Learning Objectives

- Explain the difference between the federal and state court systems.
- Distinguish different aspects of civil and criminal cases.
- Identify various sources of law and explain how to locate them.
- Evaluate how precedent will affect the outcomes of new cases.

There is some basic information about the legal system that is necessary background to understand the rest of the information in this book. This chapter outlines such background material, including:

1. The two court systems used in the U.S. and how they relate.
2. The two primary kinds of cases: civil and criminal.
3. The different sources of “law” and how to find them.
4. The concept of precedent, which is why understanding case law matters.

The Two Court Systems

The U.S. has two court systems: federal and state. These systems are separate but symmetrical. Each system has trial courts, appellate courts (meaning a court to which there is an automatic right of appeal), and a supreme court (meaning the highest level court to which an appeal is possible within the system).

In the federal system, the trial courts are called District Courts. They are organized by state. Some states are their own district, others are divided into multiple districts. So, for example, there is a District Court for the District of New Mexico, which is the federal trial court for the entire state of New Mexico. There is also a District Court for the Eastern District of Virginia and a District Court for the Western District of Virginia, each serving as the federal trial court for a portion of the state.
Any party who is unhappy with the outcome of a trial has a right of appeal to an appellate court. The federal appellate court is called a U.S. Court of Appeals, or Circuit Court. The Circuits are numbered: First Circuit, Second Circuit, Third Circuit, etc., up to Eleventh Circuit. There is also a D.C. Circuit. The D.C. Circuit obviously hears appeals from the federal court in D.C., and the numbered circuits each represent a geographic region of the U.S. There is also a Federal Circuit and a U.S. Court of Appeals for the Armed Forces, but those are specialty courts. The federal system also has specialty courts such as those for bankruptcy or tax issues.
And, there are federal administrative hearings. For the sake of simplicity, this book focuses on the District and Circuit Courts, because the cases discussed herein have come from those courts.

As you can see from the map above, states fall within various Circuits. If a party to a trial in the District of New Mexico wishes to appeal, he must appeal to the Tenth Circuit, because New Mexico is in the Tenth Circuit. Similarly, a party to a trial in the Southern District of New York must appeal to the Second Circuit, because New York is in the Second Circuit.

Once the Circuit Court issues its opinion, a party can try to appeal to the U.S. Supreme Court. A request for an appeal is called a “petition for a writ of certiorari.” If the Supreme Court decides to hear the appeal, the Court grants a writ of certiorari to the court of appeals from which the case came. The Supreme Court, though, is not obligated to take a case. It receives, on average, 7000 to 10,000 petitions each year. It chooses which cases it wants, and typically hears fewer than 100 cases per year.

The state court system is similar to the federal court system insofar as each state has trial courts, appellate courts to which there is a right of appeal, and a highest court that has discretion to choose which cases it wants to hear. The main difference is that the names of the courts can vary, and sometimes the names can be confusing. For example, some states call their trial courts “circuit courts,” and those who are familiar with the federal system might mistakenly think that refers to a court of appeal. And while most states call their highest court the “Supreme Court” (as in the federal system), New York calls its highest court the “Court of Appeals,” which is what most states call the intermediate court. But other than the potential for confusion because of the names, the state system works very much like the federal system.

The two systems run parallel to each other. A case must proceed through one system or the other. You can’t file a case in state court and then appeal to a federal court, and vice-versa. The only exception is that if a state’s highest court decides a case that involves a constitutional issue, a party may attempt to appeal that decision to the U.S. Supreme Court. An example where that happened is Heffron v. ISKON, where a case decided by the Minnesota Supreme Court was appealed to the U.S. Supreme Court. (That case is discussed in Chapter 14.)

In Which System Should a Case Be Filed?
The jurisdiction of the federal courts is limited. A case may be filed in federal court only if it is one of the following kinds of cases:

- Prosecution of a federal crime.
- The case is based on a federal statute or the Constitution.
- The U.S. itself is a party to the lawsuit.
- There is diversity jurisdiction.

Diversity jurisdiction means that the parties to the case are from different states. The traditional thought was that a state court might be biased in favor of the party from its own state, but federal courts are thought to be less likely to be biased. Diversity jurisdiction allows a party to choose federal court instead of state court to
avoid being treated unfairly in favor of the “hometown” party. However, diversity jurisdiction is permitted only if the amount in controversy exceeds $75,000. There must be enough money at stake to justify the involvement of federal courts.

