

# Public Communication and the Law

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In Aurora, Colorado on July 20, 2012, a heavily armed gunman dressed in tactical clothing began firing into the audience attending a midnight screening of the film *The Dark Knight Rises*. Twelve people died and fifty-eight others were wounded in this rampage. James Holmes was arrested outside the theater and subsequently charged with first-degree murder and attempted murder. The shooting and its aftermath, such as a police search of Holmes's booby-trapped apartment, drew international media attention.

Within days of Holmes's arrest, Judge William Sylvester issued an order limiting pretrial publicity. The order sharply restricted what prosecution and defense lawyers could say about the case outside of court. Law enforcement officials were also prevented from making statements likely to prejudice Holmes's right to a fair trial. The judge did not restrain the press from publishing information about the case as well-established precedent prevents such judicial action.

Immediately after Holmes's arrest, journalists began requesting records from the University of Colorado, where Holmes had been a student. Judge Sylvester issued an order preventing

the university from disclosing any information about Holmes. In response to motions by journalists and news organizations, the judge later vacated the order, concluding that Congress and the Colorado legislature intended that the custodian of records should make determinations of disclosure. Further, Judge Sylvester found his sealing order to be unnecessary as both federal and state law had sufficient exceptions to allow the university to continue to deny disclosure of material as a violation of Holmes's privacy. University officials subsequently released a small number of heavily redacted documents requested by the press.

On July 23, Aurora police took into custody a package sent by Holmes to his psychiatrist. The judge ordered that law enforcement and prosecutors with access to the package refrain from opening or viewing the material in the package and maintain it in a sealed fashion. Within 30 minutes of the issuance of this order, FoxNews.com published an article by reporter Jana Winter disclosing that the package contained a notebook "full of details about how he was going to kill people" and "drawings and illustrations of the massacre." Holmes's lawyers accused the police of leaking the information to Winter, thereby jeopardizing a fair trial. Following an inquiry in which all law enforcement officers who had contact with the package denied that they leaked its contents to Winter, Judge Sylvester issued a subpoena requiring that Winter identify her sources.

The Holmes case highlights many of the complex free-expression issues discussed in this book. Do journalists have a privilege to refuse to disclose their sources to courts or grand juries? If there is a journalist's privilege, under what circumstances may the privilege be pierced? What access do journalists and the public have to records controlled by government agencies? Are the exceptions to those laws so vast that disclosure is the exception rather than the rule? Finally, why is the press free to publish information it lawfully obtains, even if publication harms the fairness of a trial, while lawyers and law enforcement officials are gagged?

This book explains the law that affects journalists, and other public communicators, such as advertising and public relations professionals. This book will discuss not only the law governing political communication, but also the law of libel, privacy, copyright, obscenity, coverage of court proceedings, reporter-source relationships, and access to government-held information. The book focuses on the law affecting the content of public communication, including printed publications, electronic media, advertising, and public relations.

This chapter examines legal concepts and procedures that are important to an understanding of the law of public communication. It will explain the purpose and organization of law and describe court procedures. Finally, this chapter discusses how communicators work with lawyers.

## **THE SOURCES OF LAW**

Law can be defined in many ways, but for our purposes, law is the system of rules that govern society. The system of rules serves many functions in our society, including regulating the behavior of citizens and corporations. Law prohibits murder and restricts what advertisers can say about their products. It provides a vehicle to settle disputes, such as when a reporter refuses to testify in court. Furthermore, law limits the government's power to interfere with individual rights, such as the right to speak and publish.

The law in the United States comes primarily from six sources: constitutions, statutes, administrative rules and regulations, executive actions, the **common law**,<sup>1</sup> and the law of **equity**.

## Constitutional Law

Constitutions are the supreme source of law in the United States and are the most direct reflection of the kind of government desired by the people. Constitutions of both the federal and state governments supersede all other declarations of public policy. The Constitution of the federal government and the constitutions of the fifty states establish the framework for governing. They outline the structure of government and define governmental authority and responsibilities.

Frequently, a constitution limits the powers of government, as in the case of the Bill of Rights, the first ten amendments to the U.S. Constitution. The Bill of Rights, printed in Appendix B of this book, protects the rights and liberties of U.S. citizens against infringement by government. The First Amendment, particularly its prohibition against laws abridging freedom of speech and the press, provides the foundation for communication law.

The federal constitution is the country's ultimate legal authority. Any federal law, state law, or state constitution that contradicts the U.S. Constitution cannot be implemented; the U.S. Constitution prevails. Similarly, a state constitution prevails in conflicts with either the **statutory law** or the common law in the same state. However, federal and state laws that do not conflict with the federal constitution can provide more protection for communicators than is available under the First Amendment alone. For example, the majority of states shield journalists from revealing confidential news sources in more circumstances than the First Amendment as interpreted by the U.S. Supreme Court.

The Supreme Court, the nation's supreme judicial body, has the last word on the meaning of the federal constitution. Each state's supreme court is the interpreter of that state's constitution. Only the U.S. Supreme Court can resolve conflicts between the federal and state constitutions. The courts make constitutional law when they decide a case or controversy by interpreting a constitution. In 2010, the U.S. Supreme Court said the First Amendment requires that corporations and unions be permitted to spend money on advertising advocating the election or defeat of a candidate.<sup>2</sup> Constitutional law can be understood only by reading the opinions of the courts.

The U.S. Constitution is hard to amend and therefore is changed infrequently. Amendments to the U.S. Constitution can be proposed only by two-thirds of the members of both houses of Congress or by a convention called by two-thirds of the state legislatures. Amendments must be ratified by three-fourths of the state legislatures or by state constitutional conventions in three-fourths of the states.

## Statutory Law

A major source of law in the United States is the collection of statutes and ordinances written by legislative bodies—the U.S. Congress, the fifty state legislatures, county commissions, city councils, and countless other lawmaking bodies. Statutes set forth enforceable rules to

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<sup>1</sup> Definitions for the terms printed in boldface can be found in the glossary at the end of the book.

<sup>2</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

govern social behavior. Areas of communication law controlled by statutes include advertising, copyright, electronic media, obscenity, and access to government-held information.

Almost all of this country's criminal law, including a prohibition against the distribution of obscenity, is statutory. Statutes not only prohibit antisocial acts but also frequently provide for the oversight of acceptable behavior. For example, the federal Communications Act of 1934 was adopted so that the broadcast spectrum would be used for the public good.

The process of adopting statutes allows lawmakers to study carefully a complicated issue—such as how to regulate the use of the electromagnetic spectrum—and write an appropriate law. The process permits anyone or any group to make suggestions through letters, personal contacts, and hearings. In practice, well-organized special interests such as broadcasters, cable television system operators, and telephone companies substantially influence the legislative process. As shown in Chapter 7, highly regulated industries have the largest lobbying expenditures.

The adoption of a statute does not conclude the lawmaking process. Executive branch officials often have to interpret statutes through administrative rules. Judges add meaning when either the statutes themselves or their application are challenged in court. Judges explain how statutes apply in specific cases, as when the U.S. Supreme Court ruled in 2005 that providers of peer-to-peer file sharing services may be “contributory infringers” of material protected under the Copyright Act.<sup>3</sup> In 2011, the U.S. Supreme Court held that corporations have no “personal privacy” under a section of the Freedom of Information Act.<sup>4</sup> Consequently, information obtained from AT&T during the course of a federal investigation could be disclosed.

The courts can invalidate state and local laws that conflict with federal laws or the U.S. Constitution, including the First Amendment. In 2011, the U.S. Supreme Court declared unconstitutional a California statute restricting children's access to violent video games.<sup>5</sup> In 2006, the Court struck down a Vermont law limiting both the amounts candidates for state office could spend on their campaigns and the amounts individuals and political parties could contribute to those campaigns.<sup>6</sup>

Sometimes federal laws **preempt** state regulation, thereby monopolizing governmental control over a specific subject. Article VI of the U.S. Constitution, known as the “supremacy clause,” provides that state law cannot supersede federal law. In addition, under the Constitution, congressional regulation of the economy supersedes state law. In 1984, the U.S. Supreme Court nullified an Oklahoma statute banning the advertising of wine on cable television because it conflicted with federal law prohibiting the editing of national and regional television programming carried by cable systems.<sup>7</sup>

## Administrative Law

Federal agencies such as the Federal Communications Commission (FCC) and the Federal Trade Commission (FTC) develop rules and decisions known as **administrative law**. These agencies dominate several areas of communication law. The FCC regulates the

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<sup>3</sup> Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).

