally thirty minutes to present arguments. Soon after a presentation begins, however, the justices start asking which are often pointed and difficult. Most of the hearing exchange between the lawyer and the justices. After one ishes, the other side presents. After one case is argued, case is called. When the scheduled cases have been hea chief justice adjourns the hearing, and the justices rise and the courtroom, again in order of seniority.

The private conferences of the justices are held not only cide on which cases the Court ought to accept for review to discuss and vote on the cases that have been heard. The justice brings up each case, beginning the discussion and ing his vote. In order of seniority, the justices offer their tives on the case and vote, although any justice may chan or his mind anytime between the conference and the time cision is announced to the public. The chief justice keeps tra the votes. After the conference vote on a case, one member prevailing side is assigned to write the Court's opinion, exp ing the decision. The senior-most member of the majority writes the Court's opinion or assigns the authorship. Since chief justice tends to vote with the majority in most cases, chief justice makes the assignments much more often than sociate justices. This is considered the most significant pow the chief justice because writing the Court's opinion and exp ing the law, especially in important cases, is a prized assignm among the justices.

Once assigned, a justice will draft an opinion and circulate among the justices who react with comments. The author is u der pressure to be responsive to these comments because, if m the author risks losing the support of other justices. Besides ha ing a vote in each case, a justice has the option of writing a sep rate opinion and/or joining other opinions.

Members of the prevailing side in a case resulting in a spl vote among the justices realize that the strength of the Court decision and opinion depends on the size of the majority. If a ju tice, however, agrees with the outcome of the case but disagre

with the rationale in the opinion of the Court choose not to join the opinion and write what is "concurring in judgment" or result, explaining wh agrees. The ethic of the justices is to strive for ions, but the cases often produce split votes ar ions. A majority opinion of the Court is one wi five justices concur. A plurality opinion is an opi that attracts more agreement than any other o the justices in the absence of a majority. Obv opinion is stronger than a plurality opinion. I such as with the sudden death of a justice or i him or herself, the Supreme Court can be even When this situation occurs, Court procedur court's decision affirms the lower court's rulin any precedent.

Concurring and dissenting justices have a regarding the writing and joining of opinion with the opinion of the Court, a concurring just that opinion. The justice may join the opinio write a concurring opinion to clarify certain thinks necessary. Or, as indicated, the justice ion concurring in the judgment. These separa may not be joined by other justices.

Dissenting justices are less systematic tha in the opinion process. Dissenters do not norr a single opinion that they then "sign." To complicated, justices sometimes write opinion and dissenting in part. Once the justices hav and opinions, the record of the case is given Government Printing Office located in the preme Court building. Because Court decisio influence for some people if the decisions sions and opinions are kept under tight sec is ready to announce them to the public. At ceedings, the justices again parade into th with the chief justice presiding, announce case and summarize its opinions. At the sa versions of the judgments and opinions are ties to the cases and journalists covering th

JUDGES

Judges, through their decisions and opini the creation of law affecting communicatio of the free speech and press clauses by th especially crucial to understanding the sy pression in America. A sense of who thes and how their decisions are affected by le important to a complete understanding of

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with the rationale in the opinion of the Court, the justice can choose not to join the opinion and write what is called an opinion "concurring in judgment" or result, explaining why the justice disagrees. The ethic of the justices is to strive for unanimous opinions, but the cases often produce split votes and separate opinions. A majority opinion of the Court is one with which at least five justices concur. A plurality opinion is an opinion of the Court that attracts more agreement than any other opinion written by the justices in the absence of a majority. Obviously a majority opinion is stronger than a plurality opinion. In some instances, such as with the sudden death of a justice or if a justice recuses him or herself, the Supreme Court can be evenly deadlocked 4-4. When this situation occurs, Court procedure states that the court's decision affirms the lower court's ruling, but does not set any precedent.

Concurring and dissenting justices have a number of options regarding the writing and joining of opinions. If in agreement with the opinion of the Court, a concurring justice can simply join that opinion. The justice may join the opinion of the Court and write a concurring opinion to clarify certain points the justice thinks necessary. Or, as indicated, the justice can write an opinion concurring in the judgment. These separate writings may or may not be joined by other justices.

