

JOHN A. MCKINSEY
DEBRA D. BURKE

Carper's Understanding the Law

SEVENTH EDITION





SEVENTH EDITION

Carper's Understanding the Law

John A. McKinsey

*Partner, Locke Lord LLP, Adjunct Lecturer of Law, King Hall,
School of Law, U.C. Davis, California*

Debra D. Burke

Professor, College of Business, Western Carolina University



Australia • Brazil • Japan • Korea • Mexico • Singapore • Spain • United Kingdom • United States

This is an electronic version of the print textbook. Due to electronic rights restrictions, some third party content may be suppressed. Editorial review has deemed that any suppressed content does not materially affect the overall learning experience. The publisher reserves the right to remove content from this title at any time if subsequent rights restrictions require it. For valuable information on pricing, previous editions, changes to current editions, and alternate formats, please visit www.cengage.com/highered to search by ISBN#, author, title, or keyword for materials in your areas of interest.

**Carper's Understanding the Law,
Seventh Edition****John A. McKinsey**
Debra D. BurkeVice President, General Manager Social
Science & Qualitative Business: Erin Joyner

Product Director: Mike Worls

Senior Product Manager: Vicky True-Baker

Content Developer: Ted Knight

Product Assistant: Ryan McAndrews

Marketing Director: Kristen Hurd

Sr. Marketing Manager: Robin LeFevre

Marketing Coordinator: Christopher Walz

Art and Cover Direction, Production
Management, and Composition: Cenveo
Publisher Services

Senior Media Developer: Kristen Meere

Senior IP Director: Julie Geagan-Chevez

IP Project Manager: Anne Sheroff

Manufacturing Planner: Kevin Kluck

Cover Image(s): © Images.com/Corbis

© 2015, 2012 Cengage Learning

WCN: 02-200-203

ALL RIGHTS RESERVED. No part of this work covered by the copyright herein may be reproduced, transmitted, stored, or used in any form or by any means graphic, electronic, or mechanical, including but not limited to photocopying, recording, scanning, digitizing, taping, web distribution, information networks, or information storage and retrieval systems, except as permitted under Section 107 or 108 of the 1976 United States Copyright Act, without the prior written permission of the publisher.

For product information and technology assistance, contact us at
Cengage Learning Customer & Sales Support, 1-800-354-9706

For permission to use material from this text or product, submit all
requests online at **www.cengage.com/permissions**

Further permissions questions can be emailed to
permissionrequest@cengage.com

Library of Congress Control Number: 2013953074

ISBN-13: 978-1-285-42842-0

ISBN-10: 1-285-42842-0

Cengage Learning200 First Stamford Place, 4th Floor
Stamford, CT 06902
USA

Cengage Learning is a leading provider of customized learning solutions with office locations around the globe, including Singapore, the United Kingdom, Australia, Mexico, Brazil, and Japan. Locate your local office at: **www.cengage.com/global**

Cengage Learning products are represented in Canada by Nelson Education, Ltd.

To learn more about Cengage Learning Solutions,
visit **www.cengage.com**

Purchase any of our products at your local college store or at our
preferred online store **www.cengagebrain.com**

Brief Contents



| | | |
|-------------------|---|------------|
| | Preface | xv |
| UNIT 1 | The Legal System and Basic Principles of Law | |
| Chapter 1 | Introduction to Law | 1 |
| Chapter 2 | The Constitution | 37 |
| Chapter 3 | The Court System | 85 |
| Chapter 4 | Attorney–Client Relationship and Dispute Resolution | 131 |
| Chapter 5 | Administrative Law | 181 |
| Chapter 6 | Crimes: Public Wrongs | 215 |
| Chapter 7 | Torts: Private Wrongs | 279 |
| Chapter 8 | Contracts: Enforceable Agreements | 337 |
| UNIT 2 | Application of Law to the Individual | |
| Chapter 9 | Real Property and Homeownership | 379 |
| Chapter 10 | Intellectual and Personal Property Including Motor Vehicles | 423 |
| Chapter 11 | Renters and Landlords | 473 |
| Chapter 12 | Employee and Employer Rights and Duties | 511 |
| Chapter 13 | Consumer Rights, Privacy and Protection | 571 |
| Chapter 14 | Family Law | 601 |
| Chapter 15 | Wills, Trusts, and Probate | 655 |
| Appendix A | Case Brief | 699 |
| Appendix B | Legal Research | 703 |
| | Glossary | 713 |
| | Index | 733 |

Contents



| | | |
|------------------|---|-----------|
| | Preface | xv |
| UNIT 1 | The Legal System and Basic Principles of Law | |
| Chapter 1 | Introduction to Law | 1 |
| | The English Source of U.S. Law | 4 |
| | <i>Modern Common Law and Stare Decisis</i> | 6 |
| | Modern Sources of U.S. Law | 9 |
| | <i>Lawmaking by Legislators</i> | 9 |
| | <i>Lawmaking by the Executive Branch</i> | 11 |
| | <i>Lawmaking by Courts</i> | 11 |
| | <i>Lawmaking by the People</i> | 13 |
| | Types and Classifications of Law | 13 |
| | <i>Federal and State Law</i> | 13 |
| | <i>Civil and Criminal Law</i> | 14 |
| | <i>Private and Public Law</i> | 15 |
| | <i>International and Domestic Law</i> | 15 |
| | <i>Procedural and Substantive Law</i> | 16 |
| | <i>Subject Matter Classification</i> | 18 |
| | The Relationship between Law and Ethics | 18 |
| | <i>What Are Ethics?</i> | 19 |
| | <i>Why Study Ethics?</i> | 19 |
| | <i>The Nature of Ethical Inquiry</i> | 20 |
| | <i>The Object of Ethics</i> | 20 |
| | <i>Ethical Standards</i> | 21 |
| | <i>Duty-Based Ethics</i> | 21 |
| | <i>Utilitarianism</i> | 23 |
| | <i>Moral Reasoning</i> | 25 |
| | <i>Distinguishing between Laws and Moral Values</i> | 28 |
| | Using Court Cases | 28 |
| | <i>Federal Court Decisions</i> | 29 |
| | <i>State Court Decisions</i> | 29 |
| | <i>Reading Court Cases</i> | 31 |
| | Case | 33 |
| Chapter 2 | The Constitution | 37 |
| | What Is Constitutionalism? | 38 |
| | What Is Constitutional Law? | 40 |
| | What Is Judicial Review? | 42 |
| | What Is Separation of Powers? | 42 |
| | How Is the National Government Organized? | 44 |
| | <i>Legislative Branch (Congress)</i> | 44 |
| | <i>Executive Branch (Presidency)</i> | 45 |
| | <i>Judicial Branch (Courts)</i> | 47 |