<sup>4</sup> FCC v. AT&T, Inc., 131 S. Ct. 1177 (2011).

<sup>5</sup> Brown v. Entm't Merchant Ass'n, 131 S. Ct. 2729 (2011).

<sup>6</sup> Randall v. Sorrell, 126 S. Ct. 2479 (2006).

<sup>7</sup> Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984).

broadcast, cable, satellite, and telephone industries. The FTC regulates advertising and telemarketing. Other agencies overseeing communication include the Securities and Exchange Commission (SEC), which controls communication related to the securities industry; the Federal Election Commission (FEC), which regulates political campaign contributions and expenditures; and the Food and Drug Administration (FDA), which regulates prescription drug and medical product advertising, and tobacco product advertising. Table 1.1 lists these agencies, their areas of regulation, and key regulations.

Administrative agencies are often founded on the premise that they will be independent bodies of experts who set policy solely by analyzing facts. However, regulation by administrative agencies is an intensely political process involving complex interactions among the regulatory agency, the regulated industry, Congress, the President, and public interest groups. The President influences an agency by naming commissioners, subject to approval by the Senate, and designating an agency's chair. Through the Office of Management and Budget, the executive branch reviews proposed regulations to determine consistency with the President's policies. Congress shapes regulation by telling agencies which industries or practices they can regulate. Moreover, Congress controls the budgets of agencies, and Congressional committees closely monitor the actions of agencies. Regulated industries, such as telecommunications, are among the largest contributors to political campaigns. These industries use their ties to elected officials to influence regulatory agencies.

Successful nominees for agency positions have close ties to powerful political leaders. Julius Genachowski, FCC chair from 2009 until early 2013, was President Obama's law school classmate, basketball teammate, and advisor during the 2008 presidential campaign. Edith Ramirez, named by Obama as head of the FTC in 2013, was also Obama's law school classmate and served as Latino outreach director for Obama's 2008 presidential campaign. The nominating process, like other aspects of agency

**Table 1.1** Federal Regulatory Agencies

<b>Agency</b>	<b>Areas of Regulation</b>	<b>Key Regulations</b>
Federal Communications Commission (FCC)	Radio, television, cable, satellite, telephone	Political broadcasting rules, indecency regulations, children's television regulations
Federal Election Commission (FEC)	Federal elections	Contribution limits and prohibitions, disclosure of campaign finances, campaign expenditures
Federal Trade Commission (FTC)	Advertising (except prescription drugs and medical devices), telemarketing	Deceptive advertising, product labeling, unfair consumer practices, children's online privacy, tobacco health warnings
Food and Drug Administration (FDA)	Food, drugs, medical devices, cosmetics, tobacco	Prescription drug advertising, medical device advertising, food, drug, cosmetic labels, tobacco advertising
Securities and Exchange Commission (SEC)	Securities brokers, investment advisors, stock exchanges	Insider trading, false/misleading information

regulation, involves the tug and pull of political factions. In 2013, Republicans voiced opposition to several of President Obama's nominees, fearful that the nominees would be too aggressive as regulators.

Congress creates administrative agencies to supervise activities or industries that require more attention than legislators can provide. Administrative agencies serve a variety of functions, unique in the American system of government. First, agencies engage in **rule making**, a process that is similar to the legislative function. For example, the FCC developed a rule prohibiting a company from owning a television station and a newspaper in the same city. Second, agencies **adjudicate** disputes, resolving complaints initiated by business competitors, the public, or the agency itself. Administrative law judges conduct hearings resembling judicial proceedings at which evidence is submitted and witnesses are examined and cross-examined. After a hearing, an FTC administrative law judge found that advertisements for Extra Strength Doan's pills were deceptive because they contained an unsubstantiated claim that Doan's pills relieved pain more effectively than competing brands such as Tylenol. Third, agencies perform executive branch functions when they enforce rules against a firm or individual. In recent years, the FCC has fined broadcasters for violating indecency regulations by broadcasting sexual language. Before making its ruling, the agency reviewed the complaints of listeners and responses of broadcast licensees.

Regulatory agencies are bound by the requirements of the Administrative Procedure Act (APA).<sup>8</sup> This statute specifies the procedures that must be employed when an agency enacts rules or enforces regulations. For example, the APA requires that parties have the opportunity to comment on proposed rules. Parties may also petition an agency to issue, amend, or repeal a rule. And the APA establishes the procedures governing a hearing conducted by an administrative law judge, such as a party's right to cross-examine witnesses. Finally, under the APA, a party may seek judicial review of an agency action on a number of grounds, such as the agency has exceeded its statutory authority. Federal judges reviewing agency actions ensure that administrative agencies act within the boundaries set by the Constitution and statutory law.

An administrative action may be challenged on the ground that the agency has exceeded its statutory authority. For example, in 2000 the Supreme Court agreed with tobacco manufacturers that the FDA exceeded its authority when the agency banned outdoor tobacco advertisements near schools and playgrounds. Although the Supreme Court agreed that tobacco poses a serious health threat, the Court found Congress excluded tobacco products from the FDA's jurisdiction at that time. The Court stated, "an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."<sup>9</sup> (Congress conferred power on the FDA to regulate tobacco product advertising in 2009, a development discussed in Chapter 8.)

An agency's action may be challenged on the ground that it is arbitrary and capricious. A federal appeals court ruled in 2009 that the FCC acted arbitrarily when it capped at 30 percent the national market share of any cable company. Given the presence of competitors, such as direct broadcast satellite systems (DBS), the court found there was no proof that a cable operator serving more than 30 percent of subscribers would pose a

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<sup>8</sup> 5 U.S.C. §§ 551 et seq.

<sup>9</sup> *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 161 (2000).

threat to competition.<sup>10</sup> Similarly, a federal appeals court ruled in 2002 that the FCC was arbitrary and capricious when it decreed that one company could own two television stations in the same market but not a television station and a cable system.<sup>11</sup> The court said it was illogical for the FCC to conclude that television station and cable system ownership was harmful when the agency found that multiple television station ownership was in the public interest.

An agency's action may also be challenged as unconstitutional. The Supreme Court ruled that the FEC acted unconstitutionally when it sought to punish the Colorado Republican Party for purchasing radio advertising in a political campaign.<sup>12</sup> The Supreme Court ruled that a political party's advertising expenditures, like those of other individuals or groups, are constitutionally protected speech that cannot be limited as long as the expenditures are not coordinated with any candidate. "The independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees," the Court stated.

## Executive Actions

The President and other governmental executive officers can also make law. The President exercises power by appointing regulators, issuing executive orders and proclamations, and forging executive agreements with foreign countries. Much of the President's authority derives from Article 2 of the U.S. Constitution, requiring the President to "take Care that the Laws be faithfully executed." The Supreme Court has allowed the Chief Executive broad regulatory powers under the clause. In addition, Congress often grants the President the authority to administer statutes.

Perhaps the President's greatest influence on communication law comes from the power to nominate judges to the federal courts, including the U.S. Supreme Court. The political and judicial philosophies of the judges, and particularly their interpretation of the First Amendment, determine the boundaries of freedom for communicators. The President also nominates the members of several administrative agencies, including the FCC, the FTC, and the SEC. The President seldom issues executive orders that directly affect the law of public communication. An exception is the order that determines the documents that should be "classified" and thereby withheld from public disclosure to protect national security.

## Common Law

The common law, often called judge-made law, was the most important source of law during the early development of this country. Unlike the general rules adopted as statutes by legislatures, the common law is the accumulation of rulings made by the courts in individual disputes. Judges, not legislatures, largely created the law of privacy, which allows individuals to collect damage awards for media disclosure of highly offensive personal information.

Common law in the United States grew out of the English common law. For centuries, judges in England, under the authority of the king, decided controversies on the basis

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<sup>10</sup> *Comcast v. FCC*, 579 F.3d 1 (D.C. Cir. 2009).

<sup>11</sup> *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002).

<sup>12</sup> *Colorado Republican Campaign Committee v. FEC*, 518 U.S. 604 (1996).

of tradition and custom. These rulings established **precedents** that, together, became the law of the land. When the English colonized America, they brought the common law, including the precedents, with them.

