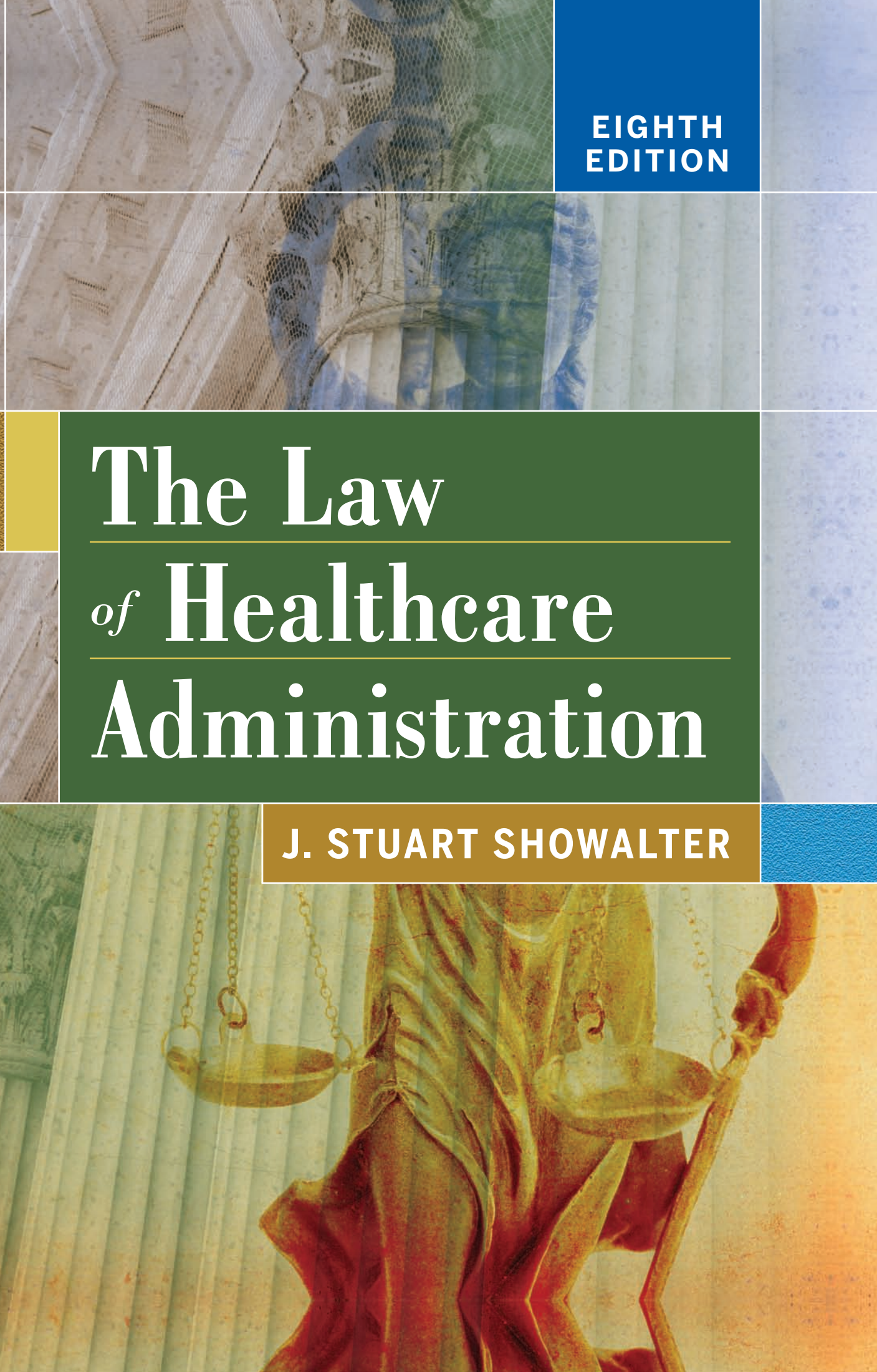
EIGHTH EDITION
The Law of Healthcare Administration
J. STUART SHOWALTER

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Health Administration Press, Chicago, Illinois