| | | |
|------------------|--|------------|
| | What Is Federalism? | 49 |
| | What Constitutional Powers Belong to Citizens? | 50 |
| | The Police Power | 52 |
| | What Is the Supremacy Clause? | 53 |
| | What About Taxes? | 54 |
| | What Is the Commerce Clause? | 55 |
| | What Is the Bill of Rights? | 57 |
| | <i>Incorporation Doctrine</i> | 58 |
| | The First Amendment and Free Speech | 59 |
| | <i>Is Commercial Speech Protected?</i> | 60 |
| | <i>Is Symbolic Speech Protected? Even “Hate Speech”?</i> | 61 |
| | <i>Public Employees and Free Speech</i> | 63 |
| | <i>Free Speech and the Internet</i> | 63 |
| | The First Amendment and Freedom of Religion | 65 |
| | <i>Establishment Clause</i> | 65 |
| | <i>Free Exercise Clause</i> | 66 |
| | Can Guns Be Banned? | 67 |
| | Freedom from Unreasonable Searches | 67 |
| | Rights of an Accused to Due Process of Law | 68 |
| | Equal Protection of the Law in Education | 70 |
| | Affirmative Action in Education | 72 |
| | Right to Privacy | 73 |
| | Due Process and Equal Protection and Medical Testing | 75 |
| | Case | 77 |
| Chapter 3 | The Court System | 85 |
| | What Is a Court? | 86 |
| | <i>What Is a Trial Court?</i> | 87 |
| | What Is an Appellate Court? | 89 |
| | What Is Jurisdiction? | 90 |
| | <i>Political Boundaries of State and Federal Courts</i> | 91 |
| | <i>Jurisdiction over Subject Matter</i> | 92 |
| | <i>Jurisdiction over Persons and Property</i> | 93 |
| | <i>Jurisdiction and the Internet</i> | 94 |
| | How Are State Court Systems Organized? | 95 |
| | <i>What Are Small Claims Courts?</i> | 96 |
| | What Is the Federal Court System? | 97 |
| | <i>Federal Trial Courts</i> | 97 |
| | <i>Federal Appellate Courts</i> | 99 |
| | Trial Proceedings | 100 |
| | <i>How Is a Civil Case Started?</i> | 100 |
| | <i>How Is a Criminal Case Started?</i> | 102 |
| | <i>What Are Pretrial Procedures?</i> | 102 |
| | <i>What Is a Jury?</i> | 106 |
| | <i>What Is an Action or Cause in Equity?</i> | 114 |
| | How Is a Trial Conducted? | 116 |
| | <i>How Is a Case Ended?</i> | 121 |
| | <i>What Happens if Either Party Appeals?</i> | 124 |
| | Case | 126 |
| Chapter 4 | Attorney–Client Relationship and Dispute Resolution | 131 |
| | What Is the Adversarial System? | 132 |
| | Attorneys-at-Law | 133 |

| | | |
|------------------|--|------------|
| | <i>Who May Practice Law?</i> | 134 |
| | <i>Specialization</i> | 135 |
| | <i>Associations of Lawyers</i> | 135 |
| | What Are Professional Ethics? | 138 |
| | <i>Confidentiality and the Attorney–Client Privilege</i> | 141 |
| | <i>Conflicts of Interest</i> | 142 |
| | <i>Frivolous Lawsuits</i> | 144 |
| | Dealing with an Attorney | 144 |
| | <i>Is an Attorney Necessary?</i> | 144 |
| | <i>How Do You Find a “Good” Attorney?</i> | 145 |
| | How Do You Hire and Fire an Attorney? | 149 |
| | <i>Attorney Fee Arrangements</i> | 151 |
| | <i>Financing the Client’s Case</i> | 154 |
| | What Is Legal Malpractice? | 155 |
| | Unauthorized Practice of Law | 157 |
| | Alternative Dispute Resolution | 158 |
| | <i>Negotiation</i> | 160 |
| | <i>Mediation</i> | 162 |
| | <i>Arbitration</i> | 163 |
| | <i>Private Judging</i> | 167 |
| | <i>Ombudsperson</i> | 168 |
| | <i>Expert Fact-Finding</i> | 168 |
| | <i>Early Neutral Evaluation</i> | 169 |
| | <i>Mini-Trial</i> | 169 |
| | <i>Summary Jury Trial</i> | 169 |
| | <i>Collaborative Law Practice</i> | 169 |
| | <i>Partnering</i> | 170 |
| | <i>Conclusions Regarding ADR</i> | 170 |
| | Case | 172 |
| Chapter 5 | Administrative Law | 181 |
| | What Is Administrative Law? | 182 |
| | <i>Agency Process</i> | 183 |
| | <i>Substantive Law of Agencies</i> | 183 |
| | <i>Focus on Agency Process</i> | 184 |
| | <i>What Is an Administrative Agency?</i> | 185 |
| | <i>Executive Departments</i> | 186 |
| | <i>Independent Administrative Agencies</i> | 186 |
| | <i>State Agencies</i> | 188 |
| | Brief History of U.S. Administrative Law | 188 |
| | Creation of Administrative Agencies | 189 |
| | <i>Administrative Procedure Act</i> | 189 |
| | <i>Delegation of Power</i> | 190 |
| | <i>State Administrative Agencies</i> | 190 |
| | Leading Areas of Administrative Law | 191 |
| | <i>Business Finance</i> | 191 |
| | <i>Communications</i> | 192 |
| | <i>Employment Practices</i> | 192 |
| | <i>Environment</i> | 193 |
| | <i>Energy</i> | 193 |
| | <i>Free Enterprise and Healthy Competition</i> | 194 |
| | <i>Other Areas of Administrative Law</i> | 195 |
| | Agency Power, Process, and Action | 195 |
| | <i>The Independence of Agencies</i> | 195 |
| | <i>Regulations and Rulemaking</i> | 196 |

| | | |
|------------------|---|------------|
| | <i>Negotiated Rulemaking</i> | 198 |
| | <i>Investigation</i> | 198 |
| | <i>Search and Seizure by Administrative Agencies</i> | 199 |
| | <i>Enforcement</i> | 200 |
| | <i>Alternative Dispute Resolution</i> | 200 |
| | <i>Adjudication</i> | 201 |
| | Limits on Agency Power | 204 |
| | <i>Political Control</i> | 204 |
| | <i>Constitutional Guarantees</i> | 205 |
| | <i>Public Accountability</i> | 205 |
| | <i>Judicial Review of Agency Action</i> | 205 |
| | Case | 209 |
| Chapter 6 | Crimes: Public Wrongs | 215 |
| | What Is a Crime? | 217 |
| | <i>Federal Versus State Crimes</i> | 221 |
| | Who Are Parties to a Crime? | 222 |
| | What Is the <i>Corpus Delicti</i> ? | 222 |
| | Felony, Misdemeanor, or Infraction? | 224 |
| | What Are Crimes Against the Person? | 224 |
| | <i>Murder</i> | 225 |
| | <i>Manslaughter</i> | 226 |
| | <i>Rape</i> | 227 |
| | <i>Extortion</i> | 229 |
| | <i>Kidnapping</i> | 229 |
| | <i>Robbery</i> | 230 |
| | <i>Mayhem</i> | 230 |
| | <i>Assault and Battery</i> | 231 |
| | <i>Hate Crimes</i> | 231 |
| | <i>Terrorism</i> | 232 |
| | <i>Stalking</i> | 232 |
| | What Are Crimes Against Property? | 233 |
| | <i>Arson</i> | 233 |
| | <i>Burglary</i> | 233 |
| | <i>Theft</i> | 233 |
| | <i>Receiving Stolen Property</i> | 234 |
| | <i>Identity Theft</i> | 235 |
| | What Are Crimes Against Public Health, Safety, and Welfare? | 235 |
| | What Are Crimes Against Public Decency and Morals? | 236 |
| | What Are Some Examples of Other Crimes? | 238 |
| | <i>White-Collar Crimes</i> | 238 |
| | What Are Some Defenses to Crimes? | 240 |
| | <i>Self-Defense</i> | 240 |
| | <i>Duress</i> | 241 |
| | <i>Is Lack of Mental Capacity a Defense?</i> | 242 |
| | <i>What Is Entrapment?</i> | 244 |
| | What Is the Statute of Limitations for Crime? | 245 |
| | Victims' Rights | 245 |
| | When are Police Permitted to Search and Seize? | 247 |
| | <i>Exclusionary Rule</i> | 248 |
| | <i>Search Warrants and Warrantless Searches</i> | 248 |
| | What Procedures Lead to a Criminal Trial? | 251 |
| | <i>Accusatory Pleading</i> | 252 |
| | <i>Arrest</i> | 254 |