All other cases can be filed in state court. And, of course, state courts are the appropriate forum for the prosecution of state crimes.

Importantly, constitutional claims are not required to be filed in federal court. They may be filed in state court. In some cases, a state constitution might provide greater protection for speech than the federal constitution, in which case, seeking a resolution in state court might be a superior option. For example, in *Sandals Resorts Int’l Ltd., v. Google, Inc.*, a New York state court acknowledged that New York law extends greater protection to speech in libel cases than the protection granted by the Supreme Court interpreting the federal constitution. Thus, the court extended protection to an email that raised questions about how Sandals Resorts treats Jamaican workers, even if the precedent of the U.S. Supreme Court did not clearly require protection.

When a case is filed, the parties have a certain time period (typically 30 days) to try to move the case from one system to the other, if appropriate. If a case is filed in state court, but diversity jurisdiction exists, the other party can try to “remove” the case to federal court. “Removal” is the name given to this process.

If a case is improperly filed in federal court, the case can be “remanded” to state court.

Once the time period for removal or remand expires, the case is fixed in either the federal or the state system and cannot be switched from one to the other.

### The Two Kinds of Cases

The two primary kinds of cases are civil and criminal. Each type of case has its own procedures and terminology. The following table compares some basic differences between the two types:

<table>
<thead>
<tr>
<th>Civil</th>
<th>Criminal</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Who are the parties?</strong></td>
<td>The “plaintiff” files the lawsuit against the “defendant.” If Jeffrey Masson sues <em>The New Yorker</em> magazine, then Masson is the plaintiff and the magazine is the defendant, and the case will be styled “Masson v. The New Yorker Magazine, Inc.”</td>
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<tr>
<td></td>
<td>The case is brought by the “prosecutor” against a “defendant,” although the charging party is usually referred to as the “State” (e.g., <em>State v. Matthews</em>) or “People” (e.g., <em>People v. Flynt</em>).</td>
</tr>
<tr>
<td><strong>What is sought?</strong></td>
<td>In most cases, a plaintiff is suing for money, but in some cases, the remedy is an injunction (for example, an order to stop publishing something) or a declaratory judgment (for example, an order declaring that a certain person holds the copyright to a work).</td>
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<tr>
<td></td>
<td>If a person is found guilty of a crime, he will be sentenced, and the penalty is usually jail time or a fine, although there are other options, such as probation.</td>
</tr>
<tr>
<td><strong>What rules apply?</strong></td>
<td>Courts will follow the Rules of Civil Procedure. (There are both state and federal versions, depending on whether the case is in state or federal court.)</td>
</tr>
<tr>
<td></td>
<td>Courts will follow the Rules of Criminal Procedure. (There are both state and federal versions, depending on whether the case is in state or federal court.)</td>
</tr>
</tbody>
</table>
### Civil

What is the burden of proof?
In most cases, a plaintiff must prove the elements of a claim by a “preponderance of the evidence,” which essentially means it is more likely than not that the plaintiff’s claims are true. However, there are times when a plaintiff must prove something by “clear and convincing evidence,” which is a higher standard.

What subject matter is included?
In general, civil claims include torts, contract claims, property disputes, and the like. “Tort” is a legal term that simply means “wrong,” and it is used to refer to a wide range of claims that plaintiffs can use to seek recovery when they feel they have been wronged somehow.

What kinds of media law issues are included?
This book discusses several torts such as libel, invasion of privacy, right of publicity, and others. Breach of contract and fraud may also be civil claims. Copyright and trademark infringement may also be civil claims.

### Criminal

A prosecutor must prove a defendant’s guilt “beyond a reasonable doubt.” That does not require 100% perfect, fool-proof evidence of guilt. It requires only that there be enough evidence so that reasonable people do not maintain doubts about guilt.

When most people think of crimes, they think of things like murder, assault, burglary, and the like. However, there are many kinds of crimes, including petty violations like speeding, jaywalking, or trespassing. There are also numerous content-specific federal laws.