Association of University Programs in Health Administration, Washington, DC

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21 20 19 18 17 5 4 3 2 1

Library of Congress Cataloging-in-Publication Data

Names: Showalter, J. Stuart, author.
Title: The law of healthcare administration / J. Stuart Showalter.
Description: Eighth Edition. | Chicago, Illinois : Health Administration Press; Washington, DC : Association of University Programs in Health Administration, 2017.
Identifiers: LCCN 2016045989 (print) | LCCN 2016046145 (ebook) | ISBN 9781567938760 (print : alk. paper) | ISBN 9781567938777 (Ebook) | ISBN 9781567938784 (Xml) | ISBN 9781567938791 (Epub) | ISBN 9781567938807 (Mobi)
Subjects: LCSH: Medical care—Law and legislation—United States. | Hospitals—Law and legislation—United States. | Medical laws and legislation—United States.
Classification: LCC KF3825 .S65 2017 (print) | LCC KF3825 (ebook) | DDC 344.7303/21 dc23
LC record available at https://lccn.loc.gov/2016045989

The paper used in this publication meets the minimum requirements of American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI Z39.48-1984. ♾™

Acquisitions editor: Janet Davis; Project manager: Theresa L. Rothschadl; Cover designer: James Slate; Layout: Cepheus Edmondson

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Health Administration Press
A division of the Foundation of the American College of Healthcare Executives
One North Franklin Street, Suite 1700
Chicago, IL 60606-3529
(312) 424-2800

Association of University Programs in Health Administration
1730 M Street
Suite 407
Washington, DC 20036
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PREFACE

Overview

As in prior editions, this newest *The Law of Healthcare Administration* attempts to offer a thorough treatment of health law in the United States in plain language for ease of use. The eighth edition moves from broad-brush treatments of the US legal system and the history of medicine to specific issues that affect healthcare leaders on a daily basis: contracts, torts, taxation, antitrust law, regulatory compliance, and of course health insurance reform. For this latter topic, the Affordable Care Act (ACA) takes center stage.

The ACA Is Prominent

We saw important changes in the healthcare sector after the ACA became law in 2010. It has been the most significant development in healthcare since Medicare and Medicaid were passed half a century ago.

Government figures show that by early 2016 an estimated 20 million people had gained insurance coverage under the ACA—the uninsured rate declined from 16.0 percent (49 million people) in 2010 to 9.1 percent (29 million) in 2015. The reasons for these improved numbers include Medicaid expansion, creation of the health insurance exchanges, and requirements that private insurance plans cover preexisting conditions and allow young adults to stay on their parents' plans to age 26.[1]

Chapter 3, titled "Health Reform, Access to Care, and Admission and Discharge," reviews the history of reform efforts, discusses the implications of Medicaid expansion, and goes to considerable length to present *NFIB v. Sebelius* and *King v. Burwell*, the two most serious legal challenges. Taken together, those decisions seem to have settled the most significant constitutional issues; despite the ACA's landmark status, however, its future is in doubt as the Donald J. Trump administration takes over. Readers will need to stay tuned for future developments.

Other Highlights of the Eighth Edition

This edition also contains new material on the following topics:

- The history of nursing, which has been added to chapter 2
- The status of Medicare's inpatient admission standards and the "two-midnight rule"

- The "dual capacity" doctrine in worker's compensation
- End-of-life topics including the Physician Orders for Life-Sustaining Treatment (POLST) paradigm and "death with dignity" laws in some states, which allow physicians to aid terminally ill patients in ending their own lives
- Prominent antitrust cases from Ohio, Idaho, and North Carolina
- The *Whole Woman's Health* case, in which the Supreme Court again reaffirmed the essential holdings of *Roe v. Wade* and related cases
- The Supreme Court's decision on "implied certification," plus other false claims and fraud-related issues

In Addition

Throughout the book I have updated citations, added current URLs, and made editorial changes to minimize (or at least clarify) legal jargon and make the text as accessible to nonlawyers as possible.

Like the editions before it, the eighth edition of *The Law of Healthcare Administration* is a practical text for students and educators in health administration, public health, nursing, and similar programs or disciplines.

Chapter Contents

Chapter 1: The Anglo-American Legal System
This chapter discusses the history of law, its sources, the relationships among the three branches of government, the basic structure of the federal and state court systems, and some basics of legal procedure in civil cases.

Chapter 2: A Brief History of Medicine
Because "a page of history is worth a volume of logic," chapter 2 adds to the foundational concepts of chapter 1 and sets the stage for material explored in the remaining 13 chapters.