Dissenting justices are less systematic than majority justices in the opinion process. Dissenters do not normally try to produce a single opinion that they then "sign." To make matters more complicated, justices sometimes write opinions concurring in part and dissenting in part. Once the justices have settled their votes and opinions, the record of the case is given to the branch of the Government Printing Office located in the basement of the Supreme Court building. Because Court decisions might have undue influence for some people if the decisions are leaked, the decisions and opinions are kept under tight security until the Court is ready to announce them to the public. At separate public proceedings, the justices again parade into the hearing room, and, with the chief justice presiding, announce the outcome of each case and summarize its opinions. At the same time, the printed versions of the judgments and opinions are distributed to the parties to the cases and journalists covering the court.

JUDGES

Judges, through their decisions and opinions, are important in the creation of law affecting communication. The interpretations of the free speech and press clauses by the Supreme Court are especially crucial to understanding the system of freedom of expression in America. A sense of who these decision-makers are and how their decisions are affected by less formal influences is important to a complete understanding of communication law.

States commonly require that a judge have a law degree and legal experience, but neither Article III of the Constitution nor federal statute requires that federal judges have either. There never has been a federal judge, however, who has not been trained in the law (although prior to the early twentieth century some did not have law degrees). State systems for choosing judges vary considerably. A plurality of states use what is called the "Missouri Plan." When a judicial seat becomes vacant, a judicial commission — usually made up of representatives of the legislature, judiciary, bar association and other constituencies — creates a short slate of candidates. The governor fills the seat with one of the candidates on the slate. After a substantial period in office, perhaps ten years, the judge runs not against another candidate, but in a retention election in which the voters are asked whether the judge should return to office for another term. Given the low visibility of judicial elections, it is highly likely that, unless the judge's performance has been extraordinarily poor, the judge will remain in office indefinitely. Proponents of the Missouri Plan argue that it protects honest judges from partisan politics and other electoral influences but provides voters with some opportunity to make judges accountable.

SYSTEMS FOR THE SELECTION OF JURISTS IN STATE COURTS OF LAST RESORT

MERIT SELECTION
Alaska, Arizona, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Indiana, Iowa, Kansas, Maryland, Massachusetts, Missouri, Nebraska, New Hampshire, New Mexico, New York, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Wyoming

NONPARTISAN ELECTIONS
Arkansas, Georgia, Idaho, Kentucky, Michigan (but with partisan nominations), Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio (but with partisan primaries), Oregon, Washington, Wisconsin

PARTISAN ELECTIONS
Alabama, Illinois, Louisiana, Pennsylvania, Texas, West Virginia

GUBERNATORIAL APPOINTMENT
California, Maine, New Jersey

LEGISLATIVE APPOINTMENT
South Carolina, Virginia

Set terms for these jurists range from six to fifteen years. The term in Massachusetts and New Hampshire is until the age of 70. In South Carolina and federal courts, a justice has lifetime tenure. The number of jurists on each of these courts is five (nineteen courts), seven (twenty-five courts), eight (only Louisiana) or nine (eight courts).

Next most common among state judicial selection systems are elections. Eight states hold partisan elections. Judges, like candidates for non-judicial offices, campaign for election for terms with endorsements of political parties. Fourteen states hold non-

partisan elections, forbidding party labels of judicial candidates on voter ballots. Four states provide for gubernatorial appointments of judges, usually requiring legislative approval of those appointments.

The framers of the Constitution intended to insulate federal judges from political influences by providing for nominations of judges by the president in Article II, section 2, clause 2, "with the Advice and Consent of the Senate," which has come to mean essentially that the president appoints them, but the Senate can veto the appointments. Article III, section 1 further distances federal judges from political considerations by giving them lifetime tenure and protecting their salaries from being reduced. Under Article II, section 4 federal judges can be removed from office only by impeachment in the House of Representatives and conviction in the Senate.