| | | |
|------------------|--|------------|
| | <i>Booking</i> | 255 |
| | <i>Bail</i> | 255 |
| | <i>Arraignment</i> | 256 |
| | <i>Plea Bargain</i> | 257 |
| | <i>Preliminary Hearing</i> | 257 |
| | What Are the Constitutional Rights of an Accused? | 257 |
| | <i>Can Innocent Persons Be Convicted?</i> | 259 |
| | <i>Terrorism Issues</i> | 260 |
| | What Is the Punishment of Convicted Persons? | 260 |
| | <i>Punishment for Misdemeanors</i> | 261 |
| | <i>Punishment for Felonies</i> | 262 |
| | What Are Parole, Probation, and Clemency? | 265 |
| | When is Punishment Cruel and Unusual? | 267 |
| | Can a Defendant's Record be Cleared? | 270 |
| | What Should you do if Arrested? | 271 |
| | Case | 272 |
| Chapter 7 | Torts: Private Wrongs | 279 |
| | What Are Torts and How Are they Classified? | 282 |
| | Torts by Intentional Conduct | 283 |
| | <i>Assault</i> | 284 |
| | <i>Battery</i> | 284 |
| | <i>False Imprisonment and False Arrest</i> | 285 |
| | <i>Intentional Infliction of Mental Distress</i> | 287 |
| | <i>Defamation</i> | 288 |
| | <i>Invasion of Privacy</i> | 293 |
| | <i>Conversion (Civil Theft)</i> | 294 |
| | <i>Fraud</i> | 295 |
| | <i>Bad Faith</i> | 298 |
| | Torts by Negligent Behavior | 299 |
| | <i>The Elements of Negligence</i> | 299 |
| | <i>Duty and Breach of Duty</i> | 299 |
| | <i>Causation: Actual and Proximate</i> | 301 |
| | <i>Intervening Causes and Shared Responsibility</i> | 306 |
| | <i>Violation of a Statute as Proof of Negligence</i> | 307 |
| | <i>Professional Malpractice</i> | 308 |
| | <i>Premises Liability</i> | 309 |
| | <i>The Injury Requirement and Damages</i> | 311 |
| | <i>What Is a Res Ipsa Loquitur Case?</i> | 312 |
| | <i>What Are Defenses to Negligence?</i> | 313 |
| | Strict Liability Torts | 315 |
| | <i>Workers' Compensation</i> | 316 |
| | <i>Defective Products That Cause Injury</i> | 317 |
| | What Are Damages? | 322 |
| | <i>Compensatory Damages</i> | 323 |
| | <i>Punitive Damages</i> | 324 |
| | <i>Nominal Damages</i> | 326 |
| | What Barriers Can Prevent Collection of Damages? | 327 |
| | <i>Statutes of Limitation</i> | 327 |
| | <i>Judgment-Proof Defendants</i> | 328 |
| | Case | 329 |
| Chapter 8 | Contracts: Enforceable Agreements | 337 |
| | <i>What Is the Uniform Commercial Code?</i> | 339 |
| | How Are Contracts Classified? | 340 |
| | <i>Method of Expression</i> | 341 |

| | |
|---|------------|
| <i>Parties Bound</i> | 342 |
| <i>Legal Effect</i> | 342 |
| <i>Extent of Performance</i> | 343 |
| What Are the Requisites of a Valid Contract? | 343 |
| <i>Competent Parties</i> | 343 |
| <i>Mutual Agreement</i> | 345 |
| <i>Genuine Assent</i> | 349 |
| <i>Reciprocal Consideration</i> | 353 |
| <i>Legality in Formation and Execution</i> | 354 |
| <i>Form Prescribed by Law</i> | 360 |
| Parole Evidence Rule | 364 |
| Direct Involvement of Third Parties in Contracts | 365 |
| <i>Third-Party Donee and Creditor Beneficiaries</i> | 365 |
| <i>Assignment of Contract Rights and Delegation of Duties</i> | 366 |
| How Are Contracts Discharged? | 367 |
| Excuses for Nonperformance | 369 |
| What Remedies Are Available for Breach of Contract? | 369 |
| Case | 372 |

UNIT 2 Application of Law to the Individual

| | | |
|------------------|---|------------|
| Chapter 9 | Real Property and Homeownership | 379 |
| | Should I Own My Own Home? | 380 |
| | What Is the Role of a Real Estate Agent? | 381 |
| | <i>Service to Sellers</i> | 382 |
| | <i>Service to Buyers</i> | 384 |
| | How Is an Offer to Purchase a Home Made? | 384 |
| | <i>What Is the Effect of an Accepted Offer?</i> | 385 |
| | What Are Disclosure Laws? | 386 |
| | How Can a Buyer Finance the Purchase of a Home? | 388 |
| | <i>The Promissory Note</i> | 388 |
| | <i>The Mortgage</i> | 389 |
| | <i>What If a Homeowner Defaults on Monthly Loan Payments?</i> | 390 |
| | <i>Types of Financing</i> | 392 |
| | What Is Escrow? | 400 |
| | <i>Closing Costs</i> | 402 |
| | <i>The Legal Significance of Close of Escrow</i> | 402 |
| | <i>What Is a Deed?</i> | 403 |
| | What Is Title Insurance? | 404 |
| | Role of Attorney in Home Transactions | 406 |
| | How May Title to Your Home Be Held? | 407 |
| | How Is a Home Taxed? | 408 |
| | What Is Fire Insurance? | 410 |
| | <i>Standard Fire Insurance Policies</i> | 410 |
| | <i>Homeowners Policy</i> | 410 |
| | <i>Coinsurance Clauses</i> | 411 |
| | What Is Neighbor Law? | 411 |
| | <i>Help from Local Officials</i> | 411 |
| | <i>Help from CC&Rs</i> | 412 |
| | <i>Help from Court</i> | 413 |
| | Case | 416 |

| | | |
|-------------------|---|------------|
| Chapter 10 | Intellectual and Personal Property Including Motor Vehicles | 423 |
| | <i>Intellectual Property versus Personal Property</i> | 425 |
| | Motor Vehicles and Personal Property | 425 |
| | <i>Is a Special Contract Required to Purchase a Motor Vehicle?</i> | 425 |
| | <i>Warranties for Motor Vehicles</i> | 426 |
| | <i>What Are Lemon Laws?</i> | 429 |
| | <i>What Are Automobile Leases?</i> | 430 |
| | <i>What Are Automobile Recalls?</i> | 432 |
| | <i>Product Liability</i> | 433 |
| | <i>Registration of Motor Vehicles</i> | 435 |
| | <i>When and How May an Automobile Be Repossessed?</i> | 437 |
| | Driving a Motor Vehicle | 438 |
| | <i>Why Must Drivers Be Licensed?</i> | 438 |
| | <i>What Standard of Care Does the Law Prescribe for Drivers?</i> | 440 |
| | <i>Must Drivers Stop at Accident Scenes?</i> | 440 |
| | <i>Does a Traffic Citation Prove Civil Liability for an Accident?</i> | 441 |
| | <i>Are Owners Liable for Negligence of Other Drivers?</i> | 442 |
| | <i>Are Drivers Liable for Injuries to Guests in Their Cars?</i> | 443 |
| | <i>Driving Under the Influence</i> | 444 |
| | <i>Must Owners Maintain Their Vehicles in Good Repair?</i> | 446 |
| | <i>Are There Special Laws for Rented Vehicles?</i> | 447 |
| | <i>Are There Special Laws for Common Carriers?</i> | 449 |
| | <i>What Is the Financial Responsibility Law?</i> | 450 |
| | Purchasing Automobile Insurance | 451 |
| | <i>What Types of Automobile Insurance Are Available?</i> | 452 |
| | <i>Who Is Protected by Automobile Insurance?</i> | 454 |
| | <i>What Is the Insurance Company's Duty to the Insured?</i> | 455 |
| | <i>What Is No-Fault Insurance?</i> | 456 |
| | <i>What Should You Do If Involved in an Accident?</i> | 456 |
| | Other Methods of Acquiring Ownership of Personal Property | 458 |
| | <i>Possession</i> | 458 |
| | <i>Production</i> | 458 |
| | <i>Gifts</i> | 458 |
| | <i>Will or Inheritance</i> | 459 |
| | <i>Accession</i> | 459 |
| | <i>Confusion</i> | 460 |
| | <i>Mislaid, Lost, and Abandoned Property</i> | 460 |
| | Intellectual Property | 461 |
| | <i>Patents</i> | 462 |
| | <i>Copyrights</i> | 463 |
| | <i>What Can be Copyrighted?</i> | 464 |
| | <i>How Do You Obtain Copyrights?</i> | 464 |
| | <i>When Can You Reproduce Copyrighted Material?</i> | 464 |
| | <i>How Can You Protect Your Copyrights?</i> | 465 |
| | <i>Trademarks</i> | 466 |
| | <i>What Can Be Trademarked?</i> | 466 |
| | <i>How Do You Obtain a Trademark?</i> | 466 |
| | <i>How Are Trademarks Enforced?</i> | 467 |
| | <i>Trade Secrets</i> | 467 |
| | <i>What Can Trade Secrets Protect?</i> | 468 |
| | <i>Protecting Trade Secrets</i> | 468 |
| | Case | 469 |
| Chapter 11 | Renters and Landlords | 473 |
| | The Conflicting Perspectives of Renters and Landlords | 478 |