Chapter 3: Health Reform, Access to Care, and Admission and Discharge
This chapter discusses the ACA's major changes, important decisions regarding the act by the US Supreme Court, and the potential that the legislation might be undone by the Trump administration. The chapter also presents traditional rules about hospital admission and discharge, law relating to emergency services, and the conflict between managed care organizations' desire to limit healthcare expenditures and providers' moral and legal duties to give quality patient care.

Chapter 4: Contracts and Intentional Torts
This chapter addresses the essential elements of a valid contract (competent parties, "meeting of the minds," consideration, and legality of purpose) and the importance of contract law in the relationships between patients and their physicians and between patients and hospitals. The chapter also briefly discusses issues related to workers' compensation and intentional tort, pointing out that both can affect physician–patient and hospital–patient relationships.

Chapter 5: Negligence
This chapter outlines the four basic elements of proof in a tort case, the ways the standard of care can be proven, and the concept of causation. It addresses *respondeat superior* (vicarious liability), the "school rule," *res ipsa loquitur*, defenses to malpractice suits, and alternatives to the tort system.

Chapter 6: The Organization and Management of a Corporate Healthcare Institution
This chapter reviews some basic concepts of corporation law, including a corporation's "personhood," its ability to shield owners from personal liability, the foundations and limitations of corporate power, and the duties of a corporation's governing board. The concept of piercing the corporate veil and the various reasons for and methods of restructuring a healthcare corporation are also explored. Attention is also given to hospital–physician joint ventures and their potential for renewal due to the effects of the ACA and other factors in the healthcare environment.

Chapter 7: Liability of the Healthcare Institution
This chapter shows that the law has come a long way in recent years as it relates to healthcare organizations: The shift from charitable immunity to application of respondeat superior in the healthcare setting is one example. The demise of the "captain-of-the-ship" and "borrowed-servant" doctrines is another. These notions have now expanded to the point that the independent contractor defense seems no longer viable in the healthcare field. The chapter also addresses the rise of managed care in the 1980s and 1990s, the conflicts that sometimes arise between advancing patient welfare and reducing healthcare costs, and the phenomenon of Employee Retirement Income Security Act (ERISA) preemption providing immunity for some managed care organizations.

Chapter 8: Medical Staff Privileges and Peer Review
This chapter focuses on decisions about medical staff privileges. It points out that management and the medical staff are responsible for the credentialing process and may recommend physician applicants (including doctors of

osteopathy, dentistry, podiatry, and chiropractic, as well as other physicians, depending on state law). The ultimate responsibility for appointing a competent medical staff lies with the hospital governing board, however. The chapter also addresses issues related to the peer review and quality assurance functions, both of which are efforts to monitor the quality of care. It concludes with some thoughts about accountable care organizations, complementary and alternative medicine practices, and "integrative healthcare."

Chapter 9: Health Information Management
The title of this chapter reflects a belief that the term *medical records* is passé because information about a person's health (or payment for health-related services) can be maintained in many types of media other than paper. Regardless of the form in which it is maintained, health information must be accurate and its confidentiality must be ensured. This chapter reviews the various ways in which health information is properly used, such as for documentation of treatment, for accurate billing, and as evidence in legal forums. It also discusses the Health Insurance Portability and Accountability Act (HIPAA) and other state and federal laws that govern the protection of health information. It outlines circumstances in which third parties may legitimately access individuals' health information with and without patient consent, and it points out the pitfalls that one can encounter when that information is improperly disclosed inadvertently or through "hacking" by cyberthieves.

Chapter 10: Emergency Care
This chapter reviews the common-law rule that individuals have no duty to provide emergency care and the rule's numerous exceptions, both judicial and statutory. It provides considerable detail on the federal Emergency Medical Treatment and Labor Act (EMTALA), which currently sets the standard for emergency department personnel's review of patients' conditions, and presents examples of liability for failure to meet those standards. The chapter concludes with a brief discussion of Good Samaritan statutes, which are probably unnecessary but have afforded some medical personnel a measure of emotional comfort.

Chapter 11: Consent for Treatment and Withholding Consent
This chapter explores the difference between consent and informed consent and outlines the minimum requirements for the latter. It also considers consent issues in emergency situations and such thorny issues as the right to die (i.e., refusal to consent to life-sustaining treatment), consent for patients who are not competent to make choices for themselves, and physicians' role in helping terminally ill patients end their lives legally. The chapter ends with discussion of various methods of documenting and enforcing patients' end-of-life preferences—including living wills and durable powers of attorney—and discusses "death with dignity" laws that allow physicians to aid certain

terminal patients to end their own lives. Appendixes present examples of an advance directive form and a Physician Order for Life-Sustaining Treatment form.