The countervailing forces that create judicial selection systems that range from partisan elections to executive appointments are the concerns for judicial accountability to the public, on the one hand, and judicial independence from undue influences, on the other hand. The results of comparisons of the quality of the judiciary resulting from these different selection systems are mixed.

How divorced federal judges are from politics may depend at least in part on how they are chosen for nomination by the president for approval by the Senate. When a district court judge retires or dies, the president normally consults with the highest ranking members of Congress in the president's party from the state that contains the district court. Members of Congress consult with party leaders in the state on the person who should be recommended to the president. If the president nominates this candidate, the nomination is unlikely to meet resistance from other members because they will want similar support when they make recommendations to the president. In the Senate, this norm is called "senatorial courtesy." The Senate Judiciary Committee makes recommendations to the Senate concerning judicial appointments. This process is frustrated, however, when the Senate is controlled by the party opposite of the president's party, as was the case for parts of the administrations of George Bush and Barack Obama.

A similar kind of politics plays a role in the filling of U.S. appeals court seats. Members of Congress from states in a federal circuit expect to be able to place an equitable share of judges from each of those states on the appeals court.

Presidents tend overwhelmingly to appoint judges from their own political parties. This is not surprising because state party leaders ultimately choose most judges. Recently presidents have attempted to increase the number of minorities and women on the federal bench. A nominee is subject to an official FBI background check and lobbying by a variety of special interest groups. In addition, a president is not likely to recommend a candidate whose credentials are poor. Political litmus tests of federal nominees are seen as an overt politicization of the federal bench, and presidential candidates often campaign for election by promising that, through judicial appointments, they will [illegible] courts that produce unpopular decisions.

There are stories of presidents being sorely disappointed [illegible] their nominations to the Supreme Court. President [illegible] enhower, a conservative Republican, said his biggest [illegible] president was naming Earl Warren the chief justice. [illegible] a Republican, led what historians consider to be a [illegible] revolution at the Supreme Court by aggressively taking [illegible] pronouncing decisions to advance civil liberties and [illegible] causes. Nevertheless, most judges, because of their [illegible] tories and perhaps interests in advancing to higher [illegible] form predictably once on the bench.

Discussion of judicial ideology tends to dwell not [illegible] ther judges develop voting patterns consistent with [illegible] or liberal perspectives on the issues but also on their [illegible] toward the role the courts should play in the political [illegible] Judges called "activists" believe the courts have an active [illegible] play in the political system. Judicial restraintists believe [illegible] courts should play a modest role.

Most of the 112 justices in Supreme Court history [illegible] properly labeled "conservative restraintists." Only during [illegible] Warren Court era of the 1950s and 1960s did liberal activists [illegible] come a majority. In recent years, the court has frequently [illegible] split 5-4, and liberals have accused the majority of the Rehnquist [illegible] and Roberts Courts of being conservative activists. The conservatives favor limited government, including a modest role for the Court in the political system. In short, the idea of judicial restraint should be kept in mind when trying to understand the Supreme Court including communication law.

The Senate's role in confirmation has evolved over the [illegible] centuries. Since 1789 there have been 164 nominations to the Supreme Court submitted to the Senate, with 127 of those confirmed as associate or chief justice. Of the 164 nominations, twelve were rejected, twelve were withdrawn, and ten [illegible] have any action taken by the Senate. Of the 127 nominees who were confirmed, seven declined to serve.

Although the Senate Judiciary Committee was formed in [illegible] it was not until 1916, with President Woodrow Wilson's nomination of Louis Brandeis, that the committee held a public hearing on a nominee. The first nominee to appear for questioning was Harlan Fiske Stone in 1925, and since 1955, with the nomination of John Marshall Harlan II, nearly all nominees have appeared before the committee. The exception to having hearings since 1955 has been Harriet Miers, who was nominated and then withdrew as nominee in 2005, and Chief Justice John Roberts, who was originally nominated to replace Sandra Day O'Connor. His nomination was withdrawn pre-hearing, and he was then nominated chief justice to replace Chief Justice Rehnquist, who died in office.