The common law recognizes the importance of stability and predictability in the law. The common law is based on the judicial policy of **stare decisis**, which roughly means “let past decisions stand.” In the common law, a judge decides a case by applying the law established by other judges in earlier, similar cases. The reliance on precedent not only provides continuity but also restricts judicial abuse of discretion. Thus, editors can use previous case law to help them determine whether a picture they want to publish is likely to be considered a violation of someone’s privacy.

Although the common law promotes stability, it also allows for flexibility. The common law can adjust to fit changing circumstances because each judge can interpret and modify the law. Judges have five options when considering a case. They can (1) apply a precedent directly, (2) modify a precedent to fit new facts, (3) establish a new precedent by distinguishing the new case from previous cases, (4) overrule a previous precedent as no longer appropriate, or (5) ignore precedent. In most cases, precedent is either followed or adjusted to meet the facts at hand. Judges only rarely overrule previous precedents directly. Ignoring precedents greatly increases the risks of an opinion being overturned by a higher court.

Constitutional law and statutory law have a higher legal status than the common law, and therefore, the common law is relied on only when a statute or constitutional provision is not applicable. In a representative democracy, the people and their representatives in the legislatures, and not the courts, have the task of lawmaking. Sometimes legislatures incorporate portions of the common law into a statute, a process called codification. For example, in 1976, Congress rewrote the federal copyright statute to reflect a judicially created exception to a copyright owner’s absolute control of a book, film, or musical score.

Sometimes, people confuse the common law with constitutional law. Both are created in part by judicial opinions based on precedent. However, constitutional law is based on judicial interpretation of a constitution, whereas common law is based on custom and practice.

The common law is not written down in one book. It can be understood only by reading recorded court decisions in hundreds of different volumes. Although the 1976 copyright statute is located in one volume of the *United States Code*, the common law of privacy can be discovered only by synthesizing numerous state and federal judicial opinions.

Common law is primarily state law. Each state has its own judicial traditions. However, as shown in Chapter 11, the Federal Rules of Evidence now allow federal judges to create common law testimonial privileges. In 1996, the U.S. Supreme Court ruled that a federal common law privilege covered confidential communications between therapists and patients.<sup>13</sup> Recently, journalists have argued that a federal common law privilege should also protect journalist–source relations. These claims have been rejected.

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<sup>13</sup> *Jaffee v. Redmond*, 518 U.S. 1 (1996).



## Law of Equity

The sixth source of law, equity, is historically related to the common law. Although **equity** is a legal term, it means what it sounds like. The law of equity allows courts to take action that is fair or just.

The law of equity developed because English common law allowed individuals to collect only monetary compensation after an injury had occurred. Under the law of equity, a **litigant** could petition the king to “do right for the love of God and by way of charity.”<sup>14</sup> The law of equity allowed for preventive action and for remedial action other than monetary compensation. Although judges sitting in equity must consider precedent, they have substantial discretion to order a remedy they believe fair and appropriate.

Unlike England, the United States and most of the 50 states have never had separate courts of equity. Equity developed in the same courts that decided common law cases. However, juries are never used in equity suits.

Equity is significant in communication law primarily because of its preventive possibilities. Judges, for example, might use equity to halt the publication of a story considered a danger to national security. Punishment after publication would not protect national security.

## ■ SUMMARY ■

Law in the United States comes from constitutions, statutes, administrative agencies, executive orders, common law, and equity. Constitutions outline the structure of government and define governmental authority and responsibilities. In the United States, the First Amendment to the federal Constitution protects the right to free speech and to a free press. Statutes are enforceable rules written by legislative bodies to govern social behavior. Administrative agencies make law as they adopt rules and adjudicate disputes, as authorized by statute. Executive orders are issued by the top officer in the executive branch of government. The common law is a collection of judicial decisions based on custom and tradition. Equity provides alternatives to the legal remedies available through the common law.

## THE COURTS

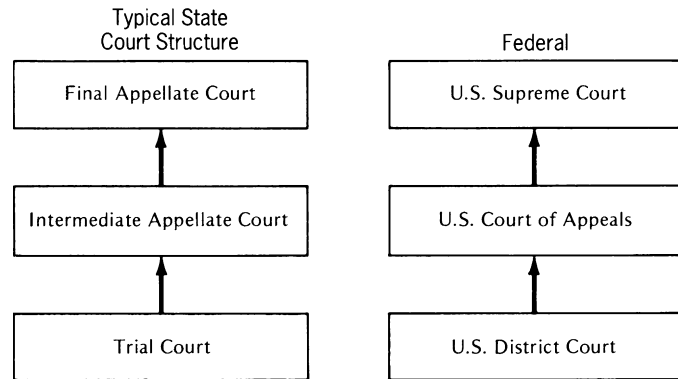
Although agencies in all three branches of government in the United States make law, the judiciary is particularly important to a student of the law of public communication. There are 52 court systems in the country: the federal system, a system for each state, and another in the District of Columbia. The structures of the 52 systems are similar, but the state systems operate independently of the federal system under the authority of the state constitutions and laws.

Most court systems consist of three layers (see Figure 1.1). At the lowest level are the trial courts, where the facts of each case are evaluated in light of the applicable law. The middle layer for both the federal system and many states is an intermediate

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<sup>14</sup> Henry Abraham, *The Judicial Process* 14 (1986).

**FIGURE 1.1** Comparative examples of state and federal court structures.



**appellate court.** Finally, all court systems include a court of ultimate appeal, usually called a supreme court. The federal court system is the most important for the law of public communication.

### The Federal System

The U.S. Constitution mandates only one federal court, the U.S. Supreme Court, but provides for “such inferior courts as the Congress may from time to time ordain and establish.”<sup>15</sup> The Constitution also spells out the **jurisdiction**, or areas of responsibility, of the federal courts. The federal courts exercise ultimate authority over the meaning of the Constitution, including the constitutionality of statutes that impinge on the First Amendment. The federal courts also resolve conflicts in the interpretation of federal statutory law. The federal courts hear controversies involving the United States, such as when the U.S. Department of Justice seeks a court order to obtain the name of a confidential news source. The federal courts can hear controversies between citizens or corporations of different states. Frequently, for example, the two parties in a libel suit—the person suing and the publisher or broadcaster being sued—live in different states. Matters not specifically assigned to the federal courts by the Constitution are tried in state courts.

Congress created the federal judicial system in 1789 with the adoption of the Federal Judiciary Act. The federal system includes ninety-four trial courts, the U.S. district courts; 13 intermediate appellate courts, the judicial circuits of the U.S. Courts of Appeals; and the highest appellate court, the U.S. Supreme Court. Courts with special jurisdiction, such as the U.S. Tax Court, are not generally important to the law of public communication.

**TRIAL COURTS** Almost all court cases begin in the trial courts, the U.S. district courts. These are also called courts of **original jurisdiction**. Trial courts examine the facts, or evidence, in a case and then apply the appropriate law. Only trial courts employ juries.

There are 94 U.S. district courts. There is at least one federal district court in every state. Some states, such as Alaska, have only one district court. Other states, such as New York, have multiple districts. District courts also exist in the District of Columbia and in

<sup>15</sup> U.S. Const. art. III, § 1.