Chapter 12: Taxation of Healthcare Institutions
This chapter addresses the taxation of healthcare organizations, primarily not-for-profit corporations. All tax-exempt organizations are not-for-profit, but not all not-for-profits are tax exempt. The standards for income and property tax exemption are also discussed, as are the occasions in which some income of a tax-exempt organization may be taxable. The chapter raises the question of what it means to be a charity and what implications that designation may have under federal and state law. It closes with a review of a 2010 decision that, if followed by other states, augurs rough sailing ahead for nonprofit hospitals' property tax exemptions, especially if the Affordable Care Act continues to decrease the number of uninsured Americans.

Chapter 13: Competition and Antitrust Law
This chapter reviews the basic concepts of antitrust law, including laws against restraints of trade, monopolization, and price discrimination. It distinguishes among the various per se violations and shows how cases that do not fit one of those categories are decided on the basis of a "rule-of-reason analysis." Exemptions from the antitrust laws include implied repeal, state action, Noerr-Pennington, and the business of insurance doctrines. This chapter reviews the factors used in defining the appropriate market for individual cases, and it concludes with a discussion of what to expect in the coming years, especially now that the ACA is being implemented. A significant US Supreme Court decision from North Carolina has been added to The Court Decides, and other cases (from Ohio and Idaho) are also discussed.

Chapter 14: Issues of Reproduction and Birth
This chapter reviews many of the sensitive and contentious legal questions surrounding reproduction. These include sterilization, wrongful life, wrongful birth, surrogate parenting, in vitro fertilization (IVF), stem cell research, and abortion. The hospital's role in reproduction issues is discussed, including whether the hospital can be required to provide such services and whether government programs will pay for the procedures if the hospital does provide them. The chapter also points out that stem cell research will continue to be an issue, but in light of the *Whole Woman's Health* case, it may be some time before abortion again comes before the Supreme Court.

Chapter 15: Fraud Laws and Corporate Compliance
This chapter addresses one of the most salient issues in healthcare today: the prevention of fraud and abuse in governmental healthcare programs. The

major fraud laws are reviewed, as are the aggressive enforcement activities of federal and state regulators, and the severe monetary and criminal penalties that can be imposed for violations of these laws are emphasized. The chapter also discusses some of the changes to the fraud laws occasioned by the passage of the ACA, and it reviews the basics of a proper corporate compliance program, an essential preventive measure and a valuable resource for a wide range of legal and ethical issues.

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San Diego

Note

1. U.S. Dep't of Health and Human Serv., *Health Insurance Coverage and the Affordable Care Act, 2010–2016* (March 3, 2016), https://aspe.hhs.gov/pdf-report/health-insurance-coverage-and-affordable-care-act-2010-2016.

Instructor Resources

This book's Instructor Resources include a test bank; two versions of a PowerPoint presentation; and an updated instructor's manual with chapter overviews, answers to end-of-chapter discussion questions, and answers to end-of-case discussion questions.

For the most up-to-date information about this book and its Instructor Resources, go to ache.org/HAP and browse for the book's title or author name.

This book's Instructor Resources are available to instructors who adopt this book for use in their course. For access information, please e-mail hapbooks@ache.org.

CHAPTER

1

THE ANGLO-AMERICAN LEGAL SYSTEM

After reading this chapter, you will

- understand that law comes from four basic sources—constitutions, statutes, administrative regulations, and judicial decisions;
- know that no one branch of government in the US legal system is meant to be more powerful than the others;
- be able to find judicial opinions in the reporter system;
- understand the importance of stare decisis and due process; and
- be familiar with basic aspects of legal procedure.

Some History

Before we discuss Anglo-American law specifically, let's discuss some of the history of "law" itself. Nearly 3,800 years ago, King Hammurabi of Babylon inscribed a set of laws on an eight-foot-tall black stone monument. Lost for centuries but rediscovered in 1901, the Code of Hammurabi is the oldest known example of written laws for the governance of a society (see exhibit 1.1).