The Senate rules for holding a full vote on a Supreme Court nominee have changed as confirmations have increasingly become hyper-partisan. Because senators have increasingly voted on party lines, Senate Majority Leader Harry Reid, a Democrat

NAME

Clarence [illegible]
Born in Pi[illegible]
Appeals fo[illegible]

John G. Rob[illegible]
Born in Buff[illegible]
Appeals for t[illegible]

Samuel A. Alit[illegible]
Born in Trento[illegible]
Jersey and asso[illegible]

Sonia M. Sotom[illegible]
Born in New Yo[illegible]
Southern District

Elena Kagan
Born in New York C[illegible]
former associate W[illegible]

Neil Gorsuch
Born in Denver, C.O.
judge on the U.S. Cou[illegible]

Brett Kavanaugh
Born in Washington D.C
W. Bush administration,

Amy Coney Barrett
Born in New Orleans, L.A
U.S. Court of Appeals for t[illegible]

Ketanji Brown Jackson
Born in Washington D.C., A[illegible]
judge of the U.S. District Cou[illegible]

Roberts is the 17th Chief Justic[illegible]
number of seats at the Court var[illegible]

The reference to justices as "mo[illegible]
Generally, in First Amendment case[illegible]
justice has a mixed voting record.
characterization of the current cour[illegible]
and Jackson as "liberal." However,
unanimous.

effectively eliminated the filib[illegible]
inations except for the Supreme
on a filibuster a simple majorit[illegible]
traditionally needed to end de[illegible]
mented in order to hold votes on
the U.S. Court of Appeals for the
larly referred to as the "nuclea[illegible]

THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

NAME	BORN	APPOINTED	IDEOLOGY
Clarence Thomas	1948	1991 by Bush I	Conservative

Born in Pinpoint, G.A., Associate Justice Thomas is a former chairman of the U.S. Equal Employment Opportunity Commission and judge on the U.S. Court of Appeals for the District of Columbia Circuit. Yale Law School, 1974.

John G. Roberts, Jr.	1955	2005 by Bush II	Conservative

Born in Buffalo, N.Y., Chief Justice Roberts is a former private practitioner, lawyer in the Reagan and Bush I administrations, and judge on the U.S. Court of Appeals for the District of Columbia Circuit. Harvard Law School, 1979.

Samuel A. Alito, Jr.	1950	2006 by Bush II	Conservative

Born in Trenton, N.J., Associate Justice Alito is a former lawyer in the Justice Department of the Reagan and Bush I administrations, U.S. attorney for New Jersey and associate judge for the U.S. Courts of Appeals for the Third Circuit. Yale Law School, 1975.

Sonia M. Sotomayor	1954	2009 by Obama	Moderate

Born in New York City, N.Y., Associate Justice Sotomayor is a former assistant district attorney in New York and judge on the U.S. District Court for the Southern District of New York and U.S. Court of Appeals for the Second Circuit. Yale Law School, 1979.

Elena Kagan	1960	2010 by Obama	Moderate

Born in New York City, N.Y., Associate Justice Kagan is a former law professor at the University of Chicago, former professor and dean at Harvard Law School, former associate White House counsel in the Clinton Administration, and former Solicitor General in the Obama Administration. Harvard Law School, 1986.

Neil Gorsuch	1967	2017 by Trump	Conservative

Born in Denver, C.O. Associate Justice Gorsuch is a former private practitioner, lawyer in the Justice Department of the George W. Bush administration, and judge on the U.S. Court of Appeals for the 10th Circuit. Harvard Law School, 1991.

Brett Kavanaugh	1965	2018 by Trump	Conservative

Born in Washington D.C., Associate Justice Brett Kavanaugh is a former lawyer for Office of Independent Counsel, private practitioner, lawyer for the George W. Bush administration, and judge on the U.S. Court of Appeals for the D.C. Circuit. Yale Law School, 1990.

Amy Coney Barrett	1972	2020 by Trump	Conservative

Born in New Orleans, L.A., Associate Justice Amy Coney Barrett is a former private practitioner, law professor at Notre Dame Law School, and judge on the U.S. Court of Appeals for the Seventh Circuit. Notre Dame Law School, 1997.