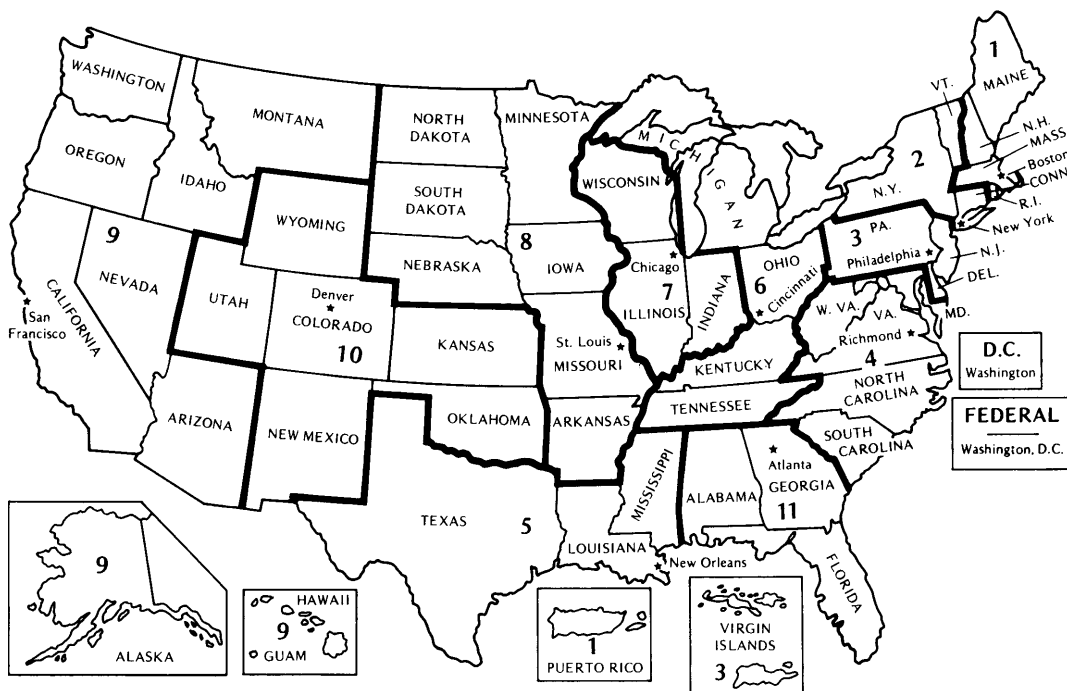
territories such as Guam. Many districts have more than one judge. By 2011, Congress had authorized 677 district court judgeships.

**INTERMEDIATE APPELLATE COURTS** Every person who loses in a trial court has the right to at least one **appeal**. In the federal system, that appeal is made to an intermediate appellate court. Appellate courts do not hold new trials and generally do not reevaluate the facts of cases. Rather, their responsibility is to ensure that trial courts use the proper procedures and apply the law correctly.

Appellate court judges decide cases primarily on the basis of lower court records and lawyers' written arguments, called *briefs*. The judges also hear a short oral argument by attorneys for both sides. If an appellate court discovers that a trial court has erred, the higher court may reverse, or overturn, the lower court and **remand** the case or send it back to a lower court for a new trial.

An appeal of a federal district court decision will ordinarily be considered in one of the 13 circuits of the U.S. Courts of Appeals (see Figure 1.2). The jurisdictions of 12 of these courts are defined geographically. The thirteenth, the U.S. Court of Appeals for the Federal Circuit, handles only specialized appeals.

By 2011, Congress had authorized 179 appellate court judgeships. The Ninth Circuit, with 28 judges, has the largest number of judges; the First Circuit, with six judges, has the smallest number. Most cases are heard by a panel of three judges. Particularly important cases will be heard **en banc**, that is, by all the judges of the court. For example, in 2007, the U.S. Court of Appeals for the District of Columbia Circuit ruled en banc that



**FIGURE 1.2** The 13 circuits of the U.S. Courts of Appeals.

Congressman Jim McDermott violated House ethics rules when he passed to journalists a tape recording he knew had been illegally created by a Florida couple.<sup>16</sup>

The decisions of the U.S. Courts of Appeals must be followed by the federal district courts under their jurisdiction. Opinions of the Courts of Appeals may be persuasive authority but are not binding on state courts in the same jurisdiction deciding similar issues. Although federal appeals court decisions are not binding outside their jurisdiction, they are frequently influential.

Three circuits of the U.S. Courts of Appeals are particularly important to communication law. The Second Circuit, which hears appeals from federal courts in New York, decides a large number of media cases because New York City is the center of commercial telecommunications and the headquarters for many magazines, book publishers, advertising and public relations agencies, and newspapers. The Court of Appeals for the D.C. Circuit hears most of the appeals of decisions by the FCC and the FTC and many of the cases involving the federal Freedom of Information Act. The Ninth Circuit, with jurisdiction over Hollywood and Silicon Valley, frequently decides film, television, and copyright cases.

**THE U.S. SUPREME COURT** Although the U.S. Supreme Court can exercise both original and appellate jurisdiction, it is primarily an appellate court. The Constitution specifically limits the occasions when the Supreme Court can be the first court to consider a legal controversy, and the Court has decided cases in that capacity fewer than 250 times in the history of the country. Original jurisdiction cases are increasingly rare on the Court's docket; during its 2006, 2007, 2008, and 2009 Terms, the Court disposed of only one original jurisdiction case each Term.<sup>17</sup> However, because the Court has the last word in the interpretation of federal law, the Court's appellate duties make it one of the most powerful institutions in the world. Appellate cases reach the Court from all other federal courts, federal regulatory agencies, and state supreme courts.

The nine Supreme Court justices, like all federal judges, are appointed by the President and confirmed by the Senate. Since 1789, the Senate has refused to confirm twelve Supreme Court nominees. Eleven nominations have been withdrawn when strong opposition was apparent. For example, Harriet Miers's nomination was withdrawn in 2005 when Senators questioned her qualifications. Justices are appointed for life, or as long as they choose to remain on the Court. They can be removed only by impeachment.<sup>18</sup> Of the nine justices on the Court in the October 2012 Term, five were appointed by Republican presidents. President Bush appointed two new conservatives in 2005, Chief Justice John Roberts, Jr., and Justice Samuel Alito, replacing the conservative Chief Justice William Rehnquist and Justice Sandra Day O'Connor, a moderate. President Obama appointed two justices in 2009 and 2010; federal appeals judge Sonia Sotomayor replaced retiring Justice David Souter in 2009, and Elena Kagan replaced John Paul Stevens, who retired in 2010. Because Souter and Stevens were members of the Court's liberal bloc and were replaced with liberals, Obama's appointees were not expected to shift the Court's ideological makeup (see Photo 1.1).

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<sup>16</sup> 484 F.3d 573 (D.C. Cir. 2007).

<sup>17</sup> Lee Epstein et al., *The Supreme Court Compendium* 78 (5th ed. 2012).

<sup>18</sup> U.S. Const. art. III, § 1; see also Samuel Mermin, *Law and the Legal System* 327 (2d ed. 1982).



**PHOTO 1.1** Justices of the U.S. Supreme Court. Standing: Sonia Sotomayor, Stephen G. Breyer, Samuel A. Alito, Jr., Elena Kagan. Sitting: Clarence Thomas, Antonin Scalia, Chief Justice John G. Roberts, Jr., Anthony M. Kennedy, Ruth Bader Ginsburg. Photograph by Steve Petteway, Collection of the Supreme Court of the United States.

The Court is substantially more conservative than it was in the 1960s, when a majority of the justices had been appointed by Democrats. Conservative justices tend to interpret constitutional rights more narrowly than liberals. Conservatives also tend to favor states rights over central government regulations and to support individual property rights. Liberal justices are more concerned about protecting individual civil rights, including free speech and press. Liberal justices are also usually more willing to recognize new constitutional rights—such as a right of privacy—not explicitly stated in the Bill of Rights, and to increase access to government information. None of the justices on the Court in 2013 are considered as protective of civil liberties as former justices William Brennan, Jr., Thurgood Marshall, and William Douglas.

During the period from 1994 to 2005, the Court had stable membership, and two distinct voting blocs emerged. The conservative bloc featured Rehnquist, Antonin Scalia, Clarence Thomas, and Anthony Kennedy. The liberal bloc featured Stevens, Ruth Bader Ginsburg, Stephen Breyer, and David Souter. Justice O'Connor, poised between the two blocs, was frequently the critical swing vote. With the replacement of Rehnquist and O'Connor by Roberts and Alito, and the replacement of Souter and Stevens by Sotomayor and Kagan, the Court remains sharply divided along ideological lines. However, the early terms of the Roberts Court show the Court is becoming more conservative. Justice Alito, O'Connor's replacement, voted with the conservative bloc 15 percent more often than

O'Connor had.<sup>19</sup> Justice Kennedy votes more often with the conservative bloc than with the liberal bloc, but has abandoned the conservatives in several 5–4 cases. In 2008, Kennedy voted with Stevens, Breyer, Ginsburg, and Souter in prohibiting the death penalty for the rape of a child and finding that enemy combatants may challenge their detention in federal court;<sup>20</sup> in 2009 Kennedy joined the liberal bloc in finding that a justice of the West Virginia Supreme Court had to recuse himself from a case involving a coal executive who had spent \$3 million to elect him.<sup>21</sup> Thus, Kennedy has become the new swing vote.<sup>22</sup> Although the Court may be more liberal or conservative at any given time, it seldom follows a prolonged extreme ideological course. As legal scholar Nelson Lund observes, “Our courts rarely make a lot of big lurches.” If they do move in significant new directions, they are then apt to pull back toward the center.<sup>23</sup>