| | | |
|-------------------|---|------------|
| | What Kinds of Leases are Available? | 480 |
| | <i>Legal Requirements of a Lease</i> | 481 |
| | <i>Tenancy for Years</i> | 481 |
| | <i>Periodic Tenancy</i> | 482 |
| | <i>Tenancy at Will</i> | 482 |
| | <i>Tenancy at Sufferance</i> | 482 |
| | Law and Public Policy in the Landlord–Tenant Relationship | 483 |
| | Legal Remedies for Landlords | 485 |
| | <i>Damages and Eviction</i> | 485 |
| | <i>Security Deposits</i> | 488 |
| | Legal Remedies for Tenants | 490 |
| | <i>Implied Warranty of Habitability</i> | 490 |
| | <i>Covenant of Quiet Enjoyment</i> | 492 |
| | <i>Landlord Negligence Causing Bodily Injury</i> | 494 |
| | <i>Assigning and Subletting</i> | 499 |
| | How Can a Renter’s Problems be Minimized? | 501 |
| | Case | 505 |
| Chapter 12 | Employee and Employer Rights and Duties | 511 |
| | The Changing Work Environment | 512 |
| | How Does the Law Affect Workers and the Workplace? | 512 |
| | Legal Classification of Employees | 514 |
| | <i>Principal–Agent Relationship</i> | 514 |
| | <i>Employer–Ordinary Employee</i> | 516 |
| | <i>Contracting Employer–Independent Contractor</i> | 518 |
| | Is There a Constitutional Right to Work? | 520 |
| | Laws Against Discrimination | 521 |
| | <i>Types of Discrimination</i> | 522 |
| | <i>The Role of the EEOC</i> | 523 |
| | <i>Race and Color Discrimination</i> | 523 |
| | <i>National-Origin Discrimination</i> | 525 |
| | <i>Religious Discrimination</i> | 526 |
| | <i>Gender Discrimination</i> | 527 |
| | <i>Equal Pay for Equal Work</i> | 532 |
| | <i>Age Discrimination</i> | 533 |
| | <i>What Is Meant by “Affirmative Action” in Employment Practices?</i> | 535 |
| | <i>Americans with Disabilities Act</i> | 536 |
| | What Are the Basic Duties of Employees? | 541 |
| | <i>Duty to Follow Lawful Instructions</i> | 541 |
| | <i>Duty of Care</i> | 542 |
| | <i>Duty of Loyalty</i> | 542 |
| | What Are the Basic Rights and Common Benefits of Employees? | 543 |
| | <i>Employment at Will and Limiting Exceptions</i> | 543 |
| | <i>What Is the Minimum Wage?</i> | 546 |
| | <i>Working Conditions</i> | 547 |
| | <i>Fringe Benefits</i> | 548 |
| | <i>Retirement Benefits</i> | 548 |
| | <i>Family and Medical Leave</i> | 550 |
| | <i>Health Care</i> | 552 |
| | <i>Privacy Rights</i> | 552 |
| | Rights Regarding Unions | 556 |
| | <i>Statutes Governing Labor–Management Relations</i> | 556 |
| | Arbitration of Employment Disputes | 561 |
| | Case | 564 |

| | | |
|-------------------|--|------------|
| Chapter 13 | Consumer Rights, Privacy and Protection | 571 |
| | Consumer Rights and Protection | 572 |
| | <i>Consumer Rights</i> | 573 |
| | Consumer Privacy | 573 |
| | <i>Privacy Act of 1974</i> | 575 |
| | <i>Right to Privacy Act of 1978</i> | 575 |
| | <i>Gramm-Leach-Bliley Act</i> | 576 |
| | <i>Other Federal Consumer Privacy Laws</i> | 576 |
| | <i>California Online Privacy Protection Act</i> | 577 |
| | <i>California’s Do-Not-Track Legislation</i> | 578 |
| | <i>Consumer Privacy Bill of Rights</i> | 579 |
| | Consumer Protection | 580 |
| | <i>Consumer Transactions</i> | 581 |
| | <i>Warranties</i> | 585 |
| | <i>Consumer Lending and Credit Reporting</i> | 589 |
| | <i>Debt Collection</i> | 592 |
| | Case | 596 |
| Chapter 14 | Family Law | 601 |
| | Is the Federal Government Involved in Family Law? | 603 |
| | What Is Marriage? | 604 |
| | <i>Common Law Marriage</i> | 605 |
| | <i>The “Marvin Marriage”</i> | 606 |
| | <i>Domestic Partnerships and Civil Unions</i> | 607 |
| | <i>Is Marriage Limited to Heterosexual Couples?</i> | 608 |
| | What Are the Legal Consequences of Marriage? | 610 |
| | <i>Obligation of Support</i> | 610 |
| | <i>Property Rights</i> | 611 |
| | <i>Gifts of Marital Property</i> | 612 |
| | <i>Creditors of the Family</i> | 613 |
| | <i>Civil Lawsuits between Family Members</i> | 614 |
| | What Laws Govern Parenthood? | 616 |
| | <i>Prenatal Laws</i> | 616 |
| | <i>Paternity</i> | 617 |
| | <i>Surrogate-Mother Contracts</i> | 618 |
| | <i>Adoption</i> | 621 |
| | <i>Parental Rights and Liabilities</i> | 621 |
| | <i>Genetic Engineering and Family Planning: Legal Issues</i> | 622 |
| | <i>“Designer Babies” in the Future?</i> | 622 |
| | <i>Cloning Babies</i> | 624 |
| | State Protection of Minors | 624 |
| | <i>Emancipated Minors</i> | 626 |
| | <i>Juvenile Court Protection</i> | 627 |
| | <i>Sexual Abuse of Children</i> | 628 |
| | <i>Maternal Abuse during Pregnancy</i> | 629 |
| | How May Marriage be Terminated? | 630 |
| | <i>Dissolution (Divorce)</i> | 630 |
| | <i>Annulment</i> | 632 |
| | <i>“Bed and Board” Separation, Separate Maintenance, or Legal Separation</i> | 633 |
| | What Are a Spouse’s Rights and Duties upon Termination of Marriage? | 634 |
| | <i>Maintenance (Alimony)</i> | 634 |
| | <i>Property Division in Equitable Distribution States</i> | 636 |
| | <i>Property Division in Community Property States</i> | 639 |