The code is known for its "eye for an eye, tooth for a tooth" philosophy (*lex talionis* is a Latin phrase meaning "the law of retaliation"). Adultery and theft were punishable by death. A slave who disobeyed his master lost an ear, which was an ancient symbol of obedience. If a surgeon caused injury, his hand was cut off; this provision may have been the first version of malpractice law known to humankind. In addition to these harsh standards, the code contained

EXHIBIT 1.1 Code of Hammurabi Stele (top portion)

rules for everyday social and commercial affairs—sale and lease of property, maintenance of lands, commercial transactions (contracts, credit, debt, banking), marriage and divorce, estates and inheritance, and criminal procedure. Given Hammurabi's reputation as a lawgiver, his depiction can be found in several US government buildings, including the US Capitol and the Supreme Court.

Fast-forward to the fourth century BCE and we find Aristotle, the father of *natural law*—the idea that there exists a body of moral principles common to all persons and recognizable by reason alone. Natural law is distinguished from *positive law*—the formal legal enactments of a particular society.[1]

Centuries later, Saint Thomas Aquinas distinguished natural law from eternal, divine, and human-made law in his *Summa Theologica* (circa 1274). A few other legal philosophies (and representative adherents) over the centuries have included the following:

- Law as a social contract (Thomas Hobbes, *Leviathan*, 1651)
- Analytic jurisprudence (David Hume, *A Treatise of Human Nature*, 1739)
- Utilitarianism (Jeremy Bentham and John Stuart Mill, nineteenth century)
- Legal positivism (John Austin, nineteenth century)
- Legal realism (Oliver Wendell Holmes Jr., Roscoe Pound, and others, twentieth century)
- Libertarianism (John Nozick and Ron Paul, late twentieth century)

The point here is not to make legal philosophers out of you but to demonstrate that various systems of thought have influenced the US legal system over the centuries.

common law the body of law based on custom and judicial precedents, as distinct from statutory law; its historical roots are the traditional laws of England that developed over many centuries and were carried over to the American colonies and thus the United States.

Anglo-American Law

In Charles Dickens's *Oliver Twist*, Mr. Bumble has been proven an accessory to his wife's attempt to deprive poor Oliver of a rightful inheritance. Bumble asserts that if the law holds him responsible, then "the law is an ass—an idiot."[2] This argument is ineffective, however. Bumble and his wife lose their jobs and become inmates of the very workhouse where Oliver's mother died while giving birth to him. Ah! The law is not so asinine after all. It has impressed and fascinated authors and scholars for millennia, and the US legal system has done the same for two and a half centuries.

One can study law simply by reading statutes and judicial decisions, but for a full understanding one must also read history, sociology, public policy, politics, economics, ethics, religion, and other relevant fields. Because the roots of Anglo-American law can be traced back to the Norman Conquest of England in 1066 and beyond, some view the richness of the US legal tradition with a respect that approaches reverence (see Legal Brief).

Stated in the simplest and arguably most important way, the purpose of a legal system is to prevent anarchy and provide an alternative to personal revenge as a method of resolving disputes. Considering the size and complexity of our nation, the litigious temperament of our people, and the wide range of possible disputes, our legal system is remarkably successful in achieving its purpose. It has its shortcomings, to be sure, but at least it stands as a bulwark against self-help and blood feuds.

The law permeates today's healthcare field. The US medical system is perhaps the most heavily regulated enterprise in the world, subject not only to the principles that affect all businesses (everything from antitrust to zoning) but also to myriad regulations peculiar to healthcare. For these reasons, students of healthcare administration need to become familiar with the law and legal system. Almost every decision made and every action taken by healthcare administrators have legal implications, and all such decisions and actions are explicitly or implicitly based on some legal standard. Furthermore, students must understand basic legal principles well enough to recognize when professional legal advice is needed. The main purpose of this book is to help you and your organization stay out of trouble.

This chapter outlines general concepts essential to any study of law. It emphasizes three areas:

Legal Brief

The **common law** is the result of centuries of judicial decisions, decrees, customs, and ordeals in the pursuit of justice. People from many backgrounds have influenced its development over the years.

More than a millennium ago, the Anglo-Saxon inhabitants of what was to become England began to centralize their various kingships to ward off enemies and maintain peace. In the process, they created a legal system that came to include concepts still familiar today, such as writs (court orders); the offices of sheriff, bailiff, and mayor; taxation; complex legal record keeping; the use of sworn testimony; and stare decisis (respect for legal precedent).