The justices who are considered “conservative” and those who are considered “liberal” do not always vote as blocs, nor do conservatives or liberals always have predictable votes in free expression cases. Many of the conservative justices have joined their more liberal colleagues to support freedom of expression. For example, Kennedy and Scalia joined Brennan, Marshall, Harry Blackmun, and Stevens in ruling unconstitutional damages assessed against a newspaper for publishing the name of a sexual assault complainant.<sup>24</sup> Kennedy and Scalia also voted with Brennan, Marshall, and Blackmun to hold that flag burning is protected by the First Amendment.<sup>25</sup> In a 2000 case in which the Court upheld a restriction on expressive activities occurring near health clinics, Scalia, Thomas, and Kennedy claimed in dissenting opinions that the Court’s decision was harmful to freedom of expression.<sup>26</sup> Conversely, Justice Breyer dissented in two cases in which the Court struck down restrictions on sexual material on cable and the World Wide Web; Breyer believed the restrictions were necessary to protect children.<sup>27</sup>

As shown in Table 1.2, the number of cases filed with the Supreme Court has dramatically increased since 1954. While the number of cases accepted for oral argument and disposed of with a full opinion increased during the tenure of Chief Justices Earl Warren (1953–1969) and Warren E. Burger (1969–1986), Chief Justice Rehnquist (1986–2005) sought to reduce the number during his tenure. In the later part of Rehnquist’s tenure, the Court usually received nearly 8,000 petitions annually and agreed to hear arguments in fewer than 100 cases a term.

Although Chief Justice Roberts stated during his confirmation hearings he thought the Court could “contribute more to the clarity and uniformity of the law by taking more cases,” the Court has yet to increase its caseload under Roberts. The number of cases filed with the Court has recently declined, dropping from 8,857 in the 2006 Term, to 7,713 in the 2011 Term. Also, the number of cases accepted for oral argument has been declining slightly under Roberts. In the 2005 Term, the Court’s first with Roberts as Chief Justice, the

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<sup>19</sup> Linda Greenhouse, “Roberts Is at Court’s Helm, But He Isn’t Yet in Control,” *N.Y. Times*, July 1, 2006, § 1, at 1.

<sup>20</sup> *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>21</sup> *Caperton v. Massey Coal Co., Inc.*, 556 U.S. 868 (2009).

<sup>22</sup> Jess Bravin, “Lawyers Swing for Kennedy Vote,” *Wall Street Journal*, Oct. 3, 2006, at A2; Adam Liptak, “Roberts Court Shifts Right, Tipped by Kennedy,” *N.Y. Times*, July 1, 2009.

<sup>23</sup> Linda Greenhouse, “Court in Transition: The 2004–2005 Session,” *N.Y. Times*, July 4, 2005, at 1.

<sup>24</sup> *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

<sup>25</sup> *Texas v. Johnson*, 491 U.S. 397 (1989).

<sup>26</sup> *Hill v. Colorado*, 530 U.S. 703 (2000).

<sup>27</sup> *Ashcroft v. ACLU*, 542 U.S. 656 (2004); *United States v. Playboy Enter. Group, Inc.*, 529 U.S. 803 (2000).

**Table 1.2** United States Supreme Court Caseload 1954–2004 Terms

	1954 Term (Warren, C.J.)	1964 Term (Warren, C.J.)	1974 Term (Burger, C.J.)	1984 Term (Burger, C.J.)	1994 Term (Rehnquist, C.J.)	2004 Term (Rehnquist, C.J.)
Cases filed	1,397	2,288	3,661	4,046	6,996	7,496
Cases disposed of by full opinions	86	103	144	159	90	87
Disposed of by per curiam opinions	16	17	20	11	3	2

Sources: Administrative Office of the United States Courts, *Judicial Business of the United States Courts: 2005 Annual Report of the Director*; United States Supreme Court, *Chief Justice's Year-End Report on the Federal Judiciary*, 2005; Lee Epstein et al., *The Supreme Court Compendium* (2003).

Court heard oral arguments in 87 cases; in the 2011 Term, the Court heard arguments in 79 cases. This is down markedly from the 1980s when the Court typically heard 150 or more cases each term. The decline is partly due to Congressional action increasing the Court's control over its docket. In 1988, Congress passed legislation giving the Supreme Court nearly total discretion in selecting the cases it will hear.<sup>28</sup> Until then, the Court was required to hear several kinds of appeals accounting for 20 percent of its caseload. Now, even more than before, most cases reach the Court by a writ of **certiorari**, a Latin term indicating the Court is willing to review a case. As the Office of the Clerk of the Supreme Court explains, "review by this Court by means of a writ of certiorari is not a matter of right, but of judicial discretion. The primary concern of the Supreme Court is not to correct errors in lower court decisions, but to decide cases presenting issues of national importance beyond the particular facts and parties involved."<sup>29</sup>

The process of submitting a case to the Supreme Court for review begins when an attorney files a written argument, called a petition for certiorari, asking the Court to review a decision by a federal court or state supreme court. Four Supreme Court justices must vote yes if the Court is to grant a writ of certiorari and put the case onto its calendar. The Court rejects about 99 percent of the petitions for certiorari, usually with no explanation. When a petition for certiorari is denied, the lower court decision stands. The Supreme Court's refusal to accept a case does not affirm a lower court's opinion. Denial of certiorari "signifies only that the Court has chosen not to accept the case for review and does not express the Court's view of the merits of the case."<sup>30</sup> The Court denies certiorari for many reasons, perhaps because a case lacks legal significance or because there is no significant conflict in the lower courts to resolve.

If the Supreme Court accepts a case, the review process is much the same as for other appellate courts. The attorneys file briefs arguing their position. The briefs generally

<sup>28</sup> Supreme Court Case Selections, Pub. L. No. 100-352, 102 Stat. 662 (1988) (amending 28 U.S.C. §§ 1254, 1257 & 1258).

<sup>29</sup> Office of Clerk, United States Supreme Court, *Guide for Prospective Indigent Petitioners for Writs of Certiorari* at 1, Oct. 2005.

<sup>30</sup> *Id.*

present the facts of the case, the issues involved, a review of the actions of the lower courts, and legal arguments. The Supreme Court justices review the written arguments and then listen to what is usually a half hour of oral argument from each attorney. The justices often interrupt attorneys to ask questions or challenge the arguments being presented. The time limit is precise. An attorney arguing before the Court is expected to stop in the middle of a sentence if the light in front of the lectern signals that time has expired.

Following oral arguments, the justices meet in the Justices' Conference Room to discuss the case. No one except the justices is permitted in the room. Once the justices have voted, a justice voting with the majority will be designated to write the Court's opinion. If the chief justice is part of the majority, he or she decides who will write the opinion of the Court. If the chief justice votes in the minority, the most senior justice in the majority decides who will write the Court's opinion. The choice of author for an opinion is significant because the author of the Court's opinion can weave in his or her political philosophy, view of the role of the Court, and interpretation of law.

After a justice drafts an opinion for the Court, the draft is circulated to the other justices for editing and comment. Drafts of dissenting opinions may be shared as well. The justices may bargain over the language in the drafts. Votes may shift. Ordinarily, at least a few justices will join the opinion of the Court without adding their own comments. However, justices often write their own **concurring** or **dissenting opinions** to explain their votes. They can also join, or sign onto, opinions written by other justices.

Sometimes none of the draft opinions presented to the Court attracts the five votes necessary for a majority. In such a situation, the draft with the most support becomes the **plurality** opinion of the Court, as occurred in *Richmond Newspapers v. Virginia*. Although the justices in *Richmond Newspapers* voted 7–1 that the First Amendment requires trials to be open to the public, no more than three justices agreed to any one opinion explaining why courtrooms should remain open during trials.<sup>31</sup> If many of the justices write their own opinions rather than joining an opinion of the Court, the high court offers little guidance to lower courts facing similar circumstances. A majority of the justices deciding a case, usually five, must agree to any point of law for the Court's opinion to become binding precedent.