Many legal concepts that create civil liability can also create criminal liability. Copyright and trademark infringement can be criminal (think of mass pirating of CDs or DVDs, for example). Obscenity laws and child pornography laws are criminal matters. Laws that regulate threats, harassment, profanity, or other kinds of speech may also be criminal matters.

In criminal cases, prosecutors have prosecutorial discretion, which means that they have the option to decide whether to charge someone with a crime and, if so, exactly which crime. For example, a prosecutor might choose to charge someone with manslaughter rather than murder if the prosecutor thinks that the evidence is not clear enough to prove the intent required to obtain a murder conviction. It also means that a prosecutor won’t spend the time and money to prosecute everything that might be considered a criminal act. Budgets are limited, so prosecutors sometimes have to choose where to focus their efforts. It may mean that they choose not to pursue pornography that might violate obscenity laws because they prefer to focus on the enforcement of drug laws. That doesn’t mean that the pornography isn’t obscene or that it deserves First Amendment protection; it simply means that the law isn’t being enforced.

In civil cases, the plaintiff chooses whom to sue. If the defendant feels that someone else is at fault, he can seek indemnity from that other party. Contracts sometimes have indemnity clauses, which are agreements that if one party gets sued, the other party will cover the cost of the suit and any damages that must be paid. For example, if a newspaper contracts with a freelancer to write an article, the freelance agreement may have an indemnity clause wherein the freelancer promises to reimburse the newspaper for any costs incurred as a result of a libel claim based on the freelancer’s article. Whether the freelancer has the money to actually cover those costs is another matter.
costs is a separate question, and it may not be practical for the newspaper to bother
seeking reimbursement. But the concept of indemnity does arise from time to time.

Similarly, the concept of *respondeat superior* is important to understanding who
is potentially liable in a civil case. In short, it means that the employer is responsible
for the conduct of its employees. Thus, if a photo editor who works for a website
posts someone else’s photograph without permission and infringes their copyright,
both the photo editor and the website can be sued. The photo editor is directly liable
and the website is responsible as *respondeat superior*. In many cases, the plaintiff
sues the employer because, presumably, the employer has “deeper pockets” (i.e., more
money) than the employee. But the plaintiff has the choice of suing one or the other
or both.

**How to Find “Law” and Understand Citation Systems**

The legal profession is nothing if not organized. There is a coherent system for
finding relevant laws or cases, but it does require some explanation.

There are five primary sources of law relevant to media law: constitutions,
statutes, regulations, executive orders, and cases.

**Constitutions**  There is a federal constitution, and each state has its own constitu-
tion. All laws must comply with the provisions of the federal constitution; if they do
not, they can be “struck down” as unconstitutional. As noted above, states are free to
provide expanded protection to citizens, so sometimes a state constitution provides
greater protection of certain rights than the federal constitution will. Sometimes, states
grant greater protection for free speech than has been granted under the federal con-
titution. But states also sometimes provide greater protection for other rights, such as
privacy rights. California, for example, has a state constitutional right of privacy that
is fairly expansive and unlike any right protected by the federal constitution.

**Statutes**  Federal statutes are the laws that are passed by Congress. They are
codified in a book called the United States Code (USC). A reference to a statute will
cite the title and section where the statute can be found. For example, 17 U.S.C.
sec. 107 is the citation to the law that describes the “fair use” defense to copyright
infringement. It can be found in the U.S. Code in Title 17, section 107. Each state
has its own code as well, codifying all state laws. State citations systems tend to be
similar to the federal system, although they may have their own quirks.

**Regulations**  Federal regulations are rules made by federal agencies in order
to implement the federal statutes. Examples include the Federal Communications
Commission (FCC) regulations on broadcasters or the Federal Trade Commission
(FTC) regulations on advertising. Regulations are spelled out in a book called the
Code of Federal Regulations (C.F.R.). They follow a citation system similar to the
system for statutes. So, for example, the regulation that requires broadcasters who
intend to record calls to be used on-air inform callers of the recording can be found
Executive Orders  The president (or a governor, in the case of a state) may issue executive orders, which are directives that set forth a procedure, or otherwise declare how an agency within the executive branch shall operate. In recent years, there has been some criticism of these orders by those who believe that the scope of power sought to be exercised is broader than what the executive branch may properly exercise. Executive orders should be based on some preexisting law that the executive branch is tasked to enforce. In any case where one believes the president has exceed his authority in issuing an order, the remedy is to file a lawsuit, just as one would to challenge the constitutionality of a law passed by Congress.