Ketanji Brown Jackson	1970	2022 by Biden	Moderate

Born in Washington D.C., Associate Justice Jackson is a former private practitioner, Vice Chair of the U.S. Sentencing Commission, federal public defender, judge of the U.S. District Court for the District of Columbia, and judge on the U.S. Court of Appeals for the D.C. Circuit. Harvard Law School, 1996.

Roberts is the 17th Chief Justice. Jackson is the 116th justice to serve on the Court. The Judiciary Act of 1789 provided for a Chief Justice and five associate justices. The number of seats at the Court varied from five to ten until 1869 when Congress established the present number of nine.

The reference to justices as "moderate" is used here to distinguish their views from such 1950s-1970s liberals as William Douglas, Thurgood Marshall and Abe Fortas. Generally, in First Amendment cases, a "conservative" justice gives more weight to the government's interest, and a "liberal" justice favors claimants' interests. A "moderate" justice has a mixed voting record. In the media the justices are sometimes termed either liberal or conservative with some justices identified as "swing votes." A popular characterization of the current court is Chief Justice Roberts and Justices Alito, Gorsuch, Kavanaugh, Thomas and Barrett as "conservatives" with Justices, Sotomayor, Kagan, and Jackson as "liberal." However, it is important to note that justices do not always vote on conservative-liberal basis, and in several cases the Court's decisions are unanimous.

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effectively eliminated the filibuster in 2013 for presidential nominations except for the Supreme Court by making the cloture vote on a filibuster a simple majority of fifty-one votes instead of sixty traditionally needed to end debate. This new rule was implemented in order to hold votes on President Obama's nominees to the U.S. Court of Appeals for the D.C. Circuit. This action, popularly referred to as the "nuclear option," in a practical sense means a filibuster could not keep a nominee who had at least fifty-one votes from receiving a confirmation vote. With the death of Justice Antonin Scalia in 2016, President Obama nominated Judge Merrick Garland to the court. Citing the fact there was an ongoing presidential election, Senator Mitch McConnell said the Senate would not hold hearings on Judge Garland because a new president was to be elected in November. This approach, some-

times called the "Biden Rule," meant Judge Garland would not receive a hearing or vote on his nomination and ultimately ended his chance to be an associate justice. The term "Biden Rule" refers to a 1992 speech given by then chairman of the Senate Judiciary Committee Senator Joe Biden. When Senator Biden, a Democrat, made the speech he was speaking about the hypothetical situation if a vacancy occurred on the Supreme Court during a presidential election year. In 1992 there was no vacancy on the court. After the 2016 election, President Donald Trump nominated Judge Neil Gorsuch to fill Justice Scalia's vacancy. Because of the threats of a Democratic filibuster for Judge Gorsuch's nomination, Senator McConnell extended the nuclear option to apply to Supreme Court nominees. This change allowed Gorsuch to be confirmed with a vote of 54-45. With the retirement of Justice Anthony Kennedy in July 2018, President Trump nominated Judge Brett Kavanaugh of the U.S. Court of Appeals for the District of Columbia Circuit. Because this nomination was made prior to a midterm election, many Democrats, citing McConnell's refusal to hold hearings on Garland's nomination, argued that the confirmation vote should be delayed until after the 2018 midterm election. Despite spirited attacks on Judge Kavanaugh, he was confirmed by a 50-48 Senate vote. Justice Ruth Bader Ginsberg died in 2020, creating another vacancy on the court during an election year. President Trump nominated Amy Coney Barrett, a conservative, to the court. Her confirmation was also very slim, 52-48, with no Democrats voting to confirm. In 2022 President Biden nominated Ketanji Brown Jackson, a liberal, to replace retiring Justice Stephen Breyer. Her confirmation was equally close to Barrett's, with the final vote being 53-47, with all Democrats and three Republican Senators voting to confirm.

ALTERNATIVE DISPUTE RESOLUTION

Between 90 and 95 percent of all civil law disputes are settled out of court before trial but often not until years after the disputes arose. In the meantime, parties to the cases suffer prolonged delays and mounting legal costs that perhaps force unsatisfactory resolutions of the disputes. As dissatisfaction with the clogged courts has risen, some legislatures, courts, attorneys' groups, business leaders, and other reformers have been encouraging, with considerable success, alternatives to courts for the resolution of disputes.