In what is known as the Pentagon Papers case, discussed in Chapter 3, each of the nine justices wrote his own opinion. Although the Court voted 6–3 that the *New York Times* and the *Washington Post* could report a secret Defense Department study, the only opinion issued on behalf of the six-justice majority was an unsigned, three-paragraph **per curiam** opinion. A per curiam opinion is “by the court” rather than an opinion attributed to any one justice. The Court's opinion in the Pentagon Papers case said only that the government had not sufficiently justified barring news stories based on the Defense Department study.<sup>32</sup> The justices could not agree on the reasons a **prior restraint** was unjustified.

Technically, the Supreme Court's decisions apply only to the case being decided. The Supreme Court's opinions do not establish statute like law. However, lower courts assume the Supreme Court will decide similar cases in similar ways, so they adjudicate conflicts before them accordingly. Otherwise lower court judges risk having their decisions overturned.

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<sup>31</sup> 448 U.S. 555 (1980).

<sup>32</sup> *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).



The Supreme Court, in its role as interpreter of the U.S. Constitution, can review the constitutionality of all legislation. This means that the Supreme Court can invalidate an act of Congress that violates the Constitution. The Court has declared all or part of a federal statute unconstitutional about 165 times in the history of the country. The Court has also declared provisions of about 1,306 state laws and constitutions to be unconstitutional.<sup>33</sup> The Supreme Court has frequently expanded freedom of expression by invalidating state and federal statutes found to conflict with the First Amendment.

Neither the Supreme Court nor any other court can enforce its own decisions. The courts have no troops or police to force compliance. The executive branch enforces court decisions. Law enforcement officers ensure that fines are paid and sentences are served. When the Supreme Court rules against the executive branch, it relies on tradition and its own prestige to achieve compliance. In 1974, public respect for the Court forced President Nixon to obey an order to release secret White House tapes to a special prosecutor who was investigating the Watergate scandal.<sup>34</sup>

## The State Systems

Most state court systems are organized much like the federal courts. Each state has trial courts, similar to the federal district courts, which handle nearly every kind of civil or criminal case. These courts, often called county courts, are ordinarily the first state courts to consider libel or privacy cases. These trial courts also handle appeals for a number of subordinate trial courts responsible for minor civil matters, traffic violations, and criminal misdemeanors. Most state court judges are elected, usually in nonpartisan elections.

State court systems provide either one or two levels of appellate courts. In some states, appeals go directly from the county courts to what is usually called the state supreme court. However, many states have intermediate appellate courts to moderate the workload of the supreme court. State courts of appeals, like the federal circuit courts, often use small panels of judges. State appellate court decisions interpreting state law are binding on both lower state courts and federal courts in the same jurisdiction.

The decisions of state supreme courts, usually made up of seven to nine justices, constitute the law of the state and are binding on all of the state's courts. Each state supreme court is the final arbiter of its own state constitution, provided there is no conflict with the Federal Constitution. A losing **party** in a state supreme court case may have recourse before the U.S. Supreme Court only if a substantial federal question is involved.

## ■ SUMMARY ■

There are fifty-two court systems: one for the federal government, one for the District of Columbia, and one for each state. Most court cases originate in the trial courts, where the law is applied to the facts of each case. Appeals courts ensure that the trial courts use the proper procedures and apply the law correctly. The federal court system consists of federal district courts, the 13 circuits of the U.S. Courts of Appeals, and the U.S. Supreme Court.

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<sup>33</sup> Congressional Research Service, *The Constitution of the United States of America: Analysis and Interpretation of the Constitution*, S. Doc. No. 111-39 (2010).

<sup>34</sup> *United States v. Nixon*, 418 U.S. 683 (1974).

## THE LITIGATION PROCESS: CIVIL AND CRIMINAL

In criminal law, the government punishes individuals who commit illegal acts such as murder, arson, and theft. Civil law ordinarily resolves disputes between two private parties. The dispute can be over a dog bite or a news story. Most communication cases are brought in civil court rather than criminal court.

A crime is an antisocial act defined by law, usually a statute adopted by a state legislature. State criminal statutes forbid behavior such as murder and rape and specify punishment, usually a jail sentence, a fine, or both. Criminal law is enforced by government law enforcement officers. Once suspects are arrested, they are prosecuted by government attorneys. The state must prove its case beyond a reasonable doubt, a heavy **burden of proof** demanding that jurors be all but certain that the government's version of events is correct. One example of criminal law discussed in this book is obscenity. Both the federal and state governments prosecute individuals who distribute obscene materials.

Journalists have won a right of access to courts for themselves and, in most states, their cameras and microphones. The Supreme Court has recognized that fair trials depend upon the presence in court of the public and the press. There are few restraints on what the press can publish before or during a trial. Under standards discussed in Chapter 10, it is almost impossible for a judge to prevent the press from publishing information presented in court.

In contrast to criminal cases intended to punish illegal behavior, civil cases often involve claims by individuals or organizations seeking legal redress for a violation of their interests. A person or organization filing a civil suit usually seeks compensation for harm suffered because of the actions of another. A woman may sue a neighbor for medical costs after being bitten by the neighbor's dog. Or a man may sue a newspaper for defamation if the paper inaccurately reports that he is an adulterer. A legal wrong committed by one person against another is often called a **tort**. Civil law provides the opportunity for a "peaceful" resolution when one person accuses another of committing a tort. A person whose reputation is harmed by false statements is supposed to sue for defamation, not challenge his detractor to a duel.

Litigants in civil cases can win by proving their cases by a preponderance of the evidence. Unlike criminal prosecutors, lawyers representing civil plaintiffs do not have to prove wrong beyond a reasonable doubt. Preponderance of the evidence means that litigants must convince jurors that their version of events is more probable—if by a narrow margin—than that of the opposing party. If the person suing wins a civil case, he or she often recovers monetary **damages**. If the person being sued wins, frequently no money changes hands except to pay the lawyers' fees. In civil law, there are no jail terms and usually no fines.

Civil law, including libel and privacy, is a significant part of the law of public communication. Civil suits are more likely to be based on common law than on statutory law. In media law, in particular, the government is not ordinarily involved except to provide neutral facilities—the judge, the jury, and the courthouse—to help settle the dispute. However, a civil suit can be based on a statute, and a person or group can sue, or be sued by, the government. Some states' open meetings and open records laws allow private citizens to sue officials to secure public access.

## A Civil Suit

A civil case begins when the person suing, called the **plaintiff**, files a legal complaint against the person being sued, the **defendant**. In April 1976, Dr. Ronald Hutchinson, then the research director at a Michigan state mental hospital, filed a civil complaint against Senator William Proxmire of Wisconsin in the U.S. District Court for the Western District of Wisconsin. Proxmire announced during a 1975 speech that he was awarding a “Golden Fleece” award to the federal agencies that had sponsored Hutchinson’s research on why monkeys clench their jaws when exposed to stressful stimuli. Proxmire’s speech included the following:

The funding of this nonsense makes me almost angry enough to scream and kick or even clench my jaw. It seems to me it is outrageous. Dr. Hutchinson’s studies should make the taxpayers as well as his monkeys grind their teeth. In fact, the good doctor has made a fortune from his monkeys and in the process made a monkey out of the American taxpayer. It is time for the Federal Government to get out of this “monkey business.”

Hutchinson complained that Proxmire had defamed him by describing his research as worthless and in a civil complaint sought \$8 million in damages. Hutchinson’s complaint said Proxmire’s speech had humiliated him, held him up to public scorn, damaged his professional and academic standing, and damaged his ability to attract research grants.<sup>35</sup>

Once a complaint has been filed at the courthouse, a defendant, in this case Senator Proxmire, is served with a summons, a notice to appear in court. If defendants fail to appear, courts may hold them in contempt and require them to forfeit their cases. Defendants often respond to complaints by denying the accusations. Senator Proxmire “answered” the complaint, in part, by filing a motion for **summary judgment**, a common defense tactic in communication cases. A judge can grant a summary judgment to either a defendant or a plaintiff if the judge believes that the two sides in a case agree on the facts of the dispute and that one side should win as a matter of law. A summary judgment terminates a suit in its early stages, saving attorney fees and avoiding the often unpredictable outcome of a jury trial. Summary judgments are discussed more thoroughly in Chapter 4.