The common law grew along with the further cohesion of the country following the conquest of England by Duke William of Normandy ("William the Conqueror"; 1028–1087) in 1066. Under King Henry II (1133–1189), tribunals such as the King's Court and circuit courts were added to the legal system, and the decisions of those bodies became part of the law common to the whole of England. Henry is sometimes described as the father of English common law. Also part of the common law are the Magna Carta (1215), the Habeas Corpus Act (1679), the Petition of Right (1628), and the English Bill of Rights (1689). These instruments describe certain basic concepts—the authority of the sovereign (king or state), freedom of speech, limitations on the use of martial law, the separation of judicial and legislative powers, and recognition that statutes are not the sole basis of law—that applied to colonial America and remain woven through the fabric of US law to this day.

1. Sources of law
2. Workings of the court system
3. Basic legal procedure

The Definition of *Law*

law
a system of standards to govern the conduct of people in an organization, a community, a society, or a nation

In its broadest sense, **law** is a system of principles and rules devised by organized society or groups in society to set norms for human conduct. Societies and groups must have standards of behavior and means to enforce those standards; otherwise, they devolve into vigilantism. The purpose of law, therefore, is to prevent conflict among individuals and between government and its subjects. When conflicts occur, legal institutions and doctrines supply the means of resolving the disputes.

Because law is concerned with human behavior, it is not an exact science. Indeed, "it depends" is a law instructor's most frequent answer to students' questions. This response is frustrating for both the students and the instructor, but it is honest. The law provides only general guidance; it is not an exact blueprint for living. Its application varies according to the circumstances of the case. However, this inherent ambiguity is a great strength; its adaptability fosters creativity. Legal rigidity would inhibit initiative, stunt the growth of social institutions, and ultimately result in decay.

Viewed in proper light, law is a landscape painting that captures the beliefs of society in a given location at a certain point in time. But it is not static; law is a work in progress, a constantly changing piece of art—a hologram, perhaps—that moves with society. Most often it moves at a glacial pace—slowly and quietly, the land shifting beneath it. At other times, it moves seismically, as was the case in 2010 with the passage of a legislative temblor known as the **Affordable Care Act (ACA)**, or "Obamacare."[3] Despite outcries from some segments of the political spectrum, the US Supreme Court in June 2012 held the ACA to be constitutional. Most of the ACA's reforms took effect in 2014, and the aftershocks will be felt for years. Until the dust settles completely, we will not know how much the act has altered the legal topography.

Affordable Care Act (ACA)
the health reform law enacted by Congress in 2010; full name: Patient Protection and Affordable Care Act, Pub. L. No. 111-148

Types and Sources of Law

Law can be classified in various ways. One of the most common ways is to distinguish between public law and private law. *Public law* concerns the government and its relations with individuals and businesses. *Private law* refers to the rules and principles that define and regulate rights and duties among

persons. These categories overlap, but they are useful in illustrating Anglo-American legal doctrine.

Private law comprises the law of contracts, property, and tort, all of which usually concern relationships between private parties. It also includes, for example, such social contracts as canon law in the Catholic Church and the regulations of a homeowners' association. Public law, on the other hand, regulates and enforces rights in which the government has an interest (e.g., labor relations, taxation, antitrust, environmental regulation, criminal prosecution). The principal sources of public law are as follows:

- Written constitutions (both state and federal)
- Statutes enacted by a legislative body (federal, state, local)
- Administrative law
- Judicial decisions

Constitutions

The US Constitution is aptly called the "supreme law of the land" because it sets standards against which all other laws are judged. Other sources of law must be consistent with the Constitution.

The Constitution is a grant of power from the states to the federal government (see Legal Brief). All powers not granted to the federal government in the Constitution are reserved by the individual states. This grant of power to the federal government is both express and implied. For example, the Constitution expressly authorizes the US Congress to levy and collect taxes, borrow and coin money, declare war, raise and support armies, and regulate interstate commerce. Congress may also enact laws that are "necessary and proper" to carry out these express powers. For example, the power to coin money includes the implied power to design US currency, and the power to regulate interstate commerce embraces the power to pass antidiscrimination legislation, such as the Civil Rights Act of 1964.

The main body of the Constitution establishes, defines, and limits the power of the three branches of the federal government:

1. The legislature (Congress) has the power to enact statutes.
2. The executive branch has the power to enforce the laws.
3. The judiciary has the power to interpret the laws.