| | | |
|-------------------|---|------------|
| | <i>Child Custody</i> | 639 |
| | <i>Child Support</i> | 641 |
| | How May Family Law be Modified by Contract? | 643 |
| | <i>Premarital Agreements</i> | 643 |
| | <i>Separation Agreements</i> | 645 |
| | <i>Cohabitation Agreements</i> | 646 |
| | Case | 647 |
| Chapter 15 | Wills, Trusts, and Probate | 655 |
| | What Is Estate Planning? | 657 |
| | What Tax Burdens Can the Estate Planner Reduce or Avoid? | 658 |
| | <i>Taxes on Lifetime Gifts</i> | 659 |
| | Matters Concerning Wills | 659 |
| | <i>What Is a Will?</i> | 659 |
| | <i>How Does One Create a Valid Will?</i> | 662 |
| | <i>How Does One Revoke a Will?</i> | 666 |
| | <i>Can a Probate Court Distribute Property Contrary to the Terms of a Will?</i> | 667 |
| | <i>What If the Testator Is the Victim of Undue Influence?</i> | 668 |
| | <i>What Happens to the Estate of a Person Who Dies without Leaving a Will?</i> | 669 |
| | Matters Concerning Probate | 669 |
| | <i>What Is Probate?</i> | 669 |
| | <i>Can Probate Be Avoided?</i> | 670 |
| | <i>What Are the Duties of an Executor?</i> | 672 |
| | What Are Living Wills and Other Advance Directives? | 674 |
| | Does a Terminally Ill Person Have the Legal Right to Commit Suicide? | 677 |
| | Matters Concerning Trusts | 678 |
| | <i>What Are Trusts?</i> | 678 |
| | <i>Who May Be a Trustee, and What Does a Trust Cost?</i> | 679 |
| | <i>What Are the Duties of a Trustee?</i> | 680 |
| | Are there Different Types of Trusts? | 680 |
| | <i>Irrevocable Inter Vivos Trusts</i> | 680 |
| | <i>Revocable Inter Vivos Trusts</i> | 681 |
| | <i>What Is a Living Trust?</i> | 681 |
| | <i>Testamentary Trusts</i> | 684 |
| | <i>Marital Life Estate Trusts</i> | 684 |
| | <i>The Rule Against Perpetuities</i> | 684 |
| | <i>Taxation of Generation-Skipping Trusts</i> | 685 |
| | <i>Are There Other Uses of Trusts?</i> | 685 |
| | Is Joint Tenancy an Effective Way to Avoid Probate? | 686 |
| | What Are Conservatorships and Guardianships? | 687 |
| | Principal Elements of Estate Planning | 688 |
| | Case | 691 |
| Appendix A | Case Brief | 699 |
| Appendix B | Legal Research | 703 |
| | Glossary | 713 |
| | Index | 733 |

Preface



In the seventh edition of *Understanding the Law*, we continue to provide a text that can be used in many different law courses. We still presume that the student lacks a prior law course and that this text is their first instruction specifically related to law. Our focus has been to make the text timely and current. Our goal always has been to provide a textbook that is interesting, and even fun, as well as scholarly. Most drama is about conflict, and nothing is more dramatic than law, the rationale and rules devised to address conflict.

The seventh edition of *Understanding the Law* includes a new chapter, Chapter 13, Consumer Rights, Privacy, and Protection, and several chapters have undergone additions or restructuring. These changes offer new, relevant material that instructors and students alike should appreciate. The seventh edition also includes more ethical examples and dilemmas, student-related topics, and additional coverage of privacy issues. Some of the cases were replaced with new, fresh, and topical ones, and there has been a restructuring of chapter sequence. In each chapter, we provide one or more examples of applications of moral and ethical principles to the issues and law raised in that chapter. Connected with the primer on ethical perspectives contained in Chapter 1, these features allow students using this book to maintain a connection to the moral views on issues that are inherent in law.

We continue to use the Legal Focus feature, which provides background, examples, cases, and problems to break up long textbook discussion of topics that become dry if not considered with the human condition. Each Legal Focus is clearly identified in the textbook. Some problems are actual cases, and the case classification is used when there is an available appellate court citation. Many Legal Focuses present issues that remain unresolved, hopefully prompting reasoned class discussion and continued attention to the resolution of important legal issues. The use of Chapter Objectives at the beginning of each chapter in the fourth edition was well received and is continued. A detailed glossary has been a feature of this text, and terms also are provided in the text margin when first introduced. Appendix A, about how to brief a case, has been retained as a critical-thinking writing exercise to assist those using case summaries.

SUPPLEMENTS

Electronic Instructor's Manual and Test Bank

The Instructor's Manual and Test Bank continues to be provided. Each chapter of the manual provides a chapter overview, along with teaching suggestions. The test bank has a minimum of twenty multiple-choice, fifteen true or false, ten fill-in, and three essay questions. It is available on the text companion website, <http://www.cengage.com/blaw/carper>.

Text Web Site

Visit the Carper, *Understanding the Law*, companion website at <http://www.cengagebrain.com>, where you will find teaching resources for your course.

Accessing CengageBrain

1. Use your browser to go to <http://www.CengageBrain.com>.
2. The first time you go to the site, you will need to register. It's free. Click on "Sign Up" in the top right corner of the page and fill out the registration information. (After you have signed in once, whenever you return to CengageBrain, you will enter the user name and password you have chosen and you will be taken directly to the companion site for your book.)
3. Once you have registered and logged in for the first time, go to the "Search for Books or Materials" bar and enter the author or ISBN for your textbook. When the title of your text appears, click on it and you will be taken to the companion site. There you can choose among the various folders provided on the Student side of the site.

Note: If you are currently using more than one Cengage textbook, the same user name and password will give you access to all the companion sites for your Cengage titles. After you have entered the information for each title, all the titles you are using will appear listed in the pull-down menu in the "Search for Books or Materials" bar. Whenever you return to CengageBrain, you can click on the title of the site you wish to visit and go directly there.

ACKNOWLEDGMENTS

We welcome our new author, Debra Burke, who has brought fresh and current perspective and energy to bear. Also, in renaming the text "Carper's Understanding the Law", we acknowledge not just Donald Carper, but all past authors of *Understanding the Law* who brought this book to life and preserved its currency through the decades. It is an honor to continue in their footsteps.

Our reviewers for this edition are again an eclectic group, providing helpful comments and suggestions. They are as follows:

Ian Bolling, *Old Dominion University*
 Jason Brandeis, *University of Alaska Anchorage*
 Jerry Brask, *Portland Community College Paralegal Program*
 Joe Bucci, *Philadelphia University*
 Dr. Elizabeth A. Cameron, *Alma College*
 Frank Carothers, *Somerset Community College*
 Bruce Carroll, *Texas Christian University*
 Richard Coffinberger, *George Mason University*
 Joshua Coplen, *Laney College*
 Stephanie Daniel, *Institute of Technology*
 Lizbeth Ellis, *New Mexico State University*
 Sharon Feder, *Nassau Community College*
 Charles Forer, *The Wharton School*
 Ken Gaines, *East-West University*

Nancy R. Gallo, *Sussex County Community College*
Ilene Goldberg, *Rider University*
Kathi Hall, *Erie Business Center South*
Jennifer Hammack, *Georgia College and State University*
Henry Hardt, *Buena Vista University*
Jane Hicks, *St. John Fisher College*
Georgia Holmes, *Minnesota State University, Mankato*
Hua-Lun Huang, *University of Louisiana*
Timothy Jackson, *University*
Edward Kaplan, *Davenport University*
John Keifer, *Ohio University*
Fred Kramer, *John Jay College of Criminal Justice*
Nance Kriscenski, *Manchester Community College*
Greg Lauer, *North Iowa Area Community College*
John Lewis, *Salve Regina University*
Avi Liveson, *Hunter College*
Robert Loomis, *Spokane Community College*
Henry Lowenstein, *Coastal Carolina University/Wall College of Business*
Bruce Marx, *SUNY College at Old Westbury*
Will Mawe, *Southeastern Oklahoma State University*
Delores McMorrin, *Montclair State University*
Margaret Zonia Morrison, *University of Missouri at St. Louis*
John J. Nader, *Davenport University*
Tim O'Dea, *Marist College*
Susanna Peters, *Michigan Technological University*
Jim Pingel, *Everest University – Brandon*
Walter C. Prentice, *Austin Community College*
Regina Robson, *St. Joseph's University*
Andree Rosen, *Midland College*
Nicole Stowell, *University of South Florida St. Petersburg*
Norman Todd, *New Mexico State University*
Diana Tsaw, *California Lutheran University*
Wendy Vonnegut, *Methodist University*
Shunda Ware, *Atlanta Technical College*
Edd Welsh, *Mesa Community College*
Judith Wright, *Indiana University Kelley School of Business – Indianapolis*

Introduction to Law

Let reverence for the laws be breathed by every American mother to the lisping babe that prattles on her lap; let it be taught in schools, in seminaries, and in colleges; let it be written in primers, spelling-books, and in almanacs; let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the political religion of the nation; and let the old and the young, the rich and the poor, the grave and the gay of all sexes and tongues and colors and conditions, sacrifice unceasingly upon its altars.