Hutchinson’s complaint, Proxmire’s answer, and a reply by Hutchinson are called the *pleadings*, documents stating the nature of a case. Sometimes the two sides in a dispute file a series of documents in an attempt to narrow the issues and thereby limit the length and expense of a trial. Frequently, the two sides will ask a judge for a pretrial conference in another attempt to narrow the issues or even to settle the case.

Meanwhile, the parties, sometimes called litigants, begin what is called **discovery**. Discovery is the information-gathering process. During discovery—which in major cases can take several years—each side finds out as much as possible about the evidence possessed by the other party. The lawyers often prepare interrogatories, written questions that must be answered under oath by people who might have relevant information. Then lawyers frequently take depositions, that is, ask questions in person that also must be answered under oath.

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<sup>35</sup> Hutchinson v. Proxmire, 443 U.S. 111 (1979).

During discovery, lawyers may request that the judge issue a **subpoena** requiring a journalist or someone else to testify or bring documents or other evidence to court. A subpoena must be served to the person named in it. Failure to comply with a subpoena can result in a contempt of court ruling. Journalists frequently fight subpoenas on the grounds that revealing sources or evidence will limit their ability to gather news, a subject discussed in Chapter 11.

In the *Hutchinson* case, the judge granted time for discovery after receiving Senator Proxmire's motion for summary judgment. The two parties exchanged interrogatories and subsequently the answers. Hutchinson requested a jury trial. He also asked to amend his complaint, a motion that was granted over the objection of Senator Proxmire. In the amended complaint, Hutchinson said the Golden Fleece announcement not only defamed him but also infringed on his rights of privacy and peace and tranquillity. Both Hutchinson, the plaintiff, and Proxmire, the defendant, filed the results of depositions. Shortly thereafter, Hutchinson filed a brief, along with five volumes of exhibits, arguing against Proxmire's motion for summary judgment. Senator Proxmire filed a reply brief with exhibits.

About a year after Hutchinson filed his complaint, the district court judge granted Senator Proxmire's motion for summary judgment.<sup>36</sup> If the summary judgment had not been granted, the case would have gone to trial.

A jury trial is required if the two parties disagree on the facts of a case and one of the parties insists on a jury. After both sides present their cases, the judge explains the relevant law to the jurors. The jury is asked to apply the law to the facts, and it may set monetary damages as part of the verdict. If a judge believes the jury verdict is contrary to law or that the damage award is excessive, he or she can overturn the jury's decision. This occurred when a judge decided that a jury verdict in favor of Mobil Oil president William Tavoulaareas and against the *Washington Post* was contrary to libel law.<sup>37</sup>

Once a judgment has been recorded in a case, either party can appeal. The person who appeals is known as the **petitioner**; the person fighting the appeal is called the **respondent**. The petitioner in one appeal may be the respondent in another appeal. In Hutchinson's suit, Hutchinson became a petitioner when he appealed the grant of summary judgment to the U.S. Court of Appeals for the Seventh Circuit, where it was upheld.<sup>38</sup> Hutchinson's petition for certiorari to the U.S. Supreme Court was granted. Proxmire was the respondent before both the Seventh Circuit and the Supreme Court. The Supreme Court reversed the decision of the Seventh Circuit and remanded the case to the lower courts for disposition consistent with the Supreme Court's opinion. Hutchinson and Proxmire eventually settled out of court. Hutchinson received \$10,000 in damages and an apology from Senator Proxmire. The Supreme Court opinion, *Hutchinson v. Proxmire*, is discussed in Chapter 4.

## A Criminal Case

The key steps in a criminal prosecution are substantially the same in most states. The procedures may be labeled differently or occur in a different sequence.

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<sup>36</sup> 431 F. Supp. 1311 (W.D. Wis. 1977).

<sup>37</sup> *Tavoulaareas v. Washington Post Co.*, 567 F. Supp. 651 (D.D.C. 1983), *aff'd*, 817 F.2d 762 (D.C. 1987) (en banc).

<sup>38</sup> 579 F.2d 1027 (7th Cir. 1978).

A criminal action begins with a law enforcement investigation. The case of Dr. Sam Sheppard, a Cleveland, Ohio, osteopath, began with the bludgeoning death of his wife, Marilyn, on July 4, 1954. This sensational case has often been described as the “crime of the century” and served as the inspiration for the top-rated 1960s television series *The Fugitive* and a 1990s Oscar-winning movie of the same name. As the Ohio Supreme Court described the case: “Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals.”<sup>39</sup>

Sensational publicity began immediately with the news of Marilyn Sheppard’s death and continued through Sam Sheppard’s conviction for second-degree murder. Sheppard told investigators that he awoke to his wife’s screams and then struggled with an unidentified “form” he found standing next to his wife’s bed. As he struggled with the “form,” Sheppard was knocked unconscious. Upon regaining consciousness, Sheppard followed the “form” outside of the house where he again grappled with it until losing consciousness a second time. Sheppard reenacted his version of these events at his home for the coroner, police investigators, and journalists. Press coverage of the police investigation and coroner’s inquest emphasized evidence incriminating Dr. Sheppard and included headlines such as “Why Isn’t Sam Sheppard in Jail?” The extensive, sensational publicity is discussed more fully in Chapter 10.

After a nearly one-month investigation, Sam Sheppard was arrested on a charge of murder on July 30. The investigation established that Mrs. Sheppard had been killed with a blunt instrument, that Dr. Sheppard was in the house at the time, that no money was missing from the home, and that no readable fingerprints could be found.<sup>40</sup>

After an arrest, the person accused of a crime appears before a magistrate for a preliminary hearing. At the hearing, the person is advised of the nature of the crime and reminded of his or her right to counsel and the right to remain silent. The primary purpose of a preliminary hearing is to determine if there is sufficient evidence, or **probable cause**, to justify further detention or a trial. Sheppard appeared before a magistrate, was informed of the murder charge, and was bound over to the grand jury.

If the magistrate decides that there is probable cause, he or she will set the bail, that is, announce the amount of money that must be posted before the accused can be released from jail. The bail is intended to ensure that the accused appears in court. Sheppard was denied bail.

The next step, depending on the state, could be the filing by the prosecutor of a criminal information, a document formally accusing the person of a crime. Or the prosecutor may take the evidence to a grand jury to seek an **indictment**, a formal accusation by a grand jury. Not all states have grand juries, and their role in the criminal justice system varies. On August 17, 1954, a grand jury in Ohio indicted Sheppard for first-degree murder.<sup>41</sup>

An arraignment usually follows the formal accusation. The arraignment is the official, formal reading of the indictment or information to the accused. The accused is asked to plead guilty or not guilty.

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<sup>39</sup> State v. Sheppard, 135 N.E.2d 340, 342 (Ohio 1956).

<sup>40</sup> State v. Sheppard, 128 N.E.2d 471 (Ohio Ct. App. 1955).

<sup>41</sup> *Id.*; Sheppard v. Maxwell, 384 U.S. 333 (1966).

If the defendant pleads not guilty, the focus turns to pretrial preparation and negotiation. Both the prosecution and defense engage in discovery, the pretrial fact-finding. Both sides may submit a variety of motions to the judge. The defense may move for an adjustment or dismissal of the charges. Or, as in Sam Sheppard's case, a defense attorney may ask that a trial be relocated or delayed because of extensive pretrial publicity. The judge in the Sheppard trial denied both motions.

During the pretrial maneuvers, the prosecution and defense may agree to resolve the case through a plea bargain. In plea bargaining, a trial is avoided because the defendant is willing to plead guilty, often to reduced charges. Roughly 90 percent of criminal defendants plead guilty, thereby avoiding a trial.<sup>42</sup> Plea bargains not only save time and money but also avoid the uncertainty inherent in a trial.

A trial can take place before a judge or a jury. Criminal defendants can waive their right to a jury trial. After the jury announces the verdict of guilty or not guilty, a judge pronounces the sentence. A jury in the Common Pleas Court of Cuyahoga County, Ohio, decided that Sheppard "purposely and maliciously" killed his wife, the requirement for second-degree murder in Ohio. The judge sentenced Sheppard to life in prison, the mandatory penalty in Ohio for the crime of second-degree murder.