Each branch plays a different role, and the branches' interaction is governed

Legal Brief

The United States is not a union; it is a federation (from the Latin word *foedus*, meaning "covenant") of 50 self-governing states that have ceded some of their sovereignty to the central (federal) government to promote the welfare of all.

by a system of checks and balances (see exhibit 1.2). The president can nominate federal judges, but the Senate must confirm those nominations; Congress can remove high-ranking federal personnel (including judges and the president) through the impeachment and trial process; and the judiciary can declare laws unconstitutional. The president can veto a congressional bill, but Congress can override a veto by a two-thirds vote of each chamber.

Twenty-seven amendments follow the main body of the Constitution. The first ten—ratified in 1791—are known as the Bill of Rights, which includes the rights to

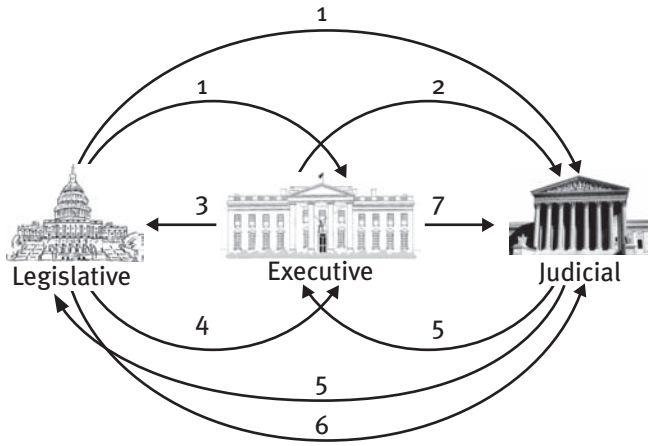
- exercise freedom of speech,
- practice religion,
- bear arms,
- be secure from unreasonable searches and seizures,
- demand a jury trial,
- be protected against self-incrimination, and
- be accorded substantive and procedural **due process of law**.

due process of law a fundamental principle of fairness in legal matters, both civil and criminal; the requirement that all legal procedures set by statute and court practice be followed so that no unjust treatment results

Of the remaining amendments, two cancelled each other: the Eighteenth, which established Prohibition, and the Twenty-First, which repealed the Eighteenth. As of this writing, only 15 substantive changes have been made to the basic structure of US government since 1791. The first ten

EXHIBIT 1.2
Checks and Balances

1. Impeach/convict
2. Appoint
3. Veto
4. Override or not confirm
5. Interpret or rule unconstitutional
6. Amend law
7. Change regulation



amendments apply only to the federal government. However, the Fourteenth Amendment—ratified in 1870—declares that no state may "deprive any person of life, liberty, or property, without due process of law." The US Supreme Court has held that most of the rights set forth in the Bill of Rights apply to the states because of the Fourteenth Amendment's Due Process Clause. (An example of a due process case is *Simkins v. Moses H. Cone Mem. Hosp.*, presented in The Court Decides at the end of this chapter.) Consequently, neither the states nor the federal government may infringe on the rights mentioned earlier.

In addition to the US Constitution, each state has its own constitution. A state's constitution is the supreme law of the particular state, but it is subordinate to the federal constitution. State and federal constitutions are similar, although state constitutions are more detailed and cover such matters as the financing of public works and the organization of local governments.

Statutes

Statutes are positive law enacted by a legislative body. Because our federal system is imbricate with national, state, and local jurisdictions, the legislative body may be Congress, a state legislature, or a deliberative assembly of local government (e.g., county council, city council). Statutes enacted by any of these bodies may apply to healthcare organizations. For example, hospitals must comply with federal statutes such as the Civil Rights Act of 1964 and the Hill-Burton Act, which prohibit discrimination at patient admission. Most states and a number of large cities have also enacted antidiscrimination statutes.

Judges face the task of interpreting statutes. Interpretation is especially difficult when the wording of a statute is ambiguous, as it usually is. To clarify statutes, the courts have developed several *rules of construction*, which in some states are themselves the subject of a separate statute. Regardless of their source, the rules are designed to help judges ascertain the intent of the legislature. Common rules of construction include the following:

- Interpretation of a statute's meaning must be consistent with the intent of the legislature.
- Interpretation of a statute's meaning must give effect to all of its provisions.
- If a statute's meaning is unclear, its purpose, the result to be attained, legislative history, and the consequences of one interpretation over another must all be considered.

Whether of constitutions or statutes, judicial interpretation is the pulse of the law. A prominent example appears later in this chapter in the discussion

of *Erie R. R. Co. v. Tompkins*, a case in which the meaning of a venerable federal statute was at issue. And in chapter 12, the section on taxation of real estate discusses numerous cases concerning the meaning of "exclusive use" of a piece of property for charitable purposes. These cases are just a few of the many examples of judicial interpretation that permeate this text. Be alert for others, and try to discern the different philosophies of judicial interpretation that the cases' outcomes represent.