Abraham Lincoln, Address before the Young Men's Lyceum of Springfield, Illinois, January 1837

LEARNING OBJECTIVES

After reading and studying this chapter, you should be able to:

- Define "law" while understanding the varied meanings that legal concepts have across society.
- Understand the origins of the English common law system and its connection to the U.S. legal system.
- Describe the important sources of U.S. law and explain how they are interrelated.
- Explain the doctrine of *stare decisis* and understand how case law is related to other sources of law.
- Classify the law in a variety of ways, including federal and state law, criminal and civil law, private and public law, and procedural and substantive law.
- Be able to define ethics and distinguish ethics from law.
- Demonstrate familiarity with two forms of ethical reasoning and the ability to use them to consider an ethical problem.

Welcome to the study of law, specifically, the law of the United States. *Understanding the Law* is designed to help you recognize opportunities and overcome obstacles in reaching your goals. The laws of society play an ever-increasing role in our lives. As an educated member of the community, you will need to apply your understanding of our legal system in voting and in actively participating in local, state, and federal issues and affairs. From a more practical standpoint, your education of our legal system will help guide you toward a happier and more financially successful life.

Citizens of the United States engage with a myriad of businesses and with government, as consumers, as employees, and as active members of communities. Community leaders deal with difficult problems such as energy and resources, neighborhood crime, traffic, homelessness, and environmental protection. Already, you have learned something about the law, simply by experiencing life. For example, you know that stealing, damaging someone else's property, or intentionally injuring another person is "unlawful." But you may not completely understand what it means for something to be "unlawful." You also know that in an automobile collision, the careless driver is held responsible, and when both drivers are careless, they share the blame. You know that divorce creates issues of alimony, division of family property, and financial support for children and changes in their parental custody. You know that employers are expected to provide safe working conditions for their employees. You probably are aware of or are learning about the "property rights" that you interact with on a daily basis, such as software and music.

From these experiences, you probably can write a reasonable definition of the law. Perhaps you correctly would conclude that laws are rules that must be obeyed to avoid the imposition of sanctions (legal penalties). More precisely, **law** often is considered to be a body of rules of conduct prescribed by controlling authority and having binding legal force. But this traditional definition of law emphasizes the static perspective of law. Law is actually much more dynamic.

Consider law as continuously changing, always responding to society's need for solutions to new and evolving issues. There are many specific, written rules, such as speed limits. But also conflicts and questions arise when those static rules get applied to unique circumstances and evolving societal values. We often explain that legal rules follow rather than lead. Consider the Internet and the digital age that we live in today. It is challenging and changing traditional laws of privacy, free speech, property, and crime.

It is perfectly logical for laws to change continually in response to the evolving characteristics of, and the issues within, our society. That is, law changes as we change. Still, there is a fairly firm foundation behind all law in our society: the Constitution of the United States. All law must conform to the immutable principles of our Constitution or ultimately be discarded. Even within the Constitution, however, not all principles are expressed; many are implied. For example, the much-publicized "right of privacy," upon which issues like abortion and interracial marriage have been decided, does not actually appear as express words in the Constitution. The role of the Constitution and the U.S. Supreme Court, in defining the law of American society is explored more fully in Chapter 2.

Our legal system and laws are dynamic and respond to the legal issues that arise within our changing society. In a nutshell, the study of law is the study of a moving target. Some changes are quite immediate, as when legislatures respond to popular demands. In contrast, courts are structured to accommodate change more slowly, at a more reflective pace.

In the twenty-first century, we are experiencing a magnificent technological revolution, one focused on digital electronics, communication and microtechnology. In this

law

A body of rules of conduct prescribed by controlling authority and having binding legal force.

revolution, the demands upon the legal system are reaching new heights of complexity, for example, the following:

- The Internet and digital technology is causing a reexamination of the principles of free speech, security, and privacy. The speed and worldwide, omniscient presence of communication is shrinking the earth and making local issues, national and international.
- Biotechnology is presenting our society and its legal system with momentous social and legal issues, such as genetic alteration of plant and animal life and human cloning.

In addition to the technology revolution, natural forces also are creating today's issues. Consider the following:

- Population continues to increase, causing a multitude of social issues, and the problem is growing exponentially. Consider, for example, the intense debate over health care, immigration policy, and energy. Additionally, our population is aging, setting the stage for fierce competition between workers and retirees for the nation's wealth and benefits.
- Environmental issues abound, many driven by increasing competition for a worldwide increasing thirst for and consumption of resources like water, trees, and fossil fuels. From global warming and energy reliability to air and water pollution, our society is facing problems it has yet to solve. Increasingly, most solutions seem to reach beyond the boundaries of the United States as well as the North American continent.
- In the United States, fundamental differences on many issues continue to divide us. Topics such as same-sex marriage, gun control, and the size and role of government are simultaneously both driving change to the law and creating inaction and stagnation within the government to change the law.

Historical perspective sharpens our understanding of the outlook for our laws and legal system in the early twenty-first century. It is said that if we ignore history, we are destined to repeat it. Here, we are not studying history, but we must take history into account when contemplating the role of law and our legal system as we tackle the issues of the twenty-first century.

From the time that our Constitution was established, our legal system has steadily accepted responsibility (jurisdiction) over an increasing variety of issues. Today, some prominent issues include gun control, sexual orientation, and abortion. There is a rationale that elected officials choose to avoid the tough and controversial issues that cost them votes and leave these no-win issues to the legal system in which the judges are brave, if for no other reason than because the electorate participates less in their tenure.

It is becoming increasingly important for well-informed citizens to be educated about our legal system, including the role of its judges and lawyers. Otherwise, citizens risk submission through ignorance and complacency to the latest sound bite or "spin" that seeks voter approval. Your understanding of the increasingly important legal system is critical over the long run, which is precisely why it is presented here.

Americans increasingly are turning to the courts to solve their problems—both public *and* private. This produces a great strain upon our legal system, as evidenced by the growth of alternative forums for dispute resolution (discussed in Chapter 4). The point here is that the future portends significant legal costs of doing business and of protecting consumers. These costs are indirectly reflected in the prices of products as well as taxes

used to support courts, judges, and government offices charged with providing public or legal services.

There is no reason to suspect that the demand for attorneys (i.e., legal solutions) will lessen or that their services will cost less in the twenty-first century. Lawyers enjoy an oligarchy with the power (and willingness) to match their fees with the capabilities of their clients to pay. Increasing demand is producing more lawyers, who participate in an ever-wider scope of increasingly specialized tasks.

This is not to suggest that our dependence on law, courts, and lawyers is either good or bad. It is merely a well-understood phenomenon. Educators often speak of the legal system as being composed of laws and courts. The logic is that laws are the rules of our society, and courts ensure their enforcement. But what of attorneys? In reality, a person cannot hope to resolve a substantial conflict or commercial transaction without an attorney's professional help. Although citizens are entitled under law to self-representation, the reality is that to do so is ill advised for many obvious reasons. Thus, the attorney is the first person to become involved when legal issues, and many business opportunities arise. Attorneys give advice, most of which is followed. They also perform other services as described in Chapter 4. The point is that attorneys must be acknowledged as an integral part of the legal system because laws and judges are powerless until attorneys bring matters into court.

The adaptability of the Constitution, the courts, and lawyers to meet an ever-growing demand for services likely will continue. But at its roots, our American legal system still reflects its English origins.

THE ENGLISH SOURCE OF U.S. LAW

To understand American law, you must understand its origin, English law. Over hundreds of years, the law of England evolved into a framework of principles, found in both customs and statutes that were brought to the New World by the early colonial settlers. This body of law was called the common law. When the United States broke away from England after the Revolutionary War, it adopted the entire body of English common law as it existed in the eighteenth century—at least to the extent it did not conflict with U.S. federal and state law. That is still the situation today: Principles of the English common law are in effect throughout the country. Only Louisiana, purchased in 1803 from Napoleon, is different, retaining a variation of the Roman civil law that was then used in France. This California statute is representative of the continuing presence of English legal doctrine and process in the courts of the United States:

The Common Law of England so far as it is not repugnant to or inconsistent with the Constitution of the United States or the Constitution or laws of this state, is the rule of decision in all the courts of this state.

(California Civil Code, §22.2.)