Cases  When a court decides a case (or an issue within a case), the resulting opinion is often published. A case may interpret a statute or the constitution, or judges may create law simply by issuing opinions on a topic. Lawyers and judges refer to the collective body of opinions as case law or common law. So, for example, if a case refers to a “common law right of privacy,” it means that, over time, judges have issued opinions that endorse some right of privacy within the bounds set forth by those prior opinions.

The citation system for cases is a little more complicated than for statutes or regulations, but it’s not too difficult to catch on. Cases are published in certain books, called “reporters,” depending on which court issued the opinion. A case citation will include the name of the case (e.g., Masson v. The New Yorker Magazine) and the abbreviation for the reporter. The volume number of the reporter precedes the abbreviation, and the page number where the case can be found follows it. Finally, the citation includes a parenthetical that specifies which court decided the case and the year the opinion was issued. The parenthetical for U.S. Supreme Court cases includes only the year and not the court, because the court is clearly the U.S. Supreme Court.

A reporter is published in volumes 1 to 999. Once 999 volumes are filled, the reporter switches to the second set of volumes. Thus, the Federal Reporter (abbreviated F.) was published up to volume 999. It then switched to Federal Reporter Second (abbreviated F.2d). After volume 999 of F.2d, there was F.3d, and so on.

The following table outlines how federal court decisions are published and cited:

<table>
<thead>
<tr>
<th>Name of the Reporter</th>
<th>Abbreviation for the Reporter</th>
<th>How a case is cited</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supreme Court cases</td>
<td>United States Reporter</td>
<td>FCC v. Pacifica Foundation, 438 U.S. 726 (1978)</td>
</tr>
<tr>
<td>Circuit Court cases</td>
<td>Federal Reporter</td>
<td>Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992)</td>
</tr>
</tbody>
</table>
Thus, a citation to *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992) provides this information:

Rogers sued Koons.
The case was decided by the Second Circuit in 1992.
The case can be found in volume 960 of the Federal Reporter second at page 301.

Similarly, the citation to *Doe v. University of Michigan*, 721 F. Supp 852 (E.D. Mich 1989) says:

Doe sued the University of Michigan.
The case was decided by the Eastern District of Michigan in 1989.
The case can be found in volume 721 of the Federal Reporter supplement at page 852.

The U.S. Reporter is the official reporter for Supreme Court cases. There are other reporters that publish Supreme Court opinions, the Supreme Court Reporter (S.Ct.) and Lawyer’s Edition (L.Ed.). If you see a reference to those, they are simply alternate versions of citations to Supreme Court cases.

State court opinions follow a similar system, but it is complicated by the fact that the reporters are regional rather than tied to a specific state or court. So, for example, you will see the Northeast Reporter (N.E. or N.E.2d) with cases from many different states. Also, most states have their own reporters, such as the California Reporter (Cal. Rptr.). There are also themed reporters, such as the Media Law Reporter (Media L. Rep.). Despite the wide range of reporter names, the citation format is essentially the same.

In citations to state cases, a reference to the state alone (e.g., Cal. Minn., or Wisc.) means that the case was decided by the state’s highest court. A reference to “App.” (e.g., Tex. App.) usually means it was decided by the intermediate appellate court. There are other abbreviations that may apply depending on the unique names or structure of state courts.

Thus, a citation to *McNamara v. Freedom Newspapers*, 802 S.W.2d 901 (Tex. App. 1991) provides this information:

McNamara sued Freedom Newspapers.
The case was decided by the Texas Court of Appeals in 1991.
The case can be found in volume 802 of the Southwest Second Reporter at page 901.

Similarly, a citation to *Shulman v. Group W. Productions*, 955 P.2d 469 (Cal. 1998) says:

Shulman sued Group W. Productions.
The case was decided by the California Supreme Court in 1998.
The case can be found in volume 955 of the Pacific Second Reporter at page 469.