Alternative dispute resolution is a broad term encompassing a number of ways that litigants can avoid courts: negotiation, mediation, arbitration, private judging, expert fact-finding, mini-trials and summary jury trials.

Mediation is a formal version of negotiation. A third party is engaged by the disputants to facilitate communication and reach a solution. The mediator need not be legally trained but should be knowledgeable in the area of dispute and effective at helping identify the problem and creating a resolution for the conflict. Mediation has been used in labor disputes for many years and has also become popular in the commercial world. A ... may meet with the parties separately before bringing ... gether. The parties may stipulate that the proceedings ... not to be used as evidence in litigation should that ... tempt to mediate. Mediators may charge hourly fees, ... times communities offer trained mediators at neighbor... pute centers for free or at low cost. Mediation is strictly ... and does not foreclose the possibility of litigation if ... parties are unhappy with the outcome.

Arbitration is more formal than mediation. A ... party, called the arbitrator, is chosen by the parties, ... tants. The arbitrator acts with the authority of a judge ... decision that is legally binding on the disputants. Arbi... ten are lawyers, sometimes retired judges, who charge ... tration is common in resolving contractual disputes ... businesses, even at the international level. Contracts ... ingly include provisions for arbitration should contro... putes arise.

Although state law may prescribe procedures for ar... often the procedures of the American Arbitration Associa... used. The disputants, likely to be represented by lawy... also agree to their own procedures. In any case, the pro... normally are more relaxed than those used in courts.

Generally, an arbitration case proceeds like a court ca... the arbitrator issues a decision, called an award, with... days after the proceeding ends. Arbitration has many adv... over courts. Cases can be conducted in secret, avoiding ... of information that the parties would rather keep out of ... court documents. Arbitration is speedier than court pro... Finally, it is less expensive than a court case.

Variations on arbitration include issue arbitration, ... ing arbitration and court-annexed arbitration. Issue arbi... means the disputants agree that an arbitrator will handle ... specific part of their dispute, not all of it. Non-binding ... tion, as its name suggests, is used when the disputants wa... formality of arbitration but also want to reserve the right ... their dispute to court. Court-annexed arbitration is when ... of a court proceeding is referred to an arbitrator, either w... consent of the parties or as a state law requirement that ... kinds of civil actions go to arbitration before they are per... to enter the courts. Courts have the power to enforce arbi... awards. Losers in arbitration can appeal the awards in ... but judges tend to be deferential to the arbitration decisio...

Private judging is another ADR trend. Parties to a dispu... voking state law, may hire a retired judge whose decision ... amounts to a private court is as final as that of a judge in a ... court. Some states have provisions for rent-a-juries as well ... sions in some states can be appealed to state appellate ... Unlike other ADR choices, private judging is likely to be ... expensive than regular court proceedings.

Expert fact-finding may be used when the parties to ... want to resolve only factual conflicts in a dispute. The ...

investigates and produces a report attempting ... truth. This determination is not binding on t... obviously influence their decisions about litig...

Short of going to court, other ways for poten... to sort out their arguments over who is right ... their dispute is to conduct a "mini-trial" o... trial." Sometimes businesses will conduct an ... with corporate officers from both companies ... Parties in a summary jury trial, unlike in a ... private citizens as potentially typical jurors ... jurors. Lawyers can present as much of a ca... allow the mock jury to reach a verdict. The la... the mock jury to anticipate how an actual ... their arguments. Whether mini-trials or sum... binding on the parties depends on whether t...

ADR has no application in the criminal ... there is no doubt that it has helped reduce ... cases in court dockets.

LEGAL RESEARCH

Law is highly codified and organized in surp... ways. Law libraries at major universities ... physical space for the vast published collect... of laws at the international, federal and st... cess to the law is helping to ease the strain ... size of legal collections.