Administrative Law

Administrative law is the type of public law that deals with the rules of government agencies. According to one scholar, "Administrative law . . . determines the organization, powers, and duties of administrative authorities."[4] Administrative law has greater scope and significance than is sometimes realized. In fact, administrative law is the source of much of the substantive law that directly affects the rights and duties of individuals and businesses and their relation to governmental authority (see the discussion of federal healthcare privacy regulations in chapter 9).

The executive branch of government carries out (administers) the law as enacted by the legislature and interpreted by the courts. However, the executive branch also makes law (through administrative regulations) and exercises a considerable amount of quasi-judicial (court-like) power. The term *administrative government* means all departments of the executive branch and all governmental agencies created for specific public purposes.

Administrative agencies exist at all levels of government: local, state, and federal. Well-known federal agencies that affect healthcare are the National Labor Relations Board, Federal Trade Commission, Centers for Medicare & Medicaid Services, and Food and Drug Administration. At the state level, there are boards of professional licensure, Medicaid agencies, workers' compensation commissions, zoning boards, and numerous other agencies whose rules affect healthcare organizations.

Legislative bodies delegate lawmaking and judicial powers to administrative government as necessary to implement statutory requirements; the resulting rules and regulations have the force of law, subject to the provisions of the Constitution and statutes. The Food and Drug Administration, for example, has the power to make rules controlling the manufacturing, marketing, and advertising of foods, drugs, cosmetics, and medical devices. Similarly, state Medicaid agencies make rules governing eligibility for Medicaid benefits and receipt of funds by participating providers.

The amount of delegated legislation increased tremendously during the twentieth century, especially after World War II. The reason for this increase is clear: Economic and social conditions inevitably change as societies become more complicated. Legislatures cannot directly provide the

detailed rules necessary to govern every particular subject. Delegation of rulemaking authority puts this responsibility in the hands of experts, but the enabling legislation will stipulate the standards to be followed by an administrative agency when it writes the regulations. Such rules must be consistent with their underlying legislation and the Constitution.

Judicial Decisions

The third major source of law is the judicial decision. All legislation, whether federal or state, must be consistent with the US Constitution. The power to legislate is, therefore, limited by constitutional doctrines, and the federal courts have the power to declare an act of Congress or of a state legislature unconstitutional.[5] Judicial decisions are subordinate to the Constitution and to statutes as long as the statutes are constitutional. Despite this subordinate role, however, judicial decisions are the primary domain of private law, and private law—especially the law of contracts and torts—traditionally has had the most influence on healthcare and thus is of particular interest to healthcare administrators.

Common law—judicial decisions based on tradition, custom, and precedent—was developed after the Norman Conquest in 1066 and produced at least two important concepts that endure today: writ and stare decisis. A *writ* is a court-issued order directing the recipient to appear before the court or to perform, or cease performing, a certain act.

The doctrine of **stare decisis** (Latin for "to stand by a decision")—the concept of precedent—requires that courts look to past disputes involving similar facts and principles and determine the outcome of the current case on the basis of the earlier precedents as much as possible. This practice engenders a general stability in the Anglo-American legal system (see Legal Brief).

stare decisis the principle that a court must respect decisions of higher courts (precedents) on a settled legal issue applicable to the instant case

Consider, for example, the opening sentence of the 1992 abortion decision, *Planned Parenthood of S.E. Pennsylvania v. Casey*. The case involved the question of whether to uphold or overturn the precedent set in *Roe v. Wade*, the landmark abortion decision of 1973. Justice Sandra Day O'Connor's opinion in the *Casey* case sums up stare decisis in nine words: "Liberty finds no refuge in a jurisprudence of doubt" (see The Court Decides at the end of this chapter).

Stare decisis applies downward, but not horizontally. An Ohio trial court, for example, is bound by the decisions of Ohio's Supreme Court and the US Supreme Court but not by the decisions

Legal Brief

Use of precedent to determine the substance of law distinguishes common-law jurisdictions from code-based civil law systems, which traditionally rely on a comprehensive collection of rules. The civil law system is the basis for the law in Europe, Central and South America, Japan, Quebec, and (because of its French heritage) the state of Louisiana.