Sheppard appealed to the Court of Appeals of Ohio for Cuyahoga County, an intermediate appellate court. He argued that there were nearly 40 errors in the conduct of the trial, including the denial of motions to move the trial and to postpone the trial. He also argued that the jury had been improperly selected and prejudicial evidence had been improperly allowed during the trial. The three-judge panel decided that Sheppard "has been afforded a fair trial by an impartial jury and . . . substantial justice has been done."<sup>43</sup> Sheppard also lost a 1956 appeal in the Ohio Supreme Court.<sup>44</sup> The U.S. Supreme Court denied certiorari the same year.<sup>45</sup> Nine years later, the U.S. Supreme Court agreed to consider Sheppard's contention that he was denied a fair trial because of sensational media coverage. That story is told in Chapter 10.

## ■ SUMMARY ■

Criminal law prohibits antisocial behavior as defined by statute. Violations are punishable by jail sentences and fines. Criminal law is enforced by the government. A criminal action begins with an investigation and an arrest. A preliminary hearing is held to determine if there is sufficient evidence to justify a trial. Then either a prosecutor or a grand jury formally accuses a person of a crime. After the accused responds to the charge during an arraignment, the prosecution and the defense engage in pretrial fact-finding, known as discovery. Civil law ordinarily involves disputes between two private parties. A plaintiff sues a defendant for damages. After the plaintiff files a civil complaint and the defendant responds, the two parties engage in discovery. Civil and criminal cases can be dismissed or otherwise resolved before trial.

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<sup>42</sup> American Bar Association, *Law and the Courts: A Handbook of Courtroom Procedures* 44 (1995).

<sup>43</sup> *State v. Sheppard*, 128 N.E.2d 471, 504 (Ohio Ct. App. 1955), *aff'd*, 135 N.E.2d 340 (Ohio 1956), *cert. denied*, 352 U.S. 910 (1956).

<sup>44</sup> *State v. Sheppard*, 135 N.E.2d 340 (Ohio 1956).

<sup>45</sup> *Sheppard v. Ohio*, 352 U.S. 910 (1956).

## **WORKING WITH THE LAW**

### **Finding and Reading the Law**

Many professional communicators value the ability to locate and understand the law by themselves. Communicators do not have to have legal training to find statutes and court opinions. Law libraries have knowledgeable personnel ready to help. Information in Appendix A in this book provides background to enable students to find court cases and other material. Although a nonlawyer can find the law with a little assistance, reading and understanding the law takes time and practice. A few tips are offered in the appendix. Also in the appendix are explanations of the legal citations in this book. However, journalists should not try to be their own lawyers, even if they have law degrees.

### **Working with Lawyers**

Because public communication often raises questions of law, professional communicators frequently need lawyers. Communicators should not fear or avoid lawyers; rather, communicators should use lawyers intelligently.

Most communicators will not have direct access to a lawyer in their first job. Newspapers, for example, generally prefer journalists to take legal questions to a supervisor. In newsrooms, city editors and managing editors ordinarily can answer routine legal questions and usually decide when a lawyer should be consulted. Some major daily newspapers and large advertising and public relations firms hire staff lawyers, known as in-house attorneys. Other media companies engage a law firm they can call as needed. Even the smallest communications organization should have experienced legal counsel to call when questions arise.

Lawyers, whose hourly fees are usually high, should be used when possible to prevent a legal conflict rather than to resolve one. A lawyer should be consulted in the following cases:

- When a communicator is served with a subpoena, a summons, or an arrest warrant. Communicators need the advice of a lawyer before responding to a legal document.
- When there is a concern that a story being considered for publication could lead to a libel or privacy suit. Attorneys can assess the risks of stories and suggest modifications.
- When a news medium is asked to print retractions or corrections. Some well-intentioned corrections can increase, rather than decrease, the risk of a suit if a lawyer is not consulted.
- When a communicator is approached by a lawyer hired by someone else. A layperson should not respond to the legal moves of a legal adversary.
- When a communicator is considering an action that may be illegal. Reporters pursuing a story sometimes consider trespassing, tape recording, or obtaining stolen documents. Sometimes it is obvious when an act is illegal; often it is not. Reporters need to understand the legal consequences of their actions. A lawyer may help.

Lawyers can do more than help limit the legal jeopardy of communication professionals. They can also help communicators do their jobs. For example, lawyers can help journalists obtain access to closed records or meetings by explaining to officials the rights of the public and press. Lawyers also help public relations specialists and

broadcasters complete forms required by the Securities and Exchange Commission, the Federal Communications Commission, and other administrative agencies.

When communicators work with lawyers, they should remember that lawyers, like other professionals, are trained to do some tasks and not others. Lawyers can help resolve a legal conflict, but they cannot eliminate the sloppy writing or editing that may have caused a suit. Attorneys can explain the probable risks and consequences of a story or an ad. They can discuss the factors that ought to be considered in deciding how to avoid **liability**. An attorney should know the questions an opposing attorney will ask about a story and what arguments are likely to be made in a libel trial.

Lawyers are not usually qualified to tell a communicator what to write or how to edit. Some lawyers are insensitive to the problems, values, and commitments of journalists. Some attorneys regularly advise cutting stories to avoid trouble. They sometimes suggest eliminating the defamatory portions of stories without regard to the public importance of the information. The job of a lawyer, according to James Goodale, a prominent media attorney, should be “to figure out how to get the story published,” not trimmed or killed.<sup>46</sup> The lawyer should explain legal risks; the communicator should make the editorial decisions after weighing those risks.

Public communicators may sometimes need a personal attorney. An employer might refuse to represent an employee in court, especially if the employee acts contrary to instructions or without consulting a supervisor. In the early 1970s, the *New York Times* refused to defend one of its reporters, Earl Caldwell, when he declined to testify before a grand jury. The *Times* wanted Caldwell to respond to a grand jury subpoena by entering the grand jury room, even if he refused to answer questions. However, Caldwell refused even to enter the grand jury room, which is closed to the public and the press. Caldwell believed that once he went behind closed doors, his sources would no longer trust his commitment to keep what he knew confidential. When Caldwell was found in contempt of court for refusing to testify, the *Times* did not provide him with a company attorney. Caldwell’s case was considered by the Supreme Court in *Branzburg v. Hayes*, a case discussed in Chapter 11.

An attorney needs to know all of the facts that pertain to a legal issue. Communicators should hold nothing back. Although it is embarrassing for journalists to confess careless reporting or writing, the failure to tell a lawyer everything can be legally damaging, particularly if the errors are first revealed by an opposing lawyer in front of a jury. Attorneys need to know the worst in order to present the best case.

## ■ SUMMARY ■

Legal advice can be an expensive but necessary part of modern communication. Lawyers should be called when a communicator must respond to an official document or someone else’s attorney. Lawyers should be consulted when a communicator is considering an act that may be illegal. Lawyers should review stories that could lead to libel or privacy suits. Lawyers can explain the risks of publishing a story, but they should not be allowed to act as editors. Information about doing legal research is in Appendix A of this book.

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<sup>46</sup> Ann Rambo, “Litigious Age Gives Rise to Media Law,” *presstime*, Nov. 1981, at 7.



## LIMITATIONS OF THE LAW

This book focuses on the law. Professional communicators need to know the law in order to do their jobs effectively and without unnecessary risk. However, the law does not resolve all questions that may arise in public communication.

For one thing, the law does not necessarily protect every action that a professional communicator believes to be in the public interest. Libel law does not always protect a newspaper that wants to report an allegation of government corruption. In addition, reporters who refuse to reveal the names of sources for a story about government corruption could go to jail. At times, communicators have to decide whether the public benefit of a story is worth a jail sentence or a libel suit. The fact that journalists might not be protected by law is not the only factor to be considered when they are deciding whether to publish a story.

Conversely, the law may allow behavior that exceeds personal or professional ethics. Ethics is the consideration of moral rights and wrongs. Ethics involves honesty, fairness, and motivation. It also involves respect for the emotional well-being, dignity, and physical safety of others. The law, as reflected in statutes and court decisions, does not always parallel personal and professional codes of conduct. The First Amendment frequently permits expression, such as the publication of the names of sexual assault complainants, which many journalists consider unethical. Ethical questions are raised not only by the publication of highly personal information but also by pretrial publication of information about criminal defendants and by the refusal of journalists to reveal their news sources, all of which are sometimes permitted by law. Communicators base decisions to publish on whether behavior is morally “right” or “wrong” as well as on its legality. However, a discussion of ethics is left for another book. The purpose of this book is to help professional communicators understand the law that affects their performance.