Most reported state cases are from appellate courts. State trial courts do not typically report their cases. Nevertheless, you may sometimes see a reference to a lower-level court decision with a citation to the case number, the court, and the date of the ruling (e.g., *Mayhew v. Dunn*, No. 580-11-07 Wmcv, Windham (VT) Superior Court (Howard J., March 18, 2008)).
One caveat is worth noting: although all courts style the case name as “plaintiff v. defendant” at the trial court level, some courts might have switched the names of parties in appellate cases. Some courts keep the names in the same order, but some courts may, on appeal, style the case as “appellant v. respondent.” The appellant is the party who files the appeal—it could be either the plaintiff or the defendant, depending on the outcome of the trial court case. The respondent is the other party. Thus, it may be possible to come across a case where the defendant’s name is first. For example, in New York Times Co. v. Sullivan, Sullivan was the plaintiff who sued the New York Times. However, it was the New York Times that appealed to the U.S. Supreme Court.

Most cases can be found by searching online or through a digital data service like Lexis or Westlaw. The nice thing is that, even though you are not looking for the cases in books, the citations remain the same. If you search electronically for “960 F.2d 301,” you will still get the opinion in Rogers v. Koons.

Why Does All This Information Matter?

One of the most important concepts for understanding law is the notion of precedent. Precedent (also called “authority”) is a rule that has been established by a court in a prior case that can be referred to for guidance in deciding later cases.

For example, the Supreme Court decided in New York Times Co. v. Sullivan that public officials may not recover damages for libel unless they can prove that a statement was made with “actual malice,” such as when a speaker knows the statement is false. If another public official sues for libel, the rule established in Sullivan—that the public official must prove that the statement was made with actual malice in order to prevail—is precedent that will guide the court that has to decide the new case.

There are two kinds of precedent: mandatory authority and persuasive authority. In order to know which is which, you need to understand how the federal and state court systems work, how cases are published, and how to read a citation.

Mandatory authority is the precedent that a court is obligated to follow. All courts are obligated to follow the decisions of the U.S. Supreme Court. But otherwise, courts are only obligated to follow courts above them. Courts in California are obligated to follow the decisions of the California Supreme Court, but courts in Nevada or Utah are not. A state trial court will also have to follow the decisions of the state’s intermediate appellate courts. Similarly, in the federal system, District Courts must follow the decisions of the Circuit Court of the Circuit in which the District Court is located.

Persuasive authority is all other precedent. It is something courts may consider, but they are not obligated to follow it. For example, if a court in Kansas is considering a privacy case, and a similar case had previously been decided in Texas, the Kansas court can consider the ruling of the Texas court. If it finds the reasoning to be persuasive, it can adopt the same rule. But the Kansas court is also free to reject that reasoning and establish its own rule.

The term stare decisis refers to the notion that judges are generally expected to adhere to precedent. If judges follow the reasoning and the application of legal
principles in the same manner as the courts before them, then there will be a certain predictability and consistency in the law. To honor this principle judges do, for the most part, adhere to precedent. If changes are made in the interpretation of a principle, judges tend to make the changes slowly and incrementally. It is rare for a court to declare a prior principle invalid and establish an entirely different rule; however, it does happen on occasion. Other than the process of appeal and the recognition of the value of *stare decisis*, there is nothing that forces a court to adhere to precedent.

It is useful to know what authority is mandatory and what authority is persuasive when trying to determine which laws might be applicable to your own conduct. If you are thinking about publishing an article that potentially invokes privacy rights, it would be useful to know how privacy claims are likely to be evaluated in your jurisdiction, which means knowing what the mandatory authority says, in addition to seeing whether there is any persuasive authority on point.

**Practical Conclusions**

- State and federal courts serve the same function in society. Where the case is heard usually has more to do with the choices of the parties than anything else (although certain kinds of cases are more likely, or sometimes required, to be filed in one court or the other). Once a case is established within either the state or the federal system, it will rise up through that system only, from trial court, to any potential appeal, to the highest court in that system.

- Civil and criminal proceedings are different in many ways—procedure, burden of proof, and potential penalties. What they have in common is the use of the courts as a “truth-finding” system that is supposed to result in a fair adjudication of the issues.

- The concept of precedent is very important. Prior case decisions provide guidance about what is considered legal or illegal, protected or unprotected, in each jurisdiction. The law may vary substantially from state to state, and one must know how to find the law for a particular jurisdiction.