Most law libraries are organized consist... of government. The national collection wi... legal materials generated by the federal leg... judicial branches of government. Using sim... ization, parallel materials from each of the ... order, are stacked behind the national ma... these primary materials of research are t... — for example, legal dictionaries, encyc... law journals.

Legislation is maintained in multi-volu... "codes" or "revised statutes," according t... "titles" or "chapters." Congressional legis... lished in the *United States Code*, organiz... of fifty titles. Each enactment of Congres... each part of the legislation is given a sect... gress enacts new legislation, it is assigned ... and given new section numbers. If Cong... can specify exactly which sections are a... scinds legislation, the section numbers a...

In legal research, a citation to the *U*... like this: Federal Freedom of Informati... 552 (1994). The name of the act, which u... in which the act was passed, is followed ... and abbreviations. This act is located i... *States Code* beginning at section 552. Th...

investigates and produces a report attempting to establish the truth. This determination is not binding on the parties but can obviously influence their decisions about litigation.

Short of going to court, other ways for potential litigants to try to sort out their arguments over who is right about the nature of their dispute is to conduct a "mini-trial" or a "summary jury trial." Sometimes businesses will conduct an informal mini-trial with corporate officers from both companies acting as the jury. Parties in a summary jury trial, unlike in a mini-trial, will hire private citizens as potentially typical jurors to act as mock petit jurors. Lawyers can present as much of a case as they wish and allow the mock jury to reach a verdict. The lawyers may interview the mock jury to anticipate how an actual jury might react to their arguments. Whether mini-trials or summary jury trials are binding on the parties depends on whether they agree to it.

ADR has no application in the criminal justice system, but there is no doubt that it has helped reduce the number of civil cases in court dockets.

LEGAL RESEARCH

Law is highly codified and organized in surprisingly sophisticated ways. Law libraries at major universities require considerable physical space for the vast published collections of all the sources of laws at the international, federal and state levels. Online access to the law is helping to ease the strain of the ever increasing size of legal collections.

Most law libraries are organized consistent with the structure of government. The national collection will include the primary legal materials generated by the federal legislative, executive and judicial branches of government. Using similar systems of organization, parallel materials from each of the states, in alphabetical order, are stacked behind the national materials. Separate from these primary materials of research are the secondary materials — for example, legal dictionaries, encyclopedias, treatises and law journals.

Legislation is maintained in multi-volume sets of books, called "codes" or "revised statutes," according to topics, usually named "titles" or "chapters." Congressional legislation is officially published in the *United States Code*, organized in alphabetical order of fifty titles. Each enactment of Congress is assigned a title, and each part of the legislation is given a section number. When Congress enacts new legislation, it is assigned to the appropriate title and given new section numbers. If Congress amends statutes, it can specify exactly which sections are affected. If Congress rescinds legislation, the section numbers and text are removed.

In legal research, a citation to the *United States Code* looks like this: Federal Freedom of Information Act of 1976, 5 U.S.C. 552 (1994). The name of the act, which usually includes the year in which the act was passed, is followed by a series of numbers and abbreviations. This act is located in Title 5 of the *United States Code* beginning at section 552. The year "1994" was when the Code book was published. Private publishers issue annotated versions of the *United States Code*, including not only all that is in the *Code* but also citations to court decisions that have interpreted provisions in it. Sets of codes and revised statutes usually have elaborate indexes to help users find laws.

Court decisions are maintained in continually published volumes of books called "reports" or "reporters." Official reports of court decisions are organized by jurisdiction, and the decisions and opinions of the court are reported in chronological order. For example, the U.S. Government Printing Office prints and publishes the official reports of the U.S. Supreme Court as *United States Reports*. The citation to a Supreme Court case looks like this: *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). The case name includes the names of the parties to the case. In almost all jurisdictions, the first-named party is the party initiating the action, and the second-named party is the party against whom the first-named party initiated the action. At the trial court level, the action initiator is called the "plaintiff," and the reactor is called the "defendant." In an appellate case, they are, respectively, the "appellant" and the "appellee." When an appellate court, usually a court of last resort, takes the case, in the form of a petition, the parties are called the "petitioner" and "respondent." The "v." is an abbreviation common in law for the word "versus." The legal community has assigned the abbreviation "U.S." to *United States Reports*. The first number refers to the number of the volume of *U.S.* in which the case appears. The second number is the first page of the report of the case in that volume. The parenthetical is the year in which the court made this decision. Thus, the case of *Chaplinsky v. New Hampshire*, decided in 1942, begins on page 568 in volume 315 of *United States Reports*. All reports of other courts also have been assigned unique abbreviations.