So what is English common law? It arises from experience and custom and from the tacit consent of the people as evidenced from its development over a thousand years. The purpose of primitive English law was to keep the peace, and fact-finding processes were likely to provoke the population rather than calm it. So authorities avoided investigation and substituted mechanical tests that were believed to obtain the judgment of God. Among the favored tests were various ordeals an accused must suffer, including cold water, hot water, hot iron, and the morsel. Imagination probably suffices to picture all but the morsel ordeal so we offer this quote from the *Domesday Book* of the County of Norfolk, England, describing an ordeal by morsel.



LEGAL FOCUS—EXAMPLE

“May this morsel which is given him in order to bring the truth to light, stick in his throat and find no passage; may his face turn pale and his limbs be convulsed; and an horrible alteration

appear in his whole body; if he is guilty. But if innocent of the crime laid to his charge, may he easily swallow it, consecrated in Thy Name, to the end that all may know.”*

Before the eleventh century, England was an Anglo-Saxon society of unified and relatively prosperous people living mostly in villages. The economy was agricultural and the people were self-sufficient, growing grain, spinning wool, and even brewing beer for home consumption. Their kings headed powerful and wealthy aristocracies. Wealth was primarily tied to the landholding feudal system. Serfdom, in which people were born into vassalage and were required to work the aristocratic lords’ hereditary lands, was widespread. Throughout the Saxon period, law was essentially a matter of local customs, and it changed very slowly.

In 1066, William, Duke of Normandy, led 5,000 men and 2,500 cavalry across the English Channel to defeat the Saxons in the Battle of Hastings. The Duke became known as William the Conqueror. The invasion was followed by decades of regional uprisings and resistance characterized by extensive murder, oppression, famine, and fear, despite William’s zeal for law, order, and justice. The Normans (Vikings who originally came from Scandinavia via northern France) were French in viewpoint and culture. Their system of law was based on the ancient Roman civil law, which was expressed mostly in detailed codes (systematic collections of rules) imposed by the ruler from above, in contrast to the Saxon practice of developing rules from below, based on the customs of the people.

The Normans mostly retained the English common law of unwritten customs. England gradually underwent positive changes. A sense of national unity ensued, leading to a national system of law derived from both Anglo-Saxon and Norman influences. The conquest led to the introduction of elements of Roman civil law. As before, local justice continued to be the concern of local sheriffs, and the **common law** (law applied uniformly throughout the country) was characterized even then by equality before the law (the law applied the same to every person), respect for established rights, and impartial administration of justice.

The king’s courts dealt with civil and criminal legal matters, and new church courts dealt with canon law (ecclesiastical law governing internal relations of the Roman Catholic Church) and all aspects of marriage and succession. Disputes between common and canon law existed in some areas, such as legitimization of illegitimate children, which was not possible under canon law. Under common law, legitimization was accomplished by subsequent marriage of the parents. This was an important matter because it affected rights of inheritance and succession to land, the foundation of wealth and power in England.

By the twelfth century, judges, who periodically visited places in the country to dispense justice, were displacing sheriffs. These “circuits” were precursors of the present U.S. circuit and district courts. The itinerant judges dealt with such crimes as murder, robbery, forgery, and arson. One judge, Glanvil, is credited with writing *Treatise on the Laws and Customs of the Kingdom of England*, the first serious book on the evolving common law. In 1215, King John was forced to accept the Magna Carta (Latin: “Great Charter”), the basis of modern English constitutional liberty, commanding free elections

common law: as a system of law

The total system of law that originated in medieval England and was adopted by the United States at the time of the American Revolution. Expressed originally in opinions and judgments of the courts, it is judge-made law that reflects the customs and usages of the people. Contrasted to Roman civil law, it is found throughout the English-speaking world. Common law is sometimes called unwritten law.

*Roscoe Pound, “Studying Law,” in Arthur Vanderbilt, ed. *Introduction to American Law* (New York: New York University Press, 1955), p. 396.

and reform of the courts and barring imprisonment without a trial by a jury of peers. Trial by jury had evolved into permanency by way of the Magna Carta, and ultimately was incorporated into the U.S. Constitution. The Magna Carta essentially decreed supremacy of law over personal authority of the king and his aides. It was a precursor of our constitutional democracy.

For several hundred years, the English system of courts evolved, influenced by conflicts and political interventions. Over time, judges required formalities to be met before a matter could be brought to court. When these requirements were not met, courts were simply unavailable to a party. When the king's courts were unable or unwilling to provide a just solution to a legal problem, and a citizen (initially citizens of high status) appealed to the king, the matter would be referred to the lord chancellor for possible intervention. The lord chancellor served as the king's chief administrative officer, and the position was initially staffed by high churchmen. As a man committed to justice and fairness, the chancellor was authorized to decide the cases without the assistance of a jury.

This alternative court became known as a *court of equity*. An example of an **action in equity** would be a dispute over the sale of a parcel of land in which the seller refused to transfer the title. The king's courts, by tradition, could do no more than award monetary damages. The chancellor (and, later, when the administration of these hearings was delegated to junior staff, courts of equity) could and would order the seller to relinquish possession. Ultimately, jurisdictional conflicts refined the fundamental distinction between courts at law and courts in equity. This distinction endures in the United States today and determines important questions. However, unlike England, where courts at law and in equity were physically separated, modern U.S. courts are empowered to render either equitable or legal relief. Equity is explained further in Chapter 3.

action in equity

A civil trial held without a jury when relief sought by the plaintiff is equitable in nature, such as an injunction, or a divorce or dissolution of a marriage.

common law: as a type of law

That law that comes from the common courts as opposed to a legislature or court of equity.

federalism

A government consisting of a union of more or less self-governing states under an umbrella of federal government.

Modern Common Law and *Stare Decisis*

The term **common law** might already be confusing to you because, like many English language terms, it is used in different ways to describe different things. For example, we have been using the term to describe law common to all of England. But we also have used the term to describe a legal system derived from English legal method, to describe law formulated by courts rather than legislatures, and to describe common law as distinguished from an action in equity. All the different expressions of the term *common law* are related. The use of the term to describe a type of legal system derives from a description of the unique nature of that legal system, the formulation of law by the courts. The distinction of law and equity derives from a historical accident within this lawmaking system. The uniqueness of the common law, or law developed by the courts, is what usually is meant when someone uses the term *common law*. In no other legal system do independent courts have the power to contribute to the law as they do in the common law system.

When considering U.S. court-made or case law, it is important to note the important relationship between federal and state law. Our form of government is one of shared and often-overlapping power referred to as **federalism** (a union of states under a central federal government). The court systems include both federal and state courts, which function as either trial courts or appellate courts. These trial courts accept testimony and other evidence to determine guilt or innocence or to place financial responsibility. Appellate courts, on the other hand, review trial court procedures to ensure that correct laws were applied during trial. These appellate reviews, or written decisions, form the body of law also called the common law, or case law.

Both federal and state appellate courts review cases based on the constantly evolving principles of the common law that are expressed in the written decisions of courts. Who

reads these written decisions? Members of the public often learn about new, unfolding laws from television, the Internet, newspapers, and news magazines (but hopefully not from tabloids). Lawyers and scholars read and study court decisions as part of their professional responsibilities. Of course, judges read and study prior court decisions upon which they may decide the trials or cases before them.

Some principles of law derived through the common law apply to both state and federal court systems. For example, the doctrine of **stare decisis** (Latin: “to stand by things that have been settled”) mandates that once a rule of law is determined to be applicable to a particular set of facts involved in a case, it will be applied to all future cases that have similar facts. This doctrine binds courts of equal or junior rank to follow the senior court that first applied the rule or principle. Essentially, lower state courts are bound to the principles established by higher appellate courts within the same state; lower federal courts are bound to the principles established by higher appellate courts within their respective jurisdictions. (The hierarchy of courts is outlined in Chapter 3.)

This important doctrine of *stare decisis* leads to stability and predictability in the law. For example, if a high court establishes the principle that a promise to marry is not enforceable in court nor are damages allowed if broken, then routine legal research will alert all attorneys to the existence of that **precedent**. If a similar case arises, they will not waste time and money litigating the question; they know their court will be bound by the same earlier outcome under the doctrine of *stare decisis*. This doctrine also commonly is called the doctrine of precedents. Once a common law rule or principle is applied in a case, it becomes a precedent and is binding on other courts in similar future cases. The appellate court’s decision thus has become a part of the common law of that particular state.