Administrative law is organized in several ways. Rules, decisions and other documents may be published officially or by private publishers in reports resembling court reports. For example, the Federal Communications Commission officially publishes its materials in *Federal Communications Commission Reports*. Citations to an agency's reports follow the format of a citation to a court case. To promulgate formal rules affecting the public or subjects of regulation, however, an agency must publish notice of its intention to do so and invite the public to participate in the process in the *Federal Register*, an official daily public accounting of the activities of the agencies. If a rule is approved, it must be published in the *Federal Register* and then in the *Code of Federal Regulations*. Each agency is assigned a title like a title in the *United States Code*. Each part of a regulation is assigned a section number. Citations to the *C.F.R.* resemble citations to the *U.S.C.* Like the *U.S.C.*, the *C.F.R.* has detailed indexes to facilitate finding regulations.

Although legal research emphasizes using original primary sources of law, comprehensive banks of legal materials are increasingly accessible online. Highly useful organizations of the

law online are those provided by LEXIS-NEXIS and WESTLAW. These services are extremely expensive, designed for researchers in law offices and government. However, many university libraries have a subscription to one or both of these databases, and students can gain access to them for research projects. If a student is looking for law review articles, another major database is Hein Online, which is an online database that contains historical legal documents, law review articles and other secondary source material. Hein Online also has a relationship with Fastcase, which is another source for case law and statutes. Even though many legal search engines require a subscription there are many sources that are free to users. For instance, state and federal codes, constitutions, and model codes are available at the Cornell Information Institute, which is an open access legal source. Other cases from the United States Supreme Court can be found using Google Scholar. To search these materials in Google Scholar users need to use the case law function on the search engine.

It is important to note that when conducting research it may be a good first step to consult a secondary source, such as a legal treatise or hornbook, to get a general idea of what the law is on a particular subject. From that beginning researchers can conduct online research in a legal search engine to find material. Sometimes it is best to begin research inquiries using broad search terms. However, to narrow a search a researcher can use connectors (AND/OR), connecting operators (/s for in the same sentence or /p for in the same paragraph, and root expanders (such as the exclamation point on the end of a word to find variations). For example, if a researcher wanted to search student speech rights in context with colleges and universities, a search could look like this: "student speech" /s college! OR university!. What this search means is the phrase "student speech" will be searched in cases where it is in the same sentence with colleges or universities. The exclamation points at the end of college and university means that the terms college, colleges, university, and universities will be included in the search.

SUMMARY

Law is a system of rules established and enforced by authority in a society. Law can be organized according to its sources: (1) common law, which is made by judges in deciding cases; (2) equity law, which consists of orders by courts to resolve legal problems expeditiously; (3) statutory law, which is enacted by legislative bodies; (4) constitutional law, which is documents containing the supreme rules for a society and the interpretation of the documents by courts; (5) administrative law, which is the rules and decisions of administrative agencies; (6) international law, which is mainly treaties between nations; and (7) contract law, which is the law created between individuals in a contract.

Trial courts find facts and apply the law. Appellate courts review the application of the law by trial courts. Civil and criminal legal procedure differs at both the trial and appellate court levels. A civil case usually consists of the complaint, the answer, discovery, hearings and motions, the settlement conference, trial and appeals. A criminal case usually consists of an investigation, the arrest, an arraignment, the complaint, a preliminary hearing, a grand jury indictment, hearings and motions, the trial, sentencing and appeals.

Federal judges are nominated by the president with the "advice and consent" of the Senate in order to protect the judiciary from politics, but the process of choosing a federal judge is a political process. States use variations on the appointive and electoral system to choose state judges.

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