Judges do not have the personal choice to disregard a binding precedent in the common law. Judges take oaths of office and are sworn “to comply with or be faithful to” the law.

stare decisis

The common law doctrine that binds an inferior (subordinate) court to follow and apply decisions and interpretations of higher courts when similar cases arise. Also called the *doctrine of precedents*.

precedent

A court decision on a question of law that gives authority or direction on a similar question of law in a later case with similar facts. See also *stare decisis*.



LEGAL FOCUS—PROBLEM

J. Anthony Kline, a justice of a state appellate court, wrote a dissenting opinion in which, as a “matter of conscience,” he refused to vote consistently with a state supreme court precedent. Does such a declaration violate the doctrine of *stare decisis*?

Although the action of refusing to comply with a precedent flies in the face of the doctrine of *stare decisis*, it may be characterized as a “highly irregular and never to be lightly undertaken” exception based upon the conscience of the justice.

Stare decisis is not a straitjacket, however. If a principle has outlived its usefulness or has grown inapplicable because of changing social standards and circumstances, it may be overruled by a high court. Often, a current case is not controlled by a principle previously applied in an earlier case simply because the two cases are distinguishable on their facts. An example of an unenforceable and uncompensable promise to marry would be distinguishable from a case in which one of the prospective spouses had incurred considerable related expenses before the promise was broken. The earlier principle, therefore, would not apply to or bind the court’s decision. Although the court, obviously, would not compel the parties to marry, it might establish a new principle in authorizing recovery of damages (an award of monetary compensation).

The common law of today is the body of rules derived from fundamental usages and customs of antiquity, particularly as they appeared in medieval England, and from

modern judgments of appellate courts recognizing and applying those customs in specific cases. Since thousands of appellate cases are decided each year, the body of common law is enormous, even though most of these cases define no new principles. In preparing current cases, lawyers spend much time and effort searching earlier case records for principles of the common law that might be applicable. Thanks to modern information technology, the task is less physically laborious today, but the information at the attorney's fingertips is nonetheless overwhelming in volume, let alone complexity. Before lawyers can draft formal opinions or business documents or perform advocacy, they must perform legal research of the applicable common, statutory, and regulatory (administrative agency) law. Lawyers, thus, are responsible to their clients more for researching than for knowing the law. For those of you who are interested in learning more about, or in practicing, legal research, we have included a summary of basic steps in Appendix B.

unwritten law

A historically based reference to court- or judge-made law.

reporter

A set of books that contains the written opinions of justices of specified appellate courts. These volumes contain the decisional, or unwritten, law. Volumes in the reporters and the cases they contain are arranged in chronological order and accessible by case name or subject matter index.

case law

All reported judicial decisions; the law that comes from judges' opinions in lawsuits. Also referred to as court law, judge law, and sometimes common law.

Originally, the common law of England was called **unwritten law**, because it evolved from judicial decisions that were based on the unwritten customs and usages of the people. Moreover, the decisions and opinions of the judges were not recorded or printed in books; often, judges talked with one another, exchanging their rulings through conversation. In contrast, codes and statutes (enacted by the king or a legislative body) were usually written (printed). Today, of course, most additions to the common law, made in appellate court decisions, are published chronologically in books, called **reporters**, and made available on the Internet. Such works are referred to as **case law**. If case law were not reported, both attorneys as well as the public would be unaware of decisions that had been made and of the appellate courts' rationale for those decisions. After centuries of relying on books, many lawyers and others are no longer using books as the primary way of finding information about cases. Instead, Internet-based databases and Websites provide much of the recorded case information.

The application of the doctrine of *stare decisis* is a challenging process. For example, is a new fact situation the same as the suggested precedent, is it similar, or is it different? The adversary system allows each side a representative who argues what events occurred, what precedent should apply, and how it should apply. And what about the situation in which the facts are clear, the law is clear, and the result is absurd? What precedents apply? Is the court bound to come to an unjust decision, or is a decision based on settled law ever unjust?

In the search for precedent, the following possibilities exist:

1. The new case is identical or virtually identical to a case previously decided by a high court in the same court system. Result: Follow old decision. This is seen as binding precedent.
2. The new case is somewhat different from a case previously decided by a high court in the same court system, but the underlying policy and rationale for the old case also applies to the new one. Result: Reason from the old case and extend the previous holding to the new facts. This is known as using precedent to extend the rule of law to new situations.
3. The new case, although having some similarity to a case previously decided by a high court in the same court system, is not the same and the underlying rationale does not make sense in this case. Result: Distinguish new case from old case and limit the rule from the old case. This is known as using cases to limit the application of judicial doctrine.
4. The new case is identical or virtually identical to a case previously decided by a high court in the same court system but the underlying rule no longer makes sense. Result: Overrule previous precedent when strong reasons exist for doing so. This is not done often, but it is consistent with the doctrine of *stare decisis*.



LEGAL FOCUS—EXAMPLE

In 1954, the U.S. Supreme Court decided, in *Brown v. Board of Education*, that maintaining separate schools for black and white schoolchildren was unconstitutional. Some forty-eight years earlier, the U.S. Supreme Court had

reached just the opposite conclusion in *Plessy v. Ferguson*. No laws had changed in the interim time between the two cases and both decisions evaluated the same Equal Protection Clause of the Fourteenth Amendment to the Constitution.

In overruling *Plessy v. Ferguson*, the Supreme Court determined that the previous reasoning, that separate facilities were equal, no longer made sense.

5. The new case presents problems that are not covered by an existing rule from a high court in the same court system. Possible Results: (a) The case will be dismissed and facts not considered because there is not a remedy in law for every perceived wrong; or (b) the case will be heard and decided based on extensions of doctrines of justice and fairness, and new law and rule will be developed. The deciding court may consider precedent from other states, the federal system, or even other countries when seeking guidance as to an appropriate rule to resolve the controversy.

MODERN SOURCES OF U.S. LAW

statutes

Laws enacted by Congress or by state legislatures.

ordinance

A written law enacted by a city or county (parish). An example is a zoning ordinance that governs the use of land.

written law

An old-fashioned reference to the statutes and ordinances of federal, state, and local governments, and the published rules of administrative agencies.

codes

Compilations of statutes that are grouped together by subject matter (e.g., a vehicle code).

Ours is a constitutional form of government. In one sense, our Constitution is the ultimate source of our laws because it contains principles by which our nation is governed. Here we are concerned with those institutions of government that create the laws of our land.

Most educated adults are familiar with the basic structure of our federal government, divided by our Constitution into the legislative, executive, and judicial branches. Knowledge of this structure facilitates an understanding of how and where our laws are made and of how they are classified for clarity and comprehensibility. State and local governments also are structured into these three branches, and they operate in a manner similar to the federal system. We explore government and these branches in greater detail in Chapters 2 and 5. Here we briefly consider the sources of our laws.

Lawmaking by Legislators

Legislators, both state and federal, enact laws called **statutes**.^{*} Local legislative bodies (e.g., for cities and counties) enact laws called **ordinances**. Collectively, these statutes and ordinances are called the **written law**, as contrasted to case law (unwritten law). Compilations of statutes by topic are called **codes**. For example, a state legislature may enact a statute lengthening the previous jail sentence for the crime of making an obscene telephone call. This statute will be compiled with, indexed to, and become a part of the state's "criminal" or "penal" code. Numerous specialized codes in the states group together statutes pertaining to particular subjects, such as the Vehicle Code, Health and Welfare Code, Corporations Code, and Business and Professions Code. These codes (often with slightly different titles) are generally available in any public law library, usually located in county courthouses.

Statutory law covers a staggering number of subjects, such as crimes, civil rights, housing, health, and indeed all matters upon which the legislative branch has the

^{*}Often, statutes are assigned titles, such as the Federal Racketeer Influence and Corrupt Organizations Act, commonly called